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Child Welfare under the Indian Child Welfare Act of 1978: A New Mexico Focus

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CHILD WELFARE UNDER THE INDIAN CHILD WELFARE ACT OF 1978: A NEW MEXICO FOCUS

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The stated purpose of the Indian Child Welfare Act[1] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.[2] This statement in itself tells little about the Act. What is in the best interests of Indian children? Against what forces does the federal government need to secure Indian tribes and families? What is the relationship between the interests of Indian children and the protection of the tribe and family? Questions like these are answered in the legislative history outlined in the reports of the House Committee on Interior and Insular Affairs[3] and the Senate Select Committee on Indian Affairs.[4] A review of the reports reveals the ends behind the means and is necessary for any understanding of the Act. Once the purpose of the Act is clarified, it is possible to examine the Act itself to see how it proposes to carry out the purpose and provide for the welfare of the Indian child and how it applies to New Mexico proceedings.

LEGISLATIVE PURPOSE

The House Report begins with the observation that "the wholesale separation of Indian children from their familieis [sic] is perhaps the most tragic and destructive aspect of American Indian life today."[5] The data base underlying this assertion consists of two surveys of states with large Indian populations[6] conducted by the Association on American Indian Affairs (hereinafter AAIA) in 1969 and again in

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1. Indian Child Welfare Act of 1978, 25 U.S.C.A. §§ 1901-1963 (Supp. 1979) [hereinafter cited as Act].

2. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7530 [hereinafter cited as H.R. Rep.].

3. *Id.*

4. S. Rep. No. 597, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. Rep.]

5. H.R. Rep., *supra* note 2, at 9.

6. The states surveyed include Alaska, Arizona, California, Idaho, Maine, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming. Association on American Indian Affairs (AAIA), Am. Indian Policy Review Comm'n, Indian Child Welfare Statistic Survey 69-74 (1976).

1974,[7] together with a follow-up statistical survey which was performed nationwide in July 1976 by the AAIA at the request of the American Indian Policy Review Commission, an agency of the United States Congress.[8] The 1969 survey indicates that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.[9]

Equally important, the survey revealed that significantly more Indian than non-Indian children were adopted or placed in foster homes. The 1976 survey of New Mexico, for example, reported that Indian children were placed for adoption by public agencies at a per capita rate 1.5 times the rate for non-Indian children and in foster care 2.4 times the rate for non-Indian children.[10] When the AAIA survey added to these figures the number of Indian children away from their families while attending boarding schools operated by the U.S. Bureau of Indian Affairs (hereinafter the BIA), it concluded that Indian children are separated from their families 74.6 times more often than non-Indian children in New Mexico.[11]

The Committee on Interior and Insular Affairs found these statistics "shocking"[12] and evidence of an "Indian child welfare crisis . . . of massive proportions."[13] They are shocking. They call for thorough investigation into the sources of this statistical disparity. The Committee report identifies the cause and culprit: the state child welfare agencies and the state court system.[14] The Committee rejects the rationale blaming social conditions on Indian reservations, low-income, joblessness, poor health, substandard housing, and low educational attainment as the source of the disparity. "Not all impoverished societies," the Committee states, "suffer from catastrophically high rates of family breakdown."[15] While these aspects of Indian life are identified and denounced by the Committee, they are not credited with causing or even contributing to the high incident of separation.

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7. H.R. Rep., *supra* note 2, at 9.

8. AAIA, Indian Child Welfare Statistics Survey (1976), *reprinted in* Hearing on S. 1214 Before the Select Comm. on Indian Affairs, 95th Cong., 1st Sess. 537-603 (1977) [hereinafter cited as Survey].

9. H.R. Rep., *supra* note 2, at 9.

10. Survey, *supra* note 8, at 575.

11. *Id.* at 577.

12. H.R. Rep., *supra* note 2, at 9.

13. *Id.*

14. *Id.* at 10. A discussion of the effect of the BIA boarding homes and the federal government's role in causing this disparity is curiously absent.

15. *Id.* at 12.

