

ACHIEVING PERMANENCY FOR AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: LESSONS FROM TRIBAL TRADITIONS

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One of the many challenges facing the American child welfare system is the need for practices that are responsive to the unique cultural needs of the children who are placed in foster care.¹ The goal of achieving permanent, stable placements for children in the child welfare system is an over-arching objective, but “permanency” is a chameleon term in the child welfare world whose meaning varies from context to context and culture to culture. Over 500,000 children are currently in foster care across the United States, representing different races, ethnicities, and cultural backgrounds.² In this article, I explore the concept of permanency in child

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¹ A growing body of literature has identified the inadequacies and biases of the American child protection system in a multi-cultural society. See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS* (2002) (criticizing pervasive racial disparities in the child protection system, particularly over-representation of African-American children in foster care); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997); Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence,”* 34 CAP. U. L. REV. 405 (2005) (contending that permanent guardianships with kinship caregivers, especially within African-American communities, may provide superior permanency alternative to adoption); Theresa Hughes, *The Neglect of Children and Culture: Responding to Child Maltreatment with Cultural Competence and a Review of Child Abuse and Culture: Working with Diverse Families*, 44 FAM. CT. REV. 501 (2006) (praising movement toward “cultural competence” in legal representation of families in child protection proceedings); Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237 (2004) (criticizing child welfare system for preferring adoption over other forms of extended-family caregiving more prevalent in minority cultures).

² According to the most recent data from the U.S. Department of Health and Human Services, 510,000 children were in foster care on September 30, 2006, and of that group,
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welfare proceedings involving American Indian and Alaska Native children: a population that is still over-represented among the nation's foster children, despite the strides of the last three decades.³

Two federal laws with contrasting approaches to permanency have particular relevance: the Indian Child Welfare Act of 1978⁴ (ICWA) and

two percent were identified as American Indian/Alaska Native, thirty-two percent as Black, nineteen percent as Hispanic, and forty percent as white non-Hispanic. *See* ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008 (14), at 2 (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf [hereinafter AFCARS REPORT].

³ The Child Welfare League of America reports that for every one thousand American Indian/Alaska Native children in 2003, at least twelve were in foster care; in contrast, for every one thousand white children, five were in foster care. *See* CHILD WELFARE LEAGUE OF AM., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM (2005), http://ndas.cwla.org/research_info/publications/ (follow "Children of Color in the Child Welfare System (summary)" hyperlink). According to another study, American Indian and Alaskan Native children are over-represented in foster care at more than 1.6 times the expected level. NAT'L INDIAN CHILD WELFARE ASS'N & THE PEW CHARITABLE TRUSTS, TIME FOR REFORM: A MATTER OF JUSTICE FOR AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN 5 (2007), http://www.pewcenteronthestates.org/topic_category.aspx (follow "Foster Care" hyperlink; then follow "Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children" hyperlink) [hereinafter TIME FOR REFORM]. In some states, the proportion of children in foster care who are American Indian exceeds fifty percent. *Id.* at 16. While the over-representation of Indian children in the foster care system continues, it seems to have decreased in recent years. The latest population estimates from the Census Bureau show that American Indian and Alaska Native children comprise about 1.7 percent of the general population in the United States under the age of eighteen. *See* POPULATION DIV., U.S. CENSUS BUREAU, TABLE 2: ANNUAL ESTIMATES OF THE POPULATION BY SEX AND SELECTED AGE GROUPS FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2007 (2008), <http://www.census.gov/popest/national/asrh/NC-EST2007-sa.html>; POPULATION DIV., U.S. CENSUS BUREAU, TABLE 4: ANNUAL ESTIMATES OF THE AMERICAN INDIAN AND ALASKA NATIVE ALONE OR IN COMBINATION POPULATION BY SEX AND AGE FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2007 (2008), <http://www.census.gov/popest/national/asrh/NC-EST2007-asrh.html>. Federal data, however, shows that American Indian and Alaska Native children constitute about two percent of the total children in foster care. *See* AFCARS REPORT, *supra* note 2, at 2. The reported foster care population does not include Indian children placed in foster care through tribal child welfare systems.

⁴ 25 U.S.C. §§ 1901–1934 (2006).

the Adoption and Safe Families Act of 1997⁵ (ASFA). While permanency, a centerpiece of ASFA, is not mentioned in ICWA, permanency as a goal for Indian children is consistent with the basic themes of ICWA. Examples from tribal law and traditions reveal that tribes themselves value continuity and stability for children in their primary caregiving relationships.⁶ At the same time, tribes often embrace more fluid approaches to permanency than are contemplated under ASFA.⁷ These alternative conceptions of permanency reflect the tribes' traditions of shared child-rearing and collective responsibility for children. While a few state courts have begun to recognize tribal care-giving traditions in applying ASFA's command to achieve permanency for foster children,⁸ child welfare laws across the country still favor the permanency model of parental rights termination followed by adoption.

Part I of this article summarizes the operation of ICWA and ASFA with respect to child placements and explores the ways in which the two statutory schemes diverge. I focus on two dimensions: first, the differing standards within each statute that state child welfare authorities must satisfy before removing children from their homes, and, second, ASFA's guidelines requiring state officials to take steps toward permanency when a child has been out of the home for a defined period of time. In each context, I suggest how ICWA and ASFA together can accommodate the unique concerns of Indian children and Indian tribes. Part II describes several illustrative cases under ICWA in which state courts grapple with the concept of permanency for Indian children. Those decisions reach results that are at odds with each other and, in some instances, with the interests of the children as defined by ICWA. Finally, Part III explores alternative approaches to permanency under tribal law. Drawing on tribal

⁵ Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

⁶ See *infra* Part III.

⁷ See *infra* Part III.

⁸ See, e.g., *In re Welfare of Children of B.W.*, No. A07-612, 2007 WL 2417331 (Minn. Ct. App. Aug. 28, 2007), discussed *infra* notes 256-66 and accompanying text. Significantly, a bill pending in the California legislature would permit state courts to recognize traditional or customary adoption as an alternative permanency plan for Indian children even though such adoptions may occur without termination of parental rights. See Assemb. B. 2736, 2007-08 Leg., Reg. Sess. (Cal. 2008) (proposing amendment to section 366.26 of the California Welfare & Institutions Code).

code provisions as well as tribal court opinions from several tribes, I highlight tribal concepts of open adoption, customary or traditional adoption, extended family care, and “suspension” of parental rights. Many tribes offer a different path toward providing care for children in need, one that avoids the all-or-nothing approach to parental rights that is typically found in state law.⁹ These traditions may be more accessible today than in the past because of the greater willingness among tribes to spell them out in codes and published court decisions. Thus, state judges and child welfare officials have the opportunity today to redefine permanency for purposes of ICWA and ASFA to include a variety of stable care-giving arrangements embraced by tribes themselves.

I. THE COMBINED IMPACT OF ICWA AND ASFA

A. *The Indian Child Welfare Act*

The Indian Child Welfare Act (ICWA) was a response to a long history of destructive practices by state and federal governmental officials that decimated Indian families, a history that was brought to light in lengthy hearings before Congress in the 1970s.¹⁰ The practices included the forced relocation of Indian children from their homes into distant Bureau of Indian Affairs (BIA) residential schools, the placement of Indian children in foster care by state welfare workers, and the paternalistic if not racist efforts to secure children for the Indian Adoption Project.¹¹ In the

⁹ See *infra* Part III.

¹⁰ See *Indian Child Welfare Act of 1978: Hearing Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 95th Cong. (1978); *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1977) [hereinafter *1977 Hearings*]; *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter *1974 Hearings*]. For a detailed summary of the congressional hearings, see Russel Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980). The impact of adoption, boarding school placements, and child welfare removals on Indian families is vividly recounted in William Byler, *The Destruction of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 16–20 (Stephen Unger ed., 1977).

¹¹ See generally H.R. REP. NO. 95-1386 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530; see also VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 241 (1983) (describing the BIA’s early efforts to develop “off-reservation boarding schools designed to inculcate Indian children with the virtues and values of Western

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effort to “civilize” the Indian by eradicating all vestiges of Indian culture, the boarding schools typically prohibited residents from speaking Native languages or engaging in Native religious rituals.¹² State child welfare officials similarly worked to “protect” Indian children by removing them from their families and tribes and placing them with non-Indian caregivers.¹³ The bias and cultural myopia of state child welfare authorities surfaced in a variety of ways: in particular, they too readily concluded that children who were being cared for by extended family were the victims of neglect, and they too often characterized impoverished parents as unfit.¹⁴ At the same time, the Indian Adoption Project mobilized state authorities to identify Indian children for adoption by white couples.¹⁵ As a result of the confluence of these factors, by the second half of the twentieth century a disturbingly high proportion of Indian children lived in out-of-home care.¹⁶

In drafting ICWA, Congress recognized that these practices not only harmed Indian children but also destroyed Indian families and tribes in the

civilization and to eliminate the traces of tribal ‘barbarism’ that their own heritage was thought to represent”).

¹² See DELORIA & LYTLE, *supra* note 11, at 241. Ironically, some BIA residential schools today are heralded by Indians as beneficial for Indian children precisely because they teach children about their Native cultures in a safe living environment away from the rampant socio-economic problems that continue to plague most reservations. See Charla Bear, *American Indian School a Far Cry from the Past*, NPR, May 13, 2008, <http://www.npr.org/templates/story/story.php?storyID=17645287>.

¹³ See generally H.R. REP. NO. 95-1386.

¹⁴ *Id.*

¹⁵ For a decade beginning in 1958, the Child Welfare League of America collaborated with the BIA and social workers across the country to facilitate the adoption of almost 400 Indian children into non-Indian families. See Arnold L. Lyslo, *Background Information on the Indian Adoption Project: 1958 through 1967*, in DAVID FANSHEL, *FAR FROM THE RESERVATION* 35–49 (1972). In fairness, Lyslo, the project director, stated that the overarching objective was for Indian children to have “a good life within their own family, or at least with a family of their own tribal heritage.” *Id.* at 49. When that goal was impossible, however, the project placed Indian children in non-Indian families, and Lyslo concluded the children had adjusted well. *Id.*

¹⁶ By the 1970s, Congress found that in some states more than one-fourth of all Indian children were living in out-of-home placements. See *1977 Hearings*, *supra* note 10, at 538, 603 (reporting comparative rates of foster and adoptive placements of Indians and non-Indians).

process.¹⁷ The focus of ICWA is accordingly twofold: the protection of Indian children against unnecessary removals from their families and tribes, and the protection of tribes and tribal authority from encroachment by state or federal authorities.¹⁸ Through ICWA, Congress attempted to restore judicial power to tribes over child welfare matters involving “Indian children,” and it erected barriers to the removal of Indian children from their homes.¹⁹ In contrast to ASFA, which was enacted almost twenty years later, ICWA does not explicitly address the concept of “permanency” in child welfare placements and does not mandate permanency plans for Indian children in foster care.²⁰ Although testimony about the harm to Indian children caused by unstable foster care placements did surface during ICWA hearings,²¹ Congress did not legislate for permanency in the Act. Instead, Congress focused on the goals of

¹⁷ The congressional findings at the outset of ICWA affirm that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children” and that “an alarmingly high percentage of Indian families are broken up by the removal . . . 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.” 25 U.S.C. § 1901(3)–(4) (2006).

¹⁸ The House Report described ICWA’s placement preferences as seeking “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” H.R. REP. NO. 95-1386, at 23.

¹⁹ *Id.* at 21.

²⁰ *Id.* at 23.

²¹ Dr. Joseph Westermeyer, one of the key witnesses on the topic of psychological harm to Indian children from child welfare abuses, testified that most of the Indian children who exhibited problems were those in foster care rather than those who were adopted. 1974 *Hearings*, *supra* note 10, at 45 (statement of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota). According to Dr. Westermeyer, Indian children in foster care suffered from “chronic insecurity, free floating anxiety, [and] panic reactions.” *Id.* Similarly, William Byler, Executive Director of the Association of Indian Affairs, expressed concern that Indian children were more likely to be placed in foster care than be adopted. *See id.* at 24 (statement of William Byler, Executive Director, Association of Indian Affairs). Dr. Westermeyer is better known for his testimony about the negative psychological repercussions among Indian children of placement in non-Indian homes, especially psychological difficulties emerging in adolescence. *See id.* at 46 (statement of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota). His testimony was based on informal observations in his clinical practice and has been justifiably criticized. *See* RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 500–03 (2003).

enhancing tribal sovereignty over child welfare matters and of ensuring that Indian children would remain in the care of Indian custodians to the greatest extent possible.²²

The primary focus of ICWA is foster care placements, adoptions, voluntary relinquishments and parental rights terminations involving Indian children, and it defers to tribes on the central question of whether a child is an “Indian child.”²³ The Act defines “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.”²⁴ Consistent with the federal policy of tribal self determination underlying ICWA, the Act looks to tribal definitions of membership, however broad or narrow.²⁵ Although the categorical nature of tribal membership may seem out of sync with the multi-racial world of the twenty-first century, tribal identity remains a fundamental aspect of Native people’s sense of self.²⁶ Moreover, tribal

²² The declared policy of ICWA is:

[T]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

²⁵ U.S.C. § 1902.

²³ *Id.*

²⁴ *Id.* § 1903(4). Deference to tribal definitions of membership is in keeping with the Act’s endorsement of tribal self-determination. In the same year that ICWA was enacted, the Supreme Court recognized that the power to determine membership is central to a tribe’s “existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

²⁵ The judicially-created “existing Indian family exception” that has been endorsed by more than a dozen state courts has no statutory basis and directly conflicts with the federal policy of tribal self-determination. For an informative review and rejection of the doctrine, see *In re Vincent*, 59 Cal. Rptr. 3d 321, 330–40 (Ct. App. 2007).

²⁶ As Christine Zuni Cruz states: “We are ‘Indian’ because we belong to a tribal community. Our identity arises from our relationship to a community.” Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyer for Indigenous Peoples*, 82 N.D. L. REV. 863, 873 (2006).

membership is not a racial categorization *per se* but a political association.²⁷ While tribal membership has been linked to blood quantum criteria since the late 1800s under compulsion of federal law,²⁸ some of the 562 federally recognized tribes in the United States have loosened their membership requirements in the face of rising rates of intermarriage between Indians and non-Indians.²⁹ Moreover, not all tribes impose a blood quantum measure.³⁰ As a result, many children of blended heritage are eligible for tribal membership.³¹ With their multi-ethnic backgrounds and complex identities, such children pose challenging issues under ICWA in regard to placement.³²

²⁷ The characterization of tribal membership as political rather than racial has been a central plank in constitutional analysis of laws distinguishing Indians from non-Indians for many years. *See* *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (upholding constitutionality of Indian hiring preferences under Indian Reorganization Act as political rather than racial classification). Due in large part to the Indian Reorganization Act of 1934, many tribes adopted constitutions tailored to meet the BIA's model, including tribal membership requirements. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 447 (2002).

