

Table of Contents

Indian Child Welfare Act and Federal Register<sup>1</sup>

**INDIAN CHILD WELFARE ACT HIGHLIGHTS..... 3**

**§ 1901. CONGRESSIONAL FINDINGS..... 7**

**§ 1902. CONGRESSIONAL DECLARATION OF POLICY ..... 7**

**§ 1903. DEFINITIONS..... 8**

**§ 1911. INDIAN TRIBE JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS.. 15**

**§ 1912 PENDING COURT PROCEEDINGS ..... 21**

**§ 1913 PARENTAL RIGHTS; VOLUNTARY TERMINATION ..... 30**

**§ 1914 PETITION TO COURT OF COMPETENT JURISDICTION TO INVALIDATE ACTION  
UPON SHOWING OF CERTAIN VIOLATIONS..... 33**

**§ 1915 PLACEMENT OF INDIAN CHILDREN ..... 33**

**§ 1916. RETURN OF CUSTODY ..... 37**

**§ 1917 TRIBAL AFFILIATION INFORMATION AND OTHER INFORMATION FOR  
PROTECTION OF RIGHTS FROM TRIBAL RELATIONSHIP; APPLICATION OF SUBJECT  
OF ADOPTIVE PLACEMENT; DISCLOSURE BY COURT. .... 38**

**§ 1918. REASSUMPTION OF JURISDICTION OVER CHILD CUSTODY PROCEEDINGS..... 39**

**§ 1919. AGREEMENTS BETWEEN STATES AND INDIAN TRIBES..... 41**

**§ 1920. IMPROPER REMOVAL OF CHILD FROM CUSTODY; DECLINATION OF  
JURISDICTION; FORTHWITH RETURN OF CHILD; DANGER EXCEPTION..... 41**

**§ 1921 HIGHER STATE OR FEDERAL STANDARD APPLICABLE TO PROTECT RIGHTS OF  
PARENT OR INDIAN CUSTODIAN OF INDIAN CHILD. .... 42**

**§ 1922. EMERGENCY REMOVAL OR PLACEMENT OF CHILD; TERMINATION;  
APPROPRIATE ACTION. .... 43**

**§ 1923. EFFECTIVE DATE ..... 45**

**§ 1931 GRANTS FOR ON OR NEAR RESERVATION PROGRAMS AND CHILD WELFARE  
CODES ..... 46**

**§ 1932. GRANTS FOR OFF-RESERVATION PROGRAMS FOR ADDITIONAL SERVICES..... 47**

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<b>§ 1933. FUNDS FOR ON AND OFF RESERVATION PROGRAMS.....</b>	<b>47</b>
<b>§ 1934. "INDIAN" DEFINED FOR CERTAIN PURPOSES.....</b>	<b>48</b>
<b>§ 1951. INFORMATION AVAILABILITY TO AND DISCLOSURE BY SECRETARY .....</b>	<b>48</b>
<b>§ 1952. RULES AND REGULATIONS.....</b>	<b>49</b>
<b>§ 1961. LOCALLY CONVENIENT DAY SCHOOLS.....</b>	<b>49</b>
<b>§ 1963. SEVERABILITY.....</b>	<b>49</b>

## Indian Child Welfare Act Highlights

- I. Law and Resources. The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (ICWA or Act) provides procedural and substantive safeguards in actions involving Indian Children.
  - A. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et. seq. (ICWA).
  - B. BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595 (November 26, 1979).
  - C. Code of Federal Regulations, 25 C.F.R. Part 23 (January 13, 1994)(Bureau of Indian Affairs - Indian Child Welfare Act Rules and Regulations).
  - D. Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice, 70 Fed. Reg. 13518 (March 21, 2005); and Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice, 70 Fed. Reg. 28953 (May 19, 2005).
  - E. Indian Child Welfare Law Center Web Page. <http://www.icwlc.org>
  - F. Department of Interior-Bureau of Indian Affairs Web Page. <http://www.doi.gov/bia>.

### II. Does the ICWA Apply?

In general, there are three threshold requirements for the ICWA to apply. An “Indian Child” must be involved in a “Child Custody Proceeding” where the child is being removed (involuntary proceeding) from a “Parent” or “Indian custodian.”