The report focuses first on the basic child protection systems of the states in relationship to the Indian culture. It decries the abusive actions of social workers who, "ignorant of Indian cultural values and social norms . . . frequently discover neglect or abandonment where none exists."[16] Their decisions are deemed "wholly inappropriate in the context of Indian family life," and are frequently based on "cultural biases."[17] The report implies that ninety-nine percent of the cases alleging neglect by Indian parents are based on such vague grounds as "neglect" or "social deprivation."[18]

Foster care is thus seen not as a haven for the neglected child but as a great hazard to which the child is exposed. The client runs the risk of the "trauma of separation," not only from his family, but also from his culture.[19] Placed in primarily non-Indian homes, the Indian child must "cope with the problems of adjusting to a social and cultural environment much different than [his] own."[20]

The report objects to the state court system. The abusive actions of the social workers "would largely be nullified if more judges were themselves knowledgeable about Indian life."[21] They are not. Removal decisions are, "in most cases, carried out without due process of law."[22] Counsel is seldom provided for either parent or child.[23]

The Senate Report, though more subdued in language, concurs in the basic findings of the Committee Report. It concludes that "family breakups frequently occur as a result of conditions which are temporary or remedial and where the Indian people involved do not understand the nature of the legal actions involved."[24] Letters and excerpts appended to the Senate Report echo the sentiments of the House Report in more explicit and accusatory terms.[25] The focus of the addenda is again the abusive practices of nontribal governmental agencies.

The purpose of the Indian Child Welfare Act is thus to protect the Indian child from the state child welfare system. Stability and security for Indian tribes and families are to be accomplished by eliminating, where possible, state intervention in Indian family affairs. The

16. *Id.* at 10.
17. *Id.*
18. *Id.*
19. *Id.* at 9.
20. *Id.*
21. *Id.* at 11.
22. *Id.*
23. *Id.*
24. S. Rep., *supra* note 4, at 11.
25. *Id.* at 31-36.

child's best interests are to be secured by protecting him from the power of the state.

To achieve this purpose, Congress decided it was neither necessary nor desirable to oust states from their traditional jurisdiction over Indian children. The idea of transferring Indian child welfare proceedings from the state to the federal court system was rejected. Congress instead chose two alternate avenues to achieve the purpose. First, Indian authority and control in Indian child welfare matters were to be developed as much as possible. Second, minimum federal standards and procedural safeguards were to be established and applied by the state court system and child welfare agencies.[26]

The assault on the state systems is unanswered in the reports. Those states which did respond to the committee, including New Mexico, were cautiously supportive of the bill. State comments uniformly supported the emphasis on Indians making decisions on Indian child welfare matters, on placement of Indian children with Indian families, and on the development of tribal resources.[27] Where questions were raised by the states, they were raised concerning the wisdom of the proposed federal standards.[28]

Accordingly, the indictment of the child welfare system's handling of Indian children was not effectively countered, probably because there was a lack of significant input by those agencies concerned with traditional child welfare matters. An elaborate dissent added to the report by Representative Ron Marlenee points out that H.R. 12533 and subsequent drafts were never generally circulated to the states, juvenile judges, and public and private welfare agencies.[29] Such significant child welfare organizations as the National Council

26. As will be seen, these standards are designed to limit and check the state's ability to act in traditional child welfare areas, thereby preventing Indian children from even coming into state custody. If an Indian child does come into state custody, the provisions are designed to insure placement with an Indian family. *See* text accompanying notes 117-21 *infra*.

It is impossible to determine from the Congressional reports whether the indictment of state intervention into Indian family life is justified. The reports clearly evidence a bias which far exceeds the statistical and testimonial base.

Noteworthy too is the absence of discussion of the federal role. The federal government, through its Bureau of Indian Affairs, runs a comprehensive boarding school system. Though the vast majority of Indian children are away from their homes due to this boarding school system, the reports and the Act pay only cursory attention to this statistically significant fact. Act, *supra* note 1, §§ 1901, 1961. The Act declares only that "[i]t is the sense of Congress that the absence of locally convenient day schools *may* contribute to the breakup of Indian families." *Id.* § 1961(a) (emphasis added). The most the Act provides for is a two year study of the feasibility of providing for local schools. *Id.* § 1961(b). The Act hardly sounds a clarion call for reform!

27. S. Rep., *supra* note 4, at 31-35.

28. *Id.*

29. H.R. Rep., *supra* note 2, at 42.

of Juvenile and Family Court Judges and the National Council of State Public Welfare Administrators requested and were denied additional time to explore the actual impact of the Act.[30]

Because this unanswered indictment of the state systems forms the underlying premise of the Act,[31] it explains the approach taken by the drafters to the provisions of the Act. With this understood, it is possible to look to the specifics of the Act.

