

The 1985 Minnesota Indian Family Preservation Act: Claiming a Cultural Identity

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In 1985, the Minnesota Indian Family Preservation Act (Minn. IFPA)¹ became law, ending a legislative saga which began with the federal Indian Child Welfare Act (federal ICWA).² The 1985 Minn. IFPA addresses the serious problem of the removal of Indian children from their cultural heritage due to foster care placement in white homes.³ This article will examine the Minn. IFPA, the needs it was intended to fulfill, and the compromises necessary to ensure its passage. Such an examination requires discussing four topics: first, the legal issues that impinge on North American Indian⁴ adoption and foster care; second, the content of the defeated 1984 Minnesota Indian Child Welfare Act (Minn. ICWA)⁵ and related legislation; third, the factors that defeated the 1984 Minn. ICWA; and fourth, the 1985 Minn. IFPA and the strategies used to ensure its passage.

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1. Minn. Stat. §§ 257.35-.357 (Supp. 1985).

2. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1982).

3. In findings presented during the congressional hearings on the federal act, studies showed that nationally about 25% of all Indian children were removed from their homes and placed in foster care, an adoptive home, or institution. 124 Cong. Rec. 38, 102 (1978). *See also* David Fanshel, *Far From the Reservation: The Transracial Adoption of American Indian Children* 340-41 (1972). Indian children in non-Indian foster care face the same problems as those who are adopted by non-Indian families because foster care is often as permanent. *See infra* note 119 and accompanying text. In an acknowledgment of the on-going nature of foster care, the federal ICWA has a section which specifically extends coverage to Indian children in foster care before the passage of the Act, but moved to a different foster home after the passage of the Act. 25 U.S.C. § 1916(b) (1982).

4. I have chosen to refer to the indigenous people of North America as Indian rather than Native American because I believe it most accurately reflects the wide practice of indigenous people in collectively naming themselves in addition to their tribal and band names. It is also a practice reflected in social activism (American Indian Movement (AIM)) and the work of North American Indian authors. *See, e.g.*, Vine Deloria, Jr. & Clifford Lytle, *American Indians, American Justice* (1983) [hereinafter *American Indians*]; Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (1969).

5. H.F. 1502, 73d Leg. (1984). *See infra* note 76.

I. Indian Adoption Issues

A. Adoption Policies

The 1984 Minn. ICWA, introduced in March 1984 and defeated in April of the same year, proposed to give Indian tribes, through Indian courts, an expanded role in voluntary and involuntary child placements. The Act, detailed in section II, addressed the growing problem of Indian children being placed in non-Indian institutions, foster or adoptive homes, primarily due to involuntary foster care removal but also through voluntary foster care and eventually, adoption proceedings.⁶ Nationally the removal rate for Indian children has reached alarmingly high proportions. From 1969 to 1974, national statistics showed that 25% to 35% of Indian children were separated from their families.⁷ It appears that out-

6. In discussing these topics, the following terms are used according to the 1985 Minn. IFPA definitions:

"Child placement proceeding" includes a judicial proceeding which could result in the following:

- (a) "Adoptive placement" means the permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption.
- (b) "Involuntary foster care placement" means an action removing an Indian child from his or her parents or Indian custodian for temporary placement in a foster home, institution, or the home of a guardian. The parent or Indian custodian cannot have the child returned upon demand, but parental rights have not been terminated.
- (c) "Preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, before or instead of adoptive placement.
- (d) "Termination of parental rights" means an action resulting in the termination of the parent-child relationship under Minnesota Statutes, section 260.221 [Juveniles, Grounds for Termination of Parental Rights].

Minn. Stat. § 257.351(3) (Supp. 1985).

"Voluntary Foster Care Placement" means a decision in which there has been participation by a local social service agency or private child placing agency resulting in the temporary placement of an Indian child away from the home of his or her parents or Indian custodian in a foster home, institution, or the home of a guardian, and the parent or Indian custodian may have the child returned upon demand.

Minn. Stat. § 257.351(17) (Supp. 1985).

The primary difference between the definition sections of the 1978 federal ICWA and the 1985 Minn. IFPA is that the former makes no distinction between voluntary and involuntary foster care and the latter does. The proposed 1984 Minn. ICWA and the successful 1985 Minn. IFPA use the same definitions for adoptive placement, involuntary foster care, preadoptive placement, termination of parental rights, and voluntary foster care placement.

7. Jo Ann Kessel & Susan Robbins, *The Indian Child Welfare Act: Dilemmas and Needs*, 63 Child Welfare 225, 226 (1984). In 1969, a report covering 16 states showed that 85% of the Indian children in foster care were placed in non-Indian homes. *Id.* at 227 (citing William Byler, *The Destruction of American Indian Families*, in *The Destruction of American Indian Families* 1, 2 (Steven Unger ed. 1977)). The figures for removal from Indian homes and placement in non-Indian settings

of-home placement is a favored policy in Minnesota. Figures for Minnesota during the same time period reported that one in eight Indian children under age eighteen was in an adoptive placement, and one in four Indian children under the age of one year was adopted.⁸ These figures did not improve even with the passage of the federal ICWA in 1978. In 1982 the United States Department of Health and Human Services compiled a report from a national one-day count of children in foster care placements.⁹ For Indian children under the age of twenty-one, Minnesota ranked first nationally in out-of-home placement although the state ranked eleventh nationally in the size of its population of Indian children.¹⁰ Despite the small population of Indian children, Minnesota has an Indian foster care placement rate, known as a point prevalence rate, of 345 per 10,000 Indian children.¹¹ By comparison, Arizona, which had the largest population of Indian children, had a placement rate of only 10 per 10,000 Indian children.¹²

To put Minnesota's placement rate of 345 for Indian children into context, Minnesota's placement rate was 177 for Black children, 37 for white children, and 32 for Hispanic children.¹³ Those figures rank Minnesota respectively fifth, ninth, and in the top forty percent nationally.¹⁴

B. *The Unique Legal Status of North American Indians*

The problem of high removal rates from Indian families is exacerbated by the special status of Indians. In legal theory, Indian

vary from state to state, but in each instance the removal and non-matched placement rates for Indian children are several times that of non-Indian children. *See id.* at 226.

8. Kessel & Robbins, *supra* note 7, at 226.

9. As the study defined it, foster care included placement in family foster homes, treatment group homes, and residential treatment centers. U.S. Dep't of Health & Human Servs., Child Welfare Research Notes #7, Race and Ethnicity of Children in State Foster Care Systems (1984).

10. *Id.* at 7.

11. Point prevalence rate equals the number of children in foster care of a specific racial/ethnic group on a single day divided by the total number of children less than 21 years old of the racial or ethnic group expressed per 10,000 children, i.e., a rate of 345 for Minnesota indicates that 345 Indian children per 10,000 Indian children in that state are in foster care on a single day. *Id.* at 5-6.

12. *Id.* at 6. "These figures do not include the Indian children in foster care under the supervision of the Indian Tribal Organizations or private arrangements. Consequently, the reported state figure under counts Indian children in foster care which may account for the low rates in some States with large numbers of Indian children." *Id.* at 2.

13. *Id.* at 5-6.

14. Citizens League, How Does Minnesota Compare With Other States in Terms of Ethnic Child Placements in the Child Welfare System? (June 1984) (Summary of Child Welfare Research Notes #7).

tribes are semi-autonomous nation states.¹⁵ In practice, the relationship between areas of the federal government's authority, states' authority, and the Indian tribes' authority is not always clear cut.¹⁶ Jurisdiction in Indian law is an often confusing melange of treaties, statutes, and common law. Agency regulations and state statutes add an additional gloss. An overview of the jurisdictional question is helpful to place the Minnesota legislation in context.¹⁷

As semi-autonomous nation states, the tribes held "limited title" to their lands which was good against all but the United States government. This rationale was based on a doctrine of discovery. The various European nations which discovered the United States held absolute title to the lands they discovered. The United States government inherited that title when it acquired the land from those European nations.¹⁸

The theory of the Indian tribal nations as separate political

15. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

16. The positions and authority of the different actors have changed over time depending upon the philosophy and attitudes of the current federal administration. Before the Civil War, the Department of the Interior functioned as a state department to act as a liaison between the United States federal government and the various tribal governments, negotiating treaties, issuing passports to non-Indians, and regulating their flow through the Indian territories. Russel Barsh, *The Red Man in the American Wonderland*, 11 Hum. Rts. J., Winter 1984, at 15, 16. As the United States expanded, the tribes were forced to deed more and more land to the federal government. This westward expansion corresponded with an expansion of European colonization of the Third World. The colonial expansion engendered a philosophical shift on the part of Europeans toward Third World People of Color from one of pure conquest to white trusteeship over other races. This European influence on the United States government and the United States's own westward expansion led to the adoption, in principle, of a similarly paternalistic attitude toward the Indian nations in North America. See Barsh, *supra*, at 16. This attitude is illustrated by language from *United States v. Kagama*.

