THE BEST INTERESTS OF THE *INDIAN* CHILD

FEDERAL GLOSS ON A STATE LAW CONCEPT

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EXERCISING SOVEREIGNTY THROUGH PROTECTION OF OUR CHILDREN

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I. Defining the Best Interests of the *Indian* Child

The traditional "best interests of the child" standard is a bedrock of state child custody and placement law. As applied to Indian children and families, however, this standard often becomes a subjective evaluation that is imbued with the values of majority non-Indian culture. Through federal legislation known as the Indian Child Welfare Act, 25 U.S.C. " 1900-1963 (ICWA), Congress sought to remedy the injection of majority values which inject anti-Indian bias into decisions affecting Indian children. Too often, however, the mandates of ICWA have foundered on the shores of state court resistance. The best interests of the child standard is one doctrine state courts routinely use to undermine the intentions of ICWA. By narrowly interpreting ICWA's requirements and relying on these judicially created exceptions, state courts have largely succeeded in resisting the meaningful involvement of tribes in Indian child custody proceedings.

Hope need not be lost. The legislative history and the plain language of ICWA indicate that Congress intended in large measure to re-define the concept of "best interests" as it is applies to Indian children. That redefined concept, what this paper refers to as the federal gloss, incorporates Congress' finding that it is in the best interests of Indian children to be raised in Indian communities that will foster their knowledge of, understanding and involvement with their native heritage and tribal communities. It is this reconceptualized best interests standard that state courts must be urged to adopt in Indian child custody cases.

A. Traditional State Law Concepts of Best Interests

Washington, like most states, requires that child custody determination be made in accordance with the best interests of the child. RCW 26.10.100. The child's best interests are often identified as the court's paramount concern *In the Matter of the Dependency of J.B.S.*, 123 Wash. 2d 1, 10, 863 P.2d 1344 (1993). Courts give themselves considerable leeway, however, by refusing to limit themselves to a set criteria of what constitutes "best interests," taking instead the position that "each case is largely dependent upon its own facts and circumstances." *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245 (1980). Likewise, Washington courts have refused to recognize Congresses' efforts to limit that discretion when it comes to Indian children.

In *Mahaney v. Johnston* (*In re Mahaney*), 146 Wash. 2d 878, 894, 51 P.3d 776 (2002), the Washington Supreme Court clarified that ICWA's strict standards for removal from Indian parents did not alter the state court's best interests analysis. Rather, the court held that findings regarding a child's "best interests" may rely on consideration of emotional damage to the children due to prior unfitness of the parent, regardless of evidence of the parents' current parental fitness. Under the facts of that case, the court held that the best interests standard did not require a finding of *present* parental unfitness because (1) the children were not presently in the physical custody of the parents; and (2) there was evidence that due to their prior emotional or physical abuse, the children would be emotionally traumatized if they were removed from their current placement in order to be placed with the parent who previously abused them. *Id*. at 896.

Because the case involved Indian children, the *Mahaney* court was also presented with the question of how ICWA's federal standards affect the state court's application of the best interests standard. As is discussed in more detail below, Washington's high court largely sidestepped the requirements of ICWA through narrow reading of the federal statute's requirements and broad application of state court's discretion to make findings regarding good cause and the child's best interests. Specifically, the high court held that ICWA does not require Washington courts to abandon the best interests of the child standard established under state law for foster care placements. "The fact that ICWA applies should not signal to state courts that state law is replaced by the Act's mandate." *Id*. at 893. The *Mahaney* case effectively, and arguably improperly, ignores the supremacy of federal law, the unique and exclusive constitutional authority of Congress to legislate on behalf of Indians, and the clear and express congressional intent expressed in ICWA.

B. ICWA's Federal Gloss

Authority over Indian matters is delegated to Congress by the Indian Commerce clause of the United States Constitution. U.S. Const. art. I, ' 8, cl. 3. This clause has widely been interpreted as vesting Congress with authority over relations with Indians and the "responsibility to protect and preserve Indian tribes and their resources." 25 U.S.C. ' 1901(2); *see also Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (describing federal trustee relationship between the U.S. government and Indians). In ICWA, Congress exercised that authority in an effort to reverse centuries of cultural genocide carried out under the rubric of state Indian child welfare programs.