OVERVIEW OF THE ACT

The Indian Child Welfare Act is divided into a purposes section, a definition section, and four titles.[32] Of these four titles, Title I is by far the most significant. It divides the jurisdictional authority between the states and tribes on child welfare matters. It also establishes the minimal substantive and procedural standards for state courts and administrative agencies when dealing with an Indian child. It is the heart of the Act and will be examined in greater detail in later sections.[33]

Title II provides for grants to be made by the Secretary of the Interior to Indian tribes and organizations. The grants are to provide for family service programs, tribal child welfare codes and systems, adoption and foster care systems, and a whole range of services which are generally family supportive.[34] Grants may also be awarded to Indian organizations to provide off-reservation programs and services to Indian families and children.[35] These grant monies may be used as nonfederal matching share funds in connection with Titles IV-B and XX of the Social Security Act or any other appropriate federal assistance program.[36]

The significance of Title II is that it provides the means for tribes to develop the capacity to undertake fully child welfare matters. The importance of this is especially evident in the area of foster care and adoptive placements. The House Report decries the fact that non-Indian parents continue to furnish almost all foster and adoptive care for Indian children, blaming it on "discriminatory stan-

30. *Id.* at 46.

31. American Indian Law Center, Inc., Background Information and Explanation of the Indian Child Welfare Act of 1978, at 3, reports that the AAIA actually drafted the first version of the Act which was introduced by Senator James Abourezk of South Dakota in 1976 [hereinafter cited as AILC Rep.].

32. Act, *supra* note 1, § 1901 (Supp. 1979).

33. *See* text accompanying notes 49-121 *infra.*

34. Act, *supra* note 1, at § 1931 (Supp. 1979).

35. *Id.* § 1932.

36. *Id.* § 1931(b).

dards."[37] The States say the problem is caused by a lack of Indian placement resources.[38]

A review of New Mexico practice confirms that there is a lack of Indian foster and adoptive resources. A recent survey conducted by the New Mexico Department of Human Services of Indian children in foster care revealed a "soft" count of 180 children. Of these it is estimated that over half were placed in state foster homes at the request of BIA and various tribes because of a lack of foster care resources.[39] In adoptions the problem is similar. The Department has an explicit policy of matching children and adoptive families racially and ethnically whenever possible.[40] This policy makes placement of Indian children with Indian families the Department's top placement priority.[41] In securing appropriate placement the Department explores not only New Mexico resources, but also those of private adoption agencies, regional, and national adoption exchanges.[42] In addition, cooperative studies of on-reservation homes by tribal social workers is utilized in securing placement.[43] Nevertheless, the state adoption agency is still able to place only approximately one half of the Indian children in Indian adoptive families.[44]

Title II could cure this lack of resources and end many of the statistical disparities that were the reason for enactment of the Act. Title II support systems and tribal child welfare systems would insure against state abuses. It could create a viable, sympathetic, and unbiased alternative for Indians. It should be the core of the Act, but Congress has failed to adequately fund it.

Title III establishes a records center in the Department of the Interior for all adoptions of Indian children.[45] Upon request of an adopted Indian child over the age of eighteen, the adoptive or foster parents of the child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for determinations of benefits, enrollment, and tribal memberships.[46] Should the Depart-

37. H.R. Rep., *supra* note 2, at 11.

38. Telephone interview with Ms. Betty Ann Rose, Program Support Bureau of the Human Services Department (Feb. 6, 1980) (based on a survey dated May 29, 1979).

39. *Id.*

40. Human Services Department, Social Services Division Manual, § 400.05(13).

41. *Id.* Provision is made to insure that such children secure a census number and rights connected with BIA registration. *Id.* § 400.05(24).

42. *Id.* § 400.17(4).

43. Interview with Heidi Illanes, Deputy Director of the New Mexico Adoption Agency (Feb. 10, 1980).

44. Interview with Linda Morgan, Director of the New Mexico Adoption Agency (Feb. 10, 1980).

45. Act, *supra* note 1, at § 1951(a) (Supp. 1979).

46. *Id.* § 1951(b).

ment's records contain an affidavit by the child's natural parents requesting anonymity, the Secretary will certify to the child's tribe whether the information warrants tribal enrollment.[47] Title III's clear purpose is to insure that the Indian child does not lose either his rights or status through the adoptive process. This is good adoption practice and represents a distinct improvement over current systems.

