

2002

# In the Matter of the Adoption of Halloway v. Navajo Nation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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IN THE MATTER OF THE ADOPTION  
OF JEREMIAH HALLOWAY,

A person under eighteen years  
of age.

Navajo Nation, Appellant.

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No. 20519

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BRIEF OF APPELLANTS

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LIST OF ALL PARTIES TO APPEAL

Navajo Nation - Appellant  
Dan and Patricia Carter - Respondents

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the State of Utah have jurisdiction to terminate the parental rights of an enrolled Navajo Indian, who, at all times pertinent, resided on the Navajo reservation, and whose child, also an enrolled Navajo Indian, was removed from the reservation without the consent of the natural mother or the consent of his custodial grandmother?

2. Does the consent of the natural mother to adoption and subsequent withdrawal of consent constitute abandonment by the mother so as to justify a finding that the child's domicile shifted from that of the mother or custodial grandparent, residing on the Navajo reservation, to the petitioners for adoption, residing in the State of Utah?

3. Was the trial court's denial of Full Faith and Credit to the tribal court order based on a finding of each of timeliness correct?

4. Was the trial court's decision to terminate the parental rights of the natural mother and to enter the Decree of Adoption correct under the Indian Child Welfare Act, the laws and Constitution of the State of Utah, and the Constitution of the United States?

5. Did the trial court err in finding that rehabilitative services had been provided to the natural mother and had proved ineffective?

### STATEMENT OF FACTS

Reference is made throughout this Brief to the Transcript of the Hearing of April 7, 1983 (hereinafter "Transcript I"), and the Transcript of the Hearing of October 22, 1984 (hereinafter "Transcript II").

1. Jeremiah Halloway (hereinafter "Jeremiah") was born on May 14, 1977 to Cecelia Saunders, an enrolled member of the Navajo Tribe domiciled on the Navajo reservation. Jeremiah is an enrolled member of the Navajo Tribe. Cecelia Saunders testified that Ernest Yazzie, Jr., an enrolled member of the Navajo Tribe, was the father of Jeremiah. (Transcript I p. 18).

2. Cecelia provided primary care to Jeremiah during the first six months of his life. (Transcript I, p. 19). Cecelia then transferred care of Jeremiah to the maternal grandmother, Bessie Begay, who was the primary caretaker of Jeremiah until he was removed from the reservation. (Transcript I, p. 119).

3. In March, 1980, Jeremiah was removed from the on-reservation home of the maternal grandmother, Bessie Begay, by a maternal aunt, Polly Ann Dick. The grandmother was not present at the time of removal, and did not consent to the removal. The oral consent of the natural mother, Cecelia Saunders, was relayed to Polly Dick by another sister. (Transcript I, pp. 58-59, pp. 67-68).

4. The Navajo Tribe was not informed of the removal of Jeremiah from the reservation. (Transcript I, p. 63.

5. Jeremiah was placed by Polly Dick in the home of Dan and Patricia Carter for adoptive placement on March 23, 1980. Dan and Patricia Carter knew that Jeremiah was to be removed from the reservation for placement with them for approximately one month before the removal actually occurred. (Transcript I, p. 78).

6. On May 30, 1980, Cecelia Saunders appeared in the Fourth Judicial District Court for Utah County and executed a Consent to Adoption. By minute entry, Judge David Sam ordered counsel for Dan and Patricia Carter to obtain the consent of the Navajo Tribe before permitting the adoption to proceed. See, Addendum Exhibits "D" & "E", pp. A-9, 10.

7. On July 14, 1982, Judge David Sam ruled that the domicile of Jeremiah was that of Dan and Patricia Carter. The court stated: "This finding is based upon the fact that the child's residence appears to have been voluntarily and purposely removed from the natural mother, grandmother, and reservation to the petitioners." See, Addendum, Exhibit "E", p. A-10.

8. On October 6, 1983, Judge David Sam entered additional findings on the issue of the domicile of Jeremiah:

3. The Court finds that the relocation of the child with the petitioners was done with the intent to transfer to the Carters full parental rights as it relates to the child and with the further intent to abandon all parental rights in the child.

4. The Court finds further that the natural mother and family have abandoned the child and that prior to the Court's awarding of temporary custody of the minor child to the petitioners on July 14, 1982, the petitioners stood in the position of loco parentis to Jeremiah Halloway.

See, Addendum, Exhibit "F", A-12.

9. On October 12, 1984, the District Court of the Navajo Nation for Window Rock found that, pursuant to Navajo common law and statute, the domicile of Jeremiah has at all times remained within the boundaries of the Navajo reservation, and that the Navajo Tribe has exclusive jurisdiction under tribal statutes and common law and the federal Indian Child Welfare Act to determine the custody of Jeremiah Halloway. See, Addendum, Exhibit "H", p. A-25.

#### SUMMARY OF ARGUMENT

The State of Utah and the Fourth Judicial District Court were without jurisdiction under both the U.S. Constitution and the Indian Child Welfare Act to entertain a state adoption proceeding involving Jeremiah Halloway. The District Court had no jurisdiction to receive the consent to adoption executed by the natural mother. Remedial and rehabilitative services were not provided to the mother and were not necessary for her to provide adequate parenting of Jeremiah. The Order of the Navajo Nation was entitled to full faith and credit by the District

Court under the Indian Child Welfare Act and the Interstate Compact.

#### AGRUMENT

#### POINT I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO RECEIVE THE CONSENT TO ADOPTION EXECUTED BY THE NATURAL MOTHER.

In May, 1980, the Carters paid for Cecelia Saunders to travel to Utah to execute a consent to adoption. Cecelia originally consented on the reservation to the removal of Jeremiah for foster placement in March, 1980, and was informed approximately one month later by her sister, Polly Ann Dick, that Polly had placed Jeremiah for adoption.

The consent to adoption was executed on May 30, 1980 in the district court. Cecelia Saunders was not advised to obtain independent legal counsel and consulted only with the Carters' attorney. Cecelia has testified that the Indian Child Welfare Act (25 U.S.C. §1901, et seq., hereinafter ICWA) was not explained to her. (See, also, Reservation of Consent, April 30, 1982).

The ICWA confirms that Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation. 25 U.S.C. §1903(a)(iv). A voluntary consent "shall not be valid

unless executed in writing and recorded before a judge of a court of competent jurisdiction". 25 U.S.C. §1913(a). Jeremiah was clearly domiciled on the reservation at the time the consent to adoption was executed, even under the rulings of the district court in this case, since he had originally been removed only for temporary foster placement, only two months had passed (March 23, 1980 to May 30, 1980), and no intent to terminate parental rights had been formalized.

In such a situation the only "court of competent jurisdiction" to receive Cecelia's consent was the tribal court, since the tribe had "jurisdiction exclusive as to any state" over any adoption proceeding involving Jeremiah while he was domiciled on the reservation. The consent to adoption executed by Cecelia in front of the district court was, therefore, not valid under the express terms of the ICWA since it was not executed before a "court of competent jurisdiction" and hence could not act to confer subject matter jurisdiction on the State over Jeremiah Halloway.

**POINT II. AN INDIVIDUAL ADULT INDIAN WHO IS  
DOMICILED ON AN INDIAN RESERVATION CANNOT  
WAIVE THE EXCLUSIVE JURISDICTION OF THE TRIBE  
IN AN ADOPTION PROCEEDING.**

Cecelia Saunders at all relevant times during this proceeding resided on and was domiciled within the Navajo reservation. Bessie Begay, the maternal grandmother of Jeremiah, also resided

and was domiciled exclusively within the boundaries of the Navajo reservation. It is axiomatic that a child born out of wedlock takes the domicile of the mother with whom it lives and retains that domicile until a new one is lawfully acquired. Application of Morse, 7 Utah 2d 312, 324 P.2d 773, 775 (1958); Restatement (Second) of Conflict of Laws §22, comment c (1971). It is, therefore, undisputed that Jeremiah was domiciled on the reservation at least until the consent to adoption was signed on May 30, 1980, either by living with his mother, Id., or with his grandmother as a blood relative under the in loco parentis doctrine. Restatement (Second) of Conflict of Laws §22, comment i.

The District Court ruled that the actions of Cecelia Saunders waived the exclusive jurisdiction of the Navajo tribe over Jeremiah by transferring his domicile, and thus tribal jurisdiction, to the State of Utah. This decision was based on Cecelia's consent to adoption, her alleged abandonment of Jeremiah and intent to transfer parental rights to the Carters. This ruling is incorrect because an individual cannot waive the exclusive jurisdiction of a tribe while remaining domiciled on the reservation. Utah Dept. of Bus. Reg., etc. v. Public Service Commission, 602 P. 2d 696, 699 (Utah 1979).

This principle was enunciated in Fisher v. District Court, 424 U.S. 382, 47 L.Ed.2d 106, 96 S.Ct. 943 (1976), where adult tribal members residing on a reservation attempted to invoke and



consent to the jurisdiction of a state court in an adoption proceeding involving an Indian child. The United States Supreme Court confirmed the exclusive jurisdiction of the tribe over the child, holding that such a ruling benefited the class of Indian people "by furthering the congressional policy of Indian self-government." Fisher, 424 U.S. 390-391. The same principle applies when an attempted transfer of parental rights to non-Indians by a mother who resides on a reservation is involved, because the same principles of self-government are involved in that the tribe has a compelling interest in determining whether the placement of the child is in his or her best interests under tribal law or custom. 25 U.S.C. §1901(3). See, Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959); Wakefield v. Little Light, 347 A.2d 228, 237 (Md. App. 1975).

Congress expressly confirmed this principle in the ICWA in the Act's exclusive jurisdiction section, 25 U.S.C. §1911(a). In the legislative history to this section, Congress stated that the section confirmed the holdings of certain Indian child custody cases such as Wisconsin Band of Potowatomies v. Houston, 393 F.Supp. 719 (D.W.D. Mich. 1973); Wakefield v. Little Light, supra; and H.R. REP. NO. 1386, 95th CONG., 2d SESS. 21, reprinted at 1978 U.S. CODE, CONG. & AD. NEWS 7530, 7544. These cases specifically held that an individual Indian cannot confer jurisdiction by consent on the state court because of the

significant tribal interest in "control over the custody of their children", Wakefield v. Little Light, 347 A.2d at 237-38; Wisconsin Band of Potowatomies v. Houston 393 F.Supp. at 738, and both cases involved the custody of Indian children by non-Indian custodians. Nor may a tribe confer its jurisdiction on a state unless express federal law is followed. Wisconsin Band of Potowatomies v. Houston, 393 F.Supp. at 733; Kennerly v. District Court, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971). It would certainly be anomalous if an Indian cannot confer jurisdiction in an Indian child custody proceeding by temporarily leaving the reservation and attempting to invoke state jurisdiction, yet can accomplish the same result by signing a piece of paper purporting to transfer parental rights to non-Indians off the reservation. Yet this is precisely the effect of the District Court's ruling.

Two states have specifically addressed this issue under the ICWA (both encompassing portions of the Navajo reservation) and both have decided the issue exactly opposite to the ruling of the District Court in the present case. In Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. App. 1981), cert. denied, 455 U.S. 1007 (1982), the mother (a minor) gave birth off-reservation, relinquished the child off-reservation for the purpose of adoption, and the child lived off-reservation with the prospective adoptive parents pursuant to a temporary custody

order. Id. at 191. Yet the Arizona Court of Appeals ruled that none of these actions were sufficient to divest the tribe of its exclusive jurisdiction since the child was still domiciled on the reservation. Id. After noting that domicile of an infant born out of wedlock remains that of the mother until a new one is lawfully acquired (Citing, Application of Morse, 7 Utah 2d 312, 324 P.2d 773 (1958)), the court ruled that a consent to adoption did not effect a legal change in the child's domicile, Id. The result of this ruling is that the mother could not confer jurisdiction on the state by her actions.

The same result occurred in Matter of the Adoption of a Baby Child, 700 P.2d 198, No. 8190 (N.M. App., 1985). In that case the Indian mother, a resident of Laguna Pueblo in New Mexico, consented to the adoption of her child by non-Indian adoptive parents before the state court. The trial court ruled that the mother's actions shifted the domicile of the child to the adoptive parents, giving the state court jurisdiction over the adoption proceeding. The Court of Appeals reversed, holding that "jurisdiction over the proceedings was exclusive in the tribal court. . ." Id. at 200. After noting that an illegitimate child takes the domicile of its mother, the court ruled that the actions of the mother did not confer jurisdiction on the state court. Id. at 201.