These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. 375, 383-84 (1886).

17. The history of and conflicts over jurisdictional questions have been written about extensively. See Vine Deloria, Jr. & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (1984); Elizabeth Ebbott, *Indians in Minnesota* 7-17 (4th ed. 1985); American Indian Policy in The Twentieth Century (Vine Deloria, Jr. ed. 1985); American Indians, *supra* note 4.

18. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823). The effect of this case was to strengthen the federal government's plenary power and to marginalize state power over the Indians. The Indians' title was good against all (including the individual state governments) except the federal government because the Indians' title was still subject to the United States power of defeasance,

entities, yet under the control of the federal government, was further developed in the two "Cherokee cases": *Cherokee Nation v. Georgia*¹⁹ in 1831 and *Worcester v. Georgia*²⁰ in 1832. In *Cherokee Nation*, the court found that Indian tribes were domestic dependent nations with a relationship to the federal government not unlike that between a ward and her guardian.²¹ *Worcester* essentially reiterates *Johnson v. McIntosh*²² and *Cherokee Nation* in finding that Indian Nations are distinct independent political communities limited "only" by their inability to sell lands to, make treaties with, or deal with anyone other than the federal government.²³

In *Lone Wolf v. Hitchcock*, the Supreme Court further expanded the concept of Congress's plenary power by holding that Congress had the power to unilaterally abrogate the terms of an Indian treaty.²⁴ The rationale was an extension of the doctrine that Indian tribes are wards of the United States, and as guardian, Congress could exercise unconditional plenary power over relations between the tribes and the federal government.²⁵ In accordance with this power, Congress passed Public Law 280 in 1953 which required five states, including Minnesota, to take over civil and criminal jurisdiction of Indian lands from the federal government.²⁶ Prior to this law, Minnesota state jurisdiction over Indians always stopped at the reservation boundaries.²⁷ In those states not required to assume jurisdiction and who did not voluntarily assume jurisdiction, the test for state jurisdiction has remained the

i.e., the Indians held title to their own land at the sufferance of the federal government.

19. 30 U.S. (5 Pet.) 1 (1831).

20. 31 U.S. (6 Pet.) 515 (1832).

21. 30 U.S. (5 Pet.) 1, 17 (1831).

22. 21 U.S. (8 Wheat.) 543 (1823).

23. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-59 (1832). This reasoning was reaffirmed recently in *Oneida County N.Y. v. Oneida Indians*, 105 S. Ct. 1245, 1251 n.3 (1985). The Court held that the Oneida Indians' claim against the state of New York for land taken 175 years ago was still valid because the state had unlawfully purchased land directly from the Indians. The Discovery Doctrine gave the Indians aboriginal title good against all but the sovereign—in this case the United States government.

24. 187 U.S. 553, 566-68 (1903).

25. *Id.* at 567. A 1980 case, *United States v. Sioux Nation*, 448 U.S. 371 (1980), diminished the precedential value of *Lone Wolf*, though it did not expressly overrule it.

26. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1982) & 28 U.S.C. § 1360 (1982)). California, Minnesota, Nebraska, Oregon, and Wisconsin were the original five states covered by Public Law 280. In 1958 Alaska was added by Pub. L. No. 85-615, § 2, 72 Stat. 545 (1958).

27. Until the passage of Public Law 280, jurisdiction over Indian country was governed by 18 U.S.C. §§ 1152-1153 (1982).

same. If some of the parties involved are Indian, if the events took place in Indian country, or if state jurisdiction would infringe on the right of reservation Indians to make their own laws and be governed by them, state jurisdiction is not permitted.²⁸

Public Law 280 was unusual because it was passed without the consent of or even consultation with the states or the tribes. The primary push for the law was to control crime on the reservations and to protect non-Indians living on or near the reservations. Civil jurisdiction was added to criminal jurisdiction almost as an afterthought.²⁹ The law had the effect of shifting not only responsibility for crime prevention on the reservations, but also the costs of that prevention, to the states. The law failed to satisfy either the Indian tribes or the states because Congress did not appropriate any funds for the costs of policing and protecting the reservations. Moreover, the law prohibited the states from taxing Indian lands to finance the new costs to the states.³⁰ The law left jurisdiction in an uproar. Although Minnesota had responsibility for civil and criminal jurisdiction on the reservations,³¹ it did not have total jurisdiction.³² Public Law 280 did not confer total jurisdiction on the states, alter the lost status of Indian lands, terminate the federal-tribal relationship, or end the sovereign immunity of the tribes.

Despite its limitations,³³ Public Law 280 brought those states

28. *Williams v. Lee*, 358 U.S. 217 (1959), is the controlling case involving a contract dispute between a non-Indian trader and an Indian couple for goods sold on a Navajo reservation. In a unanimous decision, the Court held that state jurisdiction could only be allowed if essential tribal relations were not involved and the rights of Indians would not be jeopardized. Because state jurisdiction would infringe on the right of reservation Indians to make their own laws and be governed by them, the tribal court had exclusive jurisdiction over the dispute.

29. "Most likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap." Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 543-44 (1975).

30. 28 U.S.C. § 1360(b) (1982); 18 U.S.C. § 1162(b) (1982).

31. Red Lake Reservation, at its own request, was not included in Public Law 280. Ebbott, *supra* note 17, at 13.

32. In 1976, *Bryan v. Itasca County*, 426 U.S. 373 (1976), established that the civil jurisdiction transferred to the states did not include taxing or regulatory powers over the reservations. Minnesota had adjudicatory jurisdiction only, not full legislative jurisdiction and therefore could not tax reservation land.

33. Public Law 280 was amended in 1968 by the Indian Civil Rights Act, Pub. L. No. 90-284, § 403, 82 Stat. 73, 79 (1968), which prohibited further transfer of jurisdiction to states without tribal agreement. The Act also provided retrocession from state jurisdiction back to federal jurisdiction if the state agreed. In 1975, at the request of Bois Forte Reservation and with Minnesota's agreement, the federal government resumed criminal jurisdiction over that reservation. Ebbott, *supra* note 17, at 13-14.

it covered firmly into the Indian law jurisdictional arena. Conflicts arose between tribes and states over the application of state laws to Indians and tribal law to non-Indians.³⁴ This was especially true in the area of family law. In a series of court decisions the states tried to determine jurisdiction over adoption and child custody cases on the basis of the child's domicile.³⁵ Such actions could both tear families apart and lead to the separation of the Indian child from Indian culture.

Cases involving placement of Indian children living off-reservation are under the concurrent jurisdiction of the state in which the Indians live and the tribe to which they belong. Traditionally, tribal courts have retained *exclusive* jurisdiction over domestic matters of tribal members.³⁶ State courts, however, have reasoned that it would be unconstitutional to deny Indian residents of the state access to the state courts.³⁷ The Supreme Court has not always accepted this argument and has upheld exclusive tribal jurisdiction in reservation adoption cases.³⁸

The federal ICWA was a move to re-establish tribal, rather than state, jurisdiction over Indian child placement cases involving

34. For a discussion of state jurisdiction see *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). For a discussion of hunting and fishing rights see *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979); and *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972).

35. *Fisher v. District Court*, 424 U.S. 382 (1976), held that the tribal court had exclusive jurisdiction over an adoption proceeding in which all parties were tribal members and the transaction arose on the reservation. In *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975), the tribal court had placed an Indian child off-reservation in the temporary custody of a non-Indian. Domicile of the child is that of the parent with whom the child resides. Because the child lived with the natural mother on the reservation at the time the decree of temporary custody was granted, the tribal court retained jurisdiction even though the child subsequently moved off-reservation. In *re Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (1976), held that under a New Mexico statute, the state had jurisdiction because the child and the adoptive parents lived off-reservation in New Mexico. The award of the child to the non-Indian adoptive parents, however, ran against Navajo custom, which gives the grandparent the status of custodian of the grandchildren. The federal ICWA ended this "domicile of the child test" by giving jurisdiction to the tribes on the basis of the child's eligibility for enrollment in the tribe. In situations such as custody disputes, however, although the Act provides for transfer of jurisdiction from state to tribal courts, either biological parent could refuse to allow the tribal court jurisdiction. 25 U.S.C. § 1911(b) (1982).