²⁸ Blood quantum requirements were imposed on tribes by the federal government in the late nineteenth century when the U.S. Department of the Interior began to compile rolls of Indians for purposes of distributing benefits and allocating property. *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

²⁹ *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 173–75 (Nell Jessup Newton ed., LexisNexis 2005) (1941). A complete listing of all federally recognized tribes is published in the Federal Register. *See* Indian Entitles Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 73 Fed. Reg. 18553 (April 4, 2008).

³⁰ COHEN, *supra* note 29, at 174 (noting that some tribes permit any descendant of a tribal member to be enrolled, regardless of blood quantum). The Oglala Sioux, for example, have eliminated blood quantum requirements from the membership determination and substituted a residence requirement. *See* CONST. & BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION art. II, § 1(b) (declaring membership to include “[a]ll children born to any member of the tribe who is a resident of the reservation at the time of the birth”).

³¹ COHEN, *supra* note 29, at 174.

³² *See, e.g., In re Liliana S.*, 10 Cal. Rptr. 3d 553 (Ct. App. 2004) (affirming placement of children of mixed heritage with non-Indian paternal grandmother over tribe's objection); *In re Baby Boy Doe*, 902 P.2d 477 (Idaho 1995) (affirming placement of child of mixed

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The Act has important jurisdictional provisions that reaffirm a central role for tribal courts in child welfare matters involving tribal children.³³ These include the recognition of exclusive tribal jurisdiction for children currently residing or domiciled on reservations,³⁴ concurrent jurisdiction with state courts for non-reservation Indian children,³⁵ and a mechanism for transferring cases from state court to tribal court.³⁶ Since a majority of children identified as American Indian or Alaska Native live off reservation land,³⁷ the role of the state courts under the Act is of great practical significance and is the focus of this article. The Act also grants procedural rights to tribes and Indian parents, including the right to notice of the proceeding³⁸ and a right to intervene in state court actions.³⁹ A

heritage with non-Indian adoptive family where placement was supported by non-Indian mother but opposed by tribe).

³³ In this respect, ICWA promotes self-determination for Indian tribes unambiguously. In other domains of civil jurisdiction and in criminal jurisdiction, the support for tribal court autonomy is less clear. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribe lacked jurisdiction over tribal member's civil action against state game wardens for conduct within reservation boundaries); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 333–34 (2001) (criticizing holding in *Nevada v. Hicks* for misusing the Court's precedents); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006) (criticizing gaps in tribal criminal jurisdiction and advocating broad expansion of tribal criminal authority).

³⁴ 25 U.S.C. § 1911(a) (2006) (providing for exclusive jurisdiction in tribal court over child welfare proceedings involving Indian children who reside or are domiciled on reservation or are wards of tribal court).

³⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

³⁶ 25 U.S.C. § 1911(b) (providing for transfer of jurisdiction to tribal court on request of parent, Indian custodian, or tribe, unless good cause to contrary is shown, or either parent objects). Although this transfer provision has been characterized as creating presumptive tribal jurisdiction, the Act expressly gives either parent an absolute veto. *Holyfield*, 490 U.S. at 36.

³⁷ *See* C. MATTHEW SNIPP, POPULATION REFERENCE BUREAU, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: RESULTS FROM THE 2000 CENSUS 9 (2005) (reporting that in 2000 only twenty-nine percent of all American Indian and Alaska Native children lived on Indian lands).

³⁸ Congress mandated notice to tribes for involuntary proceedings but not for voluntary proceedings. *See* 25 U.S.C. § 1912(a) (requiring notice to parent or Indian custodian and tribe “[i]n any involuntary proceeding in a State court”). The policy of not requiring notice

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tribe's right to intervene and weigh in on issues affecting a child member, such as placement options, can richly inform state court decision-making, but at least a few state courts have not been receptive to the tribes' proffered viewpoint.⁴⁰

In order to reduce the high proportion of Indian children who were living in non-Indian foster homes or institutions, Congress imposed standards for removal that are significantly more rigorous than the standards applicable to non-Indian children. A party seeking to place an Indian child in foster care or to sever the rights of the child's parents must show that "*active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."⁴¹ As explained below, this standard is more demanding than the "reasonable efforts" requirement of ASFA, and the distinction has produced some muddled case law.⁴² Moreover, under ICWA the burden of proof for foster care placement is "clear and convincing evidence" that continued custody of the child by the parent or Indian custodian is likely to result in "serious emotional or physical damage to the child."⁴³ For terminations of parental

for voluntary proceedings has been criticized as insufficiently protective of tribal interests and inconsistent with other provisions of the Act. See B.J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK* 86 (2d ed. 2008).

³⁹ 25 U.S.C. § 1911(c) (providing Indian custodian and child's tribe right to intervene in foster care placement or termination of parental rights). Interestingly, the intervention right is not extended to the child, nor does it apply generally to voluntary adoption proceedings. JONES, *supra* note 38, at 86. Intervention, of course, may be granted on a discretionary basis under a state's civil procedure rules. See *In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005) (permitting tribe to intervene under state law in voluntary proceeding governed by ICWA).

⁴⁰ For an example of overt hostility expressed by the trial judge toward the tribal attorney, see *In re Nicole B.*, 927 A.2d 1194, 1201–04 (Md. Ct. Spec. App. 2007) (noting trial judge's sarcastic remarks to tribal attorney in litigation concerning state agency's duty under ICWA to make active efforts to reunify family).

⁴¹ 25 U.S.C. § 1912(d) (emphasis added).

⁴² See *infra* notes 76–82 and accompanying text.

⁴³ 25 U.S.C. § 1912(e) (for foster care placement, court must find by clear and convincing evidence, "including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child").

rights, the petitioner must meet the highest burden of proof in civil law—“beyond a reasonable doubt.”⁴⁴ Because of evidence that state courts historically had found parental neglect by Indian parents through a biased lens and without an adequate evidentiary foundation,⁴⁵ Congress imposed a requirement that the showing of harm must include the testimony of “qualified expert witnesses.”⁴⁶ While the term is not defined in the Act, a qualified expert witness under the nonbinding BIA Guidelines includes, but is not limited to, witnesses with specialized knowledge of tribal practices and traditions.⁴⁷ The reported case law reveals that witnesses with expertise in tribal culture have been a source of contentious litigation, especially when a tribe’s expert favors a placement that comports with tribal traditions but conflicts with the state’s view of the child’s needs.⁴⁸

The most important substantive provision of ICWA is 25 U.S.C. § 1915, prescribing a set of preferred options for foster care, pre-adoptive, and adoptive placements of Indian children.⁴⁹ Rather than placing an emphasis on permanency *per se*, ICWA instead emphasizes familial and

⁴⁴ *Id.* § 1912(f) (for parental rights termination, court must find beyond reasonable doubt, “including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”). Congress did not spell out the extent to which the heightened burdens of proof apply to other showings required under ICWA—such as the active efforts requirement—and state courts are in disagreement.

⁴⁵ See H.R. REP. NO. 95-1386, at 10 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7532.

⁴⁶ See 25 U.S.C. § 1912(e)–(f).

⁴⁷ See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) (hereinafter BIA Guidelines). In addition to tribal members and expert witnesses with specialized knowledge of tribal customs, the Guidelines also identify “[a] professional person having substantial education and experience in the area of his or her specialty.” *Id.* By their own terms, the Guidelines are not binding on states. See *id.* at 67,584. However, a few state courts have adopted portions of the Guidelines by court ruling. See, e.g., *In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994) (endorsing the Guidelines’ definition of “good cause” as used in 25 U.S.C. § 1915).

⁴⁸ See, e.g., *In re Adoption of Sara J.*, 123 P.3d 1017, 1032 (Alaska 2005) (weighing conflicting expert testimony on whether Yup’ik children’s cultural needs could be met in non-Indian placement and ultimately rejecting tribe’s position).

⁴⁹ See 25 U.S.C. § 1915(a)–(b).

tribal connections.⁵⁰ The adoptive preferences are, in order, a member of the child's extended family, other members of a child's tribe, or other Indian families.⁵¹ The Act requires that state courts follow these preferences unless there is "good cause to the contrary."⁵² The Act provides a similar but slightly different array of placement options for foster care, prefaced with the mandate that the placement be "in the least restrictive setting which most approximates a family and in which [the child's] special needs, if any may be met."⁵³ The Act's requirement that a foster care placement be in a setting that most resembles a family suggests that Congress wanted family-like settings, as opposed to group homes or institutional placements. While permanency is also a characteristic of families, the legislative history indicates that Congress's attention was not focused on the concept of permanency.⁵⁴ Notably, "good cause" is not defined by statute, but the BIA Guidelines set forth factors for state courts to consider in determining whether good cause exists to deviate from the

⁵⁰ *See id.*

⁵¹ *Id.* § 1915(a).

⁵² *Id.* ("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.").

⁵³ *Id.* § 1915(b) ("Any child accepted for foster care or pre-adoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child."). The placement preferences for foster care or pre-adoptive placement are:

- (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 the Indian child's needs.

Id.

⁵⁴ Proposed amendments to ICWA in 1997 did focus on children's needs for permanency and stability, especially in adoptive placements. *See* S. 569 & H.R. 1082, 105th Cong. (1997) (requiring that tribes receive notice of voluntary adoptive placements in timely manner in order to avoid belated challenges and consequent disruption of placements).

preferred placements.⁵⁵ As will be seen, the good cause exception has generated conflicting state court decisions on the meaning of permanency for Indian children.

The tribal perspective may surface in a variety of ways in a placement dispute. First, the child's tribe may establish a different order of preference, and the state court or agency must defer to the tribe's order so long as the indicated placement is the "least restrictive."⁵⁶ At least a few tribes have formalized different placement preferences by resolution or code.⁵⁷ Second, "[t]he standards to be applied in meeting the preference[s] are] . . . 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."⁵⁸ This provision is clearly intended to move state courts away from their historical biases and misunderstandings. The common practice of sharing child-rearing responsibilities among extended family members, for example, was misinterpreted by state social workers as evidence of abandonment or neglect.⁵⁹ Thus, the Act directs courts to analyze Indian child placements through a tribal lens, something that is surely easier said than done.⁶⁰

⁵⁵ The BIA Guidelines list the following considerations as a basis for a finding of good cause: request of biological parents or child; extraordinary physical or emotional needs of child as established by testimony of qualified expert witness; or unavailability of suitable families for placement meeting the Act's criteria. *See* BIA Guidelines, *supra* note 47, at 67,594.

⁵⁶ 25 U.S.C. § 1915(c).

⁵⁷ *See, e.g.*, PASCUA YAQUI TRIBAL CIV. CODE ch. 7, § 210 (2009) (prescribing placement preferences that prioritize Yaqui and "local" placements over non-Yaqui and non-local placements); Pascua Yaqui Tribe v. Superior Court, No. F041800, 2003 WL 164977, at *9 (Cal. App. Jan. 24, 2003) (referring to Pascua Yaqui Tribal Resolution listing placement preferences that are distinct from those set out in ICWA).

⁵⁸ 25 U.S.C. § 1915(d).

⁵⁹ H.R. REP. NO. 95-1386, at 10–11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7532–33 (identifying social workers' bias or misunderstanding with regard to Indian extended family roles, child rearing practices, alcohol abuse, and poverty within Indian communities).

⁶⁰ The Act assumes, somewhat simplistically, that tribal culture and tradition are easily ascertained and seems to embrace a stereotypical and monolithic image of Indian culture. Recent work by Indian law scholars has emphasized that tribal customary law and cultural

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The Act's overall emphasis is on curbing abuses by state authorities, protecting Indian children from unnecessary removals and mandating respect for tribal authority.⁶¹ As the Supreme Court has noted, "It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities."⁶² Significantly, ICWA was not accompanied by adequate funding for tribal child welfare services, including funding for permanency planning.⁶³ The primary federal funding mechanism for foster care and adoption assistance programs, Title IV-E of the Social Security Act, has been in existence since 1980 but was only made available directly to tribes in 2008.⁶⁴ Given the historical backdrop to the Act, one can understand

beliefs are often submerged in the rhythms of daily life, narratives passed down by elders, and unrecorded traditions that are inaccessible to the outsider. *See, e.g.*, Cruz, *supra* note 26, at 890–94 (describing diversity of indigenous knowledge systems and emphasizing difficulty facing outsiders in trying to understand different ecosystems); Matthew L. M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007) (noting that tribal customary law is "undertheorized" and proposing models for discovering, recovering, and applying tribal customary law); Pat Sekaquaptewa, *Part II. Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking* (unpublished comment, manuscript on file with author) (using Hopi land dispute to illustrate difficulty of identifying complex and sometimes inconsistent tribal customs).

⁶¹ 25 U.S.C. § 1901.

⁶² *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44–45 (1989).

⁶³ Although ICWA authorized the appropriation of funds for tribal child and family service programs, 25 U.S.C. §§ 1931–1933, that funding "has barely been sufficient for some tribes to deal with the day-to-day problems associated with transferring state court cases and intervening in those cases, much less to confront family dysfunctions." JONES ET AL., *supra* note 38, at 111; *see also* Terry A. Cross, Kathleen A. Earle & David Simmons, *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAM. SOC'Y 49, 53–55 (2000) (praising ICWA for having returned responsibility for child welfare to tribes but criticizing Congress's failure to authorize funding for tribal juvenile courts and child welfare infrastructure).

⁶⁴ The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500, created Title IV-E of the Social Security Act, providing federal reimbursement for state foster care and adoption assistance expenditures. 42 U.S.C. §§ 670–679 (1994), *amended by* The Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115. Until 2008, tribes had to enter into agreements with states to receive Title IV-E

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why permanency was not a centerpiece of congressional concern. The problem as seen in 1978 was not so much that Indian children were stranded in the harmful limbo of foster care; the problem occupying Congress's attention was that Indian children were being removed from their families too readily and were being placed in non-Indian homes—whether foster or adoptive. As a result, the question of whether Indian children “needed” permanency and, if so, whether state court notions of permanency should govern, was not the focus of Congress's reform efforts.