Misunderstanding of native culture, tribal and Indian family relationships is a common thread throughout the tortured history of Native Americans' interactions with white society. For centuries, Indian children were removed from their Native American homes by state courts and welfare agencies at a rate overwhelmingly disproportionate to their non-Indian counterparts. Patrice Kunesh-Hartman explains that to Indian people, the family is the center of the tribal community. For centuries, Indian families have been torn apart by government relocation and termination plans, dissolving the Indian identity, customs, and way of life. *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. Colo. L. Rev. 131, 166 (1989). In hearings leading up to the passage of ICWA, Congress found that much of the blame for that tearing apart lies at the feet of state child welfare systems. Testimony at those hearings established that states had often failed to recognize the essential tribal relations of Indian people and the unique cultural and social standards prevailing in Indian families and communities. H. R. Rep. No. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530. Scholar Amanda Westphal summarizes that testimony as follows:

> The Native American culture values relationships and child rearing by those outside of the nuclear family. The dynamics of extended Native American families are fundamentally misunderstood. A single Indian child may have scores of, perhaps even more than a hundred, close relatives, who are considered responsible family members. The concept of the extended family maintains its vitality and strength in the Indian community. See id. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties to assist in child rearing . . . . Based on white middle-class standards, social workers who witnessed young Native American children with significant independence, or who saw them living with relatives outside of the nuclear family, condemned these practices as neglectful. Prior to enactment of ICWA, Congress heard testimony regarding the detrimental effects on Indian children by placing them in non-Indian homes. The Senate noted that "removal of Indians from Indian society has serious long-term and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences."

Amanda B. Westphal, *An Argument In Favor Of Abrogating The Use Of The Best interests Of The Child Standard To Circumvent The Jurisdictional Provisions Of The Indian Child Welfare Act In South Dakota*, 49 S.D. L. Rev. 107, 111-12 (2003) (citing H.R. Rep. No. 95-1386, at 10 (1978) and S. Rep. No. 95-597, at 43 (1977).

At the heart of ICWA is the recognition that the best interests of Native American children will be served by protecting the relationships between Indian children and their tribes. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 50 n.24 (1989). To remedy these centuries of dislocation and Indian family breakage, Congress imbued ICWA provisions aimed at achieving a number of important goals, such as protecting Indian children's interest in their tribal communities; recognizing and promoting the unique nature of the relationship between tribes, Indians, and the federal government, and between tribes and their members; recognizing the different cultural standards regarding extended family that prevail in Indian communities; remedying adjustment problems faced in adolescence by Indian children who had been placed for adoption into non-Indian homes; and protecting the right of tribes to retain effectively orphaned (under non-Indian standards) Indian children in their communities. See generally Mary J. Risling, CALIFORNIA JUDGES' BENCHGUIDE THE INDIAN CHILD WELFARE ACT (2000), specifically at p. 2 (identifying best interests of Indian child as protection of role of tribe in child's life) and pp. 42-44 (discussing ICWA policy and legislative history).

As stated by the Supreme Court of Arizona, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected." *In re Appeal in Pima County Juvenile Action*, 130 Ariz. 202, 635 P.2d 187, 189 (1981) (emphasis added). Endorsing that language, the United States Supreme Court observed that "the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a [non-Indian] white environment." *Holyfield*, 490 U.S. at 50; see *also* ICWA, 25 U.S.C. ' 1901(4) (finding that "an alarmingly high percentage" of Indian children are placed in non-Indian foster and adoptive homes and institutions); *id*. ' 1901(5) (finding failure of states to "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

Accordingly, some state courts have held that the traditional best interests standard should play no role in ICWA cases, particularly when determining whether good cause to deviate from ICWA's jurisdiction and placement preferences. The Supreme Court of Minnesota, for instance, has held that ICWA creates a presumption that placement of Indian children within preferences of the Act is in the best interests of Indian children. *Matter of the Custody of S.E.G.*, 521 N.W.2d 35 (1994). The court in effect redefined the "best interests" standard that applies to an Indian child to focus not on subjective cultural norms but rather on fostering connections between Indian children, their families and their tribes.

