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When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements

Erik W. Aamot-Snapp

When the power [to grant an adoption] is used to remove an Indian child from the surrounding most likely to connect that child with his or her cultural heritage, that decision unintentionally continues the gradual genocide of the Indians in America.¹

Congress passed the Indian Child Welfare Act of 1978 (ICWA)² to stop the mass removal of Native American children³ from their Native American communities.⁴ In 1978, state courts and child welfare workers placed over ninety percent of adopted

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¹. Quinn v. Walters, 881 P.2d 795, 801 (Or. 1994) (Fadeley, J., dissenting). Justice Fadeley also stated: "The power to grant an adoption, when exercised, changes an individual from membership in one family to another. The adopted person is lost to his birth family and... the culture into which he was born. That is an awesome power." Id. See also In re M.E.M., 635 P.2d 1313, 1316 (Mont. 1981) ("Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.").


³. The ICWA defines an Indian child as "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." 25 U.S.C. § 1903.


The ICWA's legislative history includes startling results of State child welfare surveys:

[
Approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four children under 1 year of age was adopted. In the state of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater [per capita than for non-Indian children].

Id.

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Native American children in non-Native American homes. By 1994, sixteen years after the ICWA's enactment, more than half were still adopted by non-Native Americans.

The Indian Child Welfare Act controls adoptions of Native American children by mandating a three-part adoptive placement preference. The Act requires state courts to place Native American children in the adoptive homes of their extended families, other members of their tribes, or other Native American families. The ICWA allows courts to depart from the placement preference only if they find "good cause" to do so. In some juris-

5. House Report, supra note 4, at 9, reprinted in 1978 U.S.C.C.A.N. at 7531. State welfare officials and courts placed Native American children in foster or adoptive homes up to 16 times as often as non-Native American children. Id.


7. See 25 U.S.C. § 1915. The ICWA contains other provisions also designed to stop the removal of Native American children from their Native American cultures: the tribe has the right to be notified of child custody proceedings, 25 U.S.C. § 1912(a), and to intervene in these proceedings, 25 U.S.C. § 1911(c); Native American children must be returned to their parent upon voluntary withdrawal by the parent of consent to foster care placement, adoptive placement, or termination of parental rights, 25 U.S.C. § 1913(b)-(c); Native American parents or tribes may petition to invalidate a foster placement or termination of parental rights upon a showing that the action violated certain provisions of the Act, 25 U.S.C. § 1914.

8. According to the ICWA:

   In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a).

dictions, parties in over half of the ICWA adoptive placement proceedings raise the issue of "good cause" to deviate from the placement preferences. Unfortunately, the ICWA does not define what constitutes "good cause." State courts have thus applied a variety of factors in attempting to define the good cause provision. In practice, these factors provide a channel through which the custody proceedings of Indian children.


[We are finding that the State court judges are having a field day with the language "good cause to the contrary." What is good cause to the contrary? In our situation, if a Navajo family lives 50 miles from the nearest hospital, we have had State court judges declare that to be good cause to the contrary. If the State social worker tells the judge that the nearest school is 40 miles away, we have had judges declare that to be good cause to the contrary.... This problem is probably the most serious one that we face. Out of 200 cases that we have handled in the last 15 months, this has been an issue in over half.

Id. at 161-62.

11. State courts interpreting the good cause exception have reached opposite results in factually similar cases. Compare Adoption of F.H., 851 P.2d at 1361 (finding good cause to place Indian child for adoption with non-Native American foster parents of 12 months) with In re Custody of S.E.G., 521 N.W.2d at 357 (Minn. 1994) (refusing to find good cause to place Indian children with non-Native American foster parents of 14 months), cert. denied, 63 U.S.L.W. 3560 (U.S. Jan. 23, 1995). As a result, the outcome of adoption proceedings involving Native American children depends largely upon the state in which the action arises.

Some state courts have found "good cause" to place a child outside Native American communities by evaluating factors such as parental placement preferences, Adoption of F.H., 851 P.2d at 1364-65; emotional bonding, id. at 1365; Appeal in Maricopa County Juvenile Action, 667 P.2d at 234; and the traditional concept of the child's best interests, Adoption of N.P.S., 868 P.2d 934, 938-39 (Alaska 1994). Other courts, by applying a more restrictive evaluation of factors constituting good cause, have not departed from the statutory preferences and have placed children within Native American communities. Custody of S.E.G., 521 N.W.2d at 364-65 (evaluating the child's extraordinary emotional needs, a factor set out in the BIA Guidelines, supra note 9).
which systemic judicial bias\textsuperscript{12} infects ICWA proceedings, undermining the Act's purpose of protecting the relationship between Native American communities and their children.\textsuperscript{13}

This Note analyzes the factors state courts use in determining good cause. Part I examines the historical background of the ICWA and interpretations of its provisions, particularly the adoptive placement preference. Part II critiques the factors that state courts most often apply in determining good cause to depart from the preference, concluding that courts' use of these factors ultimately circumvents the Act's purposes. Part III proposes replacing the general good cause exception with a mandatory order of placements, which would require placement of Native American children in Native American homes. This Note concludes that a mandatory order of placements with certain strictly defined exceptions would best effectuate Congress's goal of preserving Native American communities by restricting state court discretion in child placement proceedings.

State courts face not only legal issues, but also the issue of placing children who may have been moved among several foster homes. If the courts find good cause exists to place the children outside the Native American community, the children may lose their cultural identity, but gain a permanent home. If the courts do not find good cause, the children may remain in foster care until a Native American adoptive placement becomes available, but the children would retain their cultural heritage. The Minnesota Supreme Court recognized that "[d]ecisions on the custody of children, even when the cultural values are similar, are often the most difficult for our trial and appellate judges." \textit{Id.} at 366.

12. Judicial bias may be unintentional, even unconscious: "For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe." \textit{McGowan v. Maryland}, 366 U.S. 420, 565 (1961) (Douglas, J., dissenting) (citing Félix S. Cohen, \textit{Legal Conscience} 169 (1960)).

13. In the ICWA, Congress declared its findings that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

One commentator, recognizing the undermining of congressional policy through judicially created exceptions to the ICWA, stated: "Underlying the enactment of the ICWA was the Congressional concern about coercive state action by state officials, social workers, courts, and adoption agencies. Yet the judicially created exception is itself coercive state activity that undermines the federal legislation." Toni Hahn Davis, \textit{The Existing Indian Family Exception to the Indian Child Welfare Act}, 7 Am. J. Fam. L. 189, 202 (1993) (discussing refusal of courts to apply the ICWA in the absence of an "existing Indian family"); see also Patrice Kunesh, \textit{Building Strong, Stable Indian Communities Through the Indian Child Welfare Act}, 27 Clearinghouse Rev. 753, 755 (1993) ("The 'good cause to the contrary' provision, in particular, [is] employed as [a basis] . . . for avoiding application of the ICWA's placement preferences.").
I. THE ICWA'S CRITICAL MISSION: PRESERVING NATIVE AMERICAN COMMUNITIES

A. THE ICWA'S DUAL PURPOSES: GUARDING NATIVE AMERICAN CULTURES AND REIGNING IN STATE COURT DISCRETION

In 1978, Congress decried the inherent bias within the social welfare system, including the courts, which caused removal of Native American children from their communities at an alarming rate. This rampant displacement of Native American children and the country's long history of depriving Native American cultures of their youngest members led Congress to create minimum federal standards for state court child placement proceedings involving Native American children. The Act attempted primarily to prevent state courts from abusing their discretion over custody decisions.