These decisions illustrate the error of the District Court's ruling in the present case. The principle that an individual may not confer jurisdiction on a court by consent is identical to the principle discussed in the previous section that domicile cannot be changed except by judicial decree. The court must first have jurisdiction before it can entertain a consent to transfer parental rights; to hold that the consent or transfer of physical custody gives the state court jurisdiction is an attempt to bootstrap jurisdiction which does not otherwise exist.

The mother in this case, Cecelia Saunders, also could not confer jurisdiction on the state court in this proceeding because she did not have the legal authority under tribal custom to do so. The District Court's failure to recognize the social relations of Navajo people is an express violation of the ICWA, 25 U.S.C. §1901(5); 25 U.S.C. §1903(6).

The Navajo common law of adoption is set forth at Opinion of the Solicitor to the Courts of the Navajo Nation, No. 83-10 (1983) (Attached as Addendum Exhibit "B", pp. A-2-7). This Opinion is entitled to full faith and credit by the State of Utah as a public record of the Navajo tribe. 25 U.S.C. §1911(d). Navajo custom does not recognize the artificial legal relationships created by Anglo-European law wherein adoption results in the termination of the legal rights of the natural parents and the replacement of those rights in the adoptive

parents. Addendum pp. A-2,3. Instead, there is an obligation in family members to support and assist children which is not concerned with the termination of parental rights or the creation of a "legalistic" parent-child relationship.

Similarly, Navajo custom does not agree with the Anglo-European concept that the duties of child-rearing exist only in the nuclear family, and that parents of a child can terminate the legal rights of extended family members, such as grandparents, to visit with or obtain custody of a child. Under Navajo custom there is an "expectation that children are to be taken care of, and that obligation is not simply one of the child's parents." Addendum, p. A-4. Navajo custom "is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because these concepts are irrelevant in a system which has obligations to children that extend beyond the parents." Addendum, p. A-6 (emphasis added). Under Navajo custom, a parent can no more consent to the termination of the rights of extended family members than she could consent to the termination of the parental rights of the father.

The District Court in the present case has refused to recognize this concept, however. It ruled that the consent of the mother freed the child for adoption by the Carters. The maternal grandmother, the custodian of Jeremiah at the time he was removed, did not consent to his removal (Transcript I, at

127) and Cecelia's consent could not affect her legal right to custody of Jeremiah under tribal custom. 25 U.S.C. §1903(b). Cecelia could also not waive the exclusive jurisdiction of the Navajo tribe to determine the grandmother's custodial rights pursuant to tribal law and custom, and therefore her consent could not waive the tribe's exclusive jurisdiction. The lack of understanding of the District Court in this area emphasizes the reasoning that custodial relationships under tribal custom are properly the exclusive province of the tribal court.

**POINT III. THE DISTRICT COURT ERRED WHEN  
IT FOUND THAT REMEDIAL AND REHABILITATIVE  
SERVICES HAD BEEN PROVIDED TO THE MOTHER  
AND PROVED UNSUCCESSFUL.**

The ICWA requires that "[a]ny party seeking to effect a ...termination of parental rights to an Indian child under State law shall 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." 25 U.S.C. § 1912(d). In its order of January 28, 1985, the District Court found that "the burden of rehabilitation and working with the family has been met." Addendum, p. A-23. This finding was in error because the court did not apply the proper standard in determining whether such services had been provided.

The legislative history of the ICWA makes clear that remedial services must be designed to help the parents or Indian

custodians. The BIA Guidelines state that it must be demonstrated that "efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians." BIA Guidelines,, 44 Fed. Reg. 67584, 67592 (§ D.2) (Emphasis added). The congressional history emphasizes that actual efforts must be made to help the parents of an Indian child before termination can occur. See House Report, supra, at 22.

Two ICWA cases have addressed the issue of remedial services. In Matter of Appeal in Pima County Juvenile Action, 635 P.2d at 193, the Arizona Court of Appeals concluded that section 1912(d) required an "attempt to preserve the parent-child relationship" (emphasis added). See, Matter of Charles, 688 P.2d. 1354 (Or. App. 1984), appeal pending, the Oregon Court of Appeals. The most disturbing findings of the District Court appear at page 3 of the court's opinion. Reference is made to hypothetical testimony of two representatives of the Navajo Division of Social Welfare that have nothing to do with removal and rehabilitative efforts. First, reference is made to Ella Shirley's general background testimony on the "shared care" concept in Navajo culture. The court dismissed this testimony by concluding that all the relatives were unsuitable to care for Jeremiah even though the most recent evidence was five years old. In addition, this testimony had nothing to do with the care which

could be given by the mother. Second, the Court quoted testimony by Ella Shirley in response to a hypothetical question that if Jeremiah could not be placed with the extended family, would she have thought about allowing adoption outside the Navajo tribe. Transcript I, p. 109. Ms. Shirley stated that she would place Jeremiah with another Navajo family.

The District Court found that "[t]he social worker admits based upon those facts rehabilitation with the natural family would have been discontinued and the child would have been placed with another Navajo family." The conclusion made by the District Court based upon the testimony of the social worker, Lauren Bernally, is improper and has nothing to do with remedial efforts. Ms. Bernally was testifying on the critical interest the Navajo tribe has in its children, and stated only that even if in the extended family the natural mother could not care for Jeremiah, the interest of the tribe in retaining him in Navajo culture is such that they would have placed him in another Navajo home. Ms. Bernally's testimony had nothing to do with actual efforts made to help the mother retain Jeremiah. Indeed, Ms. Bernally testified that no remedial or rehabilitative services were necessary because the mother had improved her situation on her own. Transcript I, p. 124. As stated before, the testimony of Dr. Samuel Roll, expert witness for the Navajo tribe, showed that Cecelia and Arthur Saunders were fit parents and that they



had no conditions which would be detrimental to Jeremiah. Transcript II, pp. 237-39.

Finally, the District Court found that the tribe's social worker stated that the mother "vascillates [sic] continually between wanting the child back and not wanting the child". The apparent implication of this finding is that the mother could not be worked with, but the Court presents no evidence or authority to prove that such vacillation was bad or improper. In fact, the testimony was unanimous, even from experts for the adoptive parents, that such vacillation is a common occurrence in a drawn-out adoption case and has nothing to do with the actual desire of the mother for custody of her child. Transcript I, p. 126 (Lauren Bernally); Transcript II, pp. 197-198. (Dr. Howell); Transcript II, pp. 239-240 (Dr. Roll). The Court's finding on this point is, therefore, improper since it is either based on the personal opinion of the District Court judge or on authority to which the parties had no access, rather than from evidence presented to the court. As such, the finding is arbitrary and capricious and should be overturned.

The remedial services section of the ICWA requires that the party seeking to effect a termination of parental rights must satisfy the court that they have made active efforts to help the family. 25 U.S.C. § 1912(d). This applies to both public and private parties. House Report, supra, at 22. The testimony is

undisputed that the adoptive parents in this case have had no contact at all with the natural mother, and that they made no attempts to see whether the mother could be assisted in resolving her personal difficulties rather than taking her child away. Transcript I, p. 43 (Cecelia Saunders), and p. 79 (Dan Carter). Basing the "failure of remedial and rehabilitative efforts" on the purported inadequacy of relatives and the alleged prior neglect of the mother, without any showing of the present need for services by the mother or that specific services were actually provided to the mother and failed, is violative of the constitutional right to raise a family. See, M. Hardin, FOSTER CHILDREN IN THE COURTS 255 (American Bar Ass'n. Nat'l. Legal Resources Center for Child Advocacy and Protection, 1983) (diligent efforts to provide supportive services). The District Court committed error in finding that the burden of working with the family under the ICWA had been met. The decision of the District Court must be reversed. No remedial or rehabilitative services were ever provided to the mother, and the burden of proof in 25 U.S.C. § 1912(d) has not been met.

**POINT IV. THE DISTRICT COURT COMMITTED  
ERROR BY DENYING FULL FAITH AND CREDIT TO  
THE ORDER OF THE NAVAJO TRIBAL COURT.**

At the conclusion of the April 7, 1983 hearing, the adoptive parents stated that they could be ready for the subsequent termination hearing in 30 to 45 days. Transcript I, p. 171. The Court also evidenced its intent at that point to move the proceeding along. Id. at 171-172. Sixteen months later no steps had been taken by petitioners to fulfill their burden of showing that the parental rights of the natural mother should be terminated, while the Indian child's emotional attachment to his non-Indian custodians was increasing. At this point the Navajo tribe decided to take action to invalidate the District Court's jurisdictional ruling rather than wait an indefinite period of time for the state proceeding to be completed. A tribal court action was filed in the Navajo District Court, Window Rock District, on August 8, 1984. In response to the tribal court proceeding, the adoptive parents requested an immediate trial setting on the termination hearing in state court, and did not appear in the tribal proceeding despite being personally served.

The tribal court issued a decision on October 12, 1984, holding that the Navajo tribe had exclusive jurisdiction to decide the custody of Jeremiah Halloway and invalidating the Utah District Court proceeding pursuant to the Indian Child Welfare Act. Only five days later the tribe filed a Motion for Full Faith and Credit for its order in the Utah District Court pursuant to the ICWA, 25 U.S.C. § 1911(d). This motion was denied by

the District Court at the start of the October 22, 1984, hearing as being untimely. Transcript II, p. 3. This holding is not supported by case law and should be reversed.

The Utah Supreme Court has ruled that a lack of subject matter jurisdiction cannot be waived by the parties, and a court cannot ignore lack of subject matter jurisdiction to reach the merits of a case that falls outside its legally-prescribed domain. Utah Dept. of Bus. Reg., Etc. v. Public Service Comm, supra, is such a case. [A]n objection to the court's exercise of jurisdiction may be made at any point during the proceedings." Utah Dept. of Bus. Reg., Etc., supra, at 698 (emphasis added). The Motion for Full Faith and Credit by the Navajo tribe was made before the close of the District Court proceedings.

Case law is unanimous that subject matter jurisdiction may be raised at any point in a proceeding. Carlson v. Brown, 576 P.2d. 1387 (Ariz. App. 1978); Triebelhorn v. Turzanski, 370 P.2d. 757 (Idaho 1962); In re Adoption of Marsolf, 434 P.2d. 1010 (Kan. 1967). An objection to subject matter jurisdiction can be made before or after a judgment has been rendered. Espinoza v. Southern Pac. Transportation Co., 624 P.2d 162 (Or. App), aff'd 635 P.2d. 638 (Or. 1980). It can be raised even on appeal. Unruh v. Truck Inc. Exchange, 498 P.2d 1063 (Calif. 1972). No estoppel exists to asserting lack of subject matter jurisdiction.

Application of Puget Sound Pilots Assn., 385 P.2d. 711 (Wash. 1963).

The Interstate Compact on Placement of Children is specific Utah statutory authority which contradicts the District Court's ruling on the Full Faith and Credit Motion. UTAH CODE ANN. § 55-86-1. The Utah version of the ICPC includes Indian tribes within its definition of "Sending agency." Article II (2). The jurisdiction section of the ICPC states that:

[T]he sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody... and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted... Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location...

Article V (emphasis added). It cannot be disputed that the Navajo tribal court order was issued before Jeremiah was adopted, and that the denial of full faith and credit on timeliness grounds is in direct contravention of Utah statutes, and should be reversed.

**POINT V. THE DISTRICT COURT COMMITTED ERROR  
WHEN IT RULED THAT THE STATE OF UTAH HAD JURIS-  
DICTION UNDER THE INDIAN CHILD WELFARE ACT OVER  
THE ADOPTION PROCEEDING**

Jeremiah Halloway was removed from the Navajo reservation and placed in the home of the Carters in Utah on March 23, 1980. No judicial proceedings accompanied the placement until May 29,

1980, when the mother was transported to Utah at the expense of the Carters for execution of a consent to adoption before the District Court. An adoption petition was filed by the Carters with the District Court on the same date. Various agencies of the Navajo tribe had been providing services to Jeremiah Halloway and his family on a voluntary basis from his birth to the time he was removed from the reservation.