Title IV contains various miscellaneous provisions. The sole significant provision authorizes a study of the feasibility of providing Indian children with schools located near their homes.[48] The real effect of Title IV remains to be seen.

TITLE I—JURISDICTION

Introduction

Title I of the Act establishes federal standards for child custody proceedings. Central to the federal scheme are the provisions for the apportionment of child welfare jurisdiction between the Indian tribes and the states. Title I is designed to assure that as many Indian custody matters as possible are litigated before tribal courts. Before the jurisdictional rules are examined, it is necessary to review two preliminary matters, the scope of "child custody proceedings" and the meaning of "Indian child" under the Act.

A. "Child Custody Proceedings."

"Child custody proceeding" is a term of art defined by the Act. It explicitly includes four types of actions: (1) foster care placements, (2) termination of parental rights, (3) preadoptive placements, and (4) adoptive placements.[49] Two actions, placement based on an act which if committed by an adult would be deemed a crime and awards of custody to one parent, are specifically excluded from the Act.[50]

Foster care placement includes "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated."[51] In New Mexico this includes both neglect and child in need of supervision (CHINS) proceedings under New Mexico's Chil-

47. *Id.*
48. *Id.* § 1961.
49. *Id.* § 1903(1).
50. *Id.*
51. *Id.* § 1903(1)(i).

dren's Code.[52] It may also include residential treatment proceedings concerning a minor under the Mental Health and Developmental Disabilities Act[53] and general custody matters where neither party is a parent.[54]

Termination of parental rights means "any action resulting in the termination of the parent-child relationship."[55] In New Mexico this would include relinquishment of parental rights and actions for termination of parental rights.[56] For certain purposes under the Act this would also include consent to adoption.[57]

Preadoptive placement means "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement."[58] There is no judicial proceeding under New Mexico law which qualifies as a preadoptive placement. Such placements are administratively handled by adoptive agencies and are subject to Title I standards.[59]

Adoptive placement means "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[60] Once again, placements in New Mexico are generally administrative rather than judicial matters. The only exception is an action for an independent adoption. The Adoption Act provides that in an independent action, the court may authorize placement of the proposed adoptive child into the adoptive home.[61] An independent adoption requires a waiver of placement restrictions and must be accomplished prior to actual placement of the child.[62] Such independent action to adopt an Indian child would be covered by Title I.

B. "Indian Child."

Once it has been determined that the proceeding is a child custody proceeding, it must then be determined whether or not the child is an Indian child. Indian child means "any unmarried person who is under age eighteen and either (a) is a member of an Indian tribe or

52. N.M. Stat. Ann. § 32-1-34 (1978).
53. N.M. Stat. Ann. §§ 43-1-16, -16.1 (Repl. 1979).
54. *See* N.M. Stat. Ann. §§ 40-7-1 through -28 (1978).
55. Act, *supra* note 1, at § 1903(1)(ii) (Supp. 1979).
56. N.M. Stat. Ann. §§ 40-7-3, -4 (1978).
57. *Id.* § 40-7-8.
58. Act, *supra* note 1, at § 1903(1)(iii) (Supp. 1979).
59. *Id.* § 1903(1)(iv).
60. *Id.*
61. N.M. Stat. Ann. § 47-7-19 (1978).
62. *Id.*

(b) is eligible for membership in any Indian tribe and is the biological child of a member of an Indian tribe."[63] Unless the child is clearly a tribal member, it is necessary to look first to the child's biological parents to determine whether or not either of them is a member of an Indian tribe. If either parent is a member, it is then necessary to determine whether the child is eligible for membership in the tribe of either parent.[64]

Indian tribe is defined as "any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village."[65] There are 278 tribes, bands, rancherios, and groups in the lower forty-eight states and some 200 villages in Alaska that are federally recognized and receive services from the Bureau of Indian Affairs.[66] In New Mexico alone there are twenty-four federally recognized tribal groups.[67] Membership requirements for each group may vary but usually specify that a certain quantum of blood and some proper lineal descent are necessary. Each tribe's rules, however, must be examined to clarify whether or not the child is Indian.