- A. Is the child an Indian child?
  1. Indian Child under ICWA is defined as unmarried under 18 and a **member** of a tribe or eligible for membership and a biological child of a member. 25 U.S.C. § 1903(4).
  2. The tribe determines whether a child is a member or eligible for membership. 25 U.S.C. § 1903(5).
- B. Is this an applicable Proceeding? – “Child Custody Proceeding.” ICWA applies to involuntary proceedings in state court. 25 U.S.C. 1903(1) & 1912(a).
  1. Foster Care Placements.
    - a. CHIPS or Neglect or Dependency Cases
    - b. Voluntary placement
    - c. Adoptions; 25 U.S.C. § 1903 (1)(iii) and (iv);
    - d. Status offense where placement is at issue

- e. Guardianship
  - f. Third party custody
  - g. Order for protection
  - h. Involuntary custody disputes intra-family
2. Termination of parental rights either voluntary or involuntary. 25 U.S.C. § 1903 (1)(ii).
  3. Exclusions. (a) Custody action between parents, and (b) a placement based upon an act which, if committed by an adult, would be a crime. 25 U.S.C. § 1903(1).
- C. Is the action a removal from a Parent (defined at 25 U.S.C. § 1903(9)) or Indian custodian (defined at 25 U.S.C. § 1903(6))?

### III. The ICWA jurisdictional framework.

- A. Exclusive tribal court jurisdiction exists for Indian child who is domiciled on or resides on the reservation, or when the Indian child is a ward of the tribal court. 25 U.S.C. § 1911(a).
- B. Concurrent tribal and state court jurisdiction if the Indian child is domiciled off the reservation. State Courts shall transfer the proceeding to tribal court upon petition absent objections by either parent, declination by the tribal court, or good cause exceptions. 25 U.S.C. § 1911(b); Fed. Reg. Vol. 44, No 228, Nov. 1979, C.
- C. Full faith and credit must be given to the public acts, records, and judicial proceedings of any Indian tribe applicable to child custody proceedings by the United States or any state. 25 U.S. C. § 1911(d).
- D. A court shall apply the state or federal standard which has a higher standard of protection to the rights of the parent or Indian custodian. ICWA preempts conflicting state law. 25 U.S.C. § 1921.

### IV. Procedural Requirements.

- A. Notice.
  1. Notice to parents, Indian custodian and tribes usually 10 days prior to initial hearing with 20 additional days if requested. 25 U.S.C. § 1912(a). Notice requirements can be found in at Fed. Reg. Vol. 44, Nov. 1979, B.5.
  2. If the tribe cannot be identified notice should be sent to the Secretary of the Interior. 25 U.S.C. § 1912(a).

- B. Transfer to tribal court jurisdiction required under the ICWA. 25 U.S.C. 1911(a) & (b).
- C. Tribes have a right to intervene at any point in the state court proceeding. 25 U.S.C. 1911(c).
- D. Parents and Indian custodians have a right to legal counsel. 25 U.S.C. §1912(b). The court may appoint attorney for child if in the child's best interests. *Id.*
- E. Qualified expert witness testimony is required before there can be an out of home placement or a termination of parental rights. 25 U.S.C. § 1912 (e) & (f); *See also* Fed. Reg., Vol. 55, No. 228, (Nov., 26, 1979), D.4.
  - 1. Foster Care Placements. Burden of Proof for foster care placements is clear and convincing evidence including testimony of qualified expert witness, that continued custody is likely to result in serious emotional or physical damage to a child. 25 U.S.C. §1912(e).
  - 2. Termination of Parental Rights. Burden of Proof is beyond a reasonable doubt including testimony of a qualified expert witness, that continued custody is likely to result in serious emotional or physical damage to a child. 25 U.S.C. § 1912(f).
- F. Any party seeking foster care placement or termination of parental rights must prove they provided active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and the efforts proved unsuccessful. 25 U.S.C. § 1912(d).
- G. Consent.
  - 1. Parental consent to voluntary foster care placements or voluntary termination of parental rights must be in writing signed before a judge and accompanied by a judge's certification the person understood the contents of the writing. 25 U.S.C. § 1913(a).
  - 2. Any consent given prior to, or within 10 days after, birth of the Indian child is not valid. 25 U.S.C. § 1913(c).
  - 3. Voluntary terminations may be withdrawn before a final decree of termination or adoption is granted. 25 U.S.C. § 1913(c).
  - 4. A final decree of adoption of an Indian child may be vacated if provisions not followed. 25 U.S.C. § 1913(d).
- V. Mandatory Placement Priorities of the ICWA – Preferences must be given in the order listed. *See* Fed. Reg. Vol. 44, No. 228, Nov. 1979, F.1.