B. The Adoption and Safe Families Act

Flash forward to the 1990s. After two decades of emphasis on family preservation and reunification, federal child welfare policy outside the context of Indian children began to move toward an emphasis on permanency.⁶⁵ Through the Adoption and Safe Families Act (ASFA),

Foster Care and Adoption Assistance funding, and only about seventy tribes had negotiated such agreements by 2005. See Nat'l Indian Child Welfare Ass'n, *Direct Tribal Access to Title IV-E Would Provide New Resource Opportunities for Indian Communities* (2005), http://www.nicwa.org/policy/legislation/S672/IV-E_briefing.htm. Significantly, the Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA) was signed into law by President Bush on October 7, 2008. H.R. 6893, 110th Cong. (2008). Among other changes, the FCSIAA allows Indian tribes to have the same direct access as states to Title IV-E federal funding for foster care, adoption assistance, and relative guardianship, and Congress appropriated three million dollars to help tribes with start-up costs. The Act, which had the support of a broad range of child advocacy groups, also improves federal child welfare standards by encouraging financial assistance for relative guardians and permitting states to relax foster care standards for foster care in relatives' homes. See *infra* notes 83–90 and accompanying text; see also TIME FOR REFORM, *supra* note 3, at 3. The NICWA report promotes the Tribal Foster Care and Adoption Access Act of 2007, S. 1956, 110th Cong. (2007), a bill that was a precursor to FCSIAA. See also Nat'l Indian Child Welfare Ass'n, *Legislation: Government Affairs and Advocacy*, <http://nicwa.org/legislation/s1956> (last visited August 13, 2008).

⁶⁵ In a related vein, the Multiethnic Placement Act of 1994, Pub. L. 103–382, 108 Stat. 4056 (codified as amended at 42 U.S.C. § 1996b (2000)), was designed to reduce the large number of minority children in state care awaiting foster and adoptive homes. As amended, the Act bars state agencies from denying or delaying foster care or adoptive placements based on race or ethnicity. Provisions that are virtually identical to the Multiethnic Placement Act were included in ASFA. See 42 U.S.C. § 671(a)(18) (2000) (barring any state receiving federal funds from denying or delaying adoptive or foster placements on basis of “race, color, or national origin” of adoptive or foster parent or child). Interestingly,

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Congress amended existing federal child welfare legislation⁶⁶ to focus on children's safety at every stage, to reduce children's length of stay in foster care, and to promote adoption or other permanency options for those children unable to return home.⁶⁷ As a condition of receiving federal funds for foster care and child protective services, states had to comply with ASFA's new standards designed to shorten children's stay in foster care and to give priority to children's health and safety over other values.⁶⁸ As stated by one of the Act's sponsors, "The [major] objective of this Bill is to move abused and neglected kids into adopti[on] or other permanent homes and to do it more quickly and more safely than ever before."⁶⁹ Permanency under the ASFA typically means reunification or, alternatively, termination of parental rights and adoption, and the Act imposes strict time limits on efforts to achieve reunification.⁷⁰ This change in policy was based on the perception that too many children were languishing in foster care while state agencies made futile efforts to reunify

while the Multiethnic Placement Act includes language stating that it does not affect the application of ICWA, no comparable excluding language was included in ASFA. *See id.* § 1996b(3).

⁶⁶ The existing federal law consisted primarily of the Adoption Assistance and Child Welfare Act of 1980, which imposed extensive federal regulations on the states as a condition of receiving federal funding. *See supra* note 64 and accompanying text. In general, Congress hoped through AACWA to bar removals of children except where necessary for the child's safety and to require states to reunite the family whenever possible. *See* 42 U.S.C. § 671(a)(15)(B) (1994). The Act mandated that states make "reasonable efforts" to avoid unnecessary removals and to achieve family reunification. *See id.* According to one scholar, full implementation of AACWA was undermined by lax enforcement efforts at the federal level and an inadequate and distorted funding structure that effectively rewarded states for placing children in foster care. *See* Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 28–29 (2005).

⁶⁷ *See generally* Barbara Bennett Woodhouse, *The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 375, 381–83 (2000).

⁶⁸ *Id.* at 381, 384.

⁶⁹ 143 Cong. Rec. 25,439 (1997) (remarks by Senator Rockefeller).

⁷⁰ *See* 42 U.S.C. §§ 671(a)(15)(A)–(F), 675(5)(C) (2000); H.R. REP. NO. 105-77, at 13 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 2739, 2745–46; Woodhouse, *supra* note 67, at 381, 383.

the children with their birth families, and it was seen as a shift in emphasis from parents' rights to children's best interests.⁷¹

Congress included various mechanisms in ASFA for addressing the perceived problem of foster care limbo. One mechanism is the use of timelines to trigger mandated state actions, such as permanency planning or petitioning to terminate parental rights, after a child has remained in foster care for a designated period.⁷² In particular, a "permanency hearing" must be held within twelve months of removal,⁷³ and the state, subject to certain exceptions, must petition to terminate parental rights if a child has been in state care for fifteen of the past twenty-two months.⁷⁴ Significantly, one of the exceptions—when the child is being cared for by a relative at the option of the state—is a modest endorsement of kinship caregiving.⁷⁵ The Act also amended the existing obligation on states to make "reasonable efforts" at reunification by expanding the circumstances in which reasonable efforts are not required.⁷⁶ In effect, ASFA relieved the

⁷¹ As stated in the House Report on ASFA,

[t]here seems to be a growing belief that Federal statutes, the social work profession, and the courts sometimes err on the side of protecting the rights of parents. As a result, too many children are subject to long spells of foster care or are returned to families that reabuse them.

H.R. REP. NO. 105-77, at 13; *see also* Ramsey, *supra* note 66, at 29.

⁷² Under the existing Adoption Assistance and Child Welfare Act, permanency planning was to be initiated after the child had been in state care for eighteen months, and Congress chose to shorten that time frame in ASFA. *See* Woodhouse, *supra* note 67, at 381.

⁷³ 42 U.S.C. § 675(5)(C). The permanency plan may include reunification, termination of parental rights and adoption, legal guardianship, kinship placement, or, if there is a compelling reason, another planned permanent living arrangement. *Id.*

⁷⁴ *Id.* § 675(5)(E). Under the Act, the state need not petition for termination of parental rights if the child is being cared for by a relative at the option of the state, a compelling reason shows that petitioning to terminate parental rights would not be in the child's best interests, or the state failed to provide reasonable efforts to reunify the family as required by the Act. *Id.* § 675(5)(E)(i)–(iii).

⁷⁵ *Id.* § 675(5)(E)(i); *see also* David J. Herring, *Kinship Foster Care: Implications of Behavioral Biology Research*, 56 *BUFF. L. REV.* 495, 502 (2008) (noting that ASFA considers kinship placements to be "permanent" or at least stable enough to substitute for permanency).

⁷⁶ 42 U.S.C. § 671(a)(15)(D) (providing that reasonable efforts are not required when parent, for example, has subjected child to aggravated circumstances such as abandonment

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states from making remedial efforts in egregious cases involving certain serious crimes against a child or cases in which the parent has subjected the child to “aggravated circumstances” as defined by state law.⁷⁷ Moreover, the statute prioritizes permanency over reunification by redefining the mandated reasonable efforts: “if continuation of reasonable efforts [to preserve and reunify the family] is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan.”⁷⁸ At the same time, ASFA continued the federal government’s financial incentives for states to remove children from foster care for adoption⁷⁹ and authorized concurrent planning, that is, engaging in reunification efforts while also planning for out-of-home adoption.⁸⁰ Congress wanted to remove barriers to adoption and thus included provisions designed to facilitate interstate placements and to increase adoption subsidies for children with special needs.⁸¹ ASFA then places a strong thumb on the scale favoring termination of parental rights and adoption into a new family, a policy explicitly endorsed by the Administration.⁸²

Fortunately, Congress has gone further in recognizing alternatives to adoption in the recently enacted Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA) by explicitly authorizing kinship guardianship assistance where neither reunification or adoption is an appropriate permanency option for the child.⁸³ Under the structure of

or chronic abuse, when parent has murdered another child, or parent’s parental rights to sibling have been terminated).

⁷⁷ *Id.*

⁷⁸ *Id.* § 671(a)(15)(C).

⁷⁹ *Id.* § 673b (authorizing adoption incentive payments to states for foster child adoptions, special needs adoptions, and older child adoptions).

⁸⁰ *Id.* § 671(a)(15)(F).

⁸¹ *See id.* § 673(c) (defining “special needs” to include children who, because of disability, age, or racial background, cannot be placed for adoption without financial assistance).

⁸² *See* Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 3–4 (2001) (describing “ideology of ideal family” that pervades ASFA and child welfare policy in general).

⁸³ Pub. L. No. 110-351, § 101(b)(3)(A), 122 Stat. 3949 (2008) (amending 42 U.S.C. § 673(d)). The FCSIAA’s impact on tribal foster care funding is discussed at *supra* note 64.

the new law, states that choose to provide financial assistance to relatives who become legal guardians of children eligible for foster care can seek reimbursement from the federal government.⁸⁴ Thus, the new federal law does not mandate kinship guardianship assistance but does provide a mechanism for reimbursement if a state decides to offer such assistance. In other measures that favor extended family care, FCSIAA permits states to waive non-safety foster care standards on a case-by-case basis for foster care in relatives' homes.⁸⁵ In an effort to increase the likelihood of a child being placed with relatives, Congress in the new Act also requires states to make efforts to identify and notify all adult relatives of a child who is removed from a parent to apprise them of the removal and the options available for kinship care assistance.⁸⁶ In addition, the Act authorizes matching grants to state and tribal child welfare agencies for family preservation services targeting families where the children have been removed or are at risk of being removed, including services for kinship caregiver families and the use of family group decision-making.⁸⁷

Some proponents have praised FCSIAA as the most important federal statutory reform in child welfare since AFSA.⁸⁸ In implementing the law, state and federal officials should seek to maximize support for relative

⁸⁴ *Id.* § 101(a)(3) (amending 42 U.S.C. § 671(a)).

⁸⁵ *Id.* § 104(a)(2) (amending 42 U.S.C. § 671(a)(10)).

⁸⁶ *Id.* § 103 (amending 42 U.S.C. § 671(a) (requiring states within thirty days after removal of child to exercise due diligence to identify and notify all adult relatives and to provide information to them about options for kinship care, foster family homes, guardianship assistance, and other related services)).

⁸⁷ *Id.* § 102 (amending 42 U.S.C. §§ 620–629i). Family group decision-making is a process growing in popularity in juvenile courts that engage family members in developing plans to nurture at-risk children and protect them from family violence. It is particularly well-suited for addressing the needs of American Indian children in foster care, since the process of involving family members in case planning comports with the caregiving role of extended family in most tribes. *See infra* note 220 and accompanying text.

⁸⁸ Press Release, U.S. Congressman Jim McDermott, Rep. McDermott's Foster Care Legislation Signed Into Law (Oct. 8, 2008), *available at* <http://www.house.gov/mcdermott/pr081008.shtm> (according to Congressman Jim McDermott, one of the bill's sponsors, the legislation "marks the most significant reform of America's child welfare system in more than a decade"); Press Release, The Pew Charitable Trusts, New Law is Designed to Improve Lives, Outcomes of Nation's Foster Children and Youth (Oct. 8, 2008), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=45008.

foster care and kinship guardians. Although FCSIAA represents a meaningful recognition of the role that extended family can play in caring for children as an alternative to adoption, it did not change the prioritized role that adoption holds under ASFA.⁸⁹ Indeed, it enhances the incentives for adoption by providing a special financial bonus to the states for the adoption of older children and increases the incentive for adoption of children with special needs.⁹⁰

The success or failure of ASFA's innovations is hard to measure. By most accounts, the American child welfare system remains deeply flawed.⁹¹ Over half a million children were in foster care as of 2006, with the average length of stay exceeding two years, and certain racial minorities continue to be over-represented.⁹² Moreover, despite a decline in the number of foster children nationwide in the last five years, the

⁸⁹ See generally Fostering Connections to Success and Increasing Adoptions Act of 2008 §§ 101–104 (providing resources for guardianships but does not change ASFA's preference for adoption).

⁹⁰ *Id.* § 401(c) (amending 42 U.S.C. § 673b(d)(1)).

⁹¹ See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 192–96 (2005) (noting that children are more likely to be placed in foster care because of poverty than abuse and criticizing failure of child welfare system to focus on family preservation and reunification); PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 7 (2004), <http://pewfostercare.org/research/docs/FinalReport.pdf> (evaluating foster care system and recommending reforms of federal child welfare financing and strengthening of judicial oversight of children in foster care); ROBERTS, *supra* note 1, at 95 (describing biased decision making at crucial stages in case processing, leading to over-representation of African-American children in foster care nationwide); Adler, *supra* note 82, at 9–13 (criticizing AFSA for its opposing dualities of reunification versus adoption and suggesting that decision makers should have broader array of options from which to choose); Coupet, *supra* note 1, at 411 (contending that excessive focus on adoption harms children by disregarding value of long-term kinship care); Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 34 (2001).

⁹² See AFCARS REPORT, *supra* note 2, at 1–2. According to the latest government data, the average length of stay in foster care in 2006 was 28.3 months, and approximately 129,000 children were “waiting to be adopted,” meaning children “who have a goal of adoption and/or whose parental rights have been terminated.” *Id.* at 1, 5.

number of foster children in some states has steadily climbed.⁹³ More specifically, the shift in federal policy under ASFA has garnered pointed criticism. Commentators have noted that ASFA's timelines and other mandates set unrealistic standards for parents struggling to overcome substance addiction.⁹⁴ Critics argue that parents who have made good faith efforts to comply and might achieve rehabilitation if given more time are being prematurely deprived of their parental rights.⁹⁵ Children, in turn, lose the chance to grow up with their birth families.⁹⁶ Furthermore, even after terminations of parental rights, children may still face long-term foster care if no other permanency option becomes available.⁹⁷

The provisions of the newly adopted FCSIAA will ameliorate some of these identified problems. The availability of federal grants for family-preservation programs and family-group conferencing is a modest step toward greater support for birth families. The availability of kinship

⁹³ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE FY2000–FY2005 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2007), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2005.htm (showing that while the foster care populations of several populous states decreased, almost two-thirds of the states had an increase in foster care populations).