14. See 25 U.S.C. § 1901(5); supra note 13 (citing § 1901(5)). See also Indian Child Welfare Act of 1978: Hearings on S.1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess. 190, 192 (1978) [hereinafter 1978 Hearings] (testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians) ("Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.").

15. See supra notes 4-5 and accompanying text (reporting removal and placement rates included in the legislative history of the ICWA).


17. 25 U.S.C. § 1902 (setting forth specific "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").

18. Id.
In the ICWA, Congress also endeavored to design adoption standards that reflect Native American cultural values. The Act's congressional findings recognize that children constitute the most vital resource of Native American tribes in their quest for continued existence and integrity. Congress declared that the ICWA upholds the United States's policy of protecting Native American children's best interests, and promoting the stability and security of Native American tribes and families.

B. THE ADOPTIVE PLACEMENT PREFERENCE OF THE ICWA: KEEPING CHILDREN WITHIN THEIR NATIVE AMERICAN CULTURES

In § 1915 of the ICWA, Congress created an order of adoptive placement preferences in favor of a member of the child's family, another member of the child's tribe, or other Native American families. Section 1915 and its legislative history expressly alert state courts that Native American cultural stan-

19. Id. Native American cultures vary widely, and "it is impossible to describe a typical American Indian family." Lacey, supra note 16, at 330; see also Strickland, supra note 16, at 715-16 ("The contemporary American Indian is as varied as the Kansas Kickapoo, the Florida Seminole, the New York Mohawk, the Datotas' Sioux, the New Mexico Pueblo, the Arizona Navajo, and the Oklahoma Cherokee, not to mention the Alaskan Village native."). Generalizations are not entirely impossible, though, when comparing Native American cultures to Anglo-American majority culture. Lacey, supra note 16, at 330 ("There are certain generalizations that can be made about non-assimilated American Indian families for purposes of comparison with the Anglo-American model.").

20. 25 U.S.C. § 1901(3) ("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.").

21. 25 U.S.C. § 1902 ("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.").

22. 25 U.S.C. § 1915(a). See supra note 8 (quoting § 1915(a)). The ICWA also specifies the following preferences for foster placement proceedings: In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

dards must control adoptive placements. The Act affords courts a degree of discretion, however, by providing that the placement preference applies "in the absence of good cause to the contrary." Guiding state court interpretation of the good cause exception, the Act notes that courts might, where appropriate, consider the preferences of the child or the child's parents, and suggests that tribes might substitute their own order of preferences by resolution, "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." Thus, § 1915 "establishes a Federal policy that, where possible, an Indian child should remain in the Indian

23. Section 1915(d) states that: "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." 25 U.S.C. § 1915(d).

The section's legislative history adds: "All too often, State public and private agencies, in determining whether or not an Indian family is fit for . . . adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with an Indian family." House Report, supra note 4, at 24, reprinted in 1978 U.S.C.C.A.N. at 7546.

24. 25 U.S.C. § 1915(a). See also supra note 9 (discussing the discretionary nature of the good cause exception). "Good cause to the contrary" language also appears in the ICWA's foster care placement preferences provision, 25 U.S.C. § 1915(b), and its transfer of proceedings to tribal courts provision, 25 U.S.C. § 1911(b) ("[I]f the [state] court, in the absence of good cause to the contrary, shall transfer [foster care or termination of parental rights proceedings] to the jurisdiction of the tribe.").

The ICWA fails to provide the standard of proof required to show good cause to depart from the placement preferences. See 25 U.S.C. § 1915. Few state courts have addressed this issue. See In re Adoption of F.H., 851 P.2d 1361, 1363 (Alaska 1993) (requiring only a preponderance of the evidence to prove good cause); In re Custody of S.E.G., 507 N.W.2d 872, 878 (Minn. Ct. App. 1993) (holding that good cause must be proven by clear and convincing evidence), rev'd on other grounds, 521 N.W.2d 357 (Minn. 1994), cert. denied, 63 U.S.L.W. 3560 (U.S. Jan. 23, 1995). The ICWA does provide high standards of proof, however, for other actions falling under its coverage. To terminate parental rights, the ICWA requires "evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Similarly, to order a foster placement, the court must receive "clear and convincing evidence" that the present placement is likely to cause damage to the child. 25 U.S.C. § 1912(e). Although relevant to the determination of good cause, discussion of the proper standard of proof lies beyond the scope of this Note.


26. Id. See, e.g., In re Adoption of T.R.M., 525 N.E.2d 298, 313 (Ind. 1988) (reporting that the Ogalala Sioux tribal code prohibits adoption of a tribal member by a non-Indian family pursuant to § 1915(c), but refusing to apply the tribe's preference due to a finding of "good cause" not to do so), cert. denied, 490 U.S. 1069 (1989).
community, but is not to be read as precluding the placement of an Indian child with a non-Indian family." 

In practice, the operation of § 1915 arises when a state court determines that the ICWA applies to a particular case and the court retains jurisdiction, rather than transferring the action to a tribal court. Initially, the court must find that the action is a "child custody proceeding" and that the child is an "Indian child." Upon finding that the Act applies, the court must further evaluate provisions pertaining to tribal and state court jurisdiction. The Act grants the tribal court exclusive jurisdiction over Indian child custody proceedings in tribal courts. See 25 U.S.C. § 1915(a) (indicating that the ICWA applies "in any adoptive placement of an Indian child under State law").