A recent United States Supreme Court case, *Santa Clara v. Martinez,*[68] illustrates the complexity of the question. In that case Petitioner Julia Martinez, a full-blooded member of the Santa Clara Pueblo, married a Navajo man. Her children, pursuant to a Santa Clara Pueblo counsel ordinance, were excluded from membership because their father was not a Santa Claran.[69] Accordingly, the children of Julia Martinez would not be deemed "Indian children" from the perspective of the Santa Clara Pueblo.

The law allows for some interesting complications. It is possible for a Santa Clara woman to have one child by a Santa Clara husband and a subsequent child by a non-Indian husband. The first would be an Indian child, the second would not. The first would be protected by the Act, the second would not. Such examples make it clear that the initial determination may be a complex matter. It is, however, the central issue. Once the child has been identified as an Indian child, all subsequent provisions of Title I apply. Whether or

63. Act, *supra* note 1, at § 1903(4) (Supp. 1979).
64. *Id.*
65. *Id.* § 1903(8).
66. AILC Rep., *supra* note 31, at 5.
67. There are nineteen Pueblos, three Navajo Chapters, and two Apache Tribes in New Mexico. Interview with Jody Cohen, Information Specialist, New Mexico Office of Indian Affairs (Mar. 7, 1980).
68. 436 U.S. 49 (1978).
69. *Id.* at 52.

not the parent or custodian of the child is also Indian is then immaterial. The status of the child activates the provisions of the Act.

Jurisdiction—Substantive

Once the child has been clearly identified as an Indian child and the proceeding identified as a child custody proceeding, the next question is jurisdiction. There are two types of jurisdiction provided for under the Act: exclusive and concurrent.

Indian tribes are given exclusive jurisdiction in all child custody proceedings involving an Indian child who resides or is domiciled within the reservation except where jurisdiction is otherwise vested in the state by existing federal law.[70] The tribe also has exclusive jurisdiction, notwithstanding the residence or domicile of the child, where the Indian child is a ward of a tribal court.[71]

The test for residence of the child is fairly straightforward. Residence is defined in New Mexico as the place where a person actually lives or has his home, a dwelling place, or place of habitation.[72] Domicile is a more complex matter. Domicile in New Mexico requires physical presence plus intent to make a home in the state.[73] Because a child cannot formulate intent, various rules have been developed to determine a child's domicile. The basic rule is that the domicile of a minor is the same as the domicile of the parent with whom he lives.[74] Where the child has been abandoned or orphaned, the child's domicile is the place in which people to whom he is most closely related are domiciled.[75] Usually the child acquires domicile at the home of a grandparent or other person who stands *in loco parentis* to the child and with whom the child lives.[76] In a child welfare proceeding it is necessary to determine the domicile of the child's custodial parent or other custodial figure. To do this, it is necessary to determine that person's intent. This is not an easy determination for a child welfare worker to make; yet the matter is of critical importance because it determines whether the tribal or state judicial system has jurisdiction over the child.

Concurrent jurisdiction exists in any state court proceeding for foster care placement or termination of parental rights when a child is not domiciled or residing within the reservation of the child's

70. Act, *supra* note 1, at § 1911(a) (Supp. 1979).

71. *Id.*

72. Perez v. Health & Social Servs., 91 N.M. 334, 573 P.2d 689 (Ct. App. 1977), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978); *see also* 9 N.M.L. Rev. 89 (1978-1979).

73. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

74. *Id.*

75. Montoya v. Collier, 85 N.M. 356, 512 P.2d 684 (1973).

76. *Id.*

tribe.[77] The Act appears to place primary jurisdiction in the tribe by providing that absent good cause to the contrary, the state court shall transfer such proceeding to the tribal courts upon the petition of either parent, the Indian custodian, or the child's tribe, unless either parent of the child objects.[78] The sole proviso is that the tribe may decline to accept the transfer.[79]

There are, however, two possible areas of conflict: domicile, because there is the possible argument that an Indian's domicile is always on the reservation,[80] and good cause, because it allows the state court discretion to decline transfer.[81] Problems in these areas should be resolved to assure that the child is protected by the proceedings. Courts should look carefully at both areas of potential conflict. Questions of domicile should be resolved only in a judicial forum. It should be assumed that domicile tracks residence until challenged. Good cause determinations should revolve around which forum is in a better position to hear and resolve the issues, taking into account such matters as location of witnesses, evidence, and the law of the forum. As will be seen, the Act places significant burdens on the state court which may make the tribal forum more capable of looking after the child's interests.[82]