36. *Fisher v. District Court*, 424 U.S. 382 (1976).

37. See Bruce Davies, *Implementing the Indian Child Welfare Act*, 16 Clearinghouse Rev. 179, 182 (1982).

38. *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976). The Supreme Court has also upheld separate treatment of Indians in other areas as well. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974) (Indian hiring preferences are not in violation of executive orders forbidding racial discrimination in government employment).

off-reservation Indians.³⁹ The federal ICWA authorizes the transfer of certain welfare proceedings involving Indian children living off the reservation from state to tribal jurisdiction.⁴⁰ This change was important because the number of Indians living off the reservation had increased. Also, off-reservation Indians are, as a group, quite poor.⁴¹ The combination of these two factors causes Indians to have a greater number of specific client encounters with government or social welfare agencies than other segments of the population.⁴² Indian children, then, risk the consequences of state intervention. These consequences include actions by social service agencies and state courts which lack knowledge and understanding of Indian cultural heritage. As a result, they fail to consider the child's cultural heritage when placing Indian children in temporary foster homes and preadoptive placements.

The federal ICWA was enacted to protect Indian children from non-Indian placements by increasing the tribes' participation in the decision-making process. Nevertheless, the federal ICWA only allowed transfer of jurisdiction to the tribes in cases of foster care placement and termination of parental rights.⁴³ Transfer could only occur upon the petition of either parent, the Indian custodian, or the Indian child's tribe.⁴⁴ The federal ICWA does not provide for automatic transfer of cases.

In addition, only in cases of involuntary proceedings does the statute provide for specific notice to alert both the child's parent or Indian custodian and the child's tribe of the pending proceeding and their right to intervene.⁴⁵ In a case where there has been a voluntary consent to foster care placement or termination of pa-

39. The federal government has the power to determine the jurisdictional relationship between the states and the tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903).

40. 25 U.S.C. § 1911(a)-(b) (1982).

41. See Office of State Demographer, Minnesota Planning Agency, Population Notes, Social and Economic Characteristics of Minnesota's American Indian Population: 1980 (1986).

42. See Ebbott, *supra* note 17, at 183. See also Betty Reid Mandell, *Where Are the Children* 58-59 (1973).

43. 25 U.S.C. § 1911(b) (1982). Even that limited transfer of jurisdiction was tempered by an "absence of good cause to the contrary" clause and could only take place absent objection by either parent.

44. *Id.*

45. 25 U.S.C. § 1912(a) (1982). Initially, all the provisions of the federal ICWA were to apply to voluntary as well as involuntary proceedings. This proposal was vigorously and successfully opposed by religious groups with large foster home programs. Thus, the final draft of the federal law excluded most voluntary proceedings. Davies, *supra* note 37, at 192. As a result, under the federal Act, voluntary placements do not require notification to the tribal court.

rental rights, there is no requirement for notice to the tribe.⁴⁶

In 1984 and 1985, the Minnesota legislature strove to clarify the jurisdictional relationship between state and tribal courts in situations where Indian children were separated, voluntarily or involuntarily, from their biological parents. The 1984 Minn. ICWA was an attempt to re-establish tribes' traditional control over domestic relations and adoption while working in conjunction with the state and federal government agencies and service providers. The involvement of tribal courts in Indian child placement decisions would validate the Indian cultural norms of adult responsibility to children through the immediate and extended family and tribal affiliation. Such validation is an important asset in protecting Indian culture from government intrusion.

II. The 1984 Minnesota Indian Child Welfare Act

A. *Previous Legislation*

The 1984 Minn. ICWA⁴⁷ was the first piece of Minnesota state legislation introduced to deal specifically with the placement of Indian children in non-Indian homes. The Minn. ICWA grew out of concern for the shortcomings of the existing laws. When the Act was considered, two pieces of legislation partially addressed Indian adoption issues in Minnesota: the federal Indian Child Welfare Act (federal ICWA)⁴⁸ and the Minnesota Heritage Child Protection Act (Minn. HCPA).⁴⁹ The federal statute, passed in 1978, was designed "[t]o establish standards for the placement of Indian children in foster or adoptive homes, [and] to prevent the break up of Indian families."⁵⁰ The Minn. HCPA, which became law in 1983, addressed similar issues in the adoption of minority children in Minnesota by requiring consideration of the ethnic background of a child during adoption proceedings.⁵¹ Undoubtedly, the Minn. HCPA, like the federal ICWA, originated from a concern over temporary and permanent removal of minority children from their homes and their placement in nonminority foster or adoptive care.⁵²

46. See 25 U.S.C. § 1913(a) (1982).

47. H.F. 1502, 73d Leg. (1984).

48. 25 U.S.C. §§ 1901-1963 (1982).

49. Minn. Stat. § 259.255 (1984).

50. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, 3069.

51. "The policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due consideration of the child's minority race or minority ethnic heritage in adoption placements." Minn. Stat. § 259.255 (1984).

52. [T]he Congress finds—

. . . (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;

The federal ICWA was specifically intended to reduce the high rate of removal of Indian children from their homes. The intent of the Act was to change the criteria applied in making the removal decisions by changing the agencies and forums involved in making those decisions. The federal ICWA provided for exclusive Indian tribal jurisdiction over child welfare proceedings involving Indian children who reside or are domiciled on Indian reservations and authorized the transfer of proceedings involving Indian children living off the reservation, from state courts to tribal jurisdiction.⁵³

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

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

25 U.S.C. § 1901(3)-(5) (1982).

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (1982).

53. 25 U.S.C. § 1911(a)-(b) (1982).

The Act also:

1. Establish[es] a right of intervention in state court foster care and termination of parental rights proceedings on the part of an Indian child's tribe or Indian custodian. [25 U.S.C. § 1911(c).]
2. Require[s] that full faith and credit be accorded to tribal laws, records and judicial proceedings applicable to Indian child custody proceedings by federal and state courts. [25 U.S.C. § 1911(d).]
3. Require[s] in any involuntary proceeding in a state court when there is actual or constructive notice that an Indian child is involved that notice be provided to the parent or Indian custodian and tribe or that notice be provided to the Secretary of the Interior when the custodian or tribe is not known. [25 U.S.C. § 1912(a).]
4. Provide[s] for a right to court-appointed counsel for indigent parents in any child removal, placement or termination of parental rights proceedings. [25 U.S.C. § 1912(b).]
5. Establish[es] minimum federal evidentiary standards and procedures for state court proceedings involving the involuntary removal of Indian children from their homes or the termination of parental rights. [25 U.S.C. §§ 1912(c)-(f).]
6. Establish[es] federal standards governing voluntary foster care placements, relinquishments or terminations of parental rights and adoptive placements. [25 U.S.C. § 1913.]
7. Establish[es] placement preferences and standards governing fos-

Although the federal ICWA laid important groundwork, the Act did not go far enough because it did not sufficiently cover voluntary foster care, preadoptive, and adoptive placements. In cases of voluntary consent to foster care placement or the termination of parental rights, the Act requires only that the parental consent be in writing and accompanied by the judge's affidavit that the consequences of the consent were explained and understood.⁵⁴ If the identity or location of any of the parties is unknown, the court can comply with the Act by sending notice to the Secretary of the Interior.⁵⁵ There is no requirement of notice to tribal social service agencies. Many times the parent or parents do not know that prior to a final termination of parental rights, they have the right to withdraw consent and request the return of their child.⁵⁶ Once the final decree of adoption has been entered, the parent must prove fraud or duress to have the decree vacated.⁵⁷

Many of the Indian children removed from their homes each year are "voluntary" placements made by the parents. These placements occur when parents are told that unless the child is "voluntarily" turned over to the social welfare agency for a temporary placement, the child will be permanently removed by court proceedings. The welfare agency's rationale is that parents are given a certain period of time to prove they are fit to care for the child. Problems occur because the parents are unaware of their rights and options during the temporary, voluntary placement. For example, parents frequently do not know that they have visiting

ter care, preadoptive and adoptive placements of Indian children. [25 U.S.C. §§ 1915-1916.]