- A. Adoptive Placement Preferences. 25 U.S.C. § 1915(a).
  - 1. Member of the child's extended family;
  - 2. Other member of the Indian child's Tribe; or
  - 3. Other Indian families.
  
- B. Foster Care or Pre-adoptive Placement Preferences including a least restrictive setting requirement. 25 U.S.C. § 1915(b).
  - 1. Member of Indian child's extended family;
  - 2. Foster home licensed, approved, or specified by the Indian child's tribe;
  - 3. Indian foster home licensed or approved by an authorized non-Indian licensing authority;
  - 4. 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 law supercedes above placement preferences. 25 U.S.C. § 1915(c).
  
- V. Upon application, a state court shall provide to an Indian child information regarding tribal affiliation, biological parents, and other information to protect the individual the individual's tribal relationship. 25 U.S.C § 1917.
  
- VI. Remedies.
  - A. Invalidation of proceeding and possible return of child. 25 U.S.C. § 1914; 25 U.S.C. § 1916.
  - B. Vacation of adoption decree and return of child. 25 U.S.C. § 1913(d).
  - C. Malpractice actions.

## **§ 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 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.**

## **§ 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.**

### **BIA GUIDELINES FOR STATE COURTS**

#### **Section A.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 matter 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 meeting stringent

requirements to justify any result in any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines 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.

#### A.2 Commentary

In any child custody proceedings 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.2. 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 purposes. 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.

## **§ 1903. Definitions**

**For the purposes of this Act, 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 section 7 of the Alaska native Claims Settlement Act.
- (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 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;**
- (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, United States Code 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.**

#### **BIA GUIDELINES FOR STATE COURTS:**

- 1. **“Child Custody proceeding”**
  - Section B.3(a).

Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses such as truancy and incorrigibility that can only be committed by children and to any juvenile delinquency proceeding that results in the termination of a parental relationship.
  - Section B.3. Commentary.

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.
  - Section B.3(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.
  - Section B.3(c)

Voluntary placements that do not operate to prohibit the child’s parent 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.

Section B.3 commentary

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.

2. “Extended family member”
3. “Indian”
4. “Indian Child” – Determination that Child is an Indian

Section B.1.(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 BIA 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.

Section B.1.(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.

Section B.1.(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 and 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. *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. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.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. Brocheau*, 597 F. 2<sup>nd</sup> 1260, 1263 (9<sup>th</sup> 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.

### 5. "Indian child's tribe"

#### Section B.2. (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.

Section B.2. (b).

The court shall send the notice specified in recommended guideline B.4. 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 view on which tribe shall be so designated.

Sections B.2. (c)(i-viii).

In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors: length of residence on or near a reservation of each tribe and frequency of contacts with each tribe, child's participation in activities of each tribe, child's fluency in the language of each tribe, whether there has been a previous adjudication with respect to the child by a court of one of the tribes, residence on or near one of the tribe's reservation by the child's relatives, tribal membership of custodial parent or Indian custodian, interest asserted by each tribe in response to the notice specified in subsection B.2(b) of these guidelines and the child's self identification.

Section B.2. (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.

Section B.2. (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.

Section B.2. (e).

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.

Section B.2. (e).

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.

B.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 the 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 the "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.

Determination 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 difference determination may be entirely appropriate in other legal contexts.

## **§ 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.

### **BIA GUIDELINES FOR STATE COURTS**

1. Exclusive Jurisdiction.
  - Section B.4. (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.
  - Section B.4. (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

Sections 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.

2. Transfer of Proceedings

Section C.1.

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 this title of 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, 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.

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

#### Section C.2. (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 court declines jurisdiction or the court determines that good cause to the contrary exists for denying the transfer.