Congress set out the ICWA jurisdictional provision in § 1911:

(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...
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jurisdiction if the child is domiciled or resides on a reservation.\textsuperscript{32} If a child is not domiciled on a reservation, the ICWA creates "concurrent but presumptively tribal jurisdiction."\textsuperscript{33} The state court, if it retains jurisdiction, must follow all of the Act's substantive provisions, including the adoptive placement preference.\textsuperscript{34}

Although the Supreme Court considers the adoptive placement preference "[t]he most important substantive requirement imposed on state courts"\textsuperscript{35} by the ICWA, Congress left determi-

\begin{itemize}
  \item Courts must determine a child's domicile by reference to the domicile of the child's parents, which is defined as "physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).
  \item Holyfield, 490 U.S. at 36; see 25 U.S.C. § 1911(b). Upon petition by either a parent, the child's Native American custodian, or the child's tribe, the state court must, "in the absence of good cause to the contrary," transfer the proceeding to the tribal court. 25 U.S.C. § 1911(b). The Act allows the state court to retain jurisdiction if either parent objects to a transfer or if the tribal court declines jurisdiction. \textit{Id.}
\end{itemize}

Courts have frequently used the "good cause" provision contained in § 1911(b) to avoid tribal court jurisdiction. Dale, \textit{supra} note 28, at 363. \textit{See}, \textit{e.g.}, In re T.S., 801 P.2d 77, 80-82 (Mont. 1990) (finding need for stability and Native American character of foster home "good cause"), \textit{cert. denied}, 500 U.S. 917 (1991); \textit{In re Interest of C.W.}, 479 N.W.2d 105, 113-18 (Neb. 1992) (finding attachment to foster parents "good cause"); Chester County Dep't of Social Servs. v. Coleman, 399 S.E.2d 773 (S.C. 1990) (finding expense and difficulty of venue transfer "good cause"), \textit{cert. denied}, 500 U.S. 918 (1991); \textit{In re J.J.}, 454 N.W.2d 317, 328-31 (S.D. 1990) (finding "good cause" where children had little previous contact with tribe, transfer would be forum non conveniens, or transfer petition comes late in the proceedings).

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

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\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.}
nation of good cause to state courts' discretion. The improbable combination of congressional mandate in the placement preference and state court discretion in the good cause provision has resulted in government attempts to clarify the meaning of "absent good cause." In particular, the Department of the Interior Bureau of Indian Affairs ("BIA") promulgated guidelines ("BIA Guidelines") to assist state courts applying the ICWA. The BIA Guidelines suggest factors for courts to consider when determining good cause, including the child's or parent's placement preferences, the child's extraordinary emotional or physical needs, and the unavailability of suitable homes fitting the placement preferences. Courts have looked to the BIA Guidelines for assistance in determining good cause, while recognizing their nonbinding character.


37. BIA Guidelines, supra note 9.

38. Good Cause to Modify Preferences
   (a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:
      (i) The request of the biological parents or the child when the child is of sufficient age.
      (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
      (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Id. at 67,594. The BIA Guidelines place the burden of proving good cause on the proponent of a departure from the placement preferences, but do not establish a standard of proof. See id.

39. Courts give the non-binding BIA Guidelines important, but not controlling, significance. See, e.g., Batterton v. Francis, 432 U.S. 416, 424 (1977) (stating that "administrative interpretations of statutory terms are given important but not controlling significance"); Adoption of N.P.S., 868 P.2d 934, 936 (Alaska 1994); In re Adoption of F.H., 851 P.2d 1361, 1364 (Alaska 1993); In re Robert T., 200 Cal.App.3d 657, 663 (Ct. App. 1988) ("[The BIA Guidelines] are a useful aid in interpreting [the ICWA's] provisions."); In re T.R.M., 525 N.E.2d 298, 307 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989); In re Halloway, 732 P.2d 962, 970 (Utah 1986). The Guidelines represent the Department of the Interior's interpretations of the Act. BIA Guidelines, supra note 9, at 67,584 ("Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters.").
C. THE SUPREME COURT'S HOLYFIELD DECISION: RECOGNIZING THE MUTUAL INTERESTS OF TRIBES AND THEIR CHILDREN

The Supreme Court has addressed the broad discretionary power that the ICWA permits state courts to exercise. In its only ICWA case, *Mississippi Band of Choctaw Indians v. Holyfield,* the Court held that state courts could not interpret undefined terms within the ICWA so as to undermine the Act's goals and policy. In *Holyfield,* the Mississippi Supreme Court had relied upon its state law definition of "domicile" to hold that two Native American children were not domiciled on the Choctaw reservation, thereby precluding application of the ICWA and transfer of jurisdiction to the tribal court.

The Supreme Court held that although the ICWA failed to define "domicile," Congress did not intend courts to apply state law definitions to the term if those definitions defeat the spirit of the Act. Reliance on state law definitions, the Court reasoned, would exacerbate Congress's concern that "the States and their courts [are] partly responsible for the problem [the ICWA] intended to correct." The Court declared that although Congress failed to define domicile, it nonetheless "intended a uniform federal law of domicile for the ICWA," for "a statute under which different rules apply from time to time to the same child, simply

41. Id. at 42-47.
42. 511 So. 2d 918, 921 (Miss.), rev'd, 490 U.S. at 39-40; see supra notes 31-32 and accompanying text (discussing the relevance of domicile in ICWA litigation).
43. 490 U.S. at 43-47. In *Holyfield,* the Native American parents of twin children purposely left the reservation to give birth in order to circumvent tribal child placement jurisdiction and allow the children to be adopted by a white family. Id. at 51. The Chancery Court issued a final decree of adoption which the Tribe moved to vacate on the grounds that it violated the exclusive tribal jurisdiction provision of the ICWA. Id. at 38-39. The court's decision to overrule the motion was affirmed by the Mississippi Supreme Court. Id. at 39. The Supreme Court, however, held that the children's domicile was that of their mother, who was at all times domiciled on the reservation, and the tribe therefore had exclusive jurisdiction over any child custody proceeding in which these children were involved. Id. at 48-49.
44. Id. at 45.
45. Id. at 47. The Court cited the conflicting results obtained by applying state law definitions of domicile in cases arising in Mississippi and in New Mexico. Id. at 46-47 (comparing the facts of *Holyfield* with those of *In re Adoption of Baby Child,* 700 P.2d 198, 200-01 (N.M. Ct. App. 1985) (holding that the tribe had exclusive jurisdiction because under New Mexico law the child took its mother's domicile at birth)).
as a result of his or her transport from one State to another, cannot be what Congress had in mind."  

The Court also found that the individual actions of any member of the tribe, even the child's parents, could not defeat the Act. Allowing parents to bypass the Act would reject the tribe's interest in its children and would ignore the detrimental impact on children of placement outside Native American cultures. Protecting the relationship between children and their tribes, the Court concluded, serves the best interests of Native American children. The Court's holdings close the jurisdictional gap created by state law definitions of "domicile" and guide state court treatments of parental preference; they do not, however, consider state court definitions of "good cause" that defeat the Act's adoptive placement preferences. Nonetheless, Holyfield's statements regarding the policies of the ICWA and its interpretation of Congress's intent color any future judicial interpretation of the Act's provisions.

D. INCONSISTENT FINDINGS OF GOOD CAUSE IN THE STATE COURTS: ADOPTION OF F.H. AND CUSTODY OF S.E.G.

Courts that have defined good cause have considered a variety of factors that have led to placement outside the ICWA's preferences. Many courts have placed children outside Native

46. Id. at 46.
47. Id. at 49.
48. Id. The Court cited numerous provisions in the Act according certain rights to the tribe that protect tribal interests in their children, in addition to protecting the interests of the children and their families. Id.
49. Id. at 49-50. The Court favorably quoted the ICWA's legislative history, which states: "[R]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." Id. at 50 (citation omitted).
50. Id. at 50 n.24 (citing In re Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)).