In April, 1982, after negotiations to return Jeremiah to the reservation on a voluntary basis had broken down, the Navajo tribe filed a Motion to Dismiss the Utah adoption proceeding based on a lack of jurisdiction. The District Court issued a ruling on the jurisdiction issue on July 14, 1982 holding:

[T]he domicile of the minor child to be that of petitioners. This finding is based upon the fact that the child's residence appears to have been voluntarily and purposely removed from the natural mother, grandmother, and reservation to the petitioners, in view of that fact and the long period of time that the child has been with the petitioners, this court finds that apparent "good cause" exists for this court to take jurisdiction. . . .

Addendum, p. A-10.

The jurisdiction issue was reargued at the April 7, 1983 hearing, at which time the District Court upheld its prior ruling that domicile had shifted to Utah, based on the transfer of the child to the Carters with the consent of some members of Jeremiah's family and the intent to transfer all parental rights to the Carters and abandon all parental rights in the child. The

court also ruled that the mother and family had abandoned the child and—that the Carters stood in loco parentis to Jeremiah. Addendum, pp. A-11, 12. These findings were incorrect insofar as they held that the Navajo Nation had been divested of its exclusive jurisdiction over Jeremiah Halloway.

Determination of the domicile of Jeremiah is critical in the present case because it is the linch pin of the jurisdictional controversy. Indian tribes, in the absence of express federal legislation, have always had exclusive jurisdiction to regulate their internal affairs and social relations free from state interference. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 76 L.Ed.2d 611, 619 (1983); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 783, (1832). This authority includes juvenile matters, Fisher v. District Court, 424 U.S. 602, 604; 60 L.Ed. 1196; 35 S.Ct. 699 (1916); and domestic relations, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978).

Tribal jurisdiction has a territorial component, too. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973). The standard for determining whether a tribe has exclusive jurisdiction is whether the proceeding can be "appropriately characterized as litigation arising on an Indian reservation." Fisher v. District Court,

supra, 424 U.S. at 389. (Emphasis added). If the standard is met, "the-jurisdiction of the Tribal Court is exclusive." Id. This rule applies whether or not all the parties are Indian. Williams v. Lee, 358 U.S. 217, 223, 3 L.Ed.2d 251, 79 S.Ct. 269 (1955) (Navajo reservation); Fisher District Court, supra, 424 U.S. at 386. If there is a dispute over whether tribal jurisdiction is exclusive, such dispute should be resolved in tribal court. National Farmers Union Insurance Co. v. Crow Tribe, 53 USLW 4641 (June 3, 1985). "Procedural nightmare[s]" will be minimized if other courts stay their hand until the tribal court "has had a full opportunity to determine its own jurisdiction." Id. See, also, Fisher v. District Court, supra, 424 U.S. at 388 (conflicting adjudications with state courts).

For purposes of exclusive tribal jurisdiction over child custody matters, courts have equated "arising on a reservation" with the domicile of the Indian child. Wisconsin Band of Potowatomies v. Houston, 393 F.Supp. 719, 731 (D.W.D. Mich., 1973); Matter of Adoption of Buehl, 555 P.2d 1334, 1341 (Wash. 1976); Wakefield v. Little Light, 347 A.2d 228, 238 (Md. App. 1975); In re Matter of Greybull, 543 F.2d 1079 (Or. App. 1975). Congress specifically adopted the holdings of these cases when it confirmed exclusive tribal jurisdiction in the ICWA. House Report, supra, at 21. The exclusive jurisdiction section of the ICWA is set forth in 25 USC §1911(a).



The ICWA does not contain a definition of the term "domicile."~ The legislative history of the Act provides little illumination except for the fact that Congress intended to confirm the case law of the Wisconsin Potowatomies, Wakefield v. Little Light, Buehl and Greybull decisions cited above, and these cases interpreted the meaning of domicile when applied to a minor. There are well settled canons of statutory construction, however, which control the interpretation of terms in federal statutes. See, Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 34 L.Ed. 2d 845, 103 S.Ct. 986 (1983).

A substantial body of federal common law has been developed which interprets the meaning of domicile in federal statutes. The federal diversity statute, 28 U.S.C. §1332(a), uses "citizenship" to determine whether diversity exists, and all courts have equated citizenship with domicile. Gilbert v. David, 235 U.S. 561, 59 L.Ed. 360, 35 S.Ct. 164 (1915); Stifel v. Hopkins, 477 F.2d 1116 (6th Cir., 1973); Sadat v. Mertes, 615 F.2d 1176 (7th Cir., 1980). No definition of citizenship appears in the federal diversity statute, and the courts have ruled that determination of the term is controlled by federal common law rather than the law of any state. Kantor v. Wellesley Galleries, 704 F.2d 1088, 1090 (9th Cir. 1983); Sadat v. Mertes, supra, at 1180; Stifel v. Hopkins, supra, at 1120.

One federal case specifically addressed the domicile of a minor child for purposes of the federal diversity statute, and the holding of the case has been adopted by all of the diversity cases cited above. In Ziady v. Curley, 396 F.2d 873 (4th Cir. 1968), the court adopted the Restatement of the Laws of Conflicts (1934 ed., §38, domicile of a minor) as the federal common law for the domicile of a minor, Id. at 874, because the Restatement was consistent with the policies behind creation of the federal diversity statute. Id. at 875. As will be shown immediately below, the Restatement (now codified at Restatement (Second) of Conflict of Laws (1971 ed., §22) is also consistent with the purposes of the ICWA of keeping Indian children with their families, deferring to tribal judgment on child custody matters, and placing Indian children in Indian homes. 25 U.S.C. §1902; BIA Guidelines, supra, 44 Fed. Reg. at 6785-86 (§ A., Policy). Such a result is consistent with canons of construction specifically developed by the U. S. Supreme Court to interpret federal statutes affecting Indians, namely that statutes passed for the benefit of Indians must be liberally construed in their favor, Bryan v. Itasca County, 426 U.S. 373, 392, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976), and ambiguous language in such statutes must be resolved in favor of the Indians. McClanahan v. Arizona State Tax Commission, supra, 411 U.S. at 174. The Restatement is a statement of existing laws, and, as the Bureau of Indian

Affairs noted at the time the ICWA was passed, there was no indication--that "these state law definitions tend[ed] to undermine in any way the purposes of the Act." BIA Guidelines, supra, 44 Fed. Reg. at 6785 (Introduction).

We now turn to the Restatement's summary of the law of the domicile of a minor. All references are to the Restatement (Second) of Conflict of Laws (1971). The critical issue in the present case is the methods by which the domicile of a minor can be changed, and whether such a change occurred here. To characterize the laws in advance, change in the domicile of a minor where the parent does not change his or her domicile requires a court order, with one exception which does not apply in this case.

Every person acquires a domicile of origin at birth, and this domicile continues until a new domicile is acquired. Restatement, §14(1); §14, comment a. "At birth an illegitimate child takes the domicile his mother has at the time as his domicile of origin (see §14)." Restatement, §22, comment c. The general rule is that the domicile of a minor child remains that of the mother. Application of Morse, 7 Utah 2d 312, 324 P.2d 773, 774 (1958); Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, (Ariz. App. 1981), cert. denied, 455 U.S. 1007 (1982); Matter of Adoption of Baby Child, 700 P.2d 198 (N.M. App. 1985).

Comment c to section 22 of the Restatement states that an illegitimate child takes the domicile of the mother whether he lives with the mother or not, except as stated in Comments e-i. It is these comments which must be scrutinized to determine whether a change of domicile occurred in the present case. The rule stated in each relevant comment will be contrasted with the actual ruling of the District Court in the present case.

Comment e addresses the domicile of an abandoned child and states that ". . . a child abandoned by both parents retains the domicile possessed by the parent who last abandoned him at the time of abandonment . . . ." Abandonment is defined to include when the parent gives the custody of the child to another with **the** intention of relinquishing his parental rights and obligations. Since the natural mother's domicile in the present case has always been on the Navajo reservation, under this rule Jeremiah's domicile would also remain there even when he was abandoned. K.N. v. Cades, 432 A.2d 1010, 1014 (Pa. Super. Ct. 1981). Yet the District Court predicated its ruling on domicile on the abandonment by the mother and transfer of parental rights to the Carters. Addendum, p. A-10; Addendum, p. A-12.

Comment g addresses the domicile of an adopted child, and states that an adopted child takes the domicile of the adoptive parent "at the moment of adoption." The only implication that

can be taken from this statement is that the domicile of a child who is being considered for adoption does not change before the decree of adoption is granted. This is especially true since adoption statutes are in derogation of the common law and must, therefore, be strictly and narrowly construed in favor of the rights of natural parents. 2 Am. Jur. 2d 865, 866 (Adoption, §§ 6,7). This rule is also in accord with the domicile of an abandoned child discussed above in Comment e, where abandonment includes transfer of custody with the intent to relinquish parental rights. Domicile of the child remains with the parent until a judicial decree of adoption is completed. See, K.N. v. Cades, supra, at 432. In the present case the District Court bootstrapped its jurisdiction, holding that the domicile of Jeremiah shifted informally so as to give the court jurisdiction over the adoption proceeding itself. If the rule of Comment g is correct, the domicile of Jeremiah remained on the Navajo reservation, giving the Tribal Court exclusive jurisdiction over the adoption proceeding.

Comment h addresses the power of a guardian to shift a child's domicile. The Carters have argued at various times in this proceeding that they became the guardians of Jeremiah when they obtained his physical custody, and that domicile of the ward is that of the guardian. See, Memorandum in Opposition to Motion to Dismiss, filed July 6, 1982, p. 2. Yet it is well settled

that a person can become a guardian of a minor child only "through judicial decree following compliance with the statutory procedures." Matter of Adoption of T.M.M. 608 P.2d 130, 133 (Mont. 1980). Once again, a court order is required. The Restatement recognizes this principle by stating that the authority of a guardian must be ascertained from "the original decree of appointment or in some subsequent order". §22, Comment h. In any event, a guardian does not normally have the power to shift the domicile of a minor. Two of the cases cited by Congress as the basis for the exclusive jurisdiction section, Wakefield v. Little Light, supra, at 238, and Matter of Adoption of Buehl, 555 P.2d at 1340-42, both rejected arguments of non-Indian guardians of Indian children that the domicile of the children had shifted off reservation with them. Both courts cited the federal policy of protecting tribal authority over essential tribal relations as one reason not to imply a guardian's authority to shift the domicile of the ward.

The last comment of Section 22, Comment i, is the exception to the general rule that shifting the domicile of a minor child requires a judicial decree. Comment i addresses the doctrine of in loco parentis or the "natural guardian" theory. Where both parents of a child are dead or have abandoned a child and no court has appointed a guardian for the child, "the child should

acquire a domicile at the home of a grandparent or other person who stands in loco parentis to him and with whom he lives."

The in loco parentis doctrine is limited to blood relatives, and no case has ever held that unrelated strangers can acquire such status so as to change the domicile of a child. In fact, the in loco parentis doctrine has traditionally been confined to grandparents, and has only recently been "liberalized" to include other close relatives such as aunts and uncles. See, Annot: Domicile of infant on death of both parents; doctrine of natural guardianship, 32 A.L.R.2d 863, 871. In the present case the District Court ruled that the domicile of Jeremiah shifted to the Carters because the Carters stood in loco parentis to him. Addendum, p. A-12. The Carters, however, are not related by blood to Jeremiah and all of the cases cited in their briefs, such as Montoya v. Collier 512 P.2d 684 (N.M. 1973), involved blood relatives. The District Court's reliance on the in loco parentis theory to hold that the domicile of Jeremiah shifted from the Navajo reservation to Utah without a court order is, therefore, in error.

The time for determining the domicile of Jeremiah was when he first appeared before the District Court in 1980. The United States Supreme Court has ruled from the earliest days of the Republic that jurisdiction depends on the status of the parties at the commencement of a suit, and no subsequent change can give

or take it away. Connolly v. Taylor, 27 U.S. (2 Pet.) 556, 7 L.Ed. 518 (1829). This rule has been applied to the determination of domicile under the federal common law in diversity cases. Sadat v. Mertes, supra, 615 F.2d at 1180; Leavitt v. Scott, 338 F.2d 749 (10th Cir., 1964) (Utah). One of the cases cited by Congress as the basis for the exclusive jurisdiction section of the ICWA also adopted this rule. House Report, supra, at 21. In Wisconsin Band of Potowatomies, supra, the court addressed the question of when jurisdiction should be determined and concluded "that the only rational approach is to determine the domicile of the children at the time their physical custody was gained by the probate court." 393 F.Supp at 731. The District Court based its holding that the domicile of Jeremiah had shifted to Utah in the present case on the length of time he had resided in the state since the proceeding was initiated. Addendum, p. A-10. This holding is incorrect.