#### Section C.2. (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.

### **Determination of Good Cause to the Contrary**

#### Section C.3. (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.

Section C.3. (b).

Good cause not to transfer the proceeding may exist if any of the following circumstances exist:

- (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; or
- (ii) the Indian child is over twelve years of age and objects to the transfer; or
- (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; or
- (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.3. (c) 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 Potwatomies 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 though 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. 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 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. The rule is reflected in subsection (d).

#### Section C.3. (d).

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

#### C.3. Commentary.

The determination that a case should not be transferred because a child's contacts with a reservation are so limited can be made by the parent who has a veto over the transfer and only when there is no parent available to make that decision do the BIA guidelines recommend that a State court make that determination.

## **Tribal Court Declination of Transfer**

### Section C.4. (a) – (d)

- 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 either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.
- d. If the case is transferred the state court shall provide the tribal court with all 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.

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.

3. State Court Proceedings; Intervention
4. Full Faith and Credit to Public Acts, Records, and Judicial Proceedings of Indian Tribes.

## **§ 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 proceedings 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 a 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.

### **BIA GUIDELINES FOR STATE COURTS**

#### 1. Notice

##### Section B.5. (a).

In any involuntary child custody proceeding, the state court shall make inquiry 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.5. Commentary

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 custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, non-custodial 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 this reason, these guidelines recommend notice be sent to both.

##### Section B.5. (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 rights 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.

Section B.5. (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.

Section B.5. (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.

Section B.5. (e)

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

Section B.5. (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.

Section B.5. (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 section 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 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 custodians 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 notices does not involve any assertion of jurisdiction over the person served, personal notices 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.

**Section B.6. (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.

**Section B.6. (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 parent or 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.

Section B.6. (c)

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

B.6. 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.

2. Appointment of counsel

Section B.5. (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.

3. Examination of reports or other documents

Section D.1.

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.

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.

4. Active Efforts; remedial services, and rehabilitative programs; preventive measures; and burden of proof necessary.

Section D.2.

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 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.

D.2. Commentary.

The term "individual Indian caregivers" 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. "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.

D.2. Commentary

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.

5. Foster care placement orders; evidence; determination of damage to child.

Section D.3. (a).

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

Section D.3. (c). (roman numerals added).

- i. Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming 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.
- ii. 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 (Section D.3.(a) above) are essentially restatement of the statutory language.

D.3. Commentary.

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 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.

D.3. Commentary.

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.

D.3. Commentary.

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.3. Commentary

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.

**Qualified Expert Witness Testimony; Applicable to both Foster Care Placements and Termination of Parental Rights P**

Section D.4. (a).

Removal 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.

Section D.4. (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 child rearing practices,

- ii. Any 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 child rearing practices within the Indian child's tribe; and
- iii. A professional person having substantial education and experience in the area of his or her specialty.

Section D.4. (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?

D.4. Commentary.

The party presenting the 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 non-experts.

D.4. Commentary.

The second subsection makes clear that knowledge of tribal culture and child-rearing practices will frequently be very valuable to the court.

D.4. Commentary.

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.

6. Parental rights termination orders; evidence; determination of damage to child.

Section D.3. (b).

The standard of proof required for a termination of parental rights is "beyond a reasonable doubt", supported by one or more qualified expert witness, that continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child.

D.3. Commentary.

The first two paragraphs (Section D.3.(c) above) are essentially restatement of the statutory language.

D.3. Commentary

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.

D.3. Commentary.

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.

D.3. Commentary.

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.3. Commentary

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.

## **§ 1913 Parental rights; Voluntary Termination**

- 1. Consent; record; certification matters; invalid consents. Where any parent or Indian custodian voluntarily consents to a foster care placement or 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, the birth of the Indian child shall not be valid.**
- 2. 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.**
- 3. 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.**

4. **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 that has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.**

## **BIA GUIDELINES FOR STATE COURTS**

1. Consent

- Section. 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.

- Section E.2. Content of Consent Document

- a. The consent document shall contain the name and birthday 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 who 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.

2. Withdrawal of consent to foster care

Section E.3.

Where a parent or Indian custodian has consented to a foster care placement under state, 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 withdraws consent to foster care placement, the child shall as soon as is practicable to returned to the 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

3. Voluntary termination of parental rights or adoptive placement; withdraw of consent; return of custody

Section E.4.