Congress, in enacting the ICWA, recognized the ambiguity of the traditional best interests standard. Legislative history of the ICWA demonstrates Congress's belief that the best interests standard is "vague, at best . . . judges too may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values." HOUSE REPORT, supra note 4, at 19, reprinted in 1978 U.S.C.C.A.N. at 7542 (citing Smith v. Offer, 431 U.S. 820, 835 (1977)).
51. The Alaska Supreme Court stated: "Whether there is good cause to deviate in a particular case depends on many factors including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe." In re Adoption of F.H., 851 P.2d 1361, 1363-64 (Alaska 1993).
American communities after evaluating, for example, the biological parents' placement preferences, bonding or attachment of the child with the prospective adoptive parents, or a series of considerations constituting the traditional legal notion of the child's best interests. One court has confined its evaluation to the nonbinding BIA Guidelines' formulation of good cause.

In In re Adoption of F.H., the Alaska Supreme Court evaluated a variety of subjective factors. The court granted the adoption of a Native American child by a white couple despite the Alaska child welfare system's recommendation for placement of the child with a Native relative who had also petitioned for her adoption. The court discussed the purpose of the ICWA, its underlying policy, and its legislative history. Nevertheless, the court proceeded to analyze good cause, result-

Similarly, the Washington Appeals Court stated that permissible factors include: "the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement, the child's ties to the tribe, and the child's ability to make any cultural adjustments necessitated by a particular placement." In re Adoption of M., 832 P.2d 518, 522 (Wash. Ct. App. 1992) (citations omitted).

The Minnesota Supreme Court, on the other hand, embraced the BIA Guidelines for defining good cause. In re Custody of S.E.G., 521 N.W.2d 357, 363 (Minn. 1994), cert. denied, 63 U.S.L.W. 3560 (U.S. Jan. 23, 1995); see supra notes 37-39 and accompanying text (discussing the BIA Guidelines' factors for determining good cause).

52. See, e.g., Adoption of F.H., 851 P.2d at 1364-65 (considering maternal preference in determining good cause to deviate from ICWA preferences).

53. See, e.g., id. at 1365 (stating that bonding between adoptive parents and child is a proper factor for courts to consider in evaluating good cause); In re Appeal in Maricopa County Juvenile Action, 667 P.2d 228, 234 (Ariz. Ct. App. 1983) (supporting good cause determination with evidence of a strong mother-child relationship with the adoptive mother).

54. See, e.g., Adoption of N.P.S., 868 P.2d 934, 937-38 (Alaska 1994) (analyzing such factors as educational, cultural, and emotional needs of the child). See also Dale, supra note 28, at 365-70 (describing the Anglo best interests test as evaluating "what is best for the child in terms of adequacy of education, safety in the home and community environment, access to certain kinds of cultural, health and other services, and amenities in the home"); Christian R. Van Deusen, The Best Interests of the Child and the Law, 18 PEP. L. Rev. 417, 419 (1991) (describing the traditional best interests standard as "a rather nebulous and ill-defined standard that opens a plethora of considerations").

55. Custody of S.E.G., 521 N.W.2d at 363. See supra notes 37-39 and accompanying text (outlining the BIA Guidelines).


57. Id. at 1365.

58. Id. at 1364 ("ICWA was enacted to discourage the separation of Indian children from their families or tribes through adoption or foster care placement to non-Indian homes." (citation omitted)).

ing in placement of F.H. outside her Native community. Several subjective factors influenced the court's holding, including the mother's preference, the bond between F.H. and one of the adoptive parents, F.H.'s need for permanent placement, and the adoptive couple's willingness to grant the birth mother access to the child.

Not every court, however, has endorsed the approach sanctioned in cases such as In re Adoption of F.H.. In direct contrast, the Minnesota Supreme Court, in In re Custody of S.E.G., refused to uphold the adoption of three Native American sisters by a non-Native American couple, despite the possibility that without the adoption the children would remain in foster care. The court found that good cause did not exist to depart from the ICWA's placement preferences.

The Minnesota Supreme Court, acknowledging the subjective nature of the traditional best interests standard and the

60. Id. at 1364 ("Congress found that no resource is more vital to the continued existence and integrity of Indian tribes than their children.") (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 38 (1989)).

61. Id. The court rejected the tribe's argument that under Holyfield, the preference of the biological parent cannot outweigh the tribe's interest. Id. Without discussing any aspect of the reasoning in Holyfield, the court limited Holyfield to issues of jurisdiction only. Id.

62. Id. at 1364-65.

63. Id. at 1365.

64. Id.

65. Id. Under the adoption agreement, the biological mother retained contact and visitation rights. Id. at 1363. Also, F.H. held inheritance rights from the biological mother. Id. The court referred to this type of adoption arrangement as an "open" adoption. Id.


67. 521 N.W.3d 357 (Minn. 1994), cert. denied, 63 U.S.L.W. 3560 (U.S. Jan. 23, 1995). S.E.G., A.L.W., and V.M.G., Native American sisters ages 10, 9, and 7, lived in several foster homes before being placed in the foster home of Eugene and Carol Campbell. Id. at 359-60; Rhonda Hillbery, What's Permanent? Ruling Validates Indian View of Stability, STAR TRIB. (Minneapolis), Sept. 16, 1994, at 16A. The Campbells, a non-Native American couple, provided foster care for the three sisters for 14 months. 521 N.W.2d at 359-60. They, like the Hartleys in Adoption of F.H., sought adoption of the Native American children in their foster care. Id. at 357.

68. 521 N.W.2d at 361.

69. Id. at 366.

70. Id. at 363. The court stated: "The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors,
intent of the ICWA to restrict state court control over Native American child custody proceedings, applied the BIA Guidelines in evaluating "good cause." The court specifically rejected the lower court’s finding that the children had an extraordinary emotional need for permanence, noting that Native American cultures define permanency differently than the majority white culture and that Native American standards must control in ICWA proceedings.

II. FACTORS CONSIDERED IN FINDING GOOD CAUSE TO DEPART FROM THE ICWA’S PLACEMENT PREFERENCES: FLEXIBILITY OR ABUSE OF DISCRETION?

The child's best interests, a catch-all category for several distinct factors, and the parent’s placement preference frequently comprise part of the good cause analysis of state courts in ICWA adoptive placement proceedings. Examination of these common good cause factors in light of the ICWA’s purposes demonstrates the need to remove state courts’ discretionary power to stray from the adoptive placement preferences.

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many, if not all of which are imbued with the values of majority culture.” Id. at 362-63. In support of its reliance on the BIA Guidelines, the court stated that “the use of the word shall in [the good cause section of the Guidelines] strongly suggests that a consideration of whether good cause exists should be limited to the factors described in the guidelines.” Id. (quoting BIA Guidelines, supra note 9). The court relied on the guidelines after declining to apply the factors considered by the Adoption of F.H. and Adoption of M. courts. Id. at 362-63. See supra note 51 (quoting the lists of factors outlined by these courts to be considered in determining good cause).