Miscellaneous

Two other provisions were added to strengthen a tribe's primacy of jurisdiction. First, "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."[83] Upon intervention either party may petition for a transfer of jurisdiction.[84] Second, the Act provides that "[t]he 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."[85]

77. Act, *supra* note 1, at § 1911(b) (Supp. 1979).
78. *Id.*
79. *Id.*
80. AILC Rep., *supra* note 31, at 9.
81. 25 U.S.C.A. § 1911(b) (Supp. 1979).
82. *See* text accompanying notes 86-105 *infra.*
83. Act, *supra* note 1, at § 1911(c) (Supp. 1979).
84. *Id.* § 1911(b).
85. *Id.* § 1911(d).

INVOLUNTARY PROCEEDINGS

State court proceedings to secure involuntary foster care or termination of parental rights are governed by Section 102 of the Act.[86] It does not completely displace state law, either procedural or substantive. It does modify certain provisions and add others.

An involuntary foster care proceeding often commences with the emergency removal of a child from his home. The New Mexico Children's Code provides that a child may be taken into custody by a law enforcement officer "when the officer has reasonable grounds to believe that the child is suffering from illness, or injury, or is in immediate danger from the child's surroundings, and removal from those surroundings is necessary."[87] This provision applies only to Indian children residing off the reservation. For an Indian child residing on reservation, but temporarily located off reservation, an emergency removal is permissible under the Act to prevent imminent physical damage or harm to the child.[88]

Under the Children's Code, a child may be held in custody after being removed from his home for forty-eight hours. Within that time a petition alleging neglect must be filed or the child must be released.[89] The Act's provisions are less precise. Emergency removal power "terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child."[90] This is a subjective test imposing no time limits. The Children's Code's forty-eight hour rule does not apply and no petition must be filed. Under the Act the state agency is required to "expeditiously" initiate a child custody proceeding in the proper tribal forum, transfer jurisdiction (and presumably custody) to the appropriate tribe, or restore custody of the child; it is authorized to retain custody as long as necessary to prevent imminent physical damage or harm to the child while these arrangements are proceeding.[91]

For the Indian child properly within state court jurisdiction alternative provisions apply. The Act extensively discusses notice requirements. Both the parent or Indian custodian and the child's tribe are entitled to notice. Notice is to be by registered mail with return receipt requested. It is to contain notice of the pendency of the proceedings and of their right to intevene. If the child's parent or tribe cannot be identified or located, notice is to be given in a like manner

86. *Id.* § 1912.
87. N.M. Stat. Ann. § 32-1-22 (1978).
88. Act, *supra* note 1, at § 1922 (Supp. 1979).
89. N.M. Stat. Ann. § 32-1-26(A) (1978).
90. Act, *supra* note 1, at § 1922 (Supp. 1979).
91. *Id.*

to the Secretary of the Interior, who then has fifteen days to provide the requisite notice.[92] No proceeding on these issues can be held until at least ten days after receipt of notice by the parent, Indian custodian, tribe, or Secretary. Any of these parties, upon request, shall "be granted up to twenty additional days to prepare for such proceeding."[93]

The Act's notice provision modifies the requirements of the New Mexico Children's Court Rules that a hearing on the appropriateness of the custody must be held within ten days of the filing of the petition.[94] It may thus work to dilute the rights of both parent and child. It permits a delay of court review of emergency custody actions for up to and beyond thirty days.[95] A saving interpretation would be to read this provision as applying to adjudicatory hearings only.[96] Such a reading would comply with the Act's intent to give the parent and tribe adequate time to prepare while insuring questions of temporary custody are expeditiously placed before the court.

Two of the Act's other requirements are already provided for by New Mexico law. In New Mexico indigent parents have a right to appointment of counsel,[97] and all parents have a right of access to all reports or documents filed with the court.[98]

At a hearing for foster care placement, in addition to proving the elements of neglect under the Children's Code,[99] the state must also (1) "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful"[100] and (2) prove "that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[101] These elements must be shown by clear and convincing evidence, including the testimony of expert witnesses.[102]

92. *Id.* § 1912(a).

93. *Id.*

94. N.M. Child. Ct. R. 54(a). A custody hearing does not fully test the allegations which give rise to the petition. It determines only physical custody of the child pending full adjudication of the neglect petition. As such, it is a protective procedure for both the child and his parents.