⁹⁴ See ROBERTS, *supra* note 1, at 138 (contending that ASFA shortened time in which parents must recover from addiction but did not strengthen programs for drug treatment); M.J. HANNET, *Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights*, 45 FAM. CT. REV. 524, 529 (2007) (noting that ASFA's incentives for parental rights termination and adoption impedes effective rehabilitation efforts); Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243 (1999).

⁹⁵ See HANNET, *supra* note 94, at 526; Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 81 (1999).

⁹⁶ See Roberts, *supra* note 95, at 81.

⁹⁷ According to recent federal data, foster children typically remained in foster care for a year or more after their parents' rights were severed. See AFCARS REPORT, *supra* note 2, at 7; see also Adler, *supra* note 82, at 11–12 (noting that adoptive homes are in short supply and that children who are older, minority, or disabled often remain in foster care long after parental rights terminations); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 660–61 (2006) (describing traumatic impact of foster care on children and noting that among foster children who are not reunited with families, fewer than twenty percent are adopted).

guardianship assistance, while still optional with the states, is also an important change that recognizes the important benefits of that particular permanency alternative. In addition, direct Title IV-E funding for tribal foster care should enable many tribes to recruit and license more Native foster homes.

Nevertheless, the structured and accelerated permanency planning under ASFA and the continued prioritization of adoption under FCSIAA may have a particularly harsh impact on Indian children. Advocates for tribes have contended that ASFA's time lines are inconsistent with the Indian Child Welfare Act and that the favored option of parental rights termination and adoption, in particular, departs from the traditional approaches to child rearing that are common among many tribes.⁹⁸ Although FCSIAA endorses permanency alternatives to adoption, such as kinship guardianship, more strongly than AFSA, the new Act still prioritizes and incentivizes adoption as the preferred permanency option.⁹⁹ Unless the new law heralds a sea of change in federal child welfare policy, the existing emphasis on termination of parental rights and adoption may operate to bar Indian children from stable, long-term placements in culturally-appropriate families and communities.¹⁰⁰

⁹⁸ See DAVID SIMMONS & JACK TROPE, P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997: ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN 10–15, 28 (1999) (noting differences between ICWA's standards and ASFA's mandates and suggesting, *inter alia*, that tribes define parental rights terminations in culturally compatible ways).

⁹⁹ Compare Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 201–203, 303 (codified as amended in scattered sections of 42 U.S.C.) with Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, §§ 101, 401–403 (codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁰ Interview with Jennifer Espino, Assistant Attorney General, Tohono O'odham Nation, July 9, 2008 (explaining that permanent guardianships may be more compatible with Tohono O'odham culture than parental rights severances and adoption) (transcript on file with the author); Coupet, *supra* note 1, at 412–14, 422–24 (broadly criticizing ASFA's adoption incentives and arguing that kinship permanency can provide children with psychological permanence and sense of belonging); Susan C. Mapp & Cache Steinberg, *Birthfamilies as Permanency Resources for Children in Long-Term Foster Care*, 86 CHILD WELFARE 29, 42, 47 (2007) (reporting study showing that renewed contact with birth families and relatives after severance may provide sense of permanency, resulting in mental health benefits to children); Patten, *supra* note 2, at 237–39, 242 (criticizing ASFA for its
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C. The Interface of ICWA and ASFA

The potential conflicts between ASFA and ICWA concern the standards each statute imposes for family preservation and the incentives built into ASFA for adoption. The “reasonable efforts” standard of ASFA not only differs from the “active efforts” standard of ICWA, but ASFA also provides exceptions to the “reasonable efforts” mandate that are not contained within ICWA.¹⁰¹ For example, in cases of “aggravated abuse,” ASFA permits states to move toward severance of parental rights and to dispense with reasonable efforts to reunify the child with the parent.¹⁰² If the child is an Indian child subject to ICWA, may the state agency similarly dispense with “active efforts” to prevent the breakup of the child’s family? Similarly, ASFA’s qualified mandate for termination of parental rights under certain circumstances presumably applies to Indian children in foster care, even though termination itself may conflict with tribal tradition. While the Federal Children’s Bureau—the entity responsible for monitoring state compliance with federal child welfare guidelines—takes the position that ICWA’s requirements were not supplanted by ASFA, the Bureau rejects any general exemption for Indian children under ASFA’s scheme.¹⁰³ In other words, the agency believes the

continued emphasis on adoption as preferred permanency option and its failure to accord subsidized guardianship equal status).

¹⁰¹ Compare 42 U.S.C. § 671(a)(15) (2000) with 25 U.S.C. § 1912(d) (2000).

¹⁰² See 42 U.S.C. § 671(a)(15)(D).

¹⁰³ CHILDREN’S BUREAU, ADMINISTRATION FOR CHILDREN & FAMILIES, U.S. DEPT. OF HEALTH & HUM. SERV’S, CHILD WELFARE POLICY MANUAL, 9.1 Tribes/Indian Tribal Organizations, http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp (last visited Oct. 26, 2008) [hereinafter CHILD WELFARE POLICY MANUAL]. According to the Manual:

The requirement in section 475(5)(E) of the Act applies to Indian tribal children as it applies to any other child under the placement and care responsibility of a State or tribal agency receiving title IV-B or IV-E funds. While we recognize that termination of parental rights and adoption may not be a part of an Indian tribe’s traditional belief system or legal code, there is no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR.

Id. at 9.1, Question 2.

two statutes each govern where applicable and are not inconsistent.¹⁰⁴ Since Congress was aiming at quite different objectives in the statutory schemes, however, they may not be so easily reconciled in practice.¹⁰⁵

The few courts that have confronted the two statutes have held that ICWA's more demanding standard governs cases involving Indian

¹⁰⁴ The Bureau takes a similar position with respect to the interaction of provisions of ICWA and certain provisions of the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5106a (2000 & Supp. 2006). Under CAPTA, States must comply with comprehensive regulations as a condition of receiving federal child abuse prevention and treatment funds. The regulations include a provision barring the State from requiring family reunification with a parent who has been convicted of certain felonious acts. 42 U.S.C. § 5106a(b)(A)(xvi). In addressing whether the CAPTA provision conflicts with ICWA's "active efforts" requirement, the Bureau stated that:

[t]here is no conflict between the CAPTA provision and the ICWA requirement The CAPTA provision does not prohibit States from making reasonable efforts to reunify families as required under ICWA (as well as under title IV-E); it merely ensures that States not require reunification under certain circumstances. Therefore, it does not conflict with the ICWA requirement regarding efforts to prevent the breakup of Indian families.

CHILD WELFARE POLICY MANUAL, *supra* note 103, at 2.1E, Question 2. The Manual's brief answer belies the complexity of the problem.

¹⁰⁵ One entry in the Government's guidelines does suggest a softening of the official stance on permanency, at least with respect to eligibility for Title IV-E adoption assistance under section 473(c) of the Social Security Act. CHILD WELFARE POLICY MANUAL, *supra* note 103 at 9.2, Question 3. While an earlier guideline stated that a criterion for eligibility was a termination of parental rights or a signed relinquishment by the child's parents, the current guideline accepts adoptions without a severance of parental rights. *Id.* The Child Welfare Policy Manual explains:

After consideration, we believe that our earlier policy is an unduly narrow interpretation of the statute. Consequently, if a child can be adopted in accordance with State or Tribal law without a TPR or relinquishment, the requirement of section 473(c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.

Id.

children.¹⁰⁶ In *People ex rel. J.S.B., Jr.*, the South Dakota Supreme Court recognized the key distinctions between the two acts:

ICWA differs from ASFA in its means of promoting Indian children's best interests. ICWA ensures the best interests of Indian children by maintaining their familial, tribal, and cultural ties. It seeks to prevent capricious severance of those ties, whereas ASFA identifies permanency as a major consideration in promoting the best interests of children.¹⁰⁷

In that case, involving an Indian father's appeal of the termination of his parental rights, the primary question before the court was "whether ICWA's requirement to provide active efforts to prevent the breakup of Indian families is overridden or excused by the provisions of ASFA."¹⁰⁸ The state argued that it was under no obligation to make active efforts because the father's conduct fell within one or more of ASFA's exceptions to the reasonable efforts mandate, based on aggravated circumstances.¹⁰⁹ Engaging in straightforward statutory interpretation, the court held that ICWA contains no exception on its face, and the more specific language of ICWA controlled the more general language of ASFA.¹¹⁰ Since "ICWA deals with a discrete segment of our population, Native American families, . . . [and] specifically imposes higher evidentiary standards and different protections for parents whose rights are subject to termination," the provisions of ICWA must control.¹¹¹ The supreme court also invoked the maxim that statutes pertaining to Indians should be interpreted "to their benefit."¹¹² While unambiguously upholding the active efforts requirement

¹⁰⁶ See *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2006), *cert. granted*, 935 A.2d 406 (2007); *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611 (S.D. 2005).

¹⁰⁷ *People ex rel. J.S.B., Jr.*, 691 N.W.2d at 617.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The state asserted that the father had a documented history of abuse and neglect associated with substance abuse and that he had demonstrated an inability to protect the child from harm. *Id.*

¹¹⁰ *Id.* at 619.

¹¹¹ *Id.*

¹¹² *Id.* (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Since ICWA was enacted to benefit Indian children, the court reasoned, the requirement of "active efforts" must be enforced. *Id.*

of ICWA, the South Dakota court found on the factual record that the state had worked with the parents for several years to no avail and that further remedial efforts to reunify the child with his father would be futile.¹¹³ In affirming the severance of the father's rights, the court thus recognized that the "active efforts" provision does not require futile efforts.¹¹⁴

A more detailed exploration of the difference between ICWA's "active efforts" requirement and ASFA's "reasonable efforts" duty came from the Maryland Court of Appeals in *In re Nicole B.*¹¹⁵ In that case, the parents of two young Yangton Sioux children appealed a trial court order changing the permanency plan from reunification with the parents to kinship guardianship.¹¹⁶ The state child protection agency had found the children, ages six and three, to be neglected due to the parents' substance abuse and mental health issues.¹¹⁷ The children were placed with their maternal aunt and were doing well, although the evidence showed that at least one of the children suffered from post-traumatic stress disorder.¹¹⁸ Their parents had participated sporadically in treatment, with recurring relapses for drug use and alcohol.¹¹⁹

After six months, the agency changed the permanency plan from reunification to permanent guardianship with the children's aunt.¹²⁰ The children's attorney agreed, arguing that the children needed stability.¹²¹ The trial court accepted the plan, reasoning that "[b]oth children demonstrate symptoms of experiencing trauma from when they were still in their parents' care. Neither parent is able to provide them with a consistent, stable and nurturing home environment to meet their needs. They need a sense of permanency."¹²²

¹¹³ *Id.* at 621.

¹¹⁴ *Id.* at 620–21 (finding that state agency made active efforts to reunite child with parents for several years, child had been in foster care for much of his life, parents had continued to engage in substance abuse, and termination of parental rights was least restrictive alternative available).

¹¹⁵ 927 A.2d 1194, 1205 (Md. Ct. Spec. App. 2007), *cert. granted*, 935 A.2d 406 (2007).

¹¹⁶ *Id.* at 1195.

¹¹⁷ *Id.* at 1195–96.

¹¹⁸ *Id.* at 1197.

¹¹⁹ *Id.* at 1196–97.

¹²⁰ *Id.* at 1197.

¹²¹ *Id.* at 1198.

¹²² *Id.*

The tribe and the parents appealed on the ground that the state agency had failed to make “active efforts” to provide remedial services to avoid the breakup of an Indian family as required by ICWA.¹²³ Although the placement itself was with an extended family member, and therefore within ICWA’s preferences, the appellants contended that no placement at all should occur unless active efforts were made to reunify the Indian family.¹²⁴ In explaining how the state’s efforts fell short of ICWA’s standard, the tribe argued that the agency had only made referrals, a “passive” activity.¹²⁵ The tribe emphasized that the mother’s known psychological disorders made her afraid to leave her house and that merely handing her a card with a referral for treatment was not enough.¹²⁶

In light of the trial court’s failure to make a specific finding of active efforts as required by ICWA, the court of appeals reversed and remanded.¹²⁷ The appellate court endorsed the South Dakota court’s view on the distinct objectives underlying ICWA and ASFA and agreed that ICWA’s more demanding standard controls.¹²⁸ According to the court, Congress did not intend that ASFA’s “aggravated circumstances” provision should be construed to “undo the State’s burden of providing ‘active efforts’ under ICWA.”¹²⁹ As to the meaning of “active efforts,” the court explained that the state must engage in more than passive measures, but that “active efforts” did not mean “futile efforts.”¹³⁰ In the court’s

¹²³ *Id.*

¹²⁴ *Id.* at 1195.

¹²⁵ *Id.* at 1201.

¹²⁶ *Id.* The case includes a striking colloquy between the judge and tribe’s lawyer that reveals the judge’s frustration with, if not outright hostility toward, the tribe’s attorney. *See id.* at 1201–04 (quoting verbal exchange between judge and tribal attorney in which judge questioned tribe’s concern for children’s interests, and tribal attorney questioned judge’s knowledge of ICWA).

¹²⁷ *Id.* at 1195. Indeed, the trial judge made no reference to ICWA in his order and explicitly alluded to “reasonable efforts” made by the state agency. *Id.* at 1204.

¹²⁸ *Id.* at 1205–06.

¹²⁹ *Id.* at 1205.

¹³⁰ *Id.* at 1206. Giving a “parent a treatment plan and waiting for him to complete it would constitute passive efforts.” *Id.* (quoting *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005)). Here, the children had been removed for a relatively short period, and the agency was aware of the parents’ psychiatric disorders that might have prevented them from participating in

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view, both parents' psychiatric conditions might have interfered with their ability to participate in treatment programs without assistance.¹³¹ Absent a lack of resources, the department's active efforts under ICWA could include such actions as arranging affordable treatment or providing transportation.¹³² The crux of the court's reasoning was that the "active efforts" requirement of ICWA imposed a duty on the state to go beyond passive activity, consistent with the state's resources.¹³³ While the state agency's efforts in *Nicole* might have satisfied ASFA, the record in the case failed to meet the more demanding standard of ICWA.