8. Provide[s] for a system of recordkeeping on the part of states placing Indian children, and authorize[s] access to such records by Indian children when they reach the age of 18 years in the case of adoptive placements for the purpose of determining tribal affiliation and related rights. [25 U.S.C. §§ 1915(e), 1917, 1951.]
9. Authorize[s] the Secretary of the Interior to award grants to Indian tribes and organizations for the purposes of establishing and operating Indian child and family service programs and preparing and implementing child welfare codes. [25 U.S.C. § 1931(a).]
10. Authorize[s] the use of Interior Department funds as nonfederal matching shares in connection with HEW-administered Social Security Act funds, and provide[s] that the licensing or approval of foster homes or institutions by an Indian tribe shall be deemed the equivalent to the licensing or approval by a state for purposes of qualifying for assistance under federally assisted programs. [25 U.S.C. § 1931(b).]

Davies, *supra* note 37, at 182-83 (numerical designations do not correlate to the original).

54. 25 U.S.C. § 1913(a) (1982).

55. 25 U.S.C. § 1912(a) (1982) (refers only to involuntary proceedings).

56. *See* 25 U.S.C. § 1913(c) (1982).

57. 25 U.S.C. § 1913(d) (1982).

rights during voluntary placements. Not visiting a child in temporary placement may be viewed by welfare personnel as lack of interest in the child, leading to permanent removal.⁵⁸

The Minnesota Heritage Child Protection Act did not remedy the federal ICWA's narrow notice requirements for voluntary removals and placements. The Minn. HCPA only required that the appropriate state agencies take the child's cultural heritage into account before deciding on a placement.⁵⁹ There was no provision for active tribal involvement in the placement decisions of Indian children. More importantly, there was no provision for tribal input prior to making removal decisions.

B. The Content of the Defeated 1984 Minnesota Indian Child Welfare Act

The 1984 Minnesota Indian Child Welfare Act was proposed to meet the shortcomings of the federal ICWA and the Minn. HCPA. The Minn. ICWA would have extended the federal ICWA notice provisions to voluntary foster care and preadoptive placements, and clarified the enforcement powers. In addition, the Minnesota Act would have established a role for tribal courts in the decision making prior to the removal of a child and, when possible, ensured an Indian placement for the child. If it had passed, as first written, the 1984 Minn. ICWA would have been an affirmation of the federal ICWA⁶⁰ and a statement of belief in the integrity and importance of the Indian extended family and tribe.⁶¹

58. See generally Jimm Good Tracks, *Native American Noninterference*, Social Work, Nov. 1973, at 30; Carl Mindell & Alan Gurwitt, *The Placement of American Indian Children—The Need for Change*, in *The Destruction of American Indian Families* 61-66 (Steven Unger ed. 1977).

59. Minn. Stat. § 259.255 (1984).

60. Congress has established a federal policy to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by passage of the Indian Child Welfare Act of 1978 (25 USC § 1901 et seq.) and has also left to the states the option of passing their own, more protective legislation in this field (25 USC § 1921).

H.F. 1502 § 1(6), 73d Leg. (1984).

References to § 1 of H.F. 1502 refer to the findings section of the bill as it was first read in the House. Section 1 became the citation section after the Committee on Judiciary removed the findings and made additional changes in the language. All other citations to H.F. 1502 refer to the bill in its final post-committee form.

61. [T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and . . . the State of Minnesota has a direct interest in cooperating with Indian tribes to protect children who are members of or are eligible for membership in an Indian tribe.

H.F. 1502 § 1(1), 73d Leg. (1984).

The goals of the 1984 Minn. ICWA were well presented in the findings of the Act, which were:

(1) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . .;⁶²

(2) that an alarmingly high percentage⁶³ of Indian families are broken up by the removal of their children from them by non-tribal public and private agencies . . . [placing them] in non-Indian foster and adoptive homes . . .;⁶⁴

(3) that the State of Minnesota must recognize the tribal relations of Indian people and the cultural and social standards prevailing in Indian communities.⁶⁵

(4) that the State of Minnesota has expressed a desire to protect the ethnic heritage or background of children who are subject to foster care or adoption.⁶⁶

(5) that the tribes . . . are a powerful resource by which the State of Minnesota can help to protect Indian children's ethnic heritage or background.⁶⁷

(6) that the Congress has established a federal policy to protect the best interests of Indian children and to promote the stability . . . of Indian tribes and families by [passing the federal ICWA⁶⁸] and has also left to the states the option of passing their own, more protective legislation in this field . . .⁶⁹

The first version of the Minn. ICWA acknowledged both the high removal rate for Indian children and the fact that state social welfare agencies, despite the language of Minn. HCPA, had not given due consideration to Indian children's cultural heritage.⁷⁰ With

62. *Id.*

63. See *supra* notes 7-11 and accompanying text.

64. H.F. 1502 § 1(2), 73d Leg. (1984).

65. H.F. 1502 § 1(3), 73d Leg. (1984).

66. H.F. 1502 § 1(4), 73d Leg. (1984). This language is a direct reference to Minn. Stat. § 259.255 (1984), also known as the Minnesota Heritage Child Protection Act (Minn. HCPA), which states that it is the policy of the state of Minnesota "to ensure that the best interests of the child are met by requiring due consideration of the child's minority race or minority ethnic heritage in adoption placements." Minn. Stat. § 259.255 requires that preference, in the absence of good cause to the contrary, shall be given "to placing the child with (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage."

67. H.F. 1502 § 1(5), 73d Leg. (1984).

68. 25 U.S.C. §§ 1901-1963 (1982).

69. H.F. 1502 § 1(6), 73d Leg. (1984). The federal ICWA provides:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title [25 U.S.C. §§ 1911 et seq.], the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1921 (1982).

70. H.F. 1502 § 1(2), 73d Leg. (1984).

this acknowledgment, Minnesota recognized Indian tribes as political entities and recognized tribal relations and social and cultural standards, and thereby extended its commitment to protect ethnic heritage.⁷¹

In addition to making a stronger policy statement than the federal Act, the Minnesota bill was a technically better piece of legislation. Benefiting from five years of experience with the federal ICWA, the Minn. ICWA addressed the gray areas of the federal legislation by fully including voluntary and involuntary placements and by including an expanded list of definitions.⁷² The Minn. ICWA took Indian child protection onto new ground, giving tribal courts clear authority over Indian adoptions and establishing minimum standards for voluntary and involuntary removal of Indian children from their homes. The Minnesota bill extended the federal policy of "acknowledging and supporting the power of Indian tribes to develop tribal courts to take jurisdiction over the subject matter of [this Act]."⁷³ This addition was especially important because of the jealousy with which state courts have guarded their jurisdiction. The state traditionally considered itself the appropriate arbitrator of all child custody and child welfare questions.⁷⁴ Even when state court judges had been aware of the federal ICWA, some had not enforced it.⁷⁵

III. Factors That Defeated the 1984 Minnesota Indian Child Welfare Act

Two factors account for the failure of the Minn. ICWA.⁷⁶

71. H.F. 1502 § 1(3), 73d Leg. (1984).

72. Which tribe can intervene on behalf of a child when that child has, or is eligible for, membership in more than one tribe is another gray area under the federal ICWA. The language in the Minn. ICWA provided a way to address this conflict by allowing the tribe with the most significant contacts with the child to act first. If that tribe has not expressed an interest in the outcome of the proceedings then any other tribe in which the child is eligible for enrollment may act. This is particularly important when the child has parents from, or is eligible for enrollment in, separate tribes.

73. H.F. 1502 § 2, 73d Leg. (1984).

74. It is well established that domestic relations matters are primarily the concern of the states. *See De Sylva v. Ballentine*, 351 U.S. 570 (1956); *Labine v. Vincent*, 401 U.S. 532 (1971).

75. *See Kessel & Robbins, supra* note 7, at 228.

76. The Minnesota Indian Child Welfare Act was first introduced in the House on March 6, 1984. Co-authored by Democratic Farmer Labor (DFL) Reps. Karen Clark, Sharon Coleman, and Doug St. Onge, it met with bipartisan support and survived the Committee on Judiciary amendment and the Health and Welfare committee review. Opposition was heartfelt but minor and the bill passed the House 87 to 38 on Friday, April 13, 1984. H.F. 1502, 73d Leg., tape 2, rev. 827 (Apr. 13, 1984). DFL Sen. Linda Berglin carried the bill to the Senate where it was amended and passed. In six days the bill was back in the House of Representatives to be voted on

First, some of the legislators debating the bill lacked knowledge of the issue. The second factor was the unwillingness of some legislators to give tribal courts any more authority in child placements than they already had.