95. 25 U.S.C.A. § 1912(a) (Supp. 1979).

96. In New Mexico, adjudicatory hearings must be commenced within sixty days after the date the petition is served on the respondent if the alleged neglected child is in the custody of the department, or within ninety days if he is not. N.M. Child. Ct. R. 60.

97. N.M. Stat. Ann. § 32-1-27(F) (1978).

98. *Id.* § 32-1-44(B).

99. *Id.* § 32-1-3(L).

100. Act, *supra* note 1, at § 1912(d) (Supp. 1979).

101. *Id.* § 1912(e).

102. *Id.*

The sum of these provisions assures a complex trial before any Indian child can be removed from his home. The permissible intervention of the child's tribe assures a strongly contested case. To have an Indian child removed from his home is not an impossible burden. The Act requires clear and convincing evidence for such removal.[103] The provisions for removal, however, are wholly inappropriate in some cases. The Act does not contemplate such serious abuse to the child as to require removal before remedial measures are applied. Nor does the Act consider abandonment situations where questions of the effect of continued custody are irrelevant. It is clearest in these provisions that the Act was drafted with the assumption that "Indian abuse" is solely a matter of cultural perception. The lack of child welfare expertise is evident.

In termination proceedings the standards are even stricter. In addition to the requirements of tribal intervention, expert witnesses, and proof of remedial services, the Act requires proof beyond a reasonable doubt that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[104] The reasonable apprehension is that the standard of proof will prevent actions for termination from being brought. If they are brought, they will clearly be difficult to secure. The effect for the child could easily be seriously harmful. It allows for the child to be brought into the foster care system but makes it difficult to get him out. Recently both child advocates and states have protested prolonged foster care; children are often removed from their homes and never given a permanent substitute home.[105] The stricter the rules governing termination, the greater the chance the child will be left to grow up in foster care.

VOLUNTARY PLACEMENTS, FOSTER CARE, RELINQUISHMENTS, AND CONSENTS

Section 103 of the Act establishes the procedural and substantive rules which govern voluntary consents to processes resulting in foster care placement or termination of parental rights. Because it covers any consent which results in the termination of the parent-child relationship, it most likely includes relinquishments of parental rights, consents to adoption, and independent placements for adoption.

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103. *See, e.g., Id.* § 1912(e). New Mexico's Children's Code also requires clear and convincing evidence before a court can find that a child is neglected, or in need of care or rehabilitation as a delinquent child or a child in need of supervision. N.M. Stat. Ann. § 32-1-31(F) (1978).

104. Act, *supra* note 1, at § 1912(f) (Supp. 1979).

105. *See* New Mexico Department of Human Services, In Limbo (1978) (a study of New Mexico foster care children); Children's Defense Fund, Children Without Homes (1978).

All consents must be taken before a judge of a court of competent jurisdiction.[106] If the parent is domiciled or residing on the reservation, such consents may only be taken before a tribal judge.[107] None may be taken within ten days of the child's birth.[108] The presiding judge must certify "that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian."[109] The court must further certify that the parent fully understood the explanation in English or that it was interpreted into the parents' language.[110]

A consent to foster care may be withdrawn at any time under the Act; the child is then returned to the parents.[111] A consent for termination or adoptive placement may be withdrawn "for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent."[112] This provision is another example of how the Act at times neglects the welfare of the child in its effort to protect the Indian parent against the overreaching of the state. New Mexico law better protects the child's interest. Under New Mexico adoption law, consents to adoption may be withdrawn only if they were obtained by fraud.[113]

Revocable consent, such as provided for in the Act, will undoubtedly hamper placement. Few families, Indian or non-Indian, will risk the emotional commitment necessary to adopt a child when that child can be summarily removed. Once again the child runs the risk of being left in extended foster care.