Thus, the courts in *Nicole* and *J.S.B.* both emphasize that ICWA's "active efforts" standard requires something more than ASFA's "reasonable efforts," a construction that seems to be keeping with congressional intent.¹³⁴ In *Nicole*, in particular, ICWA's policy of avoiding the unnecessary break-up of Indian families overrode the state's immediate interest in achieving permanency for the child.¹³⁵ While the

treatment programs without more focused assistance. *Id.* at 1207. Department resources are also relevant to the determination of active efforts. *Id.*

¹³¹ *Id.*

¹³² The court wrote:

Quite possibly, the "active efforts" standard, under these circumstances, would require the Department to do more than just recommend a program. The "active efforts" standard may also have required that the Department facilitate . . . [mother's] visitations with her children, which she said she could not make because she "was hiding" in her house, possibly due to her panic disorder, by having a social worker accompany her when she leaves her home for the visits.

Id.

¹³³ *Id.* at 1208 (citing *A.M. v. Alaska*, 945 P.2d 296, 306 (Alaska 1997) (quoting CRAIG J. DORSAY, *THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL* 157–58 (1984)).

¹³⁴ *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 (S.D. 2005); *In re Nicole B.*, 927 A.2d at 1200–01.

¹³⁵ *In re Nicole B.*, 927 A.2d at 1198. On remand, of course, guardianships for the children might still be ordered once the state satisfied the active efforts requirement.

case law is sparse, not all courts have found a meaningful distinction between the two standards.¹³⁶

The mandatory time-frames and designated permanency plans under ASFA pose another potential point of conflict with the policies underlying ICWA. The accelerated move toward termination of parental rights in ASFA may conflict with tribal world views.¹³⁷ When a child's parents are unavailable or incapacitated, many tribes endorse a communal response of shared childrearing—through kinship lines, clans, villages, and other relational bonds.¹³⁸ Termination of parental rights carries the risk of disrupting the child's vital connection to the tribal community and may run counter to tribal conceptions of the parent-child relationship.¹³⁹ At the same time, ASFA itself contains exceptions that are of particular relevance to Indian children: terminations are not required where the child is in the care of a relative at the option of the State, where there is a compelling reason for concluding that termination is not in the child's best interests, or where requisite reunification services have not been provided by the

¹³⁶ See, e.g., *In re Michael G.*, 74 Cal. Rptr. 2d 642, 650 (Ct. App. 1998) (“active efforts” standard and “reasonable services” requirement of state law are “essentially undifferentiable”).

¹³⁷ See 42 U.S.C. § 675(5)(C) (2000) (requiring permanency hearing no later than twelve months after child enters foster care); *id.* § 675(5)(E) (requiring State to file petition to terminate parental rights if child has been in foster care for fifteen of most recent twenty-two months or other defined circumstances, unless child is being cared for by relative at option of State, a compelling reasons exists that filing such a petition would not be in best interests of child, or State has not met its reasonable efforts obligation).

¹³⁸ See Terry L. Cross & Kathleen Fox, *Customary Adoption as a Resource for American Indian and Alaska Native Children*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY* 423, 423–27 (2005).

¹³⁹ *Id.* Nevertheless, at least one tribal court has ordered the filing of a petition to terminate parental rights in accordance with ASFA where the tribe had received matching funds for foster care services and the children had been in tribal foster care for fifteen of the last twenty-two months. See *In re B.A.*, No. 2000.NAGR.0000007, ¶¶ 15–16 (Confed. Tribes of Grand Ronde Comm. Or. Juv. Ct. Sept. 8, 2000), available at <http://www.tribal-institute.org/opinions/2000.NAGR.0000007.htm>. In that case, the court acknowledged that tribal policy did not favor adoption but reasoned not only that ASFA required the result but that ASFA's policy favoring permanency was applicable to the subject children. See *id.*

state.¹⁴⁰ The unique relevance for Indian children of such exceptions has been recognized by tribal advocates and has been codified in at least one state.¹⁴¹ Although adoptions continue to be favored through the federal government's financial incentives system,¹⁴² the Act does endorse alternative placements as acceptable permanency outcomes that would be more compatible with the cultures of many tribes, including legal guardianships, kinship placements, and other "permanent living arrangements."¹⁴³ Moreover, the federal government and at least a few states are beginning to take a step in the direction of recognizing tribal customary or traditional adoption¹⁴⁴—a movement this author hopes can be extended, as explained in Part III.

The existing case law preserves the more demanding requirements of ICWA for the removal of Indian children from their families as compared to the generally-applicable standards of ASFA in order to serve the key goals of ICWA: to further Indian children's interests by protecting their cultural identities, and to promote tribal sovereignty, self-determination, and survival.¹⁴⁵ With respect to the timing and placement provisions of

¹⁴⁰ See 42 U.S.C. § 675(5)(E); INST. FOR CHILD & FAMILY POLICY, COLLABORATION WITH NATIVE AMERICAN TRIBES: ICWA AND ASFA 23–24 (2003), <http://www.cphv.usm.maine.edu/pdf/Tribes.pdf> (explaining relevance of ASFA exceptions for Indian children under ICWA).

¹⁴¹ California law has imported the standards of ASFA to delineate exceptions to parental rights terminations of particular relevance to Indian children. See CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(vi) (West 2008) (excluding Indian children from mandate for termination of parental rights if there is compelling reason for determining that termination would not be in child's best interests, including where "termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights" or "the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or other planned permanent living arrangement for the child").

¹⁴² See 42 U.S.C. § 673 (adoption assistance program); *id.* § 673b (authorizing adoptive incentive payments to states).

¹⁴³ *Id.* § 675(5)(C) (requiring States to seek permanency in the form of reunification, termination of parental rights and adoption, kinship placement, or legal guardianship, or, where there is a compelling reason, another planned permanent living arrangement).

¹⁴⁴ See CHILD WELFARE MANUAL, *supra* note 103, at 9.2, Question 3, discussed *supra* note 105; Assemb. B. 2736, 2007–08 Leg., Reg. Sess. (Cal. 2008).

¹⁴⁵ See 25 U.S.C. § 1901 (2006).

ASFA, the Act itself seems to have sufficient flexibility to accommodate the procedural and substantive requirements of ICWA. In effect, the competing policies of ASFA and ICWA mean that non-Indian children may be removed more easily from their parents' care than Indian children, but once a child has been removed, the mandate for permanency planning under ASFA impacts Indian and non-Indian children alike.¹⁴⁶ As will be seen, the concept of "permanency" under ASFA tilts toward adoption in practice but can be read to encompass alternative living arrangements that are more compatible with the practices of many tribes.

II. PERMANENCY FOR INDIAN CHILDREN IN STATE COURT PROCEEDINGS

While ICWA's demanding procedural and evidentiary standards govern the removal of children from their families, questions remain as to how the federal policy of promoting permanency for children in foster care should apply in cases involving Indian children. Case law under ICWA reveals that state courts are divided in their understanding of the meaning of permanency for the Indian child, wholly apart from the overlay of ASFA.¹⁴⁷ Some have affirmed a non-Indian placement offering permanency for an Indian foster child on a finding of "good cause,"¹⁴⁸ while others have suggested that permanency as a child welfare goal should be redefined to mean an ongoing affiliation with a tribe rather than with a particular parent figure.¹⁴⁹ This Part examines several illustrative

¹⁴⁶ Not surprisingly, the more stringent standard of ICWA for termination of parental rights, along with tribal policies favoring alternatives to adoption for Indian children, has led to a decrease in adoptions and an increase in guardianships and kinship placements. See AFCARS REPORT, *supra* note 2, at 3. Curiously, this downturn in adoptions of Indian children has been cited as evidence that Indian children "are more likely than ever to be placed in foster care or other nonpermanent situations, such as residential or institutional care." Cross & Fox, *supra* note 138, at 425. That criticism seems to miss the "good news" that culturally-incompatible adoptions of Indian children are on the decline.

¹⁴⁷ *Cf. In re Adoption of Sara J.*, 123 P.3d 1017, 1030-33 (Alaska 2005) (citing the damage that would be caused by the children's separation from their non-Indian foster mother as good cause when affirming their adoption); *In re Custody of S.E.G.*, 521 N.W.2d 357, 364 (Minn. 1994) (stating that it is improper to assume that permanence can only be met through adoption).

¹⁴⁸ *In re Adoption of Sara J.*, 123 P.3d at 1020.

¹⁴⁹ *In re Custody of S.E.G.*, 521 N.W.2d at 364.

cases to show that state courts often fall short in their interpretation of permanency as a goal for Indian children.

The Alaska Supreme Court, the most prolific state high court on ICWA,¹⁵⁰ has interpreted the Act to permit state courts to consider the “best interests” of Indian children in evaluating placement options and, in particular, the benefit to Indian children of remaining in a stable, secure home.¹⁵¹ While the court’s ICWA jurisprudence provides needed flexibility in applying the Act,¹⁵² the court recently took the further step of endorsing the application of Anglo-American standards in determining whether good cause exists to deviate from ICWA’s preferred placements.¹⁵³ *In re Adoption of Sara J.* was an adoption dispute involving three Yup’ik children who suffered from a variety of physical and emotional disorders.¹⁵⁴ In affirming the children’s adoption by their non-Indian foster mother, the Alaska Supreme Court found good cause to deviate from the ICWA preferences and refused to read ICWA as requiring that “good cause” be interpreted according to tribal tradition.¹⁵⁵ While

¹⁵⁰ A Westlaw search on August 25, 2008, using “co(high) & sy,di(icwa i.c.w.a. “indian child welfare act”)” for various states, yielded seventy-two cases from the Alaska Supreme Court, compared to forty-one cases from the South Dakota Supreme Court, and thirty-two from the Montana Supreme Court. The Alaska court’s many decisions on ICWA are not surprising in light of the fact that a majority of the state’s foster children are Indian and Alaska Native. See U.S. GOV’T ACCOUNTABILITY OFFICE, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 13 (2005) (reporting that sixty-two percent of children served in foster care in Alaska in 2003 were American Indian).

¹⁵¹ See, e.g., *In re Adoption of F.H.*, 851 P.2d 1361, 1363–64 (Alaska 1993) (good cause determination can take into account best interests of child, wishes of biological parents, suitability of persons preferred for placement, and child’s ties to tribe).

¹⁵² For a discussion of the need for flexibility in applying ICWA’s placement preferences, see Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 660–67 (2002).

¹⁵³ *In re Adoption of Sara J.*, 123 P.3d at 1019–20.

¹⁵⁴ *Id.* at 1030. The children’s diagnoses included adjustment disorders, static encephalopathy, hyperactivity, fetal alcohol spectrum disorder, developmental delays, and behavioral problems. *Id.* The adoption dispute was between the children’s Caucasian foster mother and their maternal uncle and aunt. *Id.* at 1020.

¹⁵⁵ Since the trial court had granted the foster mother’s adoption petition, the appeal raised the question of whether there was good cause to depart from the statutory preferences

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noting that trial judges should be sensitive “to any differences in the circumstances that allow children to flourish in Native and non-Native communities,” the court emphasized that the cultural standards of the Indian community need not be followed in deciding whether there are adequate resources to meet the child’s specialized needs.¹⁵⁶

The opinion offers two competing understandings of the children’s needs and the meaning of permanence. In addressing the question of good cause, the Alaska court focused on whether the children had special needs that could not be met in the tribal placement.¹⁵⁷ The state argued that continuity and stability for the children were essential to their well-being and that the foster mother had access to necessary services to address the children’s special educational and medical needs.¹⁵⁸ Experts for the foster mother testified that she could mitigate any cultural harms to the children, at least to a significant degree, by encouraging positive ongoing contact with the Yup’ik culture and Yup’ik tribal members.¹⁵⁹ The tribe argued, in contrast, that Yup’ik standards give less weight to the short-term disruption that a removal from the foster home might cause.¹⁶⁰ That disruption would be outweighed, in the tribe’s view, by the lack of a “compass and foundation in life” that would result from the children being separated “from the life blood of their culture.”¹⁶¹ The children, the tribal attorney argued, “will melt like butter into the supportive environment of their

under ICWA. *Id.* The court reasoned that Congress’s main concern was to avoid the application of white middle-class standards to placement choices, but not to the good cause question, since Indian cultural standards would effectively nullify the good cause exception. *Id.* at 1021, 1025.

¹⁵⁶ *Id.* at 1028.

¹⁵⁷ *Id.* at 1029–31. The children had been in eight placements since being removed from their birth mother for substance abuse, and they had been living in the foster home for three years by the time the case was before the state supreme court. *Id.* at 1020. Not surprisingly, the children had an array of adjustment disorders and emotional disturbances, including fetal alcohol spectrum disorder, hyperactivity, and developmental delays. *Id.* at 1030. Two of the children qualified for special education. *Id.*

¹⁵⁸ *Id.* at 1030–31.

¹⁵⁹ The court described the efforts of the foster mother to find a male Yup’ik role model for the boys and to enroll the children in Yup’ik language classes, to attend Yup’ik fish camp, and to participate in Yup’ik dance. *Id.*

¹⁶⁰ *Id.* at 1029.

¹⁶¹ *Id.*

home and village community.”¹⁶² According to the tribe, the children’s extended family would provide the necessary support network, and the children would benefit from informal helpers in the village.¹⁶³ Witnesses for the tribe testified about the harm to Native children raised in non-Native homes because of the erosion of language skills and the risk of cultural confusion and espoused the view that “full immersion in the culture is essential to all aspects of a Yup’ik child’s well-being.”¹⁶⁴ On the merits, the Alaska Supreme Court, guided by Anglo-American standards rather than Yup’ik values, ultimately concluded that good cause existed because of the children’s extraordinary health and educational needs that could not be met in a tribal placement.¹⁶⁵

The opinion in *In re Sara* gives an unnecessarily cramped interpretation to § 1915(d)’s command to apply the “prevailing social and cultural standards” of the parent’s or extended family’s tribe.¹⁶⁶ In the Yup’ik view, the long-term positive value to the children of living with extended family in their Native village outweighs the impact of lesser material resources or any short-term trauma that might ensue from disrupting the foster care placement.¹⁶⁷ The state high court, however, focused on the children’s significant educational and medical needs and the emotional benefit of remaining in a successful, stable placement.¹⁶⁸ Although the actual ruling seems justified in light of the children’s extraordinary physical and emotional needs, the court’s interpretation of § 1915(d) creates a precedent that may invite later courts to disregard Native values in deciding whether to approve of a non-Indian adoptive placement.¹⁶⁹ An alternative approach would be to read § 1915(d) more expansively, requiring courts to assess suitability of placements *and* good cause “through the lens of the Indian community’s basic values.”¹⁷⁰ Such an approach could ensure that state courts incorporate tribal perspectives at

¹⁶² *Id.*

¹⁶³ *Id.* at 1030.