521 N.W.2d at 364. The court believed the trial court’s holding was based on the “improper assumption” that only adoption could satisfy the children’s extraordinary emotional needs for permanency. Id. The court, in effect, endorsed the Minnesota Human Services Commissioner’s position that permanent placement in a Native American foster home is often preferable to adoptive placement outside the statutory preferences. Id. at 363-64.

Id. at 364 (citing legislative history of the ICWA contained in House Report, supra note 4, at 10, reprinted in 1978 U.S.C.C.A.N. at 7532).

Id. at 363.

See supra notes 51-55 and accompanying text (cataloguing state court approaches to good cause determination).

One commentator noted:
A. THE CHILD'S BEST INTERESTS STANDARD: A FREQUENTLY CITED FACTOR FOR FINDING GOOD CAUSE

1. A Standard Imbued with Majority Culture Values

State courts persistently evaluate Native American children's best interests by considering what courts perceive as their needs for permanent placement and psychological attachment. Majority culture values, however, permeate these good cause factors. As the Minnesota Supreme Court observed, "[t]he best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture."79

a. The Child's Need for Permanence

Permanency constitutes one value-laden good cause factor. Courts have found that permanent placement in a stable family unit serves a Native American child's best interests. Native American communities, however, view permanence differently than the majority culture. Native American children may

Although it establishes placement standards that are compatible with Indian goals, the Act leaves state courts relatively free to choose whether or not to follow them. Thus, the opinions of state court judges as to what is best for the child in individual custody proceedings ultimately may take precedence over both the preferences set forth in the Act and any preferences legislated by the tribes.

Barsh, supra note 36, at 1321.


Professor Dale points to cases in which the Anglo best interests of the child test operates to avoid the act when courts applied it to a determination of (1) domicile, (2) whether a child is an Indian child, (3) whether an Indian family is involved, (4) whether the case falls within the Act's divorce exception, and (5) whether good cause exists to deny transfer from state court to a tribal court.

Dale, supra note 28, at 375.

79. Custody of S.E.G., 521 N.W.2d at 363.

80. See, e.g., Adoption of F.H., 851 P.2d at 1365 (defining the need for permanency as a desire for a stable family household); In re T.S., 801 P.2d 77, 80-81 (Mont. 1990) (equating permanency with household stability), cert. denied, 500 U.S. 917 (1991).

81. The ICWA's legislative history states:

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life. . . . For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian fam-
spend considerable amounts of time living with various relatives, rather than within the majority culture's traditional nuclear family. Courts too often overestimate the importance of the nuclear family structure to Native American children and assume that placing children in such a structure best serves their interests, even if that means placement outside the Native community.

In In re Adoption of F.H., for example, the state court upheld a Native American child's "need for permanence" to the exclusion of the child's and the tribe's cultural interests. The Alaska Supreme Court held that F.H. required immediate placement in a permanent home, opining that "F.H.'s situation would be uncertain if the [non-Native couple's] adoption petition were dismissed." By making a nuclear version of family permanence so central to its analysis, the court overlooked obvious al-

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82. Id. at 11, reprinted in 1978 U.S.C.C.A.N. at 7533 (discussing the need for revision of the standards used to define mistreatment).
83. Id. at 11, reprinted in 1978 U.S.C.C.A.N. at 7533 (discussing the conflict between Native and non-Native social systems and how this conflict affects due process of law in Native child custody proceedings); see also Lacey, supra note 16, at 347 (discussing Anglo and Native American 19th century child-rearing practices and how they affected reform policy during the assimilationist era).
84. See, e.g., Adoption of F.H., 851 P.2d at 1365 (upholding trial court determination that permanent adoption, although outside the Native community, was preferable to the child facing an uncertain family status within the community). As a result of courts' best interests analyses, Native American families must conform their lifestyles and child-rearing practices to those of the majority culture in order to satisfy the Anglo best interest standard and keep their children within their communities. For example, middle class white standards may make it very difficult for Native American families to qualify as adoptive families. See House Report, supra note 4, at 11, reprinted in 1978 U.S.C.C.A.N. at 7533 (discussing discriminatory standards based on middle class values making it nearly impossible for Native American households to qualify as foster or adoptive placements); Hollinger, supra note 31, § 15.06(3) (reporting that "Indian lawyers and other tribal representatives also call for more flexible and culturally-sensitive criteria for the selection of Indian foster or adoptive parents").
85. 851 P.2d at 1361.
86. Id. at 1365.
87. Id.
ternative solutions more consistent with the ICWA’s purpose. For example, the court could have rejected the non-Native couple’s adoption petition and ordered the superior court on remand to consider placement of F.H. with her Native American cousin, who was willing and ready to adopt her.88 Such blatant disregard of Congress’s “[f]ederal policy that, where possible, an Indian child should remain in the Indian community”89 reveals the tenacity of systemic majority culture bias that infects many state court evaluations of Native American children’s best interests.

b. Bonding or Attachment to Prospective Adoptive Parents

State court use of “bonding” or “attachment” theory90 similarly injects majority culture values into best interest analyses under the ICWA’s good cause exception, resulting in the placement of Native American children outside of their cultures.91 Adoption cases under the ICWA often involve prospective adoptive parents who have a preexisting foster care relationship with the Native American children they hope to adopt.92 Any parent-like relationship formed between non-Native foster parents and Native American foster children, however, necessarily results from placement outside the ICWA’s culturally based foster placement preferences.93 Furthermore, the ICWA requires applica-

88. See id. The Division of Family and Youth Services had filed a Child in Need of Aid petition and a petition to terminate the parental rights of F.H.’s mother. Id. at 1362. The superior court dismissed these petitions upon granting the non-Native couple’s adoption. Id. at 1362 n.1. The Alaska Supreme Court relied on the dismissal of these petitions to support its conclusion that F.H.’s purported need for permanent placement justified a finding of good cause. See id. at 1365 (noting that the adoption petition by the non-Native parent was the only petition for custody of F.H. at the time of the appeal).


90. Bonding or attachment theories value the relationship between children and their “psychological parent,” which has been defined as “one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.” Joseph Goldstein et al., Beyond the Best Interests of the Child 98 (1973).