II. When Do We Care About the Best interests of the Indian Child?

The short and obvious answer is all the time, every day of their lives. As a technical legal matter, however, the best interests standard is often, and arguably improperly, injected at a number of specific stages in an ICWA case. Most often, the traditional best interests standard is relied on by state courts seeking to justify a finding of good cause to depart from ICWA's requirements.

A. Best Interests and Good Cause to Deny Transfer to Tribal Court

When a foster care placements or parental rights termination proceeding is initiated in state court that involves an Indian child who resides or is domiciled off-reservation, the Indian child's parent, custodian, or tribe may petition to transfer the proceeding to tribal court. ICWA, 25 U.S.C. ' 1911(b). There are three exceptions that allow the state court to deny a petition to transfer such a case to a tribal court. They are: (1) the tribal court declines the transfer; (2) either parent objects to the transfer; or (3) the state court finds good cause not to transfer.

Good cause is a matter of discretion of the court, and some state courts have interpreted that discretion as allowing them to consider "best interests" of the child when deciding whether or not to transfer a case to tribal court. For example, the Nebraska Supreme Court has held that the child's best interests overrides both tribal and family interests in transfer and thus may constitute good cause to deny transfer to tribal court. *In re Interest of C.W.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

The Washington Supreme Court took a similar position in *In re Mahaney*, 146 Wash. 2d 878, 894, 51 P.3d 776, 783 (2002). During the proceedings, the Indian mother of the children filed a motion to transfer the case to tribal court. The court determined there was good cause not to transfer the case, specifically holding that concern for the safety of the children, . . . [the] special needs of the children, and . . . disruption of [the] children's lives' required the case to remain in state court jurisdiction. 51 P.3d at 782. The court applied the best interests of the child test to determine that the non-Indian grandmother of the children should retain custody. *Id.* at 785.

The best interests analysis as employed by *Mahaney* and similar decisions at the transfer stage undermines ICWA by injecting into the transfer analysis entirely irrelevant considerations. The legal question of jurisdiction does not and should not

raise the discretionary, and largely value laden, question of what should ultimately happen to the child. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989) ("Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children--not what the outcome of that determination should be."); *see also* *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. Ct. App. 1995) ("The only issue in cases involving motions to transfer is the determination of the proper tribunal . . . . Thus, the question of whether a parent or guardian is abusive, neglectful, or otherwise unfit is irrelevant at this point.").

Bureau of Indian Affairs' ICWA Guidelines list several factors to be considered in determining good cause, none of which implicate substantive "best interests" type concerns. Rather, those factors are limited to purely jurisdictional considerations, such as the availability of a tribal forum to which the case can be transferred, the stage of the proceeding, whether the Indian child is over 12 years and objects to the transfer, and whether the evidence necessary to the case could be adequately presented in tribal court without undue hardship to the parties. Bureau of Indian Affairs, *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67584, 67591 (1979) (hereafter BIA ICWA Guidelines). Neither the Guidelines nor ICWA itself expressly permit the use of the best interests standard. BIA ICWA Guidelines at 67584-67595; *see also* 25 U.S.C. " 1901-1963 (2000).

The burden of establishing good cause to deny transfer of jurisdiction lies with the party opposing transfer. This burden must be met with clear and convincing evidence that the best interests of the Indian child would be injured by transfer to tribal court. BIAICWA Guidelines, 44 Fed. Reg. at 67591; *see also Matter of M. E.M.*, 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981). If such evidence is not established, the case should be transferred. The BIA ICWA Guidelines prohibit consideration of socio-economic conditions or the "perceived adequacy of tribal or [BIA] social services or judicial systems." 44 Fed. Reg. at 67591. Nevertheless, under the rubric of "best interests," state courts often slip into consideration of the extent of social services available through the tribe, the tribe's experience in providing counseling, care, assistance, placement and other related services to children, and whether the tribe has adopted a tribal juvenile code which provides procedures and rules for dependent children proceedings, shelter care, foster care placement, guardianship and related matters.

