

# FINDING THE INDIAN CHILD WELFARE ACT IN UNEXPECTED PLACES: APPLICABILITY IN PRIVATE NON- PARENT CUSTODY ACTIONS

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*In recent years, as an increasing number of Indian parents struggle with substance abuse and addiction, the number of abused and neglected Indian children is on the rise. Consequently, state child welfare agencies are overwhelmed, and caseworkers are only able to intervene in the most egregious situations. This understaffing of state agencies forces other family members and non-relatives to step in and care for these children. The federal Indian Child Welfare Act of 1978 ("ICWA") was enacted by the United States Congress to stem the removal, often unwarranted, of an alarmingly high percentage of Indian children from their families through both public and private custody actions. This Article explores the recent proliferation of state statutory provisions permitting non-parents to obtain parental rights and custody of Indian children without the involvement of state agencies and argues for the applicability of ICWA to such private actions.*

## INTRODUCTION

*Most of the people who were being given Indian children were well meaning, some were not. I have heard it said that an Indian child being raised by a non-Indian is like a swan trying to raise an eagle.<sup>1</sup>*

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1. Tina Albert, *Young Once, Indian Forever: A Look at the Indian Child Welfare Act after 25 Years*, FOSTERING FAM. TODAY MAG., Winter 2003, at 4.

Imagine a young toddler of American Indian and Mexican-American descent. He lives in an urban apartment with his Indian mother and his Mexican father. His mother is a member of a federally recognized Indian tribe, and he is eligible for membership in that same tribe. He lives a tumultuous life, threaded with his parents' frequent bouts of drunkenness and by his father's violence against his mother. He often goes hungry and is left wearing the same dirty clothes day after day. Despite neighbors' reports of the domestic violence, alcohol abuse, and parental neglect, the understaffed child welfare agency declines to bring an action to remove the child for placement in foster care. Over time, the young boy's paternal grandparents become seriously concerned about his well-being. One day, his mother brings him to the grandparents' home for a visit. Alarmed at his thin, dirty appearance, the grandparents decide that they need to keep him so that they may care for him. They persuade his parents to let him stay, saying that they want to give them a break.

Six months pass with the child in the grandparents' care and custody. Then, one day, the Indian mother leaves the child's father and moves to her own apartment. Now on her own, the Indian mother goes to the grandparents' home and requests that they return her son to her. Can the Mexican-American grandparents keep their grandson in their home away from his mother and obtain sole custody of him without the cooperation of the state child welfare agency or without filing for guardianship? If the grandparents file a private custody action under their state's domestic relations law, does the federal Indian Child Welfare Act of 1978 ("ICWA" or "the Act")<sup>2</sup> apply? This Article argues that ICWA does apply. And, if a court fails to recognize ICWA's applicability to a private custodial action brought by the Mexican-American grandparents, the Indian child and his immediate family will be deprived of the important protections of the Act.

This hypothetical scenario is an unfortunate reality for all too many Indian children. Given that an increasing number of Indian parents struggle with substance abuse and addiction, the number of abused and neglected children continues to rise.<sup>3</sup>

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2. 25 U.S.C. §§ 1901–63 (2006).

3. According to the United States Department of Health and Human Services, Administration for Children and Families, in 2000, 293,000 children entered foster care. In 2006, 303,000 children entered foster care. *Foster Care Statistics, Exhibit 1*, CHILD WELFARE INFORMATION GATEWAY (2010), <http://www.>

Consequently, state welfare agencies are overwhelmed, and state case workers can only intervene in the most egregious cases. The understaffing of state agencies, combined with a lack of available foster homes, forces other family members and non-relatives to step in and care for these children. This trend of removal without the involvement of state agencies represents a dramatic change from the 1960s and 1970s when state caseworkers vigorously sought to remove Indian children from their families.<sup>4</sup> Although the hypothetical grandparents are deeply concerned for their grandson, without the application of the protections of ICWA, the mother may not have an opportunity to address the conditions that led to her son living in his grandparent's home. Moreover, not only will the child's relationship with his mother be at risk, but he may also lose his connection to his tribal culture, placing his own emotional and psychological future at risk as well.