93. See supra note 22 (discussing the ICWA’s foster care placement preferences).
tion of Native American cultural standards in foster placements as well as in adoptive placements. Yet, child welfare workers persistently consider the same majority culture factors in making foster placements that courts consider in making adoptive placements. Thus, granting adoptions of Native American foster children on the basis of a relationship formed with their non-Native foster parents would in many cases reinforce a welfare agent's initial disregard of the ICWA's foster placement provisions. As the Supreme Court has stated of ICWA litigation, "[T]he law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'

Placing a child's bond with two nuclear parents above other social bonds also reflects deeply entrenched majority culture values. American majority culture considers the parent's role paramount in child rearing. In Native American communities, however, a child's bond with her biological parents may be no more crucial to her social development than bonds with grandparents, relatives, and other tribal members. In addition, Native American communities value cultivating ties to Native American culture. Anglo Americans feel no corresponding urgency to safeguard and cultivate their children's bonds with their culture because the values and traditions of Anglo culture permeate majoritarian society in a way that Native values and traditions

95. One legal service attorney surveyed by the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System reported that "the misapplication or nonapplication of the ICWA is appalling. Fourteen years after passage, county workers are still culturally ignorant at best and racist at worst." Racial Bias Task Force Report, supra note 6, at 631.
99. See Goldsmith, supra note 6, at 449 (contrasting the Anglo and Native American views of individual and collective upbringing of children).
100. Congress recognized this need for cultural bonds in its findings: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3) (1988). Native American tribes have an interest in their children which "finds no parallel in other ethnic cultures found in the United States." Adoption of Halloway, 732 P.2d at 969.
clearly do not. Not surprisingly then, courts that bring narrow majority views of Native American children's complex cultural needs to a best interests good cause analysis too often place the children outside the Native American community.

Examining parental bonding and family permanence, two prominent factors within the best interests standard, demonstrates that majority culture views pervade the standard. As a result, consideration of the child's best interests under the good cause exception to the ICWA becomes a means for courts to infuse majority culture values into adoption decisions that lie at the heart of Native American cultural interests.

2. Congress's Mandate to Apply Native American Cultural Values in Determining the Child's Best Interests

Congress enacted the ICWA specifically to redress the insensitivity of state courts to Native American cultural values in adoption proceedings affecting Native children. The ICWA's legislative history warns courts not to use a traditional Anglo version of the best interests standard when applying the ICWA. Instead, in § 1915, Congress specifically requires use

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103. The ICWA's congressional findings specifically recognize differences between majority culture values and Native American culture values:

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. . .

(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.


104. Congress stated that the best interests standard "is vague, at best . . . judges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." House Report, supra note 4, at 19, reprinted in 1978 U.S.C.C.A.N. at 7542 (citation omitted).
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of Native American social and cultural values in all ICWA placement preference decisions. In effect, Congress replaced the traditional best interests standard with the presumption that keeping Native American children within their Native communities serves the children's best interests.

In the more than fifteen years since Congress enacted the ICWA, however, courts have largely failed to effectuate a best interests analysis protecting the relationship between Native American children and their cultures. Only one court has successfully made Native American cultural values paramount in its good cause analysis of the child's best interests.

The Minnesota Supreme Court, confronted with a case in which three children faced continued foster care if the court denied a non-Native couple's adoption petition, refused to find good cause to depart from the ICWA's adoptive placement preferences. In In re Custody of S.E.G., the court discussed differences between Native and non-Native cultural conceptions of permanence, declaring that "it is important that this need [for permanence] not be defined so narrowly as to threaten or substantially reduce placements in Native American homes." Heeding its own warning, the court held that the children's perceived needs for permanence alone did not constitute good cause to depart from the ICWA's placement preferences.

105. "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." 25 U.S.C. § 1915(d).


108. 521 N.W.2d at 357.

109. Id. at 364 (discussing the ICWA's legislative history and the findings of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System).

110. Id.

111. Id. at 366 The court's decision has also been praised for requiring highly qualified Native American expert witnesses when determining the existence of good cause. See Siblings Can't Be Adopted, supra note 6 (quoting Mark Fiddler, director of the Indian Child Welfare Center in Minneapolis). The court
the court applied the definition of a child's best interests implicit in the ICWA, effectively finding that the importance of preserving the children's cultural heritage through continued foster placement outweighed the importance of placing them immediately in an adoptive home. In re Custody of S.E.G. upholds Congress's instructions to state courts that Native American values shape determinations of good cause under the ICWA's adoptive placement preference.

3. Holyfield's Implications for Interpreting Good Cause Under the ICWA: Prohibiting Subjective State Court Determinations of the Child's Best Interests

The Supreme Court's Holyfield decision makes clear that state courts cannot bypass the ICWA by applying state law interpretations of the Act's terms, even when Congress did not define those terms. Allowing state courts to do so would contradict the general rule that Congress intends courts nationwide to apply federal statutes uniformly, and would ignore the presumption against applying state law where that state law interferes with the federal statute's policy. Using the ma-
majority culture best interests standard to determine "good cause" ignores the Supreme Court's prohibition of state law definitions of the ICWA's key provisions that do not uphold the purpose of the Act.\textsuperscript{119} The application of a best interests standard to a determination of good cause permits states to bypass the ICWA's placement preferences, just the result the Court forbids in \textit{Holyfield}.\textsuperscript{120} Additionally, the best interests standard, due to its subjective nature,\textsuperscript{121} promotes inconsistent application of the Act.\textsuperscript{122} Application of the standard, consequently, embodies the exact abuse of state court discretion that Congress intended the ICWA to remedy.\textsuperscript{123}

B. PARENTAL PREFERENCES: INSUFFICIENT JUSTIFICATION TO DEPART FROM THE ICWA'S ADOPTIVE PLACEMENT PREFERENCES

In addition to the best interests standard, courts commonly look to a parent's placement preference when finding good cause to deviate from the ICWA's order of placement.\textsuperscript{124} Congress noted in the Act that courts might consider, "[w]here appropriate, the preference of the Indian child or parent"\textsuperscript{125} in determin-

\begin{itemize}
  \item \textsuperscript{119} See \textit{Holyfield}, 490 U.S. at 44-45.
  \item \textsuperscript{120} \textit{Id.} at 49-50.
  \item \textsuperscript{121} See \textit{supra} note 79 and accompanying text (quoting the Minnesota Supreme Court's requirement of a subjective standard).
  \item \textsuperscript{122} See \textit{supra} notes 45-46 and accompanying text.
  \item \textsuperscript{123} See \textit{supra} notes 14-18 and accompanying text.
  \item \textsuperscript{124} See, e.g., Adoption of N.P.S., 868 P.2d 934 (Alaska 1994) (considering the child's deceased mother's wishes expressed in her will); \textit{In re Adoption of F.H.}, 851 P.2d 1361 (Alaska 1993) (considering the mother's wish to place F.H. with a non-Native family); Mississippi Band of Choctaw Indians v. \textit{Holyfield}, 511 So. 2d 918 (Miss. 1987) (finding parent's preference relevant in refusing to transfer jurisdiction to tribal court), rev'd, 490 U.S. 30 (1989).
  \item \textsuperscript{125} 25 U.S.C. § 1915(c) (emphasis added). The BIA Guidelines also provide that parental preference can be a basis for a finding of good cause not to follow the statutory order of placement preferences. BIA Guidelines, \textit{supra} note 9, at 67,594.