¹⁶⁴ *Id.* at 1032.

¹⁶⁵ *Id.* at 1020.

¹⁶⁶ 25 U.S.C. § 1915(d) (2006).

¹⁶⁷ See *supra* notes 160–62 and accompanying text.

¹⁶⁸ See *supra* note 157 and accompanying text.

¹⁶⁹ This concern was forcefully articulated in the concurrence. See *In re Adoption of Sara J.*, 123 P.3d at 1037 (Bryner, C.J., concurring).

¹⁷⁰ *Id.* at 1038.

all stages of the placement inquiry, not to give the tribe an automatic veto over any non-Indian placement, but to ensure that the state judge's assessment of the child's interests is informed by tribal cultural standards.¹⁷¹

The concept of permanence also arises in ICWA litigation when courts are faced with a choice between the permanency "gold standard" of adoption and less permanent alternatives. The Act provides a list of preferred placements for adoption and, separately, for foster care or preadoptive placements, each provision containing a "good cause" exception.¹⁷² Without regard to ASFA, the courts are divided on the question whether an adoptive placement may be rejected in favor of a foster care placement or guardianship under ICWA.¹⁷³ Significantly, an early Minnesota decision rejected adoption as the key to permanence for Indian children.¹⁷⁴ In reversing a finding of good cause, the Minnesota Supreme Court in *In re Custody of S.E.G.* held that the trial court erred in approving an adoption of three Chippewa children by a white couple when placement in an Indian foster home was available.¹⁷⁵ The court reasoned that the children's need for psychological and emotional stability—their need for permanence—could be satisfied through an ongoing connection to the child's tribe in an Indian foster home and not solely through adoption.¹⁷⁶ According to the court, a child's need for permanence should not be defined so narrowly as to threaten placements in Native American homes.¹⁷⁷

¹⁷¹ *Id.*

¹⁷² See 25 U.S.C. § 1915 (2006), discussed *supra* at notes 51–53 and accompanying text.

¹⁷³ See *Carla C. v. Superior Court*, No. D046194, 2005 WL 3113452 (Cal. App. Nov. 22, 2005); *In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994), *cert. denied sub nom.*, *Campbell v. Leech Lake Band of Chippewa Indians*, 513 U.S. 1127 (1995).

¹⁷⁴ *In re Custody of S.E.G.*, 521 N.W.2d at 364.

¹⁷⁵ *Id.* at 365.

¹⁷⁶ *Id.* at 364. In recognizing that "permanency is defined differently in Native American cultures," the court credited, in particular, the testimony of a Chippewa expert witness who suggested that "S.E.G.'s need for permanence could be met through an attachment to her tribe 'if that is an ongoing part of her life.'" *Id.*

¹⁷⁷ *Id.* at 365. The court relied in part on the fact that "permanence is not discussed in the Act or its regulations." *Id.* While the Minnesota court's reasoning will maximize placement options for Indian children, the result for the three children involved in the actual dispute was harsh. After the decision came down, the Indian foster parent with whom the

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In contrast, a recent decision from the California Court of Appeals equates permanency with finality, requiring parental rights termination and adoption of the child in order to protect the child's interests. In *Carla C. v. Superior Court*, the appeals court addressed, *inter alia*, the question whether the trial court erred in placing a young Sioux girl for adoption instead of approving of the permanent guardianship advocated by the Rosebud Sioux Tribe.¹⁷⁸ The child had been in foster care with the same non-Indian couple throughout her life due to her mother's chronic substance abuse and mental illness.¹⁷⁹ Although the foster parents were willing to become the child's permanent guardians, the child welfare agency argued that ICWA and state law did not allow for any disposition other than adoption under the circumstances.¹⁸⁰ A prospective adoptive couple was identified, consisting of a husband who was a member of the Lakota Sioux Tribe and a non-Indian wife.¹⁸¹ The Rosebud Tribe, however, opposed the adoption since it was outside the child's extended family.¹⁸² The state appeals court reasoned that the tribe had no legal authority under ICWA to block the trial court's termination of parental rights based on the tribe's preference for guardianship.¹⁸³ Once the standard for termination was met, the trial court's options were limited to the preferences set out in § 1915(a).¹⁸⁴

children had been placed moved out of state and the children again faced a series of short-term placements. See *Petition for Writ of Certiorari at 7, Campbell v. Leech Lake Band of Chippewa Indians*, 513 U.S. 1127 (1995) (No. 94-971).

¹⁷⁸ *Carla C.*, 2005 WL 3113452, at *13.

¹⁷⁹ *Id.* at *1.

¹⁸⁰ *Id.* at *3. According to the appellate court, the trial judge "had no discretion to implement a guardianship after making the findings of serious harm, active efforts, adoptability and the lack of a beneficial parent-child relationship." *Id.* at *14. An earlier California decision is in accord. See *In re Jacqueline L.*, 39 Cal. Rptr. 2d 178 (Dist. Ct. App. 1995), *cert. denied*, 516 U.S. 946 (1996) (Juvenile court was required to select adoption as permanent plan for Indian children who could not be returned to parents, even though guardianship would have increased opportunities for tribal acculturation.).

¹⁸¹ *Carla C.*, 2005 WL 3113452, at *4.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ The judgment in *Carla C.* was nevertheless vacated because of the state agency's failure to give adequate notice to the mother's tribes. *Id.* at *16.

While *Carla C.* may be a plausible interpretation of ICWA, the court's reasoning disserves children. The child in *Carla C.* was said to be "thriving" in the care of her foster parents, the foster parents wanted to retain the child in their home but did not want to permanently adopt the child, and the Rosebud Sioux Tribe was in agreement with the arrangement.¹⁸⁵ The state courts' insistence on termination of parental rights and adoption rather than a permanent guardianship undermines the cultural respect that lies at the core of ICWA.

Finally, courts deciding ICWA cases frequently struggle with the question of how much weight to give a child's emotional attachments to *de facto* parents. Due to the shortage of Indian foster homes, Indian children who are taken into state custody because of abuse or neglect are often placed initially with non-Indian caregivers.¹⁸⁶ In the paradigmatic "hard" case, the question of a permanent placement arises after the Indian child has lived for several years with the non-Indian foster parent and formed deep emotional attachments.¹⁸⁷ While several courts have held that emotional attachments to a non-Indian custodian may support a finding of good cause,¹⁸⁸ others have given a narrower construction to the good cause exception to the Act's preferred placements.¹⁸⁹

¹⁸⁵ *Id.* at *2-3.

¹⁸⁶ The need for enhanced funding for tribal foster homes is discussed *supra* at notes 63-64 and accompanying text.

¹⁸⁷ *See, e.g., In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. App. 1983) (upholding finding of good cause to deviate from adoptive preferences where child resided with non-Indian adoptive mother for three years and removal would cause psychological harm); *In re C.G.L.*, 63 S.W.3d 693 (Mo. App. 2002) (Cherokee child's strong emotional bond with foster parents and risk of emotional trauma supported finding of good cause, in addition to showing of child's extraordinary physical needs).

¹⁸⁸ *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d at 234.

¹⁸⁹ *See In re C.H.*, 997 P.2d 776, 785 (Mont. 2000). The supreme courts of both Minnesota and Montana have held that an Indian child's "best interests" are not a proper consideration in deciding whether good cause exists to deviate from the placement preferences of § 1915 and have limited the inquiry to the factors set out in the BIA Guidelines. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994); *In re C.H.*, 997 P.2d at 782. In the words of the Montana court:

[W]hile the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper to apply a best

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The case of *In re C.H.* is illustrative.¹⁹⁰ There, the state supreme court reversed a finding of good cause under § 1915, rejecting the trial court's approach to permanency and the role of emotional bonding.¹⁹¹ The trial court had found good cause based largely on the strong emotional parent-child relationship existing between the young Siletz girl and the non-Indian couple with whom she had lived since infancy.¹⁹² The state supreme court held that the risk of trauma from disrupting a child's stable placement with a non-Indian custodian does not constitute good cause.¹⁹³ As the court stated, "[T]he 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."¹⁹⁴

interests standard when determining whether good cause exists to avoid the ICWA placement preferences, because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences.

In re C.H., 997 P.2d at 782 (citing *In re Adoption of Riffle*, 902 P.2d 542 (Mont. 1995)).

¹⁹⁰ *In re C.H.*, 997 P.2d 776.

¹⁹¹ *Id.* at 783–84.

¹⁹² *Id.* The girl had been admitted to the hospital at three months of age with multiple fractures and other signs of physical abuse. *Id.* at 778.

¹⁹³ The court went on to reason that being "at risk" of developing attachment disorder is not the same as a "certainty" of developing the disorder. *Id.* at 783. While a certainty might support a finding of good cause, a mere risk did not amount to an "extraordinary physical or emotional need" that would constitute good cause within the narrow meaning of the BIA Guidelines. *Id.*

¹⁹⁴ *Id.* The court explained that "[t]o 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." *Id.* at 784. Employing a questionable assumption about child development, the court reasoned that the child had been in a stable foster home for the first two years of her life and that she, therefore, was past the critical phase for attachment disorder in the event of removal. *Id.* While attachment theorists recognize that disruption of the primary caregiver in a child's earliest years may impair the child's ability to form trusting attachments in the future, the theorists also agree that a child's permanent separation from his or her primary caregiver at any point during childhood is a deeply traumatizing experience with lasting effects. *See, e.g.,* Roger Kobak, *The Emotional Dynamics of Disruptions in Attachment Relationships*, in HANDBOOK OF ATTACHMENT 21 (Jude Cassidy & Phillip R. Shaver eds., 1999) (describing
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The Montana decision emphasizes tribal interests and an Indian child's inchoate interests in cultural identity over children's emotional interests in remaining with emotionally-attached care-givers. In an ideal world, tribal homes would be available to receive Indian children when they are first removed from their families so that later disruptions would be unnecessary. Until that ideal is a reality, however, hard cases will continue to arise. Unfortunately, by subordinating a child's interest in a stable home to the child's interest in a tribal placement and by downplaying the significance of emotional bonding, the Montana court adopted a one-dimensional view of the Indian child—a view at odds with many tribes' cultures.

As these cases demonstrate, state courts vary dramatically in their understanding of permanency and the needs of American Indian children. The approach of the Alaska court in *In re Sara* gives too little weight to the benefits of growing up within a closely-knit tribal community. The formalistic holding that "good cause" is not to be interpreted according to tribal culture permitted the court to overlook creative ways of accommodating the children's interests in maintaining their tribal heritage. The holding in *Carla C.* unnecessarily deprived the Sioux child of *de facto* permanency and, at the same time, required a severance of parental rights over the tribe's cultural objection. On the other hand, categorical approaches like that of the Montana court in *In re C.H.* seem to advance a monolithic image of Indian children as able to withstand the loss of a primary caregiver without lasting trauma, so long as the end result is a tribal placement.¹⁹⁵ That approach downplays the importance of permanency and security within the child's emotional world—a value widely recognized in tribal culture itself. Ideally, Indian children can be viewed in child welfare proceedings as complex human beings with the full range of human needs and vulnerabilities as well as the potential for unique cultural identities. As explained in Part III, state courts may better serve Indian children and tribal interests by looking to the values expressed in tribal practices and the examples of care-giving that one finds in tribal law and tradition.

long-term emotional and psychological problems caused by separation from an attachment figure during childhood).

¹⁹⁵ I have explored this theme more fully in Atwood, *supra* note 152.

III. LESSONS FROM TRIBES

Tribes themselves have spoken on the question of child well-being and have revealed perspectives about the value to the child of permanency, continuity, and stability in the child's home environment. Tribal codes and court opinions often articulate the central importance of children to the tribe as well as the tribe's unique importance to the children and the unique value for tribal children to learn the ways of the tribe, to participate in tribal traditions, and to be raised among tribal members.¹⁹⁶ Moreover, alternative conceptions of permanency can be found in many tribal practices that may provide children with a stronger sense of family and belonging than the child would receive through formal adoption.¹⁹⁷

Tribal courts have frequently recognized that stability and continuity in placement are important to a child's emotional well-being. One of the best known examples is the aftermath of *Mississippi Band of Choctaw Indians v. Holyfield*.¹⁹⁸ In that case, the Supreme Court ruled that state-court adoptions by a non-Indian couple of two Choctaw infants were void under ICWA because the children were technically domiciled on the reservation at the time of birth, thus giving the Choctaw tribal court exclusive jurisdiction over their adoption proceedings.¹⁹⁹ The Mississippi adoption decree was therefore set aside, despite the fact that the children had lived in their adoptive home for the first three years of their lives.²⁰⁰

¹⁹⁶ Carole Goldberg-Ambrose, *Heeding the 'Voice' of Tribal Law in Indian Child Welfare Proceedings*, in *LAW & ANTHROPOLOGY* 1, 3 (1994).

¹⁹⁷ *Id.* at 18.

¹⁹⁸ 490 U.S. 30 (1989). The human drama underlying the decision has been vividly described in Solangel Maldonado, *The Story of the Holyfield Twins: Mississippi Band of Choctaw Indians v. Holyfield*, in *FAMILY LAW STORIES* 113, 113-38 (2008).

¹⁹⁹ Even though the children's mother had traveled off the reservation in order to give birth, she had been residing on the Choctaw reservation before the children were born. *See Holyfield*, 490 U.S. at 37. Since her domicile was on the reservation, the children's domicile was likewise on the reservation, and the Choctaw tribe had exclusive jurisdiction under 25 U.S.C. § 1911(a) over any adoption of the children. *Id.* at 48-49.