The opponents of the Minn. ICWA frequently voiced their opposition in terms of specific outcomes they feared and wanted to prevent. The feared outcomes were not always likely, or even probable, but because many of these concerns were voiced in floor debates it was not possible to completely educate or reassure these legislators before the vote.⁷⁷

The opponents' fears could be placed in two general categories. The first category concerned disruption of the foster care or adoption proceeding by tribal participation and the additional strain this would put on the biological mother. Independent Republican (IR) Rep. Kathleen Blatz felt the Minn. ICWA allowed too much tribal intervention and that it would be a burden on the biological mother.⁷⁸ She voiced concern that the tribe would have a veto power over the mother's wishes.⁷⁹ Although the 1984 Minn. ICWA would have encouraged participation of the tribe in the placement process earlier than the federal ICWA, the Minn. ICWA did not give the tribe veto power over the biological mother's wishes.⁸⁰ IR Rep. Kenneth McDonald thought the Minn. ICWA limited the choices of the individual by bringing in the tribe.⁸¹ Involvement of the tribe in the placement proceedings does not limit the available choices. In fact, a placement within the tribe represents an additional placement option rather than a limitation of choices. Also, the language of the Act was only a preference list, not a mandatory list of prioritized choices.⁸²

Democratic Farmer Labor (DFL) Rep. Wesley Skoglund opposed the bill because it allowed the child to be reclaimed from the

in its amended form. In that brief time period, the opposition had rallied and the coalition that had backed the bill had fractured. After emotional debate, the bill failed to pass 46 to 76. H.F. 1502, 73d Leg., tape 1, rev. 605 (Apr. 19, 1984).

77. Many of the most vocal opponents of the 1984 Minn. ICWA were convinced of the necessity of the 1985 Minn. IFPA after an education and lobbying effort explained that their areas of concern had been dealt with and were not a problem.

78. H.F. 1502, 73d Leg., tape 2, rev. 617 (Apr. 13, 1984). Representative Blatz was concerned about a situation in which the child's Indian heritage derives solely from the father, and his Indian heritage is of a small percentage. H.F. 1502, 73d Leg., tape 1, rev. 648-56 (Apr. 19, 1984).

79. H.F. 1502, 73d Leg., tape 2, rev. 634 (Apr. 13, 1984).

80. Either biological parent could prevent tribal jurisdiction. H.F. 1502 § 7(2), 73d Leg. (1984).

81. H.F. 1502, 73d Leg., tape 2, rev. 733 (Apr. 13, 1984).

82. The preference language was already in the federal law, 25 U.S.C. § 1915(a)-(b) (1982), and applicable to the child placements covered by that law.

placement "for any reason" until the adoption was finalized (a minimum of ninety days) and if a child was placed for adoption through fraud or duress, the child could be reclaimed anytime after the final adoption decree.⁸³ Representative Skoglund felt it was too traumatic and disruptive to the adoptive families to allow the tribe to intervene that late. He also thought the bill was biased against all non-Indian relatives of the child being placed and that the child would automatically go to the Indian side of the family.⁸⁴

The opportunity to withdraw consent and reclaim children from adoptive families is already part of the Minnesota adoption statutes⁸⁵ and the federal ICWA.⁸⁶ The 1984 Minn. ICWA would not have increased this right. The representation that the tribe could interfere after a final adoption decree was incorrect. Only the parent can bring an action in fraud or duress to have an adoption decree nullified—the tribes cannot.⁸⁷ There is also no automatic presumption that the Indian side of the family will get the child instead of the non-Indian side of the family. In the history of the federal ICWA in Minnesota, the white or non-Indian side of the extended family had never been denied adoption of the child.⁸⁸ In addition, the Minn. ICWA language went further than the federal ICWA in specifically defining "extended family" to include relatives of either parent.⁸⁹

The second category of concern was the competency of the tribal courts. This issue was raised again when the 1985 Minn. IFPA was proposed. Representative Skoglund's opposition to the bill was motivated by his concern with the adequacy of the tribal courts and the due process rights of the biological parents.⁹⁰ Tribal courts have a long history.⁹¹ If they receive federal funds, the

83. See H.F. 1502 § 9(2), 73d Leg. (1984). This provision was tempered by § 12(1) which would not permit a court to grant a parent's petition if the return was not in the best interests of the child.

84. H.F. 1502, 73d Leg., tape 1, rev. 560-75 (Apr. 20, 1984).

85. Minn. Stat. §§ 259.24(6a), .25(2a) (1984).

86. 25 U.S.C. § 1913(d) (1982).

87. 25 U.S.C. § 1913(d) (1982); Minn. Stat. §§ 259.24(6a), .25(2a) (1984). When adoption proceedings are heard in state courts, the biological mother has until her child's age of majority to raise the claim of fraud or duress and ask for the return of her child. See also H.F. 1502 § 9(2), 73d Leg. (1984).

88. H.F. 1502, 73d Leg., tape 1, rev. 660-97 (Apr. 20, 1984) (statement of Rep. Karen Clark).

89. H.F. 1502 § 3(4), 73d Leg. (1984).

90. Telephone interview with DFL Rep. Wesley Skoglund (Oct. 10, 1985).

91. The Indian Reorganization Act of 1934, popularly known as the Wheeler-Howard Act, 25 U.S.C. §§ 461-477 (1982), provided for tribes to draft constitutions and by-laws for self-government and to establish their own judicial system. See American Indians, *supra* note 4, at 116.

courts must adhere to Bureau of Indian Affairs (BIA) procedures⁹² and the Indian Civil Rights Act of 1968⁹³ which ensured the extension of constitutional rights, including due process, to Indians.⁹⁴ Therefore, the tribal courts provide the same legal safeguards and procedures as the state courts, and in addition, provide a more culturally and ethnically appropriate forum.

By defeating the 1984 Minn. ICWA, then, the legislators did not prevent their "fears" from transpiring because those "fears" were already part of the existing Minnesota adoption and child placement statutes and the federal ICWA. Furthermore, their fears were unfounded. The underlying issue in the defeat of the 1984 Minn. ICWA was an unwillingness to allow tribes a larger role in deciding child placements. The legislators' discomfort with allowing tribal participation in the placement process is evident from their comments. Their comments portrayed the proposed legislation as government intervention in the private decision of an individual,⁹⁵ the group reigning over the individual,⁹⁶ and always as a direct clash between Indians and non-Indians. The legislators' primary fear was that a non-Indian woman with no Indian heritage or self-identification would find herself pregnant by a man with only a small percentage of Indian heritage and then have to fight the tribe in court to place the child with non-Indian adoptive parents.⁹⁷ This situation does not cover the vast majority of adoptions of Indian children. Nevertheless, if this situation did arise, the tribe would not have jurisdiction to intercede in the adoption process because the child would probably not be eligible for enrollment in a tribe.⁹⁸ Even if such a child were eligible for enrollment

92. 25 U.S.C. § 1311 (1982) sets out the model code for tribal courts; 25 U.S.C. § 1312 (1982) authorizes the BIA to appropriate funds to finance the tribal courts. See Ebbott, *supra* note 17, at 59-62, for details of BIA control of tribal governments through regulations and funding.

93. 25 U.S.C. §§ 1301-1341 (1982).

94. 25 U.S.C. §§ 1302-1303 (1982). The Act provides the equivalent of the first, fourth, fifth, sixth, eighth, and fourteenth amendments and article one, section nine of the Constitution. This includes the right to due process of law.

95. H.F. 1502, 73d Leg., tape 1, rev. 548, 565 (Apr. 19, 1984) (statements of Rep. Kathleen Blatz and Rep. Wesley Skoglund, respectively).

96. H.F. 1502, 73d Leg., tape 1, rev. 775-800 (Apr. 20, 1984) (statement of Rep. Kathleen Blatz).

97. H.F. 1502, 73d Leg., tape 1, rev. 775-800 (Apr. 20, 1984). To deal more effectively with this concern, the 1985 Minn. IFPA changed the definition of parent to *exclude* unwed fathers where paternity has not been acknowledged or established. Minn. Stat. § 257.351(11) (Supp. 1985). This was consistent with the federal ICWA. 25 U.S.C. § 1903(9) (1982).

98. H.F. 1502 §§ 3(10), 10(4), 73d Leg. (1984). In addition, the interactions between a mother and a tribal court in an adoption proceeding are no different than the interactions between a mother and a state court. In both cases the purpose of a court adoption proceeding is to terminate parental custody. In both cases the

in a tribe and the tribe expressed interest in the case, the jurisdiction section of the bill would not give the tribal court jurisdiction if either biological parent objected.⁹⁹ In addition, both the federal ICWA and the Minn. ICWA provide "good cause to the contrary"¹⁰⁰ clauses for not placing the child with Indian families.