Fortunately in New Mexico there is a means by which to avoid this problem. The Adoption Act allows a relinquishment of parental rights with the approval of a judge of a court of record.[114] The final decree of relinquishment can then be entered immediately after the hearing. This effectively eliminates that period of time during which the consent is revocable at will. Such consents may still be revoked if

106. Act, *supra* note 1, at § 1913(a) (Supp. 1979).
107. *Id.* § 1911(a).
108. *Id.* § 1913(a).
109. *Id.*
110. *Id.*
111. *Id.* § 1913(b).
112. *Id.* § 1912(c).
113. N.M. Stat. Ann. § 40-7-8(D) (1978). The New Mexico Court of Appeals, in interpreting this statute, noted that once consent is given, it is presumed that it is in the best interests of the child to proceed with the adoption. *In re* Adoption of Doe, 87 N.M. 253, 531 P.2d 1226 (Ct. App. 1975). The reasoning is clear. Where the natural parent has consented to adoption and given up the child, the parent also has relinquished any interest in the child's welfare. It is in the child's interest to be placed immediately with a substitute family which can assume full parental responsibilities. Even so, the adoption process normally takes six months after consent and placement for the final adoption decree to be entered. N.M. Stat. Ann. § 40-7-14(E) (1978).
114. N.M. Stat. Ann. § 40-7-3(b) (1978).

obtained through fraud or duress,[115] but in light of the procedural safeguards that exist,[116] it is doubtful that many such cases will arise.

FOSTER CARE AND ADOPTION PLACEMENT

Section 105 of the Act provides for the eventuality that an Indian child does come into a state system. The Act sets an order of preferential placements for both foster homes and adoptive homes in case of such a contingency. These preferences insure that extended family members, other members of the child's tribe, and other Indian families are given placement preferences.[117] They control unless the child's tribe establishes an alternative order, in which case it will control placement of the child.[118]

Indian children can be placed outside the preferences if good cause exists.[119] Two specific elements of good cause are identified in the Act: the wishes of the parent or Indian custodian and his or her desire for anonymity.[120] Although these factors "shall be given weight" and "considered," they do not automatically void the preferences; if honored by the state, however, these factors will prevent full implementation of the preferences. It is impossible to give preference to family and tribal wishes if the parents' identity is withheld.

Regardless of where the child is placed, a record evidencing the efforts to comply with the orders of preference must be maintained by the state in which placement was made; these records must be made available at any time upon request of the Secretary or the Indian child's tribe.[121] This provision should ensure proper compliance.

SUMMARY

The purpose of the Indian Child Welfare Act is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. It was drafted to protect the child, family, and tribe from mishandling by the states. Alleged abuses by state child welfare systems prompted the passage of the Act.

States and tribes face a challenge to implement the Act in such a manner as to best serve the welfare of the Indian child. An adversarial stance will not accomplish this goal. Though there are clear

115. Act, *supra* note 1, at § 1913(d) (Supp. 1979).
116. N.M. Stat. Ann. § 40-7-8 (1978).
117. Act, *supra* note 1, at § 1915 (Supp. 1979).
118. *Id.* § 1915(c).
119. *Id.* § 1915(a).
120. *Id.* § 1915(c).
121. *Id.* § 1915(e).

disagreements as to the efficacy of some of the Act's specific provisions, there should be a willingness to implement the broad purposes of the Act. Its various provisions can insure (1) that the tribes are given primary jurisdiction over Indian child welfare matters, (2) that they are given the means to develop child welfare systems and resources, (3) that no state court action concerning an Indian child will be taken without full representation and a complete analysis of the issues, and (4) that the Indian child's right to his cultural heritage will not be lost when he is placed in state care. A cooperative agreement by state and tribe to pursue these ends will insure the welfare of the individual child and guarantee proper implementation of the Act.[122]

Toward these ends, the following specific actions are recommended:

First, the United States Congress should implement the Act by appropriating sufficient Title II funds. Though Title I of the Act went into effect in May of 1979, to date no Title II funds have reached the tribes. This partial implementation of the Act threatens its effectiveness.

Second, the states should reassess their handling of Indian child welfare matters in light of the Congressional reports accompanying the Act. The allegation that state child welfare agencies abuse the rights of Indian children is a serious one; it should prompt a review of internal policies and practices of those agencies.

Third, states and tribes should adopt a cooperative stance on individual child welfare cases to assure the individual child's interests are protected.

Fourth, states and tribes should closely monitor the Act's implementation in order to test the appropriateness of individual provisions. Problems should be identified and corrected through amendments to the Act or tribal/state agreements.

Fifth, Indian child welfare advocates should focus attention on the Title IV study of BIA boarding schools so that it will address and correct particular problems.

These actions should insure the compatibility of the Indian Child Welfare Act and state child welfare systems. Such compatibility offers the greatest assurance that the welfare of Indian children will be protected.

122. *See Id.* § 1919 (1976), which provides for such tribal/state agreements.