Such practices should be discouraged. State courts should not be allowed to assume that determinations by tribal courts would not be in the best interests of the child. The Texas Court of Appeals has described such an assumption as an "arrogant idea that defeats the sovereignty of Indian tribes in custody matters; the very idea for

which ICWA was enacted." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. Ct. App. 1995). Instead, state courts should recognize that by virtue of their greater familiarity with and proximity to tribal and reservation communities, tribal courts are often in a superior position to find placements that accommodate the best interests of the *Indian* child, as properly defined to incorporate the child's interest in being raised in an Indian community.

B. Removal from Indian Parental Custody: "Clear and Convincing" Evidence

ICWA requires that the clear and convincing standard be applied to all involuntary foster care placements. Involuntary foster care placement of an Indian child cannot be ordered unless there is clear and convincing evidence that the continued custody of the child by the parent or Indian custodian "is likely to result in serious emotional or physical damage to child."

The BIA ICWA Guidelines define "clear and convincing evidence" in this context:

- '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."
- '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 likely to result."

The BIA ICWA Guidelines further state that "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." 44 Fed. Reg. at 67593.

The Washington Supreme Court, however, has held that neither the Guidelines nor ICWA's statutory language supplants Washington state law requiring foster care placements be made on the basis of the best interests of the child. *In re Mahaney*, 146 Wash. 2d at 894. The lower court had strictly interpreted BIA ICWA Guidelines to require that, in ICWA cases, foster care placement and custody determinations

should focus on the parent's present fitness to care for the children. The Washington Supreme Court reversed that decision, holding that the lower court's strict reading of the BIA ICWA Guidelines effectively and impermissibly replaced the best interests test of RCW 26.10.100 because it disregarded evidence that the children would be traumatized by removal from their current non-Indian foster care placement and returned to their abusive parents. The high court held that ICWA does not require Washington courts to abandon the best interests of the child standard established under state law. "The fact that ICWA applies should not signal to state courts that state law is replaced by the Act's mandate." *Id*. at 893. Rather, the court opined, ICWA "merely requires that the foster care finding [of best interests of the child] be made by clear and convincing evidence." *Id*.

C. As a Factor in Determining Whether Good Cause Exists to Deviate from ICWA's Placement Preferences

Section 1915 of ICWA establishes foster and pre-adoptive placement preferences. Under ICWA, foster and pre-adoptive placement preference is given to: (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. 25 U.S.C. ' 1915(b). These placement preferences must be followed unless a court determines that there is good cause to deviate from the preferences.

1. Fostering Children's Connection to Their Indian Heritage

As with transfer requests, state courts often look to the best interests standard when assessing whether good exists to deviate from the placement preferences. The issue thus framed is whether it is in the best interests of the child to follow or deviate from the preferences. However, as noted above, some courts have rejected the idea that the traditional best interests test has any proper role to play in ICWA placement decisions, given the clear preferences set forth in the federal statute. *E.g*. *In the Matter of the Custody of S.E.G*., 521 N.W.2d 35 (1994) (discussed above). These courts properly recognize that when applied to an Indian child, the best interests analysis should accommodate congressional findings that an Indian child has an undeniable and overriding interest in fostering their connection to their tribe and their native heritage.

2. Bonding and Emotional Attachment

Bonding and related child development issues also implicate judicial concerns couched in terms of the Indian child's best interests. These issues typically arise when application of ICWA would result in removal of an Indian child from a non-Indian home to which she has developed an emotional attachment. In such situations, the relevant legal question is whether the extent of bonding and emotional attachment an Indian child has developed with their current non-Indian caregivers constitutes good cause to deviate from ICWA's placement preferences. Here, the federal Bureau of Indian Affairs has provided valuable guidance to state courts in the practical application of ICWA. Those Guidelines define good cause for purposes of deviating from ICWA's placement preferences. [1] The BIA ICWA Guidelines provide that only the most "extraordinary" emotional needs, as established by qualified expert witness testimony, are good cause.