The Utah Supreme Court decision in Application of Morse, supra, supports the principles discussed above. In that case, a mother domiciled in Utah consented to the adoption of her child, and the prospective adoptive parents removed the child from Utah. The mother then revoked her consent and asked for the child back. The adoptive parents argued that Utah was without jurisdiction because the child was now domiciled in Idaho. The Utah Supreme Court rejected this argument and held that the child remained



domiciled in Utah, despite the fact that the mother had "abandoned" the child and intended to transfer all of her parental rights. 324 P.2d at 775. The Court also held that the mother's consent violated Utah law and was, therefore, void and had no legal effect. This holding is analogous to the Navajo Nation's argument in the present case that the natural mother's consent violated the ICWA and was, therefore, void and ineffective as a legal attempt to abandon her parental rights and shift jurisdiction over Jeremiah to Utah.

All of the ICWA cases that have addressed the domicile and exclusive jurisdiction issues have followed the principles discussed above and have been decided opposite to the holding of the District Court in the present case. Matter of Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278, 281 (S.D. 1980); Matter of Appeal in Pima County Juvenile Action No. S-903, supra (Ariz); Matter of Adoption of Baby Child, supra (N.M.). The Pima County and Baby Child cases are particularly important in the context of the present appeal because they involve states where portions of the Navajo reservation are located in addition to Utah. If the holding of the District Court on jurisdiction is upheld, the Navajo Nation will be confronted with conflicting interpretations of the ICWA on different parts of it's reservation, a result clearly at variance with the intent of the ICWA to establish uniform federal law involving Indian children.

The Pima County case is particularly illustrative because the natural mother in that case did not live on the reservation (in Montana), the child was born off-reservation in Nevada and placed in an adoptive home in Arizona. The Arizona Court of Appeals first held that the domicile of the infant followed that of the mother. Because the mother was also a minor, however, the Court ruled in addition that the domicile of the mother was that of her parents, on the reservation in Montana. Despite the fact that the mother had signed a consent to adoption, the adoptive parents had custody of the child pursuant to a temporary custody order, and the child had been out of the mother's custody for seven months, the Court of Appeals concluded that domicile remained with the natural mother because no court order had caused a "legal" change of domicile, 635 P.2d at 191. The decisions of the New Mexico and Arizona Courts of Appeal should be followed by the Utah Supreme Court in the present case.

One unintended effect of the District Court's jurisdictional ruling must be raised. The court ruled that the parental rights of the mother could be transferred by her consent to adoption. Addendum, p. A-12. This holding is in violation of the principle that parental rights and responsibilities cannot be discarded at will by parents; they disappear only at death or at the moment of adoption when such responsibilities transfer to the adoptive parent. 59 Am.Jur. 2d 90-107 (Parent and Child, §§8-24, rights

of parents). Utah has followed this principle in its case law, See, Gulley v. Gulley, 570 P.2d 127, 129 (Utah, 1977) (duty to support cannot be relinquished by purporting to transfer duty by contract), and by statute, Utah Code Annotated §§78-45-4.2, 78-42-2(5) (natural or adoptive parent has duty to support).

The District Court's ruling, therefore, sets up a privileged class in violation of the equal protection clause of the U.S. Constitution. While the Carters acquired the benefit of a change of domicile for purposes of adopting Jeremiah, the natural mother was still responsible under Utah statute to support her child under the holding of Gulley. Either all responsibilities are transferred when the consent to adoption is signed and the Utah support statutes must fail, or all responsibilities transfer when a court order issues granting the adoption, in which case the District Court's jurisdictional ruling was incorrect. Control over domicile and the duty to support are both rights and responsibilities of parents; they cannot be split to deny the parent the benefits of parenthood while still saddling her with the burdens of such relationship.

Finally, the State of Utah was without jurisdiction over Jeremiah because the Navajo Nation was already exerting jurisdiction on a voluntary basis at the time he was removed from the reservation. It is undisputed that several Navajo agencies were providing assistance to Jeremiah and his family from 1977

until he was removed. Transcript I, pp. 62, 119. The aunt who removed Jeremiah from the Navajo tribe, Polly Dick, testified that she concealed Jeremiah's removal because she disagreed with the tribe's plans for him. Transcript I, p. 63. Polly had previously removed other Navajo children from the reservation to Utah in violation of Navajo law. Transcript I, p. 113. The ICWA requires state courts to decline jurisdiction where an Indian child has been removed and to return the child to the parent. 25 U.S.C. §1920. The District Court erred in not following this requirement.

**POINT VI. THE DECISION OF THE DISTRICT COURT  
TERMINATING THE PARENTAL RIGHTS OF CECELIA  
SAUNDERS WITHOUT A FINDING OF UNFITNESS  
WAS IN ERROR.**

In its order of January 28, 1985, the District Court found "that the evidence established beyond a reasonable doubt that to return Jeremiah to his Indian custodians would result in serious emotional or physical damage to him." Addendum, p. A-24. Therefore, no finding was made on unfitness on the part of Cecelia Saunders. The District Court's termination order was based solely on the condition of Jeremiah Halloway and the emotional damage he would suffer if he was removed from the Carters. Id., p. A-16.

The finding of the District Court confused the two separate stages of a termination proceeding: the fact-finding stage where

the parents must be found unfit, and the dispositional stage where the best interests of the child can be considered independent of parental interest. Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599, 611, 102 S.Ct. 1388 (1982). See, also, In re J.P., 648 P.2d 1364, 1368-69 (Utah 1982). By holding only that the best interests of Jeremiah required termination because he was so bonded to present custodians the District Court violated the requirements of the United States Constitution, and the Indian Child Welfare Act.

The right of parents to sustain a relationship with their children is protected by the Constitution. In re J.P., 648 P.2d 1364, 1372-74, 1377 (Utah 1982).

"The rights of adoptive parents are not, however, enveloped in the same degree of due process protection which attaches to the divestiture of parental custody." Guardianship of Baby Boy M, 135 Cal. Rptr. 866, 873 (Cal. App. 1977). It is well settled that termination of parental rights would offend the Due Process Clause if the breakup of a family is forced without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. Santosky v. Kramer, supra, 71 L.Ed.2d at 611; Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977); In re J.P., supra, 648 P.2d at 1374, 1377. The natural mother in the present case was never informed of the specific

conditions that led to her "unfitness" so that she could have a chance to take appropriate remedial action. Failure to so inform the mother is a denial of due process. State v. Lance, 23 Utah 2d 407, 464 P.2d 395, 399 (1970).

The Utah Supreme Court has established a clear standard that a court may not terminate the rights of a parent solely in the best interests of the child. In re J.P., supra, at 1368, 1374. The best interests standard is applicable only to a custody dispute between parents, Interest of Walter B., 577 P.2d 119, 125 (Utah, 1978); for termination the parents must be found unfit. J.P., supra, at 1374.

Several Utah decisions have addressed the holding of the District Court in the present case that parental rights can be terminated solely on the child's attachment to his present caretakers rather than through any fault of the parents, and have rejected such reasoning. In State, In Interest of E. v. J.T., 578 P.2d 831 (Utah 1978), the juvenile court based its termination of parental rights order in part on the finding that the children regarded their foster parents as their psychological parents and had had no contact with the mother for over two and one-half years." Id. at 834. The Supreme Court rejected this reasoning, Id. at 836, and reversed the termination order. See, also, Interest of Walter B., 577 P.2d 119 (Utah 1978); and Commonwealth ex rel. Grimes v. Yack, 433 A.2d 1363, 1380-82 (Pa.

Super. Ct. 1981) (extensive discussion of the distinction between medical and-legal models).

The District Court made no finding of unfitness on the part of the mother. Indeed, the testimony was undisputed that Cecelia Saunders and her husband, Arthur, were fit parents. Transcript II, pp. 237-239; Letter from Dr. Mueller, Addendum, p. A-1.

This conclusion is buttressed by the fact that termination of parental rights must be based on present conduct, and all of the evidence of parental conduct offered by the Carters and considered by the District Court, including the issue of abandonment, was several years old. In Interest of Winger, 558 P.2d 1311 (Utah 1976), the Utah Supreme Court, after noting that Oregon's termination statute is "identical" to Utah's, Id. at 1313, adopted the holding of the Oregon Court of Appeals in State v. Blum, 463 P.2d 367, 371 (Or.App. 1970), that the evidence must prove "that the parent is presently unable to supply physical and emotional care for the child . . . ." 558 P.2d at 1313-14. (emphasis added). See, State ex rel. Juvenile Dept. v. Chapin 675 P.2d 1117, 1118 (Or.App. 1984). This requirement of "present" conduct has been followed in all other Utah termination cases. In re J.P., supra, 648 P.2d at 1377 (parent must be shown to be "unfit, abandoning, or substantially neglectful"); Interest of Walter B., supra, 577 P.2d at 124 (quoting State v. Lance, 464 P.2d 395 (Utah 1970), on "the alleged inadequacies of the

environment she was providing"); In re Castillo, 632 P.2d 855, 857 (Utah 1981) (prospect of beneficial parenting). See, also, In re Adoption of Michael J.C., 473 A.2d 1021, 1027 (Pa. Super. 1984).

In State, In Interest of E. v. J.T., supra, the mother also placed her children from a former marriage voluntarily in substitute care because of problems with her present husband. 578 P.2d at 832. The Utah Supreme Court reversed an order terminating the parental rights of the mother despite the position of the state that the mother had taken no action to solve her problems, Id. at 835, finding the mother was attempting to address the problems which had led to the initial placement. Id. In the present case, the mother has also taken care of the problems that led to the initial placement, and as the Utah Supreme Court noted in State v. Lance, supra, there is not ". . . a scintilla of evidence that the home itself cannot or will not correct the evils which exist." 464 P.2d at 399. Where the incidents which are the basis of the trial court's opinion occurred several years before the hearing and no evidence was presented to show that the mother's present conduct would adversely affect the child, " . . . past misconduct is not controlling where a parent is presently fit." In re Adoption of Michael J.C., supra, 473 A.2d at 1027.



The District Court also found abandonment because the mother knew where the Carters lived, but made no attempt to contact them. Addendum, p. A-24. However, the Carters testified that they were advised to prohibit visitation (Transcript I, p. 80) and the Carters' attorney told the mother that she could not contact the child (Transcript I, p. 44). Indian people have a well established trait of "non-interference" in the affairs of others, particularly where confronted with non-Indian authority figures. See, e.g. J. Good Tracks, "Native American non-interference", 18 Social Work 30 (1973). Once she was told that she could not contact her child, she believed she had no option and her failure to visit does not reflect a lack of desire, but rather a lack of understanding.

The ICWA adopted the constitutional "fitness" standard but imposed an additional level of proof which can "rarely" be met. Santosky v. Kramer, supra, 455 U.S. at 768-69. The ICWA requires a ". . . determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent. . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f). The Act requires conduct on the part of the parent which will be seriously detrimental to the child, a finding of unfitness. BIA Guidelines, 44 Fed. Reg. at 67593 (§§D.3(c); D.4). In fact, termination cannot be ordered "simply

based on a determination on that the parents or custodians are 'unfit parents'. It must be shown that it is dangerous for the child to remain with his or her present custodians." BIA Guidelines, 44 Fed. Reg. at 67593 (§D.3. Commentary). Every reported ICWA case addressing termination of parental rights has required a finding that the parent's conduct toward the child would be so detrimental as to cause the child serious emotional or physical harm. See, e.g., Matter of Appeal in Pima County Juvenile Action No. S-903, supra, 635 P.2d at 193; In re Fisher, 643 P.2d 887 (Wash. App. 1982), In the Matter of J.L.H., 316 N.W.2d 650 (S.D. 1982).