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.

4. Collateral Attack

Section G.1.

(a) Within two years after a final decree of adoption of an y 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 parental

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.

Section G.1. Commentary

This section recommends that the petition 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.

## **§ 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, 1913.**

## **§ 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 Indian 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. 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 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.**

### **BIA GUIDELINES FOR STATE COURTS**

#### 1. Adoptive Placements; Preferences.

##### Section F.1.

- 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 Indian 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 culture 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 agenda 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.

#### 2. Foster Care or Preadoptive Placements; Criteria; Preferences. Section F.2

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 so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provision of the Act.

F.3. Commentary.

A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

3. Tribal Resolution for Different order of Preference; personal Preference Considered; Anonymity in Application of Preferences.

Section F.2. (c).

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

4. Social and Cultural Standards Applicable.

5. Record of placement; availability.

Section 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.

6. Good Cause to Modify Preferences.

Section F.3. Good Cause to Modify Preferences

- (a) For purposes of foster care, preadoptive or adoptive placements, 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 qualified expert witness.
  - (iii) The unavailability of suitable families for placement after 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.

#### Section 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 consideration be considered as good cause to the contrary.

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.

### **§ 1916. Return of Custody**

- A. Petition; best interest 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 Act that such return of custody is not in the best interests of the child.**
- B. Removal from foster care home; placement procedures. 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 Act, 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.**

## **BIA GUIDELINES FOR STATE COURTS (Return of custody):**

### 1. Notice of Change in Child's Status

#### Section G.3. (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.

#### Section G.3. (b)

A parent or Indian custodian may waive his right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at anytime by filing with the court a written notice of revocation, but such revocation would not affect any proceeding that 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 that 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.

## **§ 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 necessary to protect any rights flowing from the individual's tribal relationship.**

## **BIA GUIDELINES FOR STATE COURTS**

### Section G.2. (a)

Upon application by an Indian individual who has reached the 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.

### Section G.2. (b)

This section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

### Section G.2. (c)

Where state law prohibits revelation of the identity of the biological parent, assistance of the BIA 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 confidentiality 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.

## **§ 1918. Reassumption of Jurisdiction over Child Custody Proceedings**

- (a) Petition; suitable plan; approved by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953, as amended by title IV of the Act of April 11, 1968, 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), 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 Act 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 Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) 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), 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), 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 Act.**

## BIA GUIDELINES FOR STATE COURTS

### Introduction

The secretary is directed to determine whether a plan for reassumption of jurisdiction is feasible as that term is used in the statute.

### **§ 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.**

### **§ 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 after a visit 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.**

## BIA GUIDELINES FOR STATE COURTS

1. Improper Removal from custody  
Section B.8. (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.

Section B.8. (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.

## **§ 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 then the rights provided under this title, the State or Federal court shall apply the State or Federal standard.**

### **BIA GUIDELINES FOR STATE COURTS**

A. Policy

Section A.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 India Child Welfare Act to an Indian tribe or child.

A.2. 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 purposes. 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.

## **§ 1922. Emergency Removal or Placement of Child; Termination; Appropriate Action.**

**Nothing in this title 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 title, 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.**

### **BIA GUIDELINES FOR STATE COURTS**

#### Emergency Removal of an Indian Child

##### 1. Jurisdiction

###### Section B.7. (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 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.

###### 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 the reservation but is subject to exclusive tribal jurisdiction.

B.7. Commentary.

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.

2. Procedure for removal

Section B.7. (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.

Section B.7. (b) (i – vii)

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 believed to be on an Indian reservation, the name of the 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 tribes 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.

Section B.7. (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.

### 3. Section B 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.

## **§ 1923. Effective Date**

**None of the provisions of this title, except 1911(a), 1918, and 1919, 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 the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceeding affecting the custody or placement of the same child.

## **§ 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.A. §§ 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.

### **§ 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, after school care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

### **§ 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.

### **§ 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.

### **§ 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.

## **§ 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.

### **§ 1961. Locally convenient day schools**

**(a) Sense of Congress**

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

**(b) Report to Congress; contents, etc.**

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

### **§ 1963. Severability**

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