Congress enacted ICWA to stem the often unwarranted removal of an astonishingly high percentage of Indian children from their families by public and private agencies.<sup>5</sup> Most lawyers, judges, and child welfare caseworkers are familiar with the application of the Act in cases where a state agency removes a child from his or her family due to allegations of child abuse or neglect. These public agency initiated actions are the most common means used to remove Indian children from their homes. Private actions are actions initiated by a non-parent caregiver under a state probate code, and they are utilized less frequently. Guardianship actions and private adoptions often require the petitioner to follow strict procedural requirements, including paying for and subjecting him or herself to a home-study by a licensed agency, undergoing a criminal background check, and even submitting to a credit check. Since the late 1980s the number of children in need of foster care placement has risen dramatically—placing increased pressure on an already overwhelmed public child-welfare system. Given the

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[childwelfare.gov/pubs/factsheets/fosterdlinks.cfm](http://childwelfare.gov/pubs/factsheets/fosterdlinks.cfm).

4. Studies conducted by the Association on American Indian Affairs in 1969 and 1974, and presented in Congressional hearings, discovered that about 25 percent of all Indian children were removed from their families and placed in predominantly non-Indian families, foster care, or institutions. See *Indian Child Welfare Program: Hearings Before the S. Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler). The Association attributed this "appalling" statistic, in part, to the application of discriminatory standards by culturally-biased, non-Indian social workers. *Id.* at 4–5.

5. 25 U.S.C. § 1901(4).

burden on the public child-welfare system and the daunting nature of formal adoption and guardianship proceedings for non-legally trained persons, states are creating private custody actions that are easier to satisfy. These new actions give rise to concerns about compliance with ICWA when custody of an Indian child is at issue.

The new custody actions instituted by states across the country, although not called either foster care placements or guardianships, have the same practical effect as those proceedings specifically named in ICWA. All these actions result in a non-parent's authorization to exercise the full range of parental rights and responsibilities. Unfortunately, because private non-parent custody actions are filed in family courts or domestic relations divisions where cases governed by ICWA have not appeared before, presiding judges are often unaware of the Act's applicability. Consequently, Indian children are being separated from their parents, Indian families, and tribes without ICWA's protection. The very problem that ICWA was enacted to address is reoccurring in the present day through the implementation of new private non-parent custody causes of action.

This Article explores the recent proliferation of state statutory provisions permitting non-parents to obtain parental rights and custody of Indian children without the involvement of state agencies and argues for the applicability of ICWA to all such private actions. Part I of this Article discusses the origins and legislative intent of ICWA. Part II explores the changing demographics of Indian populations and the historical trends leading to the development of an increasingly urban and racially diverse Indian population. This part also reviews the changing child-welfare landscape and details the factors contributing to a disproportionately high number of Indian children in need of care. Part III discusses ICWA's applicability to child custody actions initiated by public agencies or private parties. Part IV examines the mounting pressure to create new child custody arrangements and the emerging trend of state legislative initiatives granting custodial rights to non-parent caregivers. This part also reviews private non-parent custody actions available in four different states with high urban Indian populations: Colorado, Minnesota, New Mexico, and New York. These states are of particular relevance because three of the four—Colorado, Minnesota, and New Mexico—have enacted specific, separate state statutory provisions relating to ICWA imple-

mentation and compliance.<sup>6</sup> Part IV goes on to analyze the opening hypothetical under the non-parent private custody statutes of each sample state to determine whether the grandparents will be able to obtain legal and physical custody of their grandson and whether each state's law contemplates ICWA's applicability to the hypothetical. Finally, this Article concludes with Part V, which discusses the ramifications of the applicability or non-applicability of ICWA.

## I. ORIGINS OF THE INDIAN CHILD WELFARE ACT

Since the founding of the United States, Indian tribes and their members have enjoyed a unique relationship with the federal government. Although retaining much of their inherent sovereignty, tribes are protected by an overarching trust responsibility borne by the United States to ensure their continued survival as a separate people.<sup>7</sup> Given that tribal children constitute the future of the tribes, the United States has a direct responsibility as trustee to protect those children.<sup>8</sup>

Beginning in 1973, the United States Senate Select Committee on Indian Affairs ("Committee") began to receive reports that an alarmingly high percentage of Indian children were being removed from their natural parents, predominantly through the actions of state government and private agencies.<sup>9</sup> Studies undertaken by the Association on American Indian Affairs, state welfare offices, and private child welfare groups indicated that as many as 25 percent of all Indian children were placed in institutions, or in foster or adoptive homes, usually with non-Indian families.<sup>10</sup> In 1974, when the Committee held an oversight hearing on Indian child-placement concerns, testimony from the Nixon Administration, Indian people, state representatives, tribal leaders, medical and psychiatric professionals, and child-welfare groups confirmed the validity of these reports.<sup>11</sup> In addition to the disproportionately high

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6. See COLO. REV. STAT. § 19-1-126 (2010); MINN. STAT. §§ 260.751–853 (2009); N.M. STAT. § 32A-5-4 (2010).

7. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (wherein Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian").

8. 25 U.S.C. § 1901(3).

9. S. REP. NO. 95-597, at 11 (1977).

10. *Id.*

11. *Id.* at 11–12.

number of Indian children being placed in foster or adoptive homes, the testimony established that Indian family breakups frequently occurred as “a result of conditions which [were] temporary or remedial and where the Indian people involved [did] not understand the nature of the legal actions involved.”<sup>12</sup> The Committee found that the state courts’ liberal granting of parental rights to non-parents was at odds with Indian cultural values and social norms:

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside of the nuclear family as neglect and thus as grounds for terminating parental rights.<sup>13</sup>

Following the Committee’s hearings, Congress formed the American Indian Policy Review Commission (“Commission”), which conducted two years of intensive investigative work encompassing virtually the entire field of Federal-Indian relations.<sup>14</sup> The Commission submitted its findings and 206 specific recommendations to Congress in a comprehensive report in 1977.<sup>15</sup> The Commission found that the policy of removing Indian children from their homes and tribes to “civilize” them began in the 1880s with the creation of boarding schools.<sup>16</sup> As of 1977, numerous states still engaged in the widespread removal of Indian children from their tribal cultures through adoption by non-Indian families and placement in non-Indian foster-care homes and institutions.<sup>17</sup> Noting that both Indians and non-Indians were concerned with child placement, the Commission found that social workers “without training or understanding of Indian lifestyle or culture are ill-equipped to make judgments about the adequacy of an Indian child’s upbringing.”<sup>18</sup> The Commission called for Congress to hold its own oversight hearings and to enact comprehensive legislation to address who de-

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12. *Id.* at 11.

13. H.R. REP. NO. 95-1386, at 10 (1978).

14. 1 AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT 3 (1977).

15. *See id.*

16. *Id.* at 422.

17. *See id.*

18. *Id.*

cides whether an Indian child needs to be removed from the home and where and how that child is to be raised.<sup>19</sup> Shortly after the submission of the Commission's report, Congress called for the recommended hearings.<sup>20</sup>

On August 4, 1977, the Committee held an open public hearing on Senate Bill 1214, "The Indian Child Welfare Act of 1977," which after slight alteration was enacted in 1978.<sup>21</sup> The overarching purpose of ICWA is set forth in § 1902:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families 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.<sup>22</sup>

Thus, the Act is primarily concerned with the psychological damage inflicted on Indian children when they are removed from their Indian families and placed in non-Indian foster or adoptive care.<sup>23</sup> The hearings preceding ICWA's enactment confirmed that Indian children often suffer serious emotional problems when they are placed in homes that do not reflect their special cultural needs.<sup>24</sup>

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19. *Id.* at 422–23.

20. *See To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes: Hearing Before the S. Select Comm. on Indian Affairs on S. 1214*, 95th Cong. 1–2 (1977).

21. S. REP. NO. 95-597, at 12 (1977).

22. 25 U.S.C. § 1902 (2006).

23. *See* S. REP. NO. 95-597, at 11–12.

24. *Id.* In the 1989 case *Mississippi Band of Choctaw Indians v. Holyfield*, the United States Supreme Court noted the 1974 Congressional testimony of Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, regarding "the serious adjustment problems encountered by [Indian children placed in non-Indian homes] as well as the impact of the adoptions on Indian parents and the tribes themselves." 490 U.S. 30, 33 & n.1 (1989) (citing *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974)) (internal footnote omitted). Dr. Westermeyer's research with Indian adolescents revealed that these adolescents had difficulty coping in white society in spite of being raised in a purely white environment: "[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." *Id.* at 33 n.1.