Section 1915(c) further provides that if a consenting parent wishes to remain anonymous, the court must weigh the parent's wishes when applying the preferences. 25 U.S.C. § 1915(c) (1988). One court, in considering this provision, held that a tribe's right to enforce the ICWA's adoptive placement preferences prevailed over the Native American parent's statutorily recognized interest in anonymity. \textit{In re Baby Girl Doe}, 865 P.2d 1090, 1095 (Mont. 1993).
Parents of Native American children and state courts relying on this language have often completely disregarded the tribal and cultural interests underlying the ICWA's placement provisions. In light of prevailing Native American cultural standards and the Supreme Court's *Holyfield* decision, however, courts should rarely determine that the parent's request constitutes good cause to depart from the placement preferences.

Refusing to honor a parent's placement preference arguably ignores the Act's language and denies Native American parents their right to decide who will raise their children. The ICWA, however, grants Native American parents a right only to decide whether to keep their child or place it for adoption.

127. In 1984 hearings, Congress heard the following testimony: The states are using [§ 1915(c)] with parents to have the parent[s] request that the Indian Child Welfare Act not be applied at all, or to request that the child be placed contrary to the preferences of the Act. This intimidation on the part of state courts and agencies was one of the major problems addressed by the Indian Child Welfare Act, and the practice should not be permitted to continue under the placement section as written. The Act states specifically in the legislative history that it is the child's right as an Indian which should control even over parental preference. *1984 Hearings, supra* note 10, at 168 (prepared testimony of the Navajo Nation). See also Joan H. Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. Det. L. Rev. 451, 472 (1989) ("[M]any parents of Indian children attempt to evade the ICWA goal of tribal control over Indian children by intentionally placing their children with non-Indian adopters.").
129. Courts should never consider a parent's placement preference when that parent's parental rights have been terminated. Section 1915 of the ICWA "contemplates those instances where the parental rights of the Indian parent has [sic] already been terminated." *House Report, supra* note 4, at 23, reprinted in 1978 U.S.C.C.A.N. at 7546. When the court has terminated parental rights, it is inconsistent to give the terminated parent a measure of control over a child's placement. *Barsh, supra* note 36, at 1331 ("Remembering that the Act effectively limits involuntary child custody proceedings to instances of parental abuse or neglect, it is questionable whether parents' choice of a substitute home for the child should be given great weight.").
a parent decides to place her child for adoption, "her choice of adopting parents is not entirely unfettered."\textsuperscript{133} In addition, Native American cultures reject the idea that one parent can unilaterally remove a child from her extended family and culture.\textsuperscript{134} As a result, a court properly applying the "prevailing social and cultural standards of the Indian community"\textsuperscript{135} should generally refuse to comply with the parent's request.

In \textit{Holyfield},\textsuperscript{136} for example, the Supreme Court held that a child's parents cannot defeat tribal jurisdiction by giving birth off a reservation.\textsuperscript{137} Allowing the parents' wishes to prevail over the tribe's interests, the Court stated, would "nullify the purpose the ICWA was intended to accomplish."\textsuperscript{138} To do so would result in more placements outside the tribe, thus threatening the tribe's existence. Similarly, allowing a parent's placement preference to defeat the statute's placement preferences denies the

\begin{itemize}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} One commentator, refuting the argument that the ICWA infringes on a parent's rights stated: "The concept that a mother has the right to remove her child from its extended family and community, thereby depriving the child of its heritage... is foreign to American Indian cultures." Goldsmith, \textit{supra} note 83, at 8 (citations omitted).
\item Similarly, Congress heard testimony in 1988 regarding Native American cultural relations:
\begin{quote}
Indian people have two relational systems. They have a biological relational system, and they have a clan or band relational system. It is the convergence, if you will, of these two systems in tribal society that creates the fabric of tribal life. And each of us as an Indian person has a very specific place in the fabric. We have very specific responsibilities within the fabric. Those responsibilities are our rights, individual rights. And even our mother has no right to deny us those rights.
\end{quote}
\textit{...Unfortunately, the resistance to an understanding of our philosophy remains strong. In fact, as we heard today, frankly, corrupted. 1988 Hearings, supra note 131, at 97-98 (statement of Evelyn Blanchard, Vice President, National Indian Social Workers Association). Cf. Lacey, \textit{supra} note 16, at 341-43, 346-47 (comparing 19th century Anglo-American and Native American values regarding individualism, education, and discipline of children).}
\item \textsuperscript{135} 25 U.S.C. § 1915(d).
\item \textsuperscript{136} 490 U.S. 30 (1989).
\item \textsuperscript{137} \textit{Id.} The Court found that "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." \textit{Id.} at 49.
\item \textsuperscript{138} \textit{Id.} at 52. The court went on to cite a "scholarly and sensitive opinion in what has become a leading case on the ICWA," which stated: "The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents." \textit{Id.} (citing \textit{In re Adoption of Halloway}, 732 P.2d 962, 969-70 (Utah 1986)).
\end{itemize}
tribe's interest in the child, which Congress considered paramount.\textsuperscript{139}

The reasoning of 
\textit{Holyfield}\textsuperscript{140} indicates strongly that the parental placement preference does not justify departing from the ICWA's order of preferences, even in voluntary adoption proceedings.\textsuperscript{141} If the parents of a Native American child cannot defeat tribal jurisdiction by physically leaving tribal boundaries, they should not be able to attain the same end by expressing a preference for their child's placement in a non-Native American setting.\textsuperscript{142} Alienating a child from her cultural heritage and causing the tribe's loss of a resource vital to its continued existence\textsuperscript{143} comprise the exact results Congress intended the ICWA

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140. 490 U.S. at 30.


Congress anticipated the dangers posed by voluntary actions: "[T]he voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children." \textit{House Report, supra note 4, at 11, reprinted in 1978 U.S.C.C.A.N. at 7533.} For a compelling disclosure of the use of voluntary adoptions by private adoption agencies as a device to place Native children outside the Native American community, see \textit{Oversight Hearings on the Indian Child Welfare Act: Before the Select Committee On Indian Affairs, 100th Cong., 1st Sess. 362-66 (1987)} (stating that private adoption agencies in Alaska "consistently show an utter disregard for the Indian Child Welfare Act and the values it embodies" and that the Alaskan agencies "are in the adoption business"). \textit{See also 1984 Hearings, supra note 10, at 107-08} (statement of Ethel C. Krepps, President, Oklahoma Indian Child Welfare Association) (describing an affidavit used by independent adoption agencies to bypass the ICWA).

142. Placement of Native American children in non-Native American settings has the same effect on the children and the tribes whether or not the placement is voluntary. \textit{Adoption of a Child of Indian Heritage}, 543 A.2d at 932.

143. 25 U.S.C. § 1901 ("Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.").
to remedy.\textsuperscript{144} The \textit{Holyfield}\textsuperscript{145} decision apparently would not preclude consideration, however, of a parent's placement preference \textit{within} the Native American community because such consideration is within the Act's placement preferences and in accord with the Act's purpose.