First, a word of evidentiary caution: expert witness evidence should be reviewed and presented with extreme care. Courts ought to assure themselves that the expert is qualified not only in child developmental psychology but also in the unique needs of Indian children and the ICWA. A "qualified expert" should have expertise beyond the normal social worker qualifications. *In re Appeal in Pima County Juvenile Action*, 130 Ariz. 202, 635 P.2d 187, 189 (1981). Some states' juvenile court rules give preference to experts with knowledge and experience with Indian families and cultural standards over experts who do not have such training or experience. *E.g*., Cal. Rules of Court, Rule 1439(a)(10)(C).

Unfortunately, Washington courts have not adopted this view. In *In re Mahaney*, the Washington Supreme Court held that when the testimony offered "does not inject cultural bias or subjectivity," an expert witness with "specialized training for the medical psychological and special needs of the children" was sufficient under ICWA "even though such experts lack special knowledge of and sensitivity to Indian culture." 146 Wash. 2d at 897. Accordingly, Washington state courts may now allow testimony from experts with little or no exposure to the unique cultural, social, and developmental issues facing Indian children, and are not required to give such testimony less weight than testimony from experts well versed in Indian culture, society, and traditional knowledge. This outcome obviously subverts the clear and unequivocally expressed Congressional intent that ICWA be applied to reverse state courts' historic insensitivity to the unique cultural values and norms of Indian communities.

Second, evidence of the emotional needs of the child must also be evaluated in light of the BIA ICWA Guidelines' proscription that only the most "extraordinary" cases rise to the level of good cause. The ordinary bonding that one could reasonably expect to observe between a one year old and the only caregiver he has known is not extraordinary. When faced with this issue, the Montana Supreme Court observed:

> The emotional attachment between a non-Indian custodian and an Indian child should not necessarily outweigh the interests of the Tribe and the child in having that child raised in the Indian community . . . . Moreover, a conclusion that an Indian child should be placed with a non-Indian foster parent because of a strong emotional bond is essentially a determination that it is in the child's best interests to be so placed. [W]hile the best interests of the child is an appropriate and significant factor in custody cases under state law, it is an improper test to use in ICWA cases because the ICWA expresses the presumption that it is in the Indian child's best interests to be placed in accordance with statutory preferences. To allow emotional bonding--a normal and desirable outcome when, as here, a child lives with a foster family for several years to constitute an "extraordinary" emotional need would essentially negate the ICWA presumption.

In re C.H., 997 P.2d 776, 783-849 (Mont. 2000) (citations omitted, emphasis added). The Montana high court thus reversed a lower court finding of good cause that was based primarily on evidence of the two-year-old child's strong psychological bond with the caregivers it had been placed with when released from the hospital at three months old. *Id.* at 77879. The court noted there was no testimony that the child "was certain to develop an attachment disorder" if removed from the current placement, and found that the child's need for a safe, secure and stable environment does not constitute an extraordinary physical or emotional need as contemplated by the ICWA. *Id.* at 785.

ICWA's good cause standard requires something other than the traditional state law conception of a child's best interests, under which considerable weight is typically given to the ordinary emotional bonding between a child and their current caregiver. ICWA, by contrast, establishes that the best interests of the *Indian* child are complex and necessarily include consideration of the Indian child's interest in being raised in an Indian community.

III. Conclusion

State court resistance to faithful application of ICWA can be overcome. To do so may require clear and forceful advocacy, and possibly legislation, aimed at reversing recent decisions that undermine ICWA's goals. Such efforts should be directed, in part, at ensuring that the best interests standard is not applied in Indian child custody cases in a manner that undermines ICWA's purpose to promote connections between Indian children and their tribes. Rather, if applied at all, the best interest standard should be reconceptualized so as to give full consideration to the

distinct cultural interests of Indian children, and to the finding of Congress that it is in the best interests of Indian children to foster their knowledge of, understanding and involvement with their native heritage and Indian communities.

Cases Cited

Cherokee Nation v. Georgia, 30 U.S. 1 (1831)

In re Appeal in Pima County Juvenile Action, 130 Ariz. 202, 635 P.2d 187 (1981)

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Resources and Further Reading

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The Indian Child Welfare Act, 25 U.S.C. " 1901 et seq.,

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[1] The BIA ICWA Guidelines provide that:

> [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 . . .

44 Fed. Reg. 67584, 67594 ' F.3(a)