²⁰⁰ The Court reasoned that the mother's desire to relinquish the children for adoption off reservation in order to avoid tribal authority was not determinative, since the Act's exclusive jurisdiction was not subject to waiver. *Id.* at 49. In the Court's view, if individual Indians could thwart the operation of the Act, congressional policy would be undermined. *Id.* at 51. Moreover, the legislative history suggested that Indian parents,

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In *Holyfield*, Justice Brennan, writing for the majority, suggested that state courts should not assume that the Choctaw tribal court would be insensitive to the emotional trauma to the children.²⁰¹ “Rather,” he observed, “we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”²⁰² As it happened, the Choctaw court granted continued custody to the white mother but ordered her to maintain ongoing contact with tribal relatives.²⁰³ As engagingly recounted by Professor Maldonado, the children did make regular visits to their reservation and grew up fully aware of their Choctaw identity.²⁰⁴ In *Holyfield* and similar cases, tribal courts have demonstrated their concern for the emotional security of tribal children and have ruled in ways that promote permanency in placements, even with non-Indian families.²⁰⁵ Tribal court opinions often reveal a focus on children’s welfare and a willingness to protect children’s relationships with *de facto* parents.²⁰⁶

Some tribes have drafted creative code provisions to define children’s interests that are helpful in illuminating tribal perspectives. The Zuni Code, for example, sets out standards or controlling principles that

because of the destructive impact of governmental policies, might choose to undermine tribal authority. *See id.* at 52–53.

²⁰¹ *Id.* at 54.

²⁰² *Id.* (quoting *In re Adoption of Halloway*, 732 P.2d 962, 972 (Utah 1986)).

²⁰³ Maldonado, *supra* note 198, at 121–22.

²⁰⁴ *Id.* at 132.

²⁰⁵ For example, the Utah Supreme Court voided the state-court adoption of Michael Halloway Carter, a Navajo child, by a non-Indian couple under ICWA. *In re Adoption of Halloway*, 732 P.2d at 971. The Navajo Tribal Children’s Court agreed to a settlement awarding permanent guardianship of the child to the couple. *See Mormon Couple Wins Custody of Indian Boy*, CHI. TRIB., Oct. 31, 1987, at C5. A similar order was entered in another highly publicized adoption dispute over a Navajo infant. *See Arthur H. Rotstein, Couple Get Custody of Navajo Tot*, ARIZ. DAILY STAR, Sept. 1, 1988, at B-1 (reporting that Navajo Tribal Children Court awarded permanent guardianship of Navajo infant to non-Indian couple who had sought to adopt child with consent of biological parents and who had cared for child since birth). Significantly, in both cases, the tribal court ordered the non-Indian couples to permit regular visitation by the biological parents.

²⁰⁶ *See* Goldberg-Ambrose, *supra* note 196, at 12 (describing numerous tribal court opinions and tribal code provisions in which protection of children’s welfare is prominent, and urging state courts to set aside biased views of tribal justice).

articulate children's "needs."²⁰⁷ The code recognizes "[a] child's need for love, nurturing, protection, and stability;" "[a] child's need for family;" "[a] child's need for identity and development;" and "[a] child's need for happiness."²⁰⁸ The code explains that "[a] child must develop self-identity and awareness of his or her unique role within the larger community, including the child's cultural community."²⁰⁹ In identifying placement priorities, the Zuni Code provides that "[a]ll placement decisions should support the child's affiliation with Pueblo or Indian culture and provide the least restrictive environment which meets the child's needs."²¹⁰ Similarly, the Sisseton-Wahpeton Sioux Tribe in South Dakota has articulated the tribes' values in its code: to strengthen family ties, to preserve and strengthen the child's cultural and tribal identity, and to secure for any child removed from the home "that care, guidance, and control as nearly equivalent to that which he [or] she should have been given by his [or] her parents."²¹¹ These textured descriptions focus on children's needs for stable loving relations in a nurturing home environment and evince a commitment to protecting the child's sense of family as well as the child's cultural and tribal identity.

While tribes often endorse the concept of achieving permanent family placements as a child welfare goal, many tribes do not accept the Anglo-American permanency option of severance and adoption and instead prefer a less absolute form of adoption than that mandated under state law.²¹² Within state courts, adoption is still conditioned on a complete termination of parental rights, and most state adoption statutes sever the child's relationship with the parents as well as the parents' relatives.²¹³ Despite

²⁰⁷ ZUNI TRIBAL CODE tit. IX, § 9-2-1 (2006).

²⁰⁸ *Id.* The code explains that "not all children have the benefit of family care" but "nothing can replace the primary role of loving parents and family in a child's life." *Id.* § 9-2-1(B).

²⁰⁹ *Id.* § 9-2-1(C).

²¹⁰ *Id.* § 9-2-2(A).

²¹¹ SISSETON-WAHPETON SIOUX TRIBE JUV. CODE § 38-01-01 (1996).

²¹² Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 614–15 (2000).

²¹³ See FAMILIES BY LAW—AN ADOPTION READER 157–66 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004); see also Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1013–15 (1995). Formal, closed adoption was not always the model in the United States.

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the growing movement toward open adoption within the last twenty years, even those states where open adoption is accepted generally give adoptive parents the right to decide the degree to which the child will have contact with biological relatives.²¹⁴

In contrast, many tribes view adoption very differently and seem particularly focused on maintaining the child's contact with extended family. As Terry Cross and Kathleen Fox have explained:

[I]n Indian tribal systems, a child is born into a particular family and from the moment of birth, that child's place in the world is defined by his or her relationships with his or her mother's and father's families. In a fundamental sense, a child's very definition as a human being is in the context of the family in which he or she is born.²¹⁵

Shared responsibility for child-rearing is a common tradition among tribes, with tribal traditions assigning different roles to various relatives.²¹⁶ Maternal grandparents and aunts, in particular, often have discrete parenting functions and traditionally assumed responsibility for children when parents were unavailable.²¹⁷ The growing preference for kinship care in state and federal child welfare policy is consistent with tribal custom, particularly the reliance on grandparents and other extended family members.²¹⁸ Severance of that relationship or the child's relationship with

In the nineteenth century, informal open adoption was the norm, and the informal arrangements frequently permitted ongoing contact between the child and the birth family. See DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW* 709 (2000). After Massachusetts enacted the first modern adoption law in 1851, states gradually moved to a closed adoption model, mandating the sealing of adoption records and prescribing the effect of adoption as a severance of all legal and social relationships between the child and the biological family. *Id.* at 628–29.

²¹⁴ Anita L. Allen, *Open Adoption Is Not for Everyone*, in *ADOPTION MATTERS* 47, 51 (2005) (describing movement toward open adoption and suggesting that values of familial privacy and autonomy may justify resistance to complete openness and may be necessary to retain adoption as attractive alternative).

²¹⁵ Cross & Fox, *supra* note 138, at 428.

²¹⁶ I have explored tribal approaches to child-rearing in Atwood, *supra* note 212.

²¹⁷ *Id.* at 640.

²¹⁸ Unlike a simple kinship preference, tribes have specific customs favoring categories of relatives, and in cases of parental misconduct may give those relatives rights superior to

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extended family, in the view of many tribes, is outside the purview of tribal authority.²¹⁹ Indeed, a formal judicial decree to terminate parental rights is foreign to the culture of many tribes.²²⁰ In earlier times, informal arrangements took the place of formal child protection proceedings, with children in need being raised by extended family, clan members, or other persons sharing a communal bond with the children's family.²²¹ As explained by the Navajo Supreme Court:

The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child . . . children are adopted by

those of the parent, even where the care began at a parent's request. *See, e.g.*, *Big Talk v. Big Talk*, No. 091 (Ft. Peck Ct. App. Assiniboine & Sioux Tribes, Dec. 1, 1989), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1989.NAFP.0000019.htm> (recognizing tribal custom of placing child in need with grandmother).

²¹⁹ Cross & Fox, *supra* note 138, at 429.

²²⁰ Terry L. Cross and Kathleen Fox have described the contrasts between many tribal approaches and state child welfare systems:

Permanency planning in Indian child welfare . . . has as much to do maintaining a child's connection and sense of belonging to the extended family, clan, or tribe as it does with maintaining ties to the biological parents. Termination of parental rights is valued as the method of choice to insure permanence in the mainstream child welfare system. However, in Indian child welfare, it has the potential of severing the child's connection to an extended family or tribe.

Id. at 427. The authors cite to an organization which was unable to find any tribes with customs, ceremonies, or common practices that ended relationships between parents and children. To the contrary, they found that "many tribes actively abhor the idea and will not subject their children to this unthinkable act." *Id.* at 428. The authors are evidently referring to customary practices, not contemporary tribal codes—where procedures for the absolute severance of parental rights are not uncommon. *See, e.g.*, MASHANTUCKET PEQUOT TRIBAL LAWS tit. V, ch. 5, § 7(b) (2007) (providing that termination of parental rights severs "all rights, powers, privileges, immunities, duties and obligations" between parent and child).

²²¹ *See* Cross & Fox, *supra* note 138, at 423, 427.

family members for care which may be temporary or permanent, depending upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief.²²²

The parent-child relationship was not extinguished prior to such arrangements, and the child's continued contact with extended family was a central tenet of the practice.²²³

Some tribal juvenile codes today resemble state child welfare laws—in part because of the tribes' desire to qualify for federal funding and to otherwise maintain legitimacy in the broader national context.²²⁴ Nevertheless, a few tribes have begun to codify alternative models of adoption to give recognition and contemporary viability to their unwritten, informal procedures.²²⁵ Although tribes may be reluctant to freeze their dynamic customs into written form,²²⁶ state courts are more likely to defer

²²² *In re J.J.S.*, 4 Navajo Rptr. 192, ¶ 40 (Navajo 1983) (quoting Opinion of Solicitor to Courts of Navajo Nation, No. 83-10 (Sept. 9, 1983)).

²²³ See generally John Red Horse, *Traditional American Indian Family Systems*, 15 FAM. SYS. & HEALTH 243 (1997).

²²⁴ See, e.g., COLVILLE CONFEDERATED TRIBES JUV. CODE §§ 5-2-192 to -195, 5-3-330 to -340 (2005) (providing procedures for termination of parental rights and adoption similar to state child welfare systems, with exception of provision for “peacemaking circle”); *In re B.A.*, No. 2000.NAGR.0000007, ¶ 16 (Confederated Tribes of Grand Ronde Cmty. of Or. Juv. Ct. Sept. 8, 2000), available at <http://www.tribalresourcecenter.org/opinions/opfolder/2000.NAGR.0000007.htm> (recognizing that ASFA funding stream required tribe to adhere to ASFA mandates, resulting in termination of parental rights and placement of children for adoption).

²²⁵ Official approval of customary adoption, for example, might be helpful in complying with federal funding requirements and to clarify parental authority to give consent for a child's medical treatment or education. Cross & Fox, *supra* note 138, at 428–29. The National Indian Child Welfare Association has initiated a “Reclaiming Customary Adoptions Project” to assist Indian people in implementing customary adoption programs. The Project is intended to examine the barriers that prevent tribal families from becoming adoptive placements in the child welfare context and to bring tribal laws into alignment with tribal values and custom. See TIME FOR REFORM, *supra* note 3, at 10.

²²⁶ Cross & Fox, *supra* note 138, at 429.

to tribal permanency options if there is clear tribal authorization for the practice.²²⁷

Alternative permanency options take various forms in tribal law, including open adoption and customary or traditional adoption. The codes of several tribes now express a clear preference for open adoption.²²⁸ In some codes, that goal is accomplished by providing that some portion of parental rights will survive the adoption, and in other codes, the result is achieved by “suspending” rather than terminating parental rights.²²⁹ Although a few states have incorporated “suspensions” of parental rights in their statutes, the term is used in conjunction with guardianships or other forms of custody that fall short of adoption.²³⁰ Some tribes, in contrast, view the status of parenthood more fluidly and permit adoption to rest on a suspension of parental rights.²³¹ The Confederated Salish and Kootenai Tribes of Montana, for example, include the following passage in their Children’s Code:

In accordance with Indian custom, the Court may determine that an open adoption in some degree is best for the child and family. In that case, the Court will decide that a full termination of parental rights is not in the best interests of the child, and that certain residual parental rights will be maintained by the natural parents of the child. Such residual rights may include rights to visitation, contact, to be informed of matters of major importance affecting the health, welfare, education or spiritual training

²²⁷ I have written elsewhere about the trade-offs that tribes face in navigating the competing pressures to conform their laws to majoritarian standards and to maintain their unique cultural identity. *See generally* Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927 (1999).

²²⁸ For an example, see SALISH & KOOTENAI CHILDREN CODIFIED § 3-2-406(10)(h) (2005).

²²⁹ For an example, see *id.* §§ 3-2-401–405.

²³⁰ *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5204 (2005) (authorizing guardianship where parental rights have been “terminated or suspended by circumstances or prior court order”); ME. REV. STAT. ANN. tit. 18-A, § 5-204(a) (1998) (same); MICH. COMP. LAWS ANN. § 700.5204 (2002) (same, with delineation of circumstances justifying guardianship).

²³¹ *See* SALISH & KOOTENAI CHILDREN CODIFIED § 3-2-406(10)(h).

of the child, or such other residual rights as the Court may determine in the best interests of the Child.²³²

Under the Code, a “suspension of parental rights” means the “temporary or indefinite severance of the legal relationship between parent or child,” while a “termination of parental rights” means the “permanent cancellation” of the relationship.²³³ Nevertheless, even in ordering a termination of parental rights, the tribal court has the authority to identify “residual parental rights” that survive the termination.²³⁴

Many tribes allowed an informal child-rearing arrangement through mutual agreement when biological parents cannot function adequately as parents.²³⁵ In general, the practice involved placing a child with extended family or other members of the child’s clan, village, or community.²³⁶ Under the Salish and Kootenai Code, such adoptions may be created by a parent’s voluntary placement of a child with another person without court involvement.²³⁷ According to the Code:

Such an adoption must be voluntarily entered into by the natural parent or parents involved and the custodian, and shall be recognized as a legal adoption. The natural parent or parents consenting to the adoption must do so with knowledge of the permanent nature and effect upon their natural parent rights.²³⁸

²³² *Id.*

²³³ *Id.* § 3-2-401.

²³⁴ *Id.* § 3-2-313(6)(b)(ii) (permitting tribal court to order residual parental rights in termination decree, such as rights to communicate and visit with child, right to be consulted about child’s religious affiliation, medical treatment, or marriage). Residual rights for extended family members may also be ordered. *Id.* § 3-2-313(7).

²³⁵ Red Horse, *supra* note 223.