DFL Rep. Randolph Staten made an eloquent appeal for the passage of the 1984 Minn. ICWA before the final vote. He urged his fellow lawmakers not to take intervention fears out of context and instead to deal with the reality of Indian children being placed in non-Indian homes. The "possibilities" and "might happens" of one violation of parental rights should not, he urged, overshadow the reality of hundreds of Indian children being removed from their heritage.¹⁰¹ Although the Minn. ICWA had successfully moved through the House and the Senate, the bill was voted down forty-six to seventy-six¹⁰² and was ultimately defeated in a reconsideration vote fifty-nine to seventy-one.¹⁰³ The efforts of the bill's supporters were not sufficient to save it.

IV. Strategies for Passage of the 1985 Minnesota Indian Family Protection Act

In the aftermath of the defeat of the 1984 Minn. ICWA, advocates who had lobbied for the legislation met to discuss what had gone wrong. So smoothly had the 1984 Minn. ICWA moved through the committees and passed in the Minnesota House of Representatives that when the amended version of the Act, previously passed by the Senate, came up for a reconsideration vote in the House, there were no lobbyists on the floor.¹⁰⁴ No significant opposition was expected because none had been displayed at any of the earlier points of voting in the long process from proposed legislation to law. When the 1984 Minn. ICWA reached the House floor for the final vote, Representative Skoglund, in a surprise move, galvanized enough opposition to defeat the bill by voicing his concerns about the biological mother's rights and the adequacy of tribal courts.¹⁰⁵ As a result of the failure of the 1984 Minn. ICWA, the strategy for passing the 1985 Minn. IFPA centered on eliminat-

mother has no final say in placement. As was stated earlier, the mother has a longer period of time in state court to bring an action for fraud or duress to have the child returned. Minn. Stat. §§ 259.24(6a), .25(2a) (1984).

99. H.F. 1502 § 7(2), 73d Leg. (1984).

100. 25 U.S.C. § 1915(a) (1982); H.F. 1502 § 10(1), 73d Leg. (1984).

101. See H.F. 1502, 73d Leg., tape 1, rev. 800-67 (Apr. 20, 1984).

102. H.F. 1502, 73d Leg., tape 1, rev. 605 (Apr. 19, 1984).

103. H.F. 1502, 73d Leg., tape 1, rev. 997 (Apr. 20, 1984).

104. Interview with DFL Rep. Karen Clark (Oct. 16, 1985).

105. Skoglund interview, *supra* note 90.

ing the adoption provisions of the bill and on identifying and ameliorating the political opposition to the Act.¹⁰⁶

The goal of the 1985 Minn. IFPA, and of the 1984 proposed ICWA, was to inform local judges and referees of the federal ICWA and to strengthen that law. The state laws strove to make the federal law more powerful by addressing its shortcomings. The 1984 Minn. ICWA especially strengthened those provisions of the federal law which dealt with voluntary placements leading to adoption.¹⁰⁷ It was this emphasis that defeated the 1984 Minn. ICWA. Therefore, the drafters of the 1985 bill made the strategic decision to remove the language that dealt with adoption. Although this meant a lost opportunity to strengthen the federal Act, this decision did not greatly compromise the goal of the legislation because the federal Act already had language, albeit not as strong as advocates would have liked, which addressed adoption.¹⁰⁸ Instead, the 1985 Act concentrates on strengthening the provisions of the federal ICWA that deal with foster care. The Minn. IFPA sections on foster care are more comprehensive than their earlier counterparts in the federal ICWA. The new Minnesota law distinguishes between voluntary foster care placements¹⁰⁹ and involuntary foster care placements¹¹⁰ and requires social service agencies and private child placing agencies to provide notice to the child's tribe in cases of any *potential* out-of-home placement (involuntary foster care),¹¹¹ voluntary foster care,¹¹² or any *potential* preadoptive or adoptive placement.¹¹³

The effect of these distinctions is to ensure tribal involvement before the decision is made to place the child out of the home. This will prevent culturally biased removals and work toward keeping the Indian family together. In the case of voluntary foster care placement, the notice provision ensures that the parent

106. Clark interview, *supra* note 104.

107. See H.F. 1502 § 10, 73d Leg. (1984).

108. 25 U.S.C. § 1915(a) (1982).

109. Minn. Stat. § 257.353 (Supp. 1985) sets out in detail the procedures required of an agency for voluntary foster care placement: determination of the child's tribe; notice to the parents, tribal agency, and Indian custodian within seven days of placement; notice of administrative review; return of the child upon demand of the parents; and identification and location of extended family members.

110. The Act defines involuntary foster care placement as "an action removing an Indian child from his or her parents or Indian custodian for temporary placement in a foster home, institution, or the home of a guardian. The parent or Indian custodian cannot have the child returned upon demand, but parental rights have not been terminated." Minn. Stat. § 257.351(3)(b) (Supp. 1985).

111. Minn. Stat. § 257.352(2) (Supp. 1985).

112. Minn. Stat. § 257.353(2) (Supp. 1985).

113. Minn. Stat. § 257.352(3) (Supp. 1985).

understands the nature of the out-of-home placement.¹¹⁴

The Minn. IFPA also provides for the immediate return of a child in voluntary foster care placement to his or her parents.¹¹⁵ Where the federal law only permits the parents to withdraw consent anytime prior to the final termination or adoption decree,¹¹⁶ under state law the parents may secure return of their child within twenty-four hours of their request.¹¹⁷ This prevents loss of custody due to bureaucracy and ensures that parents receive the information they need to reclaim their children.

Moreover, because the 1985 IFPA regulates foster care, its effects are nearly the same as if it covered adoption. The temporary nature or impermanence of foster care is a myth. Sometimes long-term foster care is the permanent placement goal rather than adoption. In fact, long-term foster care has been a much more common goal for Minnesota children than for children nationwide.¹¹⁸ Although foster care was originally intended, and is still frequently thought of, as a temporary placement option, the reality is that a substantial number of children will remain in foster care even after it is clear the child cannot return to his or her biological parent.¹¹⁹ Minority children spend a longer time in foster care

114. Notice ensures that the parents know the child is in voluntary foster care placement and are aware of their rights to the child. It also specifies whether a petition has been filed to terminate parental rights to the child. Minn. Stat. § 257.353(2) (Supp. 1985).

115. Minn. Stat. § 257.353(4) (Supp. 1985) requires that a child be returned within 24 hours of the parents' demand. This subdivision also requires the agency to inform the parents immediately of any requirement that prevents the return of the child, i.e., the demand (request for return) was not made in writing. *Id.* See also Minn. Stat. § 257.351(4) (Supp. 1985). This allows the parents to correct any defect.

116. 25 U.S.C. § 1913(c) (1982).

117. Minn. Stat. § 257.353(4) (Supp. 1985).

118. Minnesota Dep't of Human Servs., *Substitute Care in Minnesota 1983-1984*, at 27 (Feb. 1986).

119. Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *Foster Children in the Courts* 128, 139-43 (Mark Hardin ed. 1983). In the past, as many as 75% of the children in foster care in the United States would not be adopted or returned to their family of origin. Joseph Westermeyer, *Cross Racial Foster Home Placement Among Native American Psychiatric Patients*, 69 J. Nat'l Med. A. 234 (1977) (citing Henry Maas & R.E. Engler, *Children in Need of Parents* (1959)). In 1983 and 1984 nearly 25% of the children in substitute care in Minnesota had been there three years or longer. Fourteen percent had been in foster care for five years or longer. Minnesota Dep't of Human Servs., *supra* note 118, at 9-10.

Foster care might be used as a permanent placement option for many reasons. Long-term foster care can provide stability for the child while still providing periodic review by the agency and visits by the biological parents (if their visitation rights have not been terminated by the court). It also might avoid a painful court case. For children who need special services, foster care payments may be the only

than white children.¹²⁰ Because of the length of time a child might spend in foster care, an Indian foster care placement can be as important for an Indian child's cultural identity as an Indian adoptive placement.

The 1985 IFPA has an early-notice provision so the tribe becomes involved before the process of termination of parental rights begins.¹²¹ This allows all the tribal resources to be brought to bear in a timely fashion to aid in counseling the family and in making an appropriate foster care placement for the child. This early involvement of the tribe is the most important distinction between the federal ICWA and the 1985 Minn. IFPA. The 1985 Act also makes the identification of extended family members the responsibility of any agency considering placement of an Indian child.¹²² It is important to look to the extended family members because they are an integral part of child rearing in Indian communities.¹²³

When the tribal court and tribal social service agencies are involved early, it is less likely that a child will be removed from an Indian setting merely because one of the extended family members, rather than a biological parent, is caring for the child.¹²⁴ State court removal for "neglect" is common in situations where

way to provide those services. For further discussion of this topic, see Hardin, *supra*, at 128.