The Carters successfully argued to the District Court that termination of parental rights was justified under the ICWA because continued custody of Jeremiah by Ceclia would result in emotional damage to him, not through any conduct on the part of the mother, but only because her actions in asserting parental rights would cause him damage because he would suffer harm by being removed from the custody of the Carters. This is the same best interests test rejected by both the U.S. and Utah Supreme Courts. It is well settled that Congress must follow constitutional structures in its dealings with Indians. F. Cohen, Handbook of Federal Indian Law 217-220 (1982 ed.), and so Congress could not possibly have imposed a standard on Indians which has been found to be unconstitutional. It also makes no

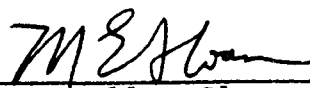
sense to permit an easier "best interests" or "condition of the child" termination test under the ICWA when the stated purpose of the ICWA was to make termination more difficult. See, 25 U.S.C. §1921.

The District Court ruled in essence that the Navajo reservation was an improper place for Jeremiah to grow up, and that his Navajo environment would cause him severe emotional or physical damage. The Utah Supreme Court rejected such a standard In re J.P., supra, 648 P.2d at 1376 where it held that cultural diversity is entitled to constitutional protection. The ICWA also specifically prohibits termination based on community conditions. BIA Guidelines, supra, 44 Fed. Reg. at 67592-93 (§D.3.(c)).

#### CONCLUSION

For the foregoing reasons, the decree of adoption issued by the District Court in the present proceeding should be declared void, and the custody of Jeremiah Halloway returned to his natural mother, Cecelia Saunders.

Submitted this 22 day of July, 1985.

  
\_\_\_\_\_  
Mary Ellen Sloan  
Craig Dorsay

\_\_\_ooo0ooo\_\_\_

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I served four (4) true and correct copies of the foregoing Brief of Appellants upon the following, by mailing the same, on the 22 day of July, 1985:

Richard B. Johnson  
P.O. Box 778  
Provo, Utah 84603  
Attorney for Respondent

M E Hoar

## A D D E N D U M

ADDENDUM EXHIBIT "A"



DEPARTMENT OF HEALTH & HUMAN SERVICES

PUBLIC HEALTH SERVICE  
HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION

November 15, 1983

Navajo Area Indian Health Service

Gallup Indian Medical Center  
Wilcox Boulevard  
P.O. Box 1337  
Gallup, New Mexico 87301

Ms. Lauren Bernally  
Division of Social Welfare  
Special Services Unit  
Eastern Navajo Agency  
P. O. Box 777  
Gallup, N.M. 87301

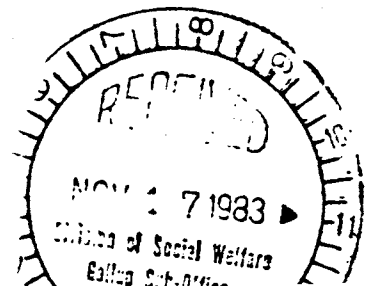
Re: Cecelia Saunders

Dear Ms. Bernally:

I have interviewed Cecelia Saunders, and can find no indication from our interview that she might have a mental disorder that would make her incapable of caring for a child. I have no useful data from which to form an opinion as to whether Mrs. Saunders and Arthur Saunders would be better parents, or as good parents for Jeremiah Williams as his current foster parents, Dan and Patricia Carter.

Sincerely,

W. E. Mueller, M.D.  
Board Certified,  
American Board of Psychiatry  
and Neurology



ADDENDUM EXHIBIT "B"



OPINION OF THE SOLICITOR TO THE  
COURTS OF THE NAVAJO NATION

No. 83-10

QUESTION: What is the Navajo Common Law of adoption?

This opinion is prepared for the Honorable William Leupp, former judge of the Courts of the Navajo Nation, at the instruction of Chief Justice Nelson J. McCabe.

There are some very important distinctions and differences in approaching the Navajo Common Law of adoption because it is quite different from the Anglo-European law of adoption.

First of all, Anglo-European adoption focuses upon artificial legal relationships:

"Adoption is the legal process by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child. As a result of the adoption decree the legal rights and obligations which formerly existed between the child and his natural parents come to an end, and are replaced by similar rights and obligations with respect to his new adoptive parents." Clark, The Law of Domestic Relations in the United States, Sec. 18.1, p. 602 (1968).

In other words, the law makes a substitution of parents for a child and terminates the parent and child bond with the natural parents (at least legally-speaking). The adoption process requires the termination of the legal bond with natural parents because of the idea that there can only be one parent and child relationship at any one time. Id.

Another important point about Anglo-European adoption law is that it is a law which is created only by statute, and it did not come to the United States courts through the English Common (or customary) Law. Id. at p. 603. As a result, the current American law of adoption is recent and a product of modern American

attitudes. There has also been a history of hostility toward the law of adoption in American courts, possibly due to the fact that it was not created over a long period of time by the courts to fit the needs of those who have come before them. Id.

The American law of adoption thinks in terms of duties. Natural parents have duties toward their children, and when those duties are breached, then the law will take the children away from the natural parents and "give" them to other parents. Navajo concepts are different, and the following description has been made of Navajo legal attitudes toward family relationships:

"Navajo believe that each person has the right to speak for oneself and to act as one pleases. The mutual rights and duties of kinsmen normally discussed under the concept of jural relations are best described as mutual expectations, rather than obligations. This distinction is a matter of emphasis and decree, but it is very real and worth noting. Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored." Witherspoon, Navajo Kinship and Marriage, pp. 94-95 (1975).

Therefore the Navajo view of the relation of children to parents is not one of a simple parent and child relationship, but an entire pattern of expectations and desirable actions surrounding children.

The central concept of child rearing in Navajo society should be grasped before there is any discussion of the Navajo Common Law of adoption. One description of that concept is:

"The Navajo people identify themselves as 'Dine,' which means 'The People.' The term is simply an expression of native pride or a message that conveys many things which are central in native feelings. One of the most important societal values included in this central native feeling is the attitude toward children. They are highly valued and wanted. The basis for this Navajo life ethic was that the original parents of the first human infant pronounced a death penalty on any creature or being who mistreated the first child. This act or behavior would devalue or humiliate the supernaturals with whom the first human baby was identified. Therefore, in the Navajo religious context inhumane cruelty to children was prohibited." "Navajo Child Rearing Concepts," Child

Abuse and Neglect - A Navajo Perspective (Navajo Childrens' Legal Services, draft section of a manual for use in child welfare services, 1983).

The legal sanctions underlying the basic value of the child are spiritual, and they in turn create restrictions on behavior as well as set down obligations which are cultural and a part of the everyday "folk law" of the Navajo. Navajo Common Law is frequently expressed in terms of sacred instructional stories and symbols, and the place of the child in Navajo society is expressed in this way:

"The special social position of an infant is illustrated further by the symbolic significance of the manner in which the cradle board was constructed and assembled for the first infant. The mythological belief of the Navajo was that the first female infant was conceived through the union of the goddess Earth and the Heavens. 'A significant other,' a member of some centaur generation often referred to as 'the first people,' heard an echo of a baby cry and after a long search found an infant on a cliff of a mesa. The discoverer then immediately designed the first cradle board with a certain 'omnipotent being' giving her instructions.

The main boards of the cradle were given by the earth which represented the soul and mind. The headboard was made from the rainbow which stood for abiding presence of peace and beauty. The footrests were made of sunbeams, and the lacings were zig-zag lightening which represented power. Finally, the protective coverings held in place by the arch represented the black clouds or the Universe. In this sphere of protection and security of the cradle board, the first infant was to be reared. Therefore, each part of the cradle board had a symbolic and an important meaning. The cradle board nurturing process is therefore considered by Navajo as a religious ritual. Significant also is the belief that the acceptance of the first infant by the 'first people' was the ancient Navajo concept of adoption." Id.

Therefore we have the Navajo Common Law principles of the expectation that children are to be taken care of, and that obligation is not simply one of the child's parents. The Navajo have very strong family and clan ties, and Dan Vicenti, a noted commentator on Navajo Common Law, said this regarding the care of children of broken homes:

"In the old days, and even among some of the present Navajo families where the kinship ties are still very strong, the matter of child support is not of paramount concern to relatives of couples

that break apart or get a divorce, because, from the time a child is small, he or she is treated as a son or daughter. The child identifies with his maternal aunts or, in a lot of cases, paternal aunts, as being mothers; and the term aunt is (translated as) little mother. And if the real mother is away for any reason at the hospital or some place, they're just taken in by the maternal aunts or paternal aunts, who are already treating them as being their own, a member of their own nuclear family, so that particular system took care of the matter of child support. That is the reason why, it seems to me, that child support or paternity suits and things like that were never a Navajo practice, or of real concern to mothers before, as they seem to be now." Vicenti, Jimson, Conn and Kellogg, II The Law of the People - Dine' Bibee Haz'aanii, p. 230 (1972).

The term "adoption" is used by Navajo commentators on Navajo Common Law, but it is used in a different sense than that used in Anglo-European adoption statutes:

"Orphans of Navajo families, or children of large families or broken homes are adopted by other family members or a family member of the same clan as the child." Carl N. Gorman, "The Navajo Nation is Made up of Many Clans," (Address to the Navajo Childrens' Conference, 1980); Published in Dine' Center for Human Development, For Generations to Come. . . (1982).

Navajo adoption has a different focus than Anglo-European law, i.e. it is not principally concerned with the exchange of "legal" parents:

"Navajo adoption is based on need, mutual help and love. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law." Id.

Another distinctive aspect of Navajo adoption is that it is not necessarily permanent:

"Adoption is merely a case of taking the child into the home for a limited time, or permanently, by extending family or parental agreement, depending on the circumstances. The child is raised and treated as one's own. Grandparents are sometimes the ones to take in and raise the young children belonging by birth to their own deceased or unwed children, or other related family members." Id.

In Navajo Common Law a child is said to be "born for" his father's clan

and a "member" of his mother's clan. This means that a child is an integral part of a functioning, self-reinforcing and protecting group. Anglo-European law is primarily concerned with immediate parent and child relationships while Navajo law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children.

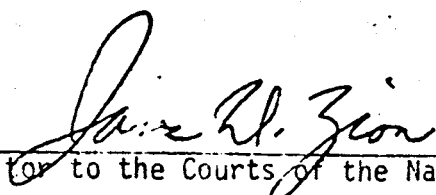
This is not uncommon among Indian Peoples. There is one example of tribal court family law policies which are based upon the common law of its people. The termination of the parent and child relationship and adoption (in the Anglo-European sense) is not permitted in the Makah Tribal Court in Washington due to the perception that a child's relationship with his or her parents and family is permanent and cannot be tampered with. That court does confirm custody relationships for the protection of children or where necessary for the receipt of benefits from governmental agencies, but formal legal mechanisms respect the basic values of Makah common law. Interview with the Hon. Jean Vitalis, Juvenile Judge, Makah Tribal Court, August 17, 1983.

#### CONCLUSION

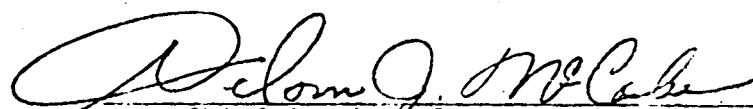
I believe that a correct statement of the Navajo common law of adoption is that there is an obligation in family members (usually aunts or grandparents or a family member who is best suited to assist a child) to support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy affecting the parents. The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligations to children that extend beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are

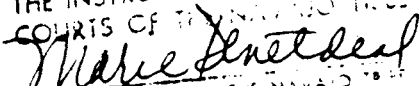
"adopted" by family members for care which may be temporary or permanent, depending upon the circumstances. The mechanism is informal and practical, and based upon community expectations founded in religious and cultural belief.

DATED: September 19, 1983.

  
Solicitor to the Courts of the Navajo Nation

This opinion is hereby approved.

  
Chief Justice of the Navajo Nation

I HEREBY CERTIFY THAT THIS IS A  
TRUE AND CORRECT COPY OF  
THE INSTRUMENT OF THE  
COURTS OF THE NAVAJO NATION  
  
CLERK, COURTS OF THE NAVAJO NATION

ADDENDUM EXHIBIT "C"

FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH  
IN AND FOR UTAH COUNTY  
**FILED**

May 30, 1980

RICHARD L. MAXFIELD of  
MAXFIELD AND GAMSON  
Attorney for Petitioners  
60 East 100 South, Suite 100  
Provo, Utah 84601  
Tel: 374-6272

WILLIAM F. HUISE, Clerk  
h Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY,  
STATE OF UTAH

In the Matter of the Adoption of: :  
JEREMIAH HALLOWAY, : CONSENT TO ADOPTION  
A Minor, : Probate No. 19,981

I, Cecelia Ann Dick, the undersigned, being the natural mother of Jeremiah Halloway, the above named minor child, having appeared in Open Court, and having had my legal rights and responsibilities explained to me, and realizing the effect and legal consequences of my signing this consent, do hereby consent that my minor child, Jeremiah Halloway, may be adopted by Dan Lewis Carter and Patricia Hawkins Carter, the Petitioners herein. I hereby state that I am doing this fully and freely and without duress or undue influence of any person whomsoever.