²³⁶ *See, e.g.*, Big Talk v. Big Talk, No. 091 (Ft. Peck Ct. App. Assiniboine & Sioux Tribes, Dec. 1, 1989), *available at* <http://www.tribalresourcecenter.org/opinions/opfolder/1989.NAFP.0000019.htm> (recognizing tribal custom of grandparent assuming responsibility for grandchild in cases of neglect by parent or absence of parent).

²³⁷ SALISH & KOOTENAI CHILDREN CODIFIED § 3-2-408.

²³⁸ *Id.* § 3-2-408(1).

While the Code does not purport to prescribe the elements of the voluntary placement or agreement, it does provide that an informal or traditional adoption, once validly created, has the same effect as formal adoption.²³⁹

Thus, through explicit code passages and the evocative notion of a “suspension” of parental rights, the Salish and Kootenai Tribes have made clear that some residual portion of parental rights can survive an adoption, whether formal or informal. Moreover, the Tribe has taken the bold step of acknowledging in its code the practice of informal adoption. By declaring the effect of an informal adoption without attempting to regulate the details of its creation, the Tribe has achieved a balance between the need to respect the unwritten dynamic nature of tribal tradition and the practical need to have clear legal records of parent-child relations.²⁴⁰

Other tribal codes similarly evince a policy against the complete severance of parent-child relations. In the Sisseton-Wahpeton Sioux Tribe in South Dakota, open adoptions are described as “adoptive placements made through the Court when most, but not all parental rights have been terminated.”²⁴¹ The code goes on to explain that “[o]pen adoption allows the Court to insure that an older child who has established bonds of affection with its natural parents is able to maintain a relationship with its natural parents, while at the same time becoming part of another family.”²⁴² The Sisseton-Wahpeton Sioux also have included a description

²³⁹ *Id.* § 3-2-408(5) (“Following the effective creation of an informal adoption, the relation of parent and child and all rights, duties, and other legal consequences of the natural relation of the child and the parent shall be in accordance with Section 3-2-406(11), as specified for formal adoptions.”).

²⁴⁰ In a similar recognition that parental rights survive and can be restored, the White Mountain Apache Tribe provides for revocation of a termination order and restoration of parental rights within six months of a termination on a showing that the best interests of the child would be served. *See* WHITE MOUNTAIN APACHE JUV. CODE § 8.7(A) (2000).

²⁴¹ SISSETON-WAHPETON SIOUX JUV. CODE § 38-03-37 (1996).

²⁴² *Id.* Similarly, the White Earth Band of Ojibwe endorses open adoption in its code. *See* WHITE EARTH BAND OF CHIPPEWA CHILD/FAM. PROTECTION CODE tit. 4, ch. XXVII, § 1 (2003) (providing that “[m]ost adoptions under this code shall be in the nature of ‘Open Adoptions.’ The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child’s natural family”). The White Earth code goes on to provide that, absent compelling reasons to the contrary, the child has a right to information about his or natural family and tribal heritage and rights of visitation with biological parents and other family members. *Id.*

of traditional adoption, or “ecagwaya,” in their tribal code.²⁴³ Unlike the Salish and Kootenai Tribes, the Sisseton-Wahpeton Sioux have spelled out the details of the process of traditional adoption. According to the code:

Ecagwaya or “traditional adoption” means according to Tribal custom, the placement of a child by his natural parents . . . with another family but without any Court involvement. After a period of two (2) years in the care of another family, the court, upon petition of the adoptive parents, will recognize that the adoptive parents, in custom or traditional adoption have certain rights over a child even though parental rights of the natural parents have never been terminated The decision of the Court shall be based on the best interests of the child and on recognition of where the child’s sense of family is[.] Ecagwaya is to raise or to take in as if the child is a biological child.²⁴⁴

In the description of ecagwaya, with its guidelines for achieving judicial recognition, the Sisseton-Wahpeton Sioux have chosen to partially formalize an informal process. Again, this approach serves the practical needs of contemporary society by imparting a degree of certainty to a heretofore unwritten tribal tradition.

The cultural dissonance of severing parental rights takes a different form in other tribes. Some have articulated a tribal policy against formal adoption and, in so doing, rejecting the permanency preferences that dominate state and federal law.²⁴⁵ The Siletz Tribe of Oregon is illustrative:

It is the policy of the Siletz Tribe that children should be adopted only as a matter of last resort, and that alternative longterm placements that maintain the connection between

²⁴³ SISSETON-WAHPETON SIOUX JUV. CODE § 38-03-24.

²⁴⁴ *Id.* The same code provision also provides that a traditional adoption must be attested to by two reliable witnesses. *Id.*

²⁴⁵ See SILETZ JUV. CODE § 8.436(a) (2005), available at <http://www.narf.org/nill/Codes/siletzcode/silcode16juvenile.htm>. The Coquille Indian Tribal Code has similar provisions endorsing longterm placements other than adoption in order to preserve children’s familial and tribal connections. See COQUILLE INDIAN TRIBAL CODE § 643.010 (Policy) (2006).

the minor and his or her parent(s) and family, such as guardianship and long-term foster care, should be considered first. A decree of adoption shall not terminate the legal relationship between the minor and the minor's natural family members, except by order of the Court.²⁴⁶

Thus, the Siletz model gives priority to less "permanent" placement options, such as foster care, over the alternative of adoption. Similar to other tribes, the Siletz Tribe also endorses open adoption as a means of retaining a child's relationships with extended family.²⁴⁷

Customary or informal adoption can play a significant role in the permanency stage of a child welfare placement. A dispute from Minnesota involving the White Earth Band of Ojibwe illustrates the dynamics at play.²⁴⁸ In its "Customary Adoption Code," the tribe affirms its commitment to preservation of a "child's identity as a tribal member and member of an extended family and clan" as well as preservation of "culture, religion, language, values, clan system and relationships of the Tribe."²⁴⁹ The Code states the White Earth Band of Ojibwe believe "that children deserve a sense of permanency and belonging throughout their lives and at the same time they deserve to have knowledge about their unique cultural heritage."²⁵⁰ "Customary adoption" is defined broadly to mean "a traditional tribal practice recognized by the community and tribe which gives a child a permanent parent-child relationship with someone other than the child's birth parent(s)."²⁵¹ Although the Code does not prescribe the elements of a customary adoption, it authorizes the tribal court to issue an order for customary adoption if it is in the best interests of

²⁴⁶ See SILETZ JUV. CODE § 8.436(a).

²⁴⁷ The Siletz Code explicitly states that a termination of parental rights shall have no effect on the child's enrollment status or degree of blood quantum, rights of inheritance from the biological parents, or the child's "relationship with his or her extended family members, where appropriate." *Id.* § 8.424.

²⁴⁸ See *In re Welfare of Children of B.W.*, No. A07-612, 2007 WL 2417331 (Minn. Ct. App. Aug. 28, 2007).

²⁴⁹ WHITE EARTH BAND OF OJIBWE JUDICIAL CODE tit. 4a-1(B)(3), available at <http://www.whiteearthtribalcourt.com/WhiteEarthCustomaryAdoptionCode.doc.pdf>.

²⁵⁰ *Id.* § 4a-1(C)(2).

²⁵¹ *Id.* § 4a-1(C)(7).

the child and the child's tribe,²⁵² or, alternatively, to certify a customary adoption based on the testimony of an expert witness.²⁵³ Similar to the language of other tribal codes, the White Earth Customary Adoption Code refers to a "suspension" rather than "termination" of parental rights²⁵⁴ and sets forth procedures for this to occur, again requiring that it be in the best interests not only of the child but also of the tribe.²⁵⁵

In a Minnesota appellate court decision,²⁵⁶ a child welfare dispute arose concerning four young siblings, all enrolled members of the White Earth Band. The children's longstanding custodians, a non-Indian couple who were not their biological parents, had been charged with abuse.²⁵⁷ After the custodians' parental rights to their own child were terminated in a consolidated hearing, the White Earth Band moved for transfer of the case to tribal court.²⁵⁸ The children's guardian ad litem and the children's biological mother ultimately supported the transfer.²⁵⁹ The children's custodians, on the other hand, opposed the motion, arguing that good cause existed to deny transfer.²⁶⁰ The trial court granted the motion for transfer, relying in part on the availability of customary adoption in tribal court.²⁶¹

²⁵² *Id.* § 4a-11. The code does specify that petitions to establish a customary adoption must prove the allegations by clear and convincing evidence. *Id.* § 4a-10(B)(4).

²⁵³ *Id.* § 4a-12 ("A customary adoption, conducted in a manner that is a long-established, continued, reasonable process and considered by the people of the White Earth Band to be binding and authentic, based upon the testimony of an expert witness, may be certified by the Children's Court as having the same effect as an adoption order issued by this court so long as it is in the best interests of the child and the child's tribe.").

²⁵⁴ *Id.* § 4a-1(C)(15) ("suspension of parental rights" means the "permanent suspension of the rights of biological parents to provide for the care, custody and control of their child"). The code gives flexibility to the tribal court to determine the exact nature of the suspension, permitting the court to decide whether or not to suspend parent-child contact, for example. *See id.* § 4a-7(A)(2). A suspension does not sever the child's relationship to the tribe. *Id.* § 4a-7(A)(7).

²⁵⁵ *Id.* § 4a-7(A).

²⁵⁶ *In re Welfare of Children of B.W.*, No. A07-612, 2007 WL 2417331 (Minn. Ct. App. Aug. 28, 2007).

²⁵⁷ *Id.* at *1.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *2.

²⁶¹ *Id.* at *3-4.

Even though the White Earth Band moved for transfer of the case at a late stage in the proceedings, the trial judge reasoned that the tribal court was the appropriate forum.²⁶²

On appeal, the custodians contended that permanency for the children would be delayed by the transfer.²⁶³ The tribe argued, however, that the primary reason for the transfer was because the tribal court had the permanency option of “customary adoption” that was not available in state court.²⁶⁴ The guardian ad litem supported the concept of customary adoption and contended that the streamlined procedures in tribal court would permit permanency to be achieved more quickly.²⁶⁵ The appeals court agreed:

Despite the importance of permanency timelines in state-court proceedings, given the clear federal and state mandate that tribes are in the best position to make decisions for Indian children and the availability in tribal court of a permanency option not available in state court . . . we cannot conclude that the district abused its discretion in concluding that transfer to tribal court best serves the interests of the children.²⁶⁶

The Minnesota courts’ willingness to accept the tribe’s “permanency option” of customary adoption is heartening. The *B.W.* case reveals how tribal approaches to permanency can offer dispositions for children that not only are consistent with their tribal culture but also may be achieved more quickly because of the flexibility of tribal procedures. While state courts do not often recognize the advantages of tribal permanency options,²⁶⁷ the *B.W.* case is a promising example.

²⁶² *Id.* at *4.

²⁶³ *Id.* at *3.

²⁶⁴ *See id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *4.

²⁶⁷ *See, e.g.,* *Carla C. v. Superior Court*, No. D046194, 2005 WL 3113452 (Cal. App. Nov. 22, 2005), discussed *supra* notes 178–85 and accompanying text.

IV. CONCLUSION

Indian child welfare cases in the state courts continue to raise difficult issues related to children's physical and psychological well-being, their cultural identity, and their need for permanent, stable homes. The interplay of ASFA and ICWA has added to the complexity of the task facing state court judges in these proceedings. As explained in Part I, state courts must adhere to the more rigorous requirements of ICWA where applicable, even if ICWA's heightened standards may delay an Indian child's entry into a permanent placement. Achieving permanency for foster children may have been a central goal of ASFA, but it was not the focus of congressional concern twenty years earlier in ICWA. Instead, the earlier Act focused on the unique plight of American Indian children and the practices that threatened to destroy children's lives, families, and tribes themselves.²⁶⁸ Nevertheless, ICWA's recognition of the value of tribal identity and tribal culture can enhance permanency planning for Indian children whose cases are processed in the state court systems. Also, the newly-enacted FCSIAA complements ICWA's policies by encouraging family preservation programs, expanding federal assistance for kinship guardianships, and improving federal funding for tribal foster and adoption assistance.²⁶⁹

State courts have advanced competing visions of permanency in placement disputes under § 1915 of ICWA, sometimes subordinating tribal cultural norms to other concerns in the placement calculus,²⁷⁰ and sometimes discounting the child's emotional trauma likely to ensue from a disruption of a *de facto* family.²⁷¹ As noted in Part II, some courts have unnecessarily excluded the tribal viewpoint from the critical "good cause" determination.²⁷² Other courts, in contrast, seem to reject the Indian child's human vulnerability to trauma from a disruption of a *de facto* parent-child relationship.²⁷³

Tribal views, evident from codes, tribal court opinions, and longstanding practices, indicate that Indian children are no different from other children in their need for a nurturing ongoing family, whether it be

²⁶⁸ See *supra* notes 17–18.

²⁶⁹ See *supra* notes 83–84.

²⁷⁰ See *supra* note 169.

²⁷¹ See *supra* notes 184–85.

²⁷² See *supra* notes 188–89.

²⁷³ See *supra* notes 194–95.

the child's birth family, extended family, or other members of the tribal community.²⁷⁴ At the same time, tribal laws and traditions also reveal that relationships with birth families can continue after a removal, a practice that seems to benefit Indian and non-Indian children alike.²⁷⁵ Part III highlights just a few of the myriad expressions of tribal tradition to emphasize that many tribes share a resistance to absolute severance of parental rights but vary in their approach to care-giving for abused or neglected children.

Tribal practices described in this article offer alternative forms of parent-like care for Indian children that satisfy their need for permanency but differ from the all-or-nothing approach to parenting that has shaped ASFA. In some circumstances, transfer to tribal court can make these alternative forms immediately available. When an Indian child welfare case remains in state court, however, judges can invoke the flexibility in ASFA's permanency mandates, especially as amended by FCSIAA, to permit placements that reflect the culture of the child's tribe. Through such time-honored arrangements as guardianships, open adoptions, and customary or traditional adoptions, state courts may be able to satisfy the Indian child's need for familial security in a placement that comports with the child's tribal heritage.

²⁷⁴ See *supra* note 207.

²⁷⁵ See Susan C. Mapp & Cache Steinberg, *Birthfamilies as Permanency Resources for Children in Long-Term Foster Care*, 86 CHILD WELFARE 29 (2007) (reporting on study showing that children's continued contact with birth families and other relatives resulted in psychological benefits to children even if permanent placement was not available); see also *supra* note 100.