120. The percentage of children of *all* races in substitute care for two years or longer was 32.5%; for Black children, it was 43%; for Indian children, 36%. Minn. Dep't of Human Servs., *Children in Substitute Care by Race* (Aug. 20, 1984).

121. The Act provides for early notice, and therefore, involvement of the tribe whenever it appears that an Indian child will become involved with a social service agency or privately licensed child placement agency. Whenever either of these types of agencies "determines that an Indian child is in a dependent or other condition that could lead to [either] an out-of-home placement and requires the continued involvement of the agency with the child for a period in excess of 30 days," or a preadoptive or adoptive placement, "the agency shall send notice of the condition and of the initial steps taken to remedy it to the Indian child's tribal social service agency within seven days of the determination." Minn. Stat. § 257.352(2)-(3) (Supp. 1985).

When an Indian child is voluntarily placed in foster care, the local social service agency involved in the decision to place the child shall give notice of the placement to the child's parents, tribal social service agency, and the Indian custodian within seven days of placement. . . .

If a private licensed child placing agency makes a temporary voluntary foster care placement pending a decision on adoption by a parent, notice of the placement shall be given . . . upon the filing of a petition for termination of parental rights or three months following the temporary placement, whichever occurs first.

Id. at § 257.353(2).

122. Minn. Stat. § 257.353(5) (Supp. 1985).

123. Henry Green, *Risks and Attitudes Associated with Extra-Cultural Placement of American Indian Children: A Critical Review*, 22 J. Am. Acad. Child Psychiatry 63, 66 (1983).

124. See Ebbott, *supra* note 17, at 171-72, 178-82.

child care is provided by a member of the extended family. This diffusion of parental authority to extended family members is seen as a lack of responsibility on the part of nuclear family members.¹²⁵ State courts use a nuclear family model which is a Euro-American concept. Indian courts look at the tribe and the extended kinship networks. The "nuclear family" is not an Indian cultural concept.¹²⁶ State courts also sometimes overlook the importance of cultural, spiritual, and heritage support available in Indian communities in favor of material resources available in a non-Indian family.¹²⁷ Courts have also been bound by outmoded standards which have eliminated Indian homes for placement.¹²⁸ Although the new tribal courts have taken on some of the procedures of the Anglo-American system, they have also maintained their own distinctive approach.¹²⁹ The emphasis is on mediation and the resolution of the conflict at hand.¹³⁰ The tribal judge attempts to reach a resolution that will benefit the entire Indian community because the community or tribe is seen as a large extended family unit.¹³¹

In addition to a change in emphasis, other political strategies were pursued to ensure passage of the 1985 Minn. IFPA. The public leadership of the 1985 effort was much less politically partisan. IR House majority leader Connie Levi was named as a co-author of the Act. DFL Rep. Karen Clark gave away authorship of the bill

125. As one social worker in a reservation town stated: "I understand the extended family relationship; I just don't accept it." Westermeyer, *supra* note 119, at 236 (quoting Edwin McDowell, *The Indian Adoption Problem*, Wall St. J., July 12, 1974, at 6, col. 3).

126. Green, *supra* note 123, at 66.

127. *Id.* at 63.

128. Some Indian homes have been rejected as placements because of minimum space rules, i.e., state laws which require a certain number of square feet per child in a foster home. These minimum space rules were adopted in the pre-antibiotic era when certain illness rates were related to crowding. Such rules place physical requirements before social and psychological characteristics. Westermeyer, *supra* note 119, at 236.

An additional concern has been raised by some Indian community workers about the way foster parent eligibility is determined. (At their request, these community workers will remain anonymous.) "Rule One," Minn. R. 9545.0010-.0260 (1985), which sets out criteria for foster care parents, has not been revised since 1974. Its regulations against allowing anyone with a criminal record to be a foster parent has eliminated some applicants on the basis of their past activities in AIM and the civil rights movement. Yet these are also some of the applicants with the strongest and most positive Indian self-image. In some instances the applicant's juvenile record has been resurrected and examined.

129. American Indians, *supra* note 4, at 118. Bureau of Indian Affairs guidelines lay out the requirements that must be fulfilled in order for a tribe to receive federal financial support for their court. See *supra* note 92.

130. American Indians, *supra* note 4, at 120.

131. *Id.*

to IR Rep. Steve Sviggum. These actions made the Independent Republican support for the bill more visible.¹³² The new, broader-based support for the bill made it easier to pass.

In their final effort, the proponents sought to meet the objections of those who had opposed the law in 1984. This meant addressing those concerns for race-blind adoptions voiced by Representative Skoglund and his supporters, most notably those adoption agencies which specialize in overseas, interracial adoptions. Some adoption agencies felt threatened by the adoption provisions because there was concern that limiting the interracial adoption of Indian children would open the door to similar restrictions on other racial or ethnic groups. Open-adoption policy advocates felt this was a return to the "segregationist" policies of the 1950's.¹³³ This approach to Indian adoption ignores North American Indians' unique legal status in the United States and persists in viewing Indians as a racial classification rather than as a political and legal entity. Separate treatment of Indians is not an equal protection violation because it is not based on race, but on political status.¹³⁴ Therefore, Indian adoption policy cannot set a precedent for other racial minority children.

Supporters of the Act ascertained the position of adoption agencies early in the push for the 1985 Act, and used a combination of confrontation, compromise, education, and emotional public testimony to counter much of the adoption agency opposition to the law.¹³⁵ This process took several forms depending on the activity. The confrontation entailed just that—asking adoption agencies and advocates directly to determine where they stood on the Act and to educate them about the issues involved in Indian adoption so that the agencies would support the Act. Certainly the compromises changing the language and focus from adoption to foster care went a long way in accomplishing that goal.

Nevertheless, the most important and effective tools for educating the public about the 1984 Minn. ICWA and for gaining the adoption agencies' support for the 1985 Minn. IFPA were the Indian speakouts at many of the subcommittee hearings and meetings.¹³⁶ In the speakouts, Indian adults recounted what growing up

132. IR Rep. Steve Sviggum was listed as the chief author of the bill. Co-authors were IR Reps. Ben Boo, Maurice Zaffke, House Majority Leader Connie Levi, and DFL Rep. Karen Clark.

133. Telephone interview with DFL Rep. Wesley Skoglund (Oct. 18, 1985).

134. See *Fisher v. District Court*, 424 U.S. 382, 390 (1976); *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

135. Clark interview, *supra* note 104.

136. *Id.*

in a non-Indian, white adoptive home had done to them and their sense of self. For many it was a devastating experience to try to come to terms with their Indian status. Indian adults raised in non-Indian homes reported a profound sense of isolation coupled with a complete lack of Indian identity. These feelings are often labeled the "Apple Syndrome,"¹³⁷ where during adolescence, Indian children raised in white homes as white, come to a sense of their ethnic and racial differences from their adoptive parents. Without any knowledge of their own cultural history and identity, these Indian children feel they have nowhere to belong. As adults they are left knowing they are not white, but do not quite feel they are Indian because they lack any knowledge of the ceremonies, customs, and religion that make up their cultural identity. These Indian children are raised without the sense of tribal affiliation which is an integral part of Indian self-knowledge and identity.

A. Content of the 1985 Minn. IFPA

Placing the defeated 1984 Minn. ICWA and the successful 1985 Minn. IFPA side by side, two major differences become clear. The first difference between the laws is language. The 1985 Minn. IFPA eliminated all language that was already in the federal ICWA. The findings section,¹³⁸ which had the most political and emotional impact because it talked about the importance of the Indian child being raised with a sense of Indian welfare and identity, was not reintroduced. The 1985 Act also eliminated any declaration of policy,¹³⁹ especially any acknowledgment that the state law would extend the federal policy provisions of the ICWA. In essence, the language that was most controversial in the 1984 version was removed from the 1985 Act. This included the sections on jurisdiction, intervention, and full faith and credit,¹⁴⁰ state recognition of tribal courts,¹⁴¹ and much of the procedural explanations. Rather than replicating portions of the federal ICWA in the state law as the 1984 version would have, the 1985 Minn. IFPA is a com-

137. "'Apple' refers to racially Indian people with ethnic preferences of the majority society, i.e., 'Red' or Indian on the outside and 'White' on the inside." Joseph Westmeyer, *The Apple Syndrome in Minnesota: A Compilation of Racial-Ethnic Discontinuity*, 10 J. Operational Psychiatry 134, 134 (1979).