DATED and signed in Open Court this 30 day of May, 1980.

Cecelia Ann Dick  
CECELIA ANN DICK

Executed and signed before me in Open Court this 30 day of May, 1980.

BY THE COURT:

David L. ...  
JUDGE



ADDENDUM EXHIBIT "D"

1980 JUL -1 PM 4:07  
ALLIANCE HUIST. CLEER  
DEPT

**In the Fourth Judicial District Court**

**of the State of Utah  
In and For Utah County**

**MINUTE ENTRY**

**ADOPTION OF:**

**CASE NUMBER 19,981**

**DATED May 30, 1980**

**JEREMIAH HALLOWAY**

**David Sam JUDGE**  
**Richard L. Maxfield, Atty.**  
**Reported by Rick Tatton, C.S.R.**

**CONSENT OF NATURAL MOTHER**

This matter came before the court for hearing the consent of the natural mother to the adoption of the above named child. Richard L. Maxfield appeared as legal counsel for the petitioners, Dan Lewis Carter and Patricia Hawkins Carter.

The natural mother was sworn and testified in her own behalf and executed her Consent to Adoption in open court. The court affixed its signature to the same, finding it to be freely and voluntarily given with a full knowledge of the consequences.

Before allowing the adoption to proceed, counsel is to comply with U.S. Code in obtaining consent from the natural mother's indian tribe.

ADDENDUM EXHIBIT "E"

EXHIBIT B

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH  
IN AND FOR UTAH COUNTY

IN THE MATTER OF THE  
ADOPTION OF JEREMIAH  
HALLOWAY

R U L I N G  
# 19,981

Having now considered the arguments of counsel and the memoranda of law on file herein together with the applicable provisions of the Indian Child Welfare Act, the court now holds, rules, and finds as follows:

R U L I N G

Under the facts and circumstances of this case as have now been presented to the court and considering the applicable law as it relates thereto, the court finds the domicile of the minor child to be that of the petitioners. This finding is based upon the fact that the child's residence appears to have been voluntarily and purposely removed from the natural mother, grandmother, and reservation to the petitioners. In view of that fact and the long period of time that the child has been with the petitioners, this court finds that apparent "good cause" exists for this court to take jurisdiction and that the requirements of the Indian Child Welfare Act have at this stage of the proceedings been satisfied in order to do so.

Accordingly, this court will proceed to now take evidence on the issue of domicile if any further evidence need be presented as to that issue and also on the issue of abandonment by the natural mother. Evidentiary hearing on those issues will be set upon application of either party which application should also indicate the length of time estimated for said hearing. Temporary custody of the minor child to remain with the petitioners until further order of the court.

Dated this 14<sup>th</sup> day of July, 1982.

  
DISTRICT JUDGE

cc: E. L. Johnson

ADDENDUM EXHIBIT "F"

1 HOWARD, LEWIS & PETERSEN  
2 ATTORNEYS AND COUNSELORS AT LAW  
3 120 EAST 300 NORTH STREET  
4 P. O. BOX 778  
5 PROVO, UTAH 84601  
6 TELEPHONE: 873-6348

7  
8  
9 Attorneys for PETITIONERS

10 IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
11 STATE OF UTAH

12  
13 IN THE MATTER OF THE ADOPTION :

O R D E R

14 OF JEREMIAH HALLOWAY, :

15 A person under eighteen years :  
16 of age.

Probate No. 19,981

17 This matter came on before the Court for hearing on the 7th o  
18 April, 1983 and the 16th day of September, 1983. The petitioners,  
19 Dan Carter and Pat Carter were present at the April 7th hearing  
20 and represented by their attorney, Richard B. Johnson. The Navajo  
21 Nation was present and represented by its attorneys, Craig Jay  
22 Dorsay and Larry Kee Yazzie. The Court, on the basis of testi-  
23 mony, evidence and the argument of counsel, now makes and enters  
24 the following Order:

25 1. In the Court's prior ruling of July 14, 1982, the Court  
26 both sides the opportunity to request an evidentiary hearing on t  
27 issue of jurisdiction. The Court, after considering the evidence  
28 finds that this Court has jurisdiction to hear this matter as an  
29 adverse proceeding for termination of parental rights and adoptio  
30 of an Indian child not domiciled or residing within the reserva-  
tion of the Indian child's tribe.

2. The Court specifically finds that the child was taken f

1 the reservation by a family member, with some of the family's con  
2 sent and delivered to the petitioners, for adoption. The Court  
3 finds that the transfer of the child to the petitioners by the  
4 biological family of the child was done in what some members of th  
5 family felt was the child's best interests. The Court finds that  
6 no one in the family of the child protested placement of the child  
7 with the petitioners.

8 3. The Court finds that the relocation of the child with the  
9 petitioners was done with the intent to transfer to the Carters  
10 full parental rights as it relates to the child and with the furth  
11 intent to abandon all parental rights in the child.

12 4. The Court finds further that the natural mother and the  
13 family have abandoned the child and that prior to the Court's  
14 awarding of temporary custody of the minor child to the petitioners  
15 on July 14, 1982, the petitioners stood in the position of loco  
16 parentis to Jeremiah Halloway.

17 5. The Court finds further that on the basis of the Court's  
18 determination of domicile and the Court's finding that the child  
19 had a residence with the petitioners in Utah County, State of Utah,  
20 the Court finds further that there is good cause pursuant to  
21 25 U.S.C.S. §1911(b) for this Court to retain jurisdiction based  
22 upon the findings of the Court that there has been a long period of  
23 time that the child has been with the petitioners; the fact that no  
24 Indian custodian has been appointed and that the custody and  
25  
26

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HOWARD, LEWIS & BROWN  
ATTORNEYS AND COUNSELORS AT LAW  
180 EAST 300 NORTH STREET  
P. O. BOX 778  
PROVO, UTAH 84601  
TELEPHONE: 373-8348

1 parental rights to the child had been voluntarily relinquished by  
2 the parents and family; that the child has had little contact with  
3 the tribe for a significant period of time; that the child has not  
4 resided on the reservation for a significant period of time and  
5 that the child has significant contact with this district; and, that  
6 the convenience and assessability of witnesses best able to deter-  
7 mine the status, condition and health of the child are located in  
8 this district.

9         6. The Court makes no ruling with respect to termination of  
10 parental rights as it relates to Jeremiah Halloway, the Court  
11 determining that the petitioners must meet the burden of 25 U.S.C.  
12 §1912(f) by proving beyond a reasonable doubt from the evidence,  
13 including testimony of qualified expert witnesses, that the  
14 continued custody of the child by the parent or Indian custody is  
15 likely to result in serious emotional or physical damage to the  
16 child. The Court will be guided by the Indian Child Welfare Act  
17 25 U.S.C.S. §1901 et seq. and those matters contemplated by said  
18 Act.

19         7. The Court finds that the natural mother has withdrawn her  
20 consent prior to the entry of a Decree of Adoption.

21         8. Accordingly, the Court orders that the matter be set for  
22 hearing at a time convenient for counsel to determine whether or  
23 not parental rights should be terminated.

24         9. The Court notes the stipulation of the parties recognizi  
25  
26



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1 the rights of the Court to enter Findings of Fact, Conclusions of  
2 Law and Decree in this matter after a hearing of all of the evidence

3 10. The Court orders that the records previously ordered to  
4 become part of the record on April 7, 1983 hearing be made part  
5 of this record.

6 11. All motions for sanctions are, as of the present time,  
7 denied.

8 DATED this 6 day of October, 1983.

9 BY THE COURT:

10  
11 APPROVED AS TO FORM:

H. David Sam  
JUDGE DAVID SAM

12  
13 Craig J. Dorsay  
14 CRAIG J. DORSAY

15  
16 LARRY KEE YAZZIE  
17 Attorneys for Navajo Nation

ADDENDUM EXHIBIT "G"

option  
decree entered  
Feb. 4th 1985

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY  
STATE OF UTAH

IN THE MATTER OF THE  
ADOPTION OF JEREMIAH  
HALLOWAY, A PERSON  
UNDER EIGHTEEN YEARS OF  
AGE

)  
)  
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)  
)  
)

D E C I S I O N

# 19,981

FEDERAL LAW

This case is before the Court on petitioner's Motion to Terminate the Parental Rights of the Natural Mother of Jeremiah Halloway, a Navajo Indian Child. The controlling law in this case is the Indian Child Welfare Act. The portions of that act we are specifically concerned with are the following:

25 U.S.C. Sec. 1912(d)

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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.

25 U.S.C. Sec. 1912(f)

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The child was placed with the petitioners on March 23, 1980; the biological mother consented to the adoption of the child on May 30, 1980. The petitioners notified the Navajo Nation of their intent to adopt the

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child and on April 30, 1982 the mother revoked her consent to the adoption. Testimony was taken on these matters on April 7, 1983 and trial was held on October 22, 1984.

Testimony of experts concerning the effect of taking the child from the petitioner's home and replacing him in the reservation is summarized here.

#### Damage to the Child

#### Paul Steven Buckingham

Mr. Buckingham interviewed the petitioners and Jeremiah. He found no signs of depression or identity crisis. (October transcript page 65). He found them to be extremely bonded (October transcript page 68). He found that to return the child to the reservation would cause at worst "tremendous physhological damage, emotional damage, from the fact that he has been taken from the home that he felt loved and bonded to and put in a home where there was a very lost [sic] potential at the very least for neglect and at the very most of physical abuse." (October transcript page 77)

The Navajo Nation has challenged the testimony of Mr. Buckingham on the grounds that he did not have sufficient qualifications to testify as an expert under the ICWA. Mr. Buckingham's qualifications were set out as follows: Bachelors Degree in Science and Psychology from BYU in 1972; Masters of Social Work from the University of Utah in 1974;

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Clinical Worker for L.D.S. Social Services for last eight years; case worker in the Indian Placement Program for Navajo children. He has also worked with Navajo children on the reservation. He has had a Navajo youth in his home for the last five years. These are ample qualifications in light of In the Matter of K.A.B.E. and K.B.E., 325 NW2d 840 (S.D. 1982). In that case, the South Dakota Supreme Court found that a person who had worked as a social worker for over four years, had a bachelor of arts degree in social work and had contact with Indians on a regular basis was a qualified expert under the ICWA. See also, In re the Welfare of Fisher, 643 P.2d 887 (Wash. App. 1982).

Dr. Robert M. Crist

Dr. Robert M. Crist also testified regarding the effect of returning the child to the reservation. He stated that "the likelihood of that is very great that you would be rupturing the child-parent bond which is one of those primary necessary developments in young people and children. You would be placing him in a new strange environment for him. There would be a questions as to who would be the parent figures in the future." Again, the Navajo Nation challenged Dr. Crist's qualifications to testify as an expert. While the witness's experience had not been with Navajo people per se, his work in psychiatry and minority integration are sufficient to qualify him to testify.

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Dr. Samuel Roll

Dr. Samuel Roll, called on behalf of the Navajo Nation, submitted a report (Exhibit 4) based upon his evaluation of the child and background information supplied by counsel for the tribe. Dr. Roll found that the child is mildly depressed and that he has a negative image of Indians. With regard to the child's attachment to the petitioners, Dr. Roll found that

Jeremiah is very closely and warmly bonded and attached to the Carters. It is clear that he sees them as faithful and powerful sources of stimulation, confidence and security. He also looks to them for positive productive discipline. His love and bonding to them very strongly speaks to the value that the relationship with the Carters has for him. It will be extremely difficult for Jeremiah to make a break with the Carters and will cause considerable pain and a period of painful mourning. It is clear that Jeremiah will not be able to go through this period successfully without close supervision and professional help.

Nevertheless, Dr. Roll's opinion was that the child should be taken from the petitioner's home and replaced with the tribe so that he would not suffer an identity crisis in his adolescent years.