III. ACHIEVING COMPLIANCE WITH THE ICWA'S ORDER OF ADOPTIVE PLACEMENTS: ABOLISHING THE GOOD CAUSE EXCEPTION

Congress enacted the ICWA to remedy abuses of state courts' traditional discretion over adoption cases involving Native American children.\textsuperscript{146} Nonetheless, the ICWA's legislative history reveals Congress's intent to afford state courts some flexibility through judicial application of the ICWA's good cause provisions.\textsuperscript{147} Thus far, many state courts have been unable to shed their majority culture views of child welfare and have repeatedly disregarded the ICWA's substantive purpose of preserving Native American cultures.\textsuperscript{148} State court resistance to the ICWA has also impeded fulfillment of its purposes. As one trial court judge tellingly characterized the ICWA's requirement of finding relatives for placement, it is merely a "hoop" to jump through.\textsuperscript{149} Such courts seem to harbor animosity toward the Act's purpose.\textsuperscript{150} If the ICWA placement preferences have become merely "hoops" to jump through before ultimately applying

\textsuperscript{144} See supra notes 14-21 and accompanying text (describing Congress's intent when enacting the ICWA).

\textsuperscript{145} 490 U.S. 30 (1989).

\textsuperscript{146} See supra notes 14-18 and accompanying text (describing displacement of Native American children).

\textsuperscript{147} BIA Guidelines, supra note 9, at 67,584. As the Minnesota Supreme Court pointed out, this section of the BIA Guidelines cites to the legislative history of the good cause provision contained in § 1911, referring to jurisdiction, not the good cause provision of 25 U.S.C. § 1915. \textit{In re Custody of S.E.G.}, 521 N.W.2d 357, 362 n.4 (Minn. 1994), cert. denied, 63 U.S.L.W. 3560 (U.S. Jan. 23, 1995).


\textsuperscript{149} Racial Bias Task Force Report, supra note 6, at 640 (citing Trial Court Memorandum, \textit{In re Welfare of M.S.S.} (Nov. 19, 1991) (on file with the Minnesota Supreme Court)). The Task Force concludes that "[t]his misunderstanding and disregard of the law are far from unusual." \textit{Id}.

\textsuperscript{150} "There is clearly a great deal of hostility among some judges and court personnel as [the ICWA] relates to Native American foster care placement. For example, one practitioner reported that a judge, although reluctantly signing an order, stated 'in another words, counselor, when an Indian child is involved, our hands are tied.'" Racial Bias Task Force Report, supra note 6, at 640. An-
the courts' own views of the child's best interests, Congress must act to tighten courts' use of the good cause exception. Amendments to the ICWA must redirect judicial focus to the Act's purpose of keeping Native children in Native communities.

The Minnesota Supreme Court, in In re Custody of S.E.G., took a step in the right direction by applying the BIA Guidelines factors to its analysis of good cause. Mandatory application of a uniform set of federal guidelines like those advanced by the BIA would remove some of state courts' discretion under the good cause exception. Such mandatory guidelines would not, however, advance the Act's purposes far enough. The BIA Guidelines unequivocally defer to the parent's placement preference, effectively making the parent's interest paramount, contrary to the purpose of the Act. In addition, a uniform set of factors necessarily denies the reality that Native American cultures differ from each other, as well as from the majority culture. As a result, a uniform set of guidelines would most likely reflect only one Native culture, or worse, would once again reflect majority culture values.

Congress could better solve the problem by creating a firm presumption that state courts must place all Native American children available for adoption in Native American adoptive families absent one of several specific exceptions. This pre-

other judge, responding to an open-ended survey question about the ICWA, stated simply: "Eliminate it. Is unconstitutional." Id.

151. See supra part II.A (discussing use of the best interests standard by state courts).
153. See supra notes 37-39 and accompanying text (discussing the BIA Guidelines factors for determining good cause to depart from the statutory adoptive placement preferences).
154. 521 N.W.2d at 363.
155. BIA Guidelines, supra note 9, at 67,594.
156. See supra part II.B (discussing reasons the parent's preference should not be considered, despite Congress's statement that it should be considered "where appropriate").
157. See supra note 19 (discussing tribal differences and the difficulty of making general statements regarding all Native Americans).
158. Senator Daniel Evans of Washington introduced a bill in the 100th Congress containing amendments to § 1915 similar to those proposed here. See S.1976, 100th Cong., 1st Sess. (1987), reprinted in 1988 Hearings, supra note 131, at 3-45. The bill's primary provisions expanded the applicability of the ICWA by redefining "child custody proceeding," id. at 7-8, and "Indian child," id. at 9-10. It also abolished the good cause provision of § 1915 and permitted departure from the placement preferences only in specific instances. Id. at 24-27. Finally, the bill restricted consideration of the parent's placement preference. Id. at 26.
Indian Child Adoptions


This situation would require the court to insure that the child’s tribal ties are preserved, despite the placement outside the statutory order. Such a placement would resemble an “open” adoption. See Hollinger, supra note 127, at 497-99 (describing attempts to place Native American children in “open adoption” settings).

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989) (“Congress perceived the States and their courts as partly responsible for the problem it intended to correct [by passing the ICWA].”; see 25 U.S.C. § 1901(5) (finding that state “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”).

An exception’s proponent should be required to meet a high burden of proof in recognition of the unique relationship between the child and the tribe. See supra note 24 (discussing the burden of proof requirement).

One commentator supported this suggestion when stating that “[o]nly an explicit waiver by the child’s tribe, or other substantial reasons should permit a court to decline to follow the placement preferences.” Hollinger, supra note 31, § 15.06(1).

160. Thus, the amendment would allow placement outside the community only if the child retains her relationship with her Native American culture and the placement meets one of a few possible strictly defined exceptions.

Any exceptions must reflect the ICWA’s underlying policy of protecting the child’s and tribe’s interests, as well as the Act’s remedial purpose of restricting state court discretion in Native American child custody matters. Such exceptions would require precise definitions of key provisions to remove state court discretion. One such exception might be a permissive departure from the placement presumption when the child’s tribe consents to the departure. This exception would allow the court to retain control over the matter without imposing majority culture values on the decision. Another possible exception might arise when the child’s extraordinary medical needs could be accommodated only through a placement outside the presumption. These exceptions must, at all times, recognize the child’s interests as a


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CONCLUSION

State courts abusing the good cause exception to the ICWA's placement preference contribute to grossly disproportionate placement rates of Native American children outside their cultures. Through their evaluations of various forms of the majority culture best interests standard or the parental placement preference, state courts disregard the unique relationship between Native American tribes and their children. The remedy for this difficult problem lies in amending the ICWA's adoptive placement preference provision. Congress must require state courts to place children within the order of preferences set out by the Act and allow the courts to deviate from this order only upon a finding of certain precisely defined exceptions. This proposed amendment would protect the interests of Native American tribes and their children in maintaining their relationships with one another.