138. H.F. 1502 § 1, 73d Leg. (1984). The findings section had been deleted from the Minn. ICWA by the Committee on Judiciary.

139. H.F. 1502 § 2, 73d Leg. (1984).

140. H.F. 1502 § 7, 73d Leg. (1984). The 1985 Act replaced these with a short subdivision giving Indian tribes jurisdiction and providing for transfer of proceedings in child placement proceedings. Minn. Stat. § 257.354 (Supp. 1985).

141. H.F. 1502 § 6, 73d Leg. (1984).

plementary law. The changes in language did not weaken the Act because the omitted language is all included in the federal act.¹⁴² The changes therefore do not harm the purpose of the Act.

The second major difference between the 1984 Minn. ICWA and the 1985 Minn. IFPA is in scope. The proposed 1984 law would have extended the scope of early tribal notice and therefore involvement in Indian child placements to include voluntary adoption. In the successful 1985 version of the Act, the law concentrates on the involuntary foster care placement process rather than adoption, although voluntary foster care is covered. The reason for both changes, in language and in scope, between the 1984 bill and the 1985 Act is the same: politics. Although these changes were sufficient to allow the Act to pass into law in 1985, they were not enough to totally eliminate opposition.

B. Opposition to the 1985 Minn. IFPA

Opposition to the 1985 Minn. IFPA focused on two concerns: whether tribal courts could adequately protect participants' procedural rights and whether transracial adoptions would be permitted. The first concern was based on due process. Were tribal courts as competent and procedurally fair as state courts? Was there a right of appeal in the tribal courts? Opponents felt that if there was no right of appeal, then it was not fair that of all the ethnic or minority groups in the United States, only North American Indians were denied a right of appeal.¹⁴³

Under the Minn. IFPA, "tribal court" is defined as "a court with jurisdiction over child custody proceedings which is either a court of Indian offenses, or a court established and operated under the code or custom of an Indian tribe, or the administrative body of a tribe which is vested with authority over child custody proceedings."¹⁴⁴ As stated earlier, tribal courts which are supported by federal funds must follow BIA guidelines and procedures. The tribal court system provides for an appeal process. From the tribal courts, the case is appealed to the tribal court of appeals. From there an appeal would move to the federal district courts. Once in

142. The 1985 Minn. IFPA also dropped certain definitions previously included in H.F. 1502 § 3, 73d Leg. (1984), which were unnecessary because the scope of the 1985 Act was narrower. The 1985 Act also eliminated H.F. 1502 § 14 (improper removal of a child from custody) and § 15 (emergency removal of the child). These changes were made in response to the defeat of the 1984 law. The changes streamlined the state law and therefore made it more palatable to its opponents. The changes did not sacrifice any protection of the Indian families, however, because the language omitted from the state law was already in the federal ICWA.

143. See Skoglund interview, *supra* note 90 and accompanying text.

144. Minn. Stat. § 257.351(15) (Supp. 1985).

the federal court system, the case would follow the regular appeal route through the United States courts of appeal to the United States Supreme Court.¹⁴⁵ In addition, the Indian Civil Rights Act of 1968 also ensures the extension of certain constitutional rights to Indians.¹⁴⁶

Under the Minn. IFPA, the tribal court has exclusive jurisdiction over a child placement proceeding involving an Indian child who resides within the tribe's reservation at the commencement of the custody proceedings.¹⁴⁷ If the child is in legal custody elsewhere pursuant to an order of a tribal court, the Indian tribe retains exclusive jurisdiction.¹⁴⁸ If the child does not live on the reservation and is therefore not already subject to tribal court jurisdiction, the state court must transfer jurisdiction to the tribal court. Opponents found the required transfer to be too oppressive because it would "force" the family into a tribal court. The transfer will only occur, however, "absent objection by either parent," and absent "good cause to the contrary," so either parent could prevent the transfer of jurisdiction.¹⁴⁹

The second area of opposition to the Minn. IFPA centers on the premise that transracial adoption is beneficial and often necessary to prevent children being raised in institutional facilities due to a lack of minority adoptive parents. The Minn. IFPA does not prohibit transracial adoption. The Act merely provides for participation by Indian tribes in the placement of their children. The Minn. IFPA does not even list a placement order of preference.¹⁵⁰ In addition, opponents argued that a return to the "matching" theory approach to adoption would be racist and detrimental to the child's best interests because this would often mean eliminating a potential adoptive family in a higher income bracket because of its race. This argument underlines what was already happening in social service agencies and state courts. The non-Indian social service providers' values placed material resources above the importance of Indian cultural, spiritual, and community support for the Indian child. Besides the paternalistic attitude toward In-

145. See American Indians, *supra* note 4, at 112, for a diagram of the right to appeal.

146. Among others, the Indian Civil Rights Act of 1968 imposed such basic requirements as free speech, free exercise of religion, due process and equal protection. 25 U.S.C. § 1302 (1982).

147. Minn. Stat. § 257.354(1) (Supp. 1985).

148. *Id.*

149. *Id.* at § 257.354(3).

150. The placement order of preference is in the federal Indian Child Welfare Act, 25 U.S.C. § 1915(a)-(c) (1982), and in Minn. Stat. § 259.255 (1984) (Protection of Heritage or Background).

dian adoptive and foster care families, this argument also flies in the face of the "Apple Syndrome" studies¹⁵¹ and the personal testimony of the Indians who "spoke-out" about the effects of non-Indian adoption on their lives.¹⁵²

VI. Conclusion

The 1978 federal ICWA was passed "[t]o establish standards for the placement of Indian children in foster or adoptive homes, [and] to prevent the break up of Indian families."¹⁵³ While the federal Act accomplished many of its goals, the law was insufficient to completely solve the problem of Indian child placement in non-Indian homes. This was in part because the Act did not sufficiently address voluntary foster care, preadoptive, and adoptive placements.¹⁵⁴ In 1983 the state of Minnesota passed the Heritage Child Protection Act which required consideration of the child's ethnic background during the decision-making process of adoption proceedings.¹⁵⁵ This law, however, was written for racial minorities and the placement of minority children in white homes. The law makes no provision for Indian tribal participation in placement decisions. Because Indians are a separate political entity with their own governments, lands, and cultural and spiritual existence, which pre-date the United States and continue to this day, their situation is different from that of other racial groups. The Minn. HCPA did not address this difference.

The 1984 Minnesota Indian Child Welfare Act would have remedied these shortcomings. Nevertheless, the 1984 Act failed to pass the Minnesota legislature for two reasons. First, general adoption law was not well-known by a number of opponents. This situation allowed unlikely or inaccurate scenarios to dominate the final discussions of the bill. Second, a number of legislators were hesitant to give Indian courts more power. This last concern reflected a fear of increased government intervention in the family (in the form of tribal courts) and a dilution of state court authority over adoption. Legislators were concerned with tribal jurisdiction over non-Indians. Supporters had not anticipated such responses because they had not been raised earlier in the discussion of the bill.

The 1985 Minnesota Indian Family Preservation Act suc-

151. See Westermeyer, *supra* note 137.

152. See *supra* text accompanying notes 136-137.

153. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, 3069.

154. See *supra* text accompanying notes 54-57.

155. See *supra* note 51 and accompanying text.

ceeded using a combination of general education about adoption law, specific education on the effects on Indians of non-Indian placement, and a redrafting of the bill's language to emphasize early tribal notification and the foster care process. The more volatile emphasis on adoption was skirted. The Minn. IFPA dealt with foster care, but not adoption, as a political expedient to allow passage of the bill. Because foster care can be as permanent as adoption, indeed some foster parents adopt their foster children,¹⁵⁶ the Minn. IFPA still makes an important contribution toward the preservation of Indian cultural heritage. Although the Minn. IFPA will not eliminate the problem of out-of-home placement of Indian children in non-Indian homes, the Act has brought the problem to the attention of the state legislature and sensitized the state government and service agencies to the issues involved. The 1985 Act is a substantial first step toward addressing the shortcomings of the federal ICWA and will be an important tool for protecting the integrity of Indian cultural identity.

156. For a discussion of the rights of foster parents to adopt their foster children, see Mark Hardin & Josephine Bulkley, *The Rights of Foster Parents to Challenge Removal and to Seek Adoption of Their Foster Children*, in *Foster Children in the Courts* 299 (Mark Hardin ed. 1983).