Dr. Robert J. Howell

Testimony and a report (Exhibit 3) prepared by Dr. Robert J. Howell reveal that after his examination of the child, and conversations with the child's teachers and the petitioners, he formed a professional opinion as to the effect of removing the child from his

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present circumstances:

It is my opinion that the probability of emotional damage taking place which would result from removing Michael from the Carter home, far outweighs the potential conflict as to Michael['s] not having a clear identity of himself as an Indian, and yet, also knowing that he is not Caucasian. It is my belief that the probability of emotional damage is at a very high level of certainty--beyond a reasonable doubt.

Specifically, Dr. Howell's findings were as follows:

1. Michael is a bright youngster who has no memory of his life for, two years and ten months on the reservation.
2. Michael is well adjusted in the home that he is now in and sees Mr. and Mrs. Carter as his parents. In my opinion, the Carters are his psychological parents.
3. It is my opinion that Michael will be emotionally damaged by taking him out of the home. The nearly five years that he has spent with the Carters, especially, when considering the early age that he came with them, clearly speaks to the importance of his continuing to live with them.
4. I agree with Dr. Roll that effort should be made to inculcate in Michael an appreciation for his heritage, and I see no reason why contact could not be effected between Cecelia Sanders and Michael.
5. I could not find any evidence that Michael was depressed, if he was depressed when Dr. Roll saw him, it is likely that this was a reaction to his fears that he would be taken away from the Carters. He told his school teacher Paula Farrer that he was going to see a man to determine if he could keep living with the carters.

In addition to the testimony of experts regarding the effect of removing the child from the petitioner's home, there was (in the April hearing) some testimony regarding the fitness of his Indian custodians.

In In the Matter of J.H.L. and P.L.L.H., 316 NW2d 650 (S.D. 1982) the court found that evidence of conduct of not only the natural parent

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but also "other persons in and about the residence" may support a trial court's finding that severe emotional or physical damage would be likely if the child were returned to the natural parents. Id. at 651. In the present case, the record indicates that the child's grandmother and other members of the extended family are alcoholic (April transcript pages 23-25,30); the natural mother's husband did not like the child nor did he want him in the marital relationship (April transcript page 21-23); the natural mother willingly gave the child up for adoption (April transcript page 31) and only revoked her consent to the adoption after the Navajo Nation indicated its disapproval of the adoption. There is also testimony, although not uncontroverted, that the mother revoked her consent only after being subject to duress by the Navajo Nation. (April transcript pages 60-62).

An Arizona court has held that an Indian mother who revokes her relinquishment of parental rights is entitled to the return of the child in the absence of evidence of her fitness as a parent or any attempt to preserve the parent-child relationship. Matter of Appeal in Pima County, 635 P.2d 187 (Ariz. App. 1981). In that case, the court also seemed to belittle the adoptive parent's argument that return of the child would be emotionally traumatic:

Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act.

Id. at 193.



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The relevant facts in the present case are quite different and distinguishable from Matter of Appeal. In that case the adoptive parent had had custody of the child for only about four months before the natural mother revoked her relinquishment. In the case at bar, the petitioners had custody of the child for a full two years before there was any indication that the natural mother would revoke her consent to the adoption. At that time the child had already developed emotional and psychological bonds with the petitioners and it would be unfair to punish the child because the adoptive parents did not send him off to the reservation immediately upon hearing that the biological mother had changed her mind.

#### Rehabilitative Efforts

In the first hearing conducted on April 7, 1983, the natural mother testified that the primary care of Jeremiah after the initial six month period was with the child's Indian grandmother (Page 20). She testified that at the time physical custody of the child was transferred to the grandmother, the step-father was apparently abusing Jeremiah. He did not like the child because it was not his son (Page 20). In addition, he stated he was not going to bother with the child and would not care for or support Jeremiah and would not give the child the normal love that a father would give a child (Pages 22-23).

The mother testified that there was only one sister who would take the child and she was determined not to be fit (Pages 45-46).

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The most important testimony concerning the frustrated rehabilitation in the case comes from Ms. Ella Shirley. On page 86 of the transcript, she explains the shared care concept. In her testimony, she stated that if the natural parents could not take care of the child then the extended family would then be charged with the care. Ms. Shirley testified specifically that there was a maternal aunt and sister who could be used. However, the record clearly indicates the unsuitability of all of the extended family. On page 108 of the transcript, the social worker was asked questions as to what decision she would have made as far as rehabilitation of the family unit or placement in 1980. Starting on page 109 she was asked that if the facts revealed that the members of the extended family who wanted the child were not fit custodians, would adoption outside the Tribe be considered. The social worker testified that they would simply place the child with another Navajo family. The social worker admits based upon those facts rehabilitation with the natural family would have been discontinued and the child would have been placed with another Navajo family. The social worker agreed that from the notes of the case worker it appeared that the natural mother vacillated continually between wanting the child back and not wanting the child (Page 112).

Another social worker testified that the first referral to the social agencies was because Jeremiah was neglected (Page 119). The social worker stated that "they were interested in taking the child, but after doing a thorough investigation of the sisters, we decided

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that placement with those relatives would not work (Page 120).

Accordingly, the court finds that the burden of rehabilitation and working with the family has been met.

#### STATE LAW

In addition to the provisions of the ICWA, the State of Utah has set forth certain requirements which must be met before the rights of a parent may be terminated. One of the things that satisfy state requirements for termination is abandonment. Utah Code Annotated Sec. 78-3a-48(1) states in relevant part:

The court may decree an involuntary termination of all parental rights with respect to one or both parents if the court finds . . . (b) That the parent or parents have abandoned the child. It shall be prima facie evidence of abandonment that the parent or parents, although having legal custody of the child have surrendered physical custody of the child, and for a period of six months following such surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child . . .

Under, the guidelines laid down by the above statute, the natural mother's sustained absence of any showing of interest in the child for a two year period establishes prima facie evidence of abandonment.

In State v. J.T., 578 P.2d 831 (Utah 1978) the State Division of Family Services had placed children of the litigant mother in foster homes after she had released them to the agency. Despite her

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attempts to remain in contact with her children, the state refused to tell her where the two youngest were. Consequently, she had no contact with them for two and one-half years. Eventually, when the mother sought custody of the children, the State sought to terminate her parental rights on the basis of abandonment. The Supreme Court found that there could be no abandonment where everytime the parent sought to see the children she was denied visitation.

In the case before the court, the mother knew that the petitioners had the child and at all times relevant to this action their phone number and address were listed in the telephone directory, nevertheless, she made no attempt to contact the child.

#### Conclusion

In light of the foregoing, the court finds 1) that the evidence (including expert testimony) established beyond a reasonable doubt that to return Jeremiah to his Indian custodians would result in serious emotional or physical damage to him; 2) that active efforts have been undertaken to attempt the rehabilitation of the Indian family and have failed; and 3) that the biological mother knowingly and voluntarily abandoned the child as defined in Utah Code Annotated Sec. 78-3a-48(1). Accordingly, the amended petition of adoption is granted.

Dated this 28<sup>th</sup> day of January, 1985.

  
DISTRICT JUDGE

ADDENDUM EXHIBIT "H"

OC 11 1980

IN THE DISTRICT COURT OF THE NAVAJO NATION  
JUDICIAL DISTRICT OF WINDOW ROCK, ARIZONA

IN THE MATTER OF:

JEREMIAH HALLOWAY, DOB: 5/14/77

No. WR-JV-CV-71-84

A person under eighteen years of age.

O R D E R

This matter having come before the Court this 12th day of October, at 8:30 am, those present being Craig J. Dorsay, counsel for the Navajo Nation; no representative for respondents Dan and Patricia Carter appearing before the Court; testimony having been presented and arguments made; and the Court hereby being fully advised in the premises:

THE COURT HEREBY FINDS

1. That Jeremiah Halloway, DOB: 5/14/77, is an enrolled Navajo child, C# 427,273.

2. That Jeremiah Halloway was born out of wedlock to Cecelia (Celine) Dick, now known as Cecelia Saunders, an enrolled member of the Navajo Tribe, C# 122,217, in Iyanbito, New Mexico.

3. That Cecelia Saunders has always been and still is a domiciliary and resident of the Navajo reservation.

4. That child-rearing of Jeremiah was shared between Cecelia Saunders and members of her extended family on the reservation, from his birth until March of 1980.

5. That Jeremiah was removed from the reservation by a maternal aunt, Polly Ann Dick, in March, 1980, and was transported to Utah for placement in a non-Indian prospective adoptive family.

1       6. That the consent of the maternal grandmother Bessie Begay, in  
2 whose home Jeremiah then resided, was not obtained for such removal.

3       7. That no order was obtained from the courts of the Navajo Nation  
4 authorizing removal of Jeremiah from the reservation.

5       8. That Cecelia Saunders was transported to Provo, Utah, at the  
6 expense of the adoptive parents to execute a written consent to adoption of  
7 Jeremiah Halloway.

8       9. That under the Navajo Tribal Code, 7 N.T.C. § 253 and 9 N.T.C. §  
9 1053, and pursuant to Navajo common law, the domicile of Jeremiah Halloway  
10 has at all times remained within the boundaries of the reservation.

11       10. That under Navajo statutes and common law, the courts of the  
12 Navajo Nation have exclusive jurisdiction to determine the custody of  
13 Jeremiah Halloway.

14       11. That 7 N.T.C. § 204 directs that in all civil cases the Court of  
15 the Navajo Tribe shall apply any laws of the United States that may be  
16 applicable.

17       12. That the Indian Child Welfare Act of 1978 (ICWA), 25 USC §§  
18 1901-1963, applies to this proceeding and is incorporated by reference.

19       13. That under the ICWA, 25 USC § 1911(a), the courts of the Navajo  
20 Nation have exclusive jurisdiction over Jeremiah Halloway.

21       14. That under the ICWA, 25 USC §§ 1913(a), 1914, this Court is a  
22 court of competent jurisdiction.

23       15. That on July 14, 1982, and October 6, 1983, the District Court of  
24 Utah County, State of Utah, in Probate No. 19981, entered orders holding  
25 that the Navajo Nation did not have exclusive jurisdiction over Jeremiah  
26 Halloway and that the State of Utah should retain jurisdiction to decide  
27 his custody.

28       16. That these orders by the District Court of the State of Utah are

1 in violation of the statutes, common law and public policy of the Navajo  
2 Nation, which confirms the exclusive jurisdiction of the tribe over Jeremiah  
3 Halloway.

4 17. That these orders by the District Court of Utah were in violation  
5 of the exclusive jurisdiction section of the Indian Child Welfare Act, 25  
6 USC § 1911(a), as well as other applicable sections of that statute.

7 18. That a proceeding was commenced under the Indian Child Welfare  
8 Act, 25 USC § 1914, and the Navajo Tribal Code, in this Court on August 8,  
9 1984, to invalidate the Utah State proceeding, No. 19,981.

10 19. That this Court has jurisdiction over the respondents, Dan and  
11 Patricia Carter, under 9 N.T.C. § 1055(c), which provides for jurisdiction  
12 over any adult who removes a Navajo child from the custody of the parent  
13 and detains such child after demands are made for the return of the child.

14 20. That respondents Dan and Patricia Carter have refused to return  
15 the child to the Navajo reservation.

16 21. That personal service of process of the Motion to Invalidate on  
17 Dan and Patricia Carter was authorized by order of this Court on August 9,  
18 1984.

19 22. That the interests of the Navajo Nation in Jeremiah Halloway are  
20 sufficient to authorize the service of process beyond reservation boundar-  
21 ies.

22 23. That return of service for the Motion to Invalidate, supporting  
23 brief and Notice of Hearing on respondents Dan and Patricia Carter in  
24 Spanish Fork Utah has been filed with this Court.

25 24. That respondents Dan and Patricia Carter have been afforded due  
26 process in this proceeding and have chosen not to appear before this Court.

27 **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:**

28 1. Under the statutes and common law of the Navajo Nation, and under



1 the Indian Child Welfare Act of 1978, this Court has exclusive jurisdiction  
2 to determine the custody and disposition of Jeremiah Halloway, DOB: 5/14/77,  
3 CF 427,273.

4 2. The District Court for Utah County, State of Utah, Probate No.  
5 19,981, was without subject matter jurisdiction to receive the consent to  
6 adoption from Cecelia Saunders, to entertain the adoption petition of  
7 respondents Dan and Patricia Carter, and to enter any orders involving the  
8 custody of Jeremiah Halloway.

9 3. The actions of the District Court for Utah County, State of Utah,  
10 Probate No. 19,981 are in violation of the Indian Child Welfare Act and are  
11 hereby invalidated pursuant to the Indian Child Welfare Act, 25 USC § 1914.

12 4. The Navajo Division of Social Welfare and Department of Justice  
13 shall take all necessary steps to secure the return of Jeremiah Halloway to  
14 the Navajo reservation.

15 5. A hearing to decide the permanent custody of Jeremiah Halloway  
16 shall be scheduled in this Court upon his return to the reservation.  
17 Respondents Dan and Patricia Carter shall present their Petition for  
18 Adoption to this Court at that time.

19 6. Counsel for the Navajo Nation shall prepare Findings of Fact and  
20 Conclusions of Law for the Court by October 29, 1984.

21 7. Because of the serious nature of this proceeding and the fact that  
22 it is a case of first impression in this Court or any other court in the  
23 United States, this Court will issue an opinion supporting this Order in  
24 the near future.

25 ORDERED this 12<sup>th</sup> day of October, 1984.

26  
27 INTERPRETING THIS AS A  
28 TRUE AND CORRECT COPY OF  
THE INSTRUMENT ON FILE IN THE  
COURTS OF THE NAVAJO TRIBE.

Marie Bluet  
CLERK, COURTS OF THE NAVAJO TRIBE

Tom As  
Judge of the District Court

ADDENDUM EXHIBIT "I"

**Monday  
November 26, 1979**

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**Part III**

**Department of the  
Interior**

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**Bureau of Indian Affairs**

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**Guidelines for State Courts; Indian Child  
Custody Proceedings**

## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

## Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the *Federal Register*, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent *Federal Register* notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

## Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*, 432 U.S. 410, 424-425 (1977).

In other words, when the Department writes rules needed to carry out

responsibilities Congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassignment of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory

control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to the parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would only provide unnecessary applications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the final guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the positions and attitudes of states and tribes, it is difficult to deal with that subject in the context of guidelines. The Department is currently developing materials to aid states and tribes with agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines. The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the near future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are provided in large part by the Department of Health, Education, and Welfare. The policies and regulations of that

Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

- Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501, (907) 265-5301.
- Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW., Suite 1328, Atlanta, Georgia 30303, (404) 221-4447.
- Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 829-9258.
- Office of the Field Solicitor, Department of the Interior, 688 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725-3540.
- Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234-3175.
- Office of the Field Solicitor, Department of the Interior, P.O. Box 549, Aberdeen, South Dakota 57401, (605) 225-7254.
- Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103, (406) 245-8711.
- Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484-4331.
- Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073, (602) 281-4750.
- Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 787-1560.
- Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86518, (602) 871-5151.
- Office of the Regional Solicitor, Department of the Interior, Room 3008, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 581-7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 766-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 397, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247-0673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 683-3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74056, (918) 207-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84130, (801) 524-5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231-2125.

#### Guidelines for State Courts

##### A. Policy

##### B. Pre-trial requirements

1. Determination that child is an Indian
2. Determination of Indian child's tribe
3. Determination that placement is covered by the Act
4. Determination of jurisdiction
5. Notice requirements
6. Time limits and extensions
7. Emergency removal of an Indian child
8. Improper removal from custody

##### C. Requests for transfer to tribal court

1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding
2. Criteria and procedures for ruling on 25 U.S.C. § 1911(b) transfer petitions
3. Determination of good cause to the contrary
4. Tribal court declaration of transfer

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#### A. Policy

'(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own



families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

#### A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents

greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

#### B. Pretrial requirements

##### B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

##### B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also

entitled to great deference. See, e.g., *United States v. Sandoval*, 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

##### B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.A. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;

(ii) child's participation in activities of each tribe;

(iii) child's fluency in the language of each tribe;

(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;

(v) residence on or near one of the tribes' reservation by the child's relatives;

(vi) tribal membership of custodial parent or Indian custodian;

(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and

(viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

## 2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations

by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

## B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

## B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (See, e.g., Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such arrangements. Inclusion of such a provision is advisable because courts frequently assume that when an

agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

#### B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

#### B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

#### B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

- (i) The name of the Indian child.
- (ii) His or her tribal affiliation.
- (iii) A copy of the petition, complaint or other document by which the proceeding was initiated.
- (iv) The name of the petitioner and the name and address of the petitioner's attorney.
- (v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
- (vi) A statement that if the parents or Indian custodians are unable to afford

counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

9e) Notice may be personally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.



### B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case.

In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodian must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection

or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

### B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more more time to prepare where state law permits.

### B.8. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

### B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or

custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness,

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

#### B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

#### B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have

been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

#### B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

#### C. Requests for Transfer to Tribal Court

##### C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

##### C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to

the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

##### C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

### C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

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

### C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian are no more nor less in need of the Act's protections than other children. It was also pointed out that these criteria are

contrary to the decision in *Wisconsin Potawatcomies of the Hannahville Indian Community v. Houston*, 397 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are



generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

#### C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written findings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with available information on the case.

#### C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

#### D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

##### D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

##### D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

##### D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the

need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

##### D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

##### D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, 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.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

#### D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

#### D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on

competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

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

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

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

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

#### D.4 Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable

concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

#### E. Voluntary Proceedings

##### E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

##### E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

##### E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

## E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

## E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

## E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

## E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

## E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

## F. Dispositions

### F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below)

absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

### F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

### F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met; and

(iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed as long as the criteria enumerated in subsection (a) are met.

### F.2. Commentary

This guideline simply restates the provisions of the Act.

### F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

### F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.



Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

### G. Post-Trial Rights

#### G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

#### G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

#### G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

#### G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

#### G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

#### G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives

legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

#### G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

#### G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,  
Assistant Secretary, Indian Affairs.

November 16, 1979.

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ADDENDUM EXHIBIT "J"



- Sec.  
1922. Emergency removal or placement of child; termination; appropriate action.  
1923. Effective date.

#### SUBCHAPTER II—INDIAN CHILD AND FAMILY PROGRAMS

1931. Grants for on or near reservation programs and child welfare codes.  
    (a) Statement of purpose; scope of programs.  
    (b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program.  
1932. Grants for off-reservation programs for additional services.  
1933. Funds for on and off reservation programs.  
    (a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments.  
    (b) Appropriation authorization under section 13 of this title.  
1934. "Indian" defined for certain purposes.

#### SUBCHAPTER III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

1951. Information availability to and disclosure by Secretary.  
    (a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act.  
    (b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment.  
1952. Rules and regulations.

#### SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

1961. Education; day schools; report to congressional committees; particular consideration of elementary grade facilities.  
1962. Omitted.  
1963. Severability of provisions.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1727 of this title.

#### § 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

- (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;  
(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as

trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(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.

(Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

#### SHORT TITLE

Section 1 of Pub. L. 95-608 provided: "That this Act [which enacted this chapter] may be cited as the 'Indian Child Welfare Act of 1978'."

#### § 1902. Congressional declaration of policy

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.

(Pub. L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

#### § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean 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;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean 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; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

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

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means 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 as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is

vested with authority over child custody proceedings.

(Pub. L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1727 of this title.

### SUBCHAPTER I—CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

#### (a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

#### (b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

#### (c) State court proceedings; intervention

In 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.

#### (d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

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

(Pub. L. 95-608, title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1914, 1918, 1923 of this title.

**§ 1912. Pending court proceedings**

**(a) Notice; time for commencement of proceedings; additional time for preparation**

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

**(b) Appointment of counsel**

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

**(c) Examination of reports or other documents**

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

**(d) Remedial services and rehabilitative programs; preventive measures**

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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.

**(e) Foster care placement orders; evidence; determination of damage to child**

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely

to result in serious emotional or physical damage to the child.

**(f) Parental rights termination orders; evidence; determination of damage to child**

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(Pub. L. 95-608, title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 1914, 1916 of this title.

**§ 1913. Parental rights, voluntary termination**

**(a) Consent; record; certification matters; invalid consents**

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

**(b) Foster care placement; withdrawal of consent**

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

**(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody**

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent 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.

**(d) Collateral attack; vacation of decree and return of custody; limitations**

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be in-

validated under the provisions of this subsection unless otherwise permitted under State law.

(Pub. L. 95-608, title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1914 of this title.

#### § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub. L. 95-608, title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

#### § 1915. Placement of Indian children

##### (a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

##### (b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

##### (c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this

section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

##### (d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

##### (e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub. L. 95-608, title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

#### § 1916. Return of custody

##### (a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

##### (b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub. L. 95-608, title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

#### § 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be neces-



sary to protect any rights flowing from the individual's tribal relationship.

(Pub. L. 95-608, title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

**§ 1918. Reassumption of jurisdiction over child custody proceedings**

**(a) Petition; suitable plan; approval by Secretary**

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

**(b) Criteria applicable to consideration by Secretary; partial retrocession**

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

- (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
- (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
- (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and
- (iv) the feasibility of the plan in cases of multiracial occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

**(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval**

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

**(d) Pending actions or proceedings unaffected**

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub. L. 95-608, title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

**REFERENCES IN TEXT**

The Act of Aug. 15, 1953, referred to in subsec. (a), is act Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, which enacted section 1162 of Title 18, Crimes and Criminal Procedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under section 1360 of Title 28. For complete classification of this Act to the Code, see Tables.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 1727, 1923 of this title.

**§ 1919. Agreements between States and Indian tribes**

**(a) Subject coverage**

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

**(b) Revocation; notice; actions or proceedings unaffected**

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub. L. 95-608, title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 1918, 1923 of this title.

**§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child; danger exception**

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub. L. 95-608, title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

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 subchapter, the State or Federal court shall apply the State or Federal standard.

(Pub. L. 95-608, title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Pub. L. 95-608, title I, § 112, Nov. 8, 1978, 92 Stat. 3075.)

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub. L. 95-608, title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

## SUBCHAPTER II—INDIAN CHILD AND FAMILY PROGRAMS

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in

particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act (42 U.S.C. 620 et seq., 1397 et seq.) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

(Pub. L. 95-608, title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

### REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (b), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV-B and XX of the Social Security Act are classified generally to part B (§ 620 et seq.) of subchapter IV and subchapter XX (§ 1397 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

**§ 1932. Grants for off-reservation programs for additional services**

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

(Pub. L. 95-608, title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 1934 of this title.

**§ 1933. Funds for on and off reservation programs**

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

(Pub. L. 95-608, title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub. L. 96-88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

**CHANGE OF NAME**

"Secretary of Health and Human Services" and "Department of Health and Human Services" were substituted for "Secretary of Health, Education, and Welfare" and "Department of Health, Education, and Welfare", respectively, in subsec. (a) pursuant to section 509(b) of Pub. L. 96-88, which is classified to section 3508(b) of Title 20, Education.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 1934 of this title.

**§ 1934. "Indian" defined for certain purposes**

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

(Pub. L. 95-608, title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

**SUBCHAPTER III RECORDKEEPING, INFORMATION AVAILABILITY, AND TIME-TABLES**

**§ 1951. Information availability to and disclosure by Secretary**

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

(Pub. L. 95-608, title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

**§ 1952. Rules and regulations**

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

(Pub. L. 95-608, title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

**SUBCHAPTER IV - MISCELLANEOUS PROVISIONS****§ 1961. Education; day schools; report to congressional committees; particular consideration of elementary grade facilities**

(a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Omitted

(Pub. L. 95-608, title IV, § 401, Nov. 8, 1978, 92 Stat. 3078.)

**CODIFICATION**

Subsec. (b), which required the Secretary, in consultation with agencies in the Department of Health, Education, and Welfare, to report on the feasibility of providing Indian children with schools located near their homes and to submit the report to specific committees of the House of Representatives and Senate within two years from Nov. 8, 1978, was omitted from the Code as executed.

**§ 1962. Omitted****CODIFICATION**

Section, Pub. L. 95-608, title IV, § 402, Nov. 8, 1978, 92 Stat. 3078, which provided that within sixty days after Nov. 8, 1978, the Secretary of the Interior send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter, was omitted from the Code as executed.

**§ 1963. Severability of provisions**

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub. L. 95-608, title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)