The psychological harm suffered by Indian children placed in non-Indian families continues to be a topic of concern for and study by mental health professionals.<sup>25</sup> Although ICWA slowed the removal of Indian children from their families, it did not curtail such removal entirely.<sup>26</sup> Twelve years after the passage of ICWA, Carol Locust, training director for the Native American Research and Training Center at the University of Arizona College of Medicine, conducted a pilot study to determine the long-term effect on Indian children removed and placed in non-Indian homes.<sup>27</sup> The study revealed that every Indian child placed in a non-Indian home for either foster care or adoption is at greater risk of long-term psychological damage as an adult.<sup>28</sup> The cluster of long-term psychological liabilities exhibited by Indian adults who experienced non-Indian placement as children is called the "Split Feather Syndrome."<sup>29</sup> Of the twenty Indian adoptees studied by Locust, nineteen of them took steps as adults to repatriate or reclaim their tribal identity.<sup>30</sup> Of these nineteen, eighteen said their personal lives had "changed dramatically for the better after the reclamation."<sup>31</sup> Profound positive changes in their psychological health included decreases in depressive feelings, alcohol and drug abuse, and aggressive behaviors.<sup>32</sup> The study showed increases in self-esteem, spiritual activities, days worked (working more regularly, finding a job, and getting a better job), and feeling that they had found a purpose in life.<sup>33</sup>

In the three decades following the enactment of ICWA, the number of Indian children removed through state agency intervention and the adoption of Indian children by non-Indians has decreased dramatically.<sup>34</sup> It remains unknown, however,

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25. See, e.g., Carol Locust, *Split Feathers . . . Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 ONT. ASS'N OF CHILD AID SOCIETIES J. 11 (2000).

26. *Id.* at 11.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 15.

31. *Id.*

32. *Id.*

33. *Id.*

34. See Ann E. MacEachron et al., *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 457 (1996) (finding that between 1975 and 1986, Indian children foster-care placements decreased 31 percent and adoption rates decreased 93 percent on average nationally); Gordon E. Limb et al., *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Family Preservation for American Indian Children*, 28 CHILD ABUSE &



how many Indian children have been removed from their families and separated from their tribes through private non-parent custody actions. Given the high risk of trauma and psychological harm for these Indian children, it is critical that the protections of ICWA be extended to all private non-parent custody actions.

## II. KEY TRENDS AND FACTORS THAT MAKE AWARENESS OF ICWA'S APPLICABILITY INCREASINGLY IMPORTANT

In the years following the passage of ICWA, the number of children who qualify as "Indian children" under the Act has steadily increased. This increase is attributed partially to the upsurge in individuals self-identifying as Indian and the relaxation of some tribes' membership criteria. Section A will discuss the effects that increasing Indian self-identification has had on private custody actions. Then, Section B will address how the Indian population's urbanization has brought the importance of ICWA into stark relief. Section C will look at the changing racial compositions of modern Indian families and how those changes implicate the need for the application of ICWA. How the child welfare system has evolved with regard to Indian children since the passage of ICWA is addressed in Section D. Finally, Section E describes steps that states have taken in an attempt to handle the growing foster care system and social worker caseloads.

### A. *Increase in Self-Identification and Modified Tribal Membership Criteria*

According to the United States Census, approximately four million Americans self-identify as having some Indian heritage.<sup>35</sup> This reflects a dramatic rise in persons reporting their Indian identity between 1970 and 1980.<sup>36</sup> This increase may

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NEGLECT 1279, 1285 (2004) (citing to a 2001 study finding that 83 percent of children placed in foster care or pre-adoptive homes in Arizona were placed within ICWA preferences).

35. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 11 (2005) [hereinafter GAO ICWA REPORT].

36. COMM. ON POPULATION, NAT'L RESEARCH COUNCIL, CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 82 (Gary D. Sandefur, Ronald R. Rindfuss & Barney Cohen eds., 1996)

be attributable in part to the advent of tribal gaming and other tribal economic successes, providing an impetus for persons of tribal heritage to come forward and receive recognition from their tribes. In addition, several tribes, such as the Cherokee Nation, have modified their tribal membership criteria from one based on the possession of a minimum quantum of Indian blood to one requiring only that a person demonstrate his or her biological relationship to a tribal member ancestor without regard to blood quantum.<sup>37</sup> Consequently, tribal enrollments have grown exponentially in the years since the passage of ICWA, and an increasing number of children may come within the definition of an “Indian child” and thus ICWA’s attendant requirements.<sup>38</sup> These recently recognized Indian children are among those that will be the subjects of the newly created private non-parent custody actions. Given the significant number of Indian children that may come before domestic courts unfamiliar with ICWA, it is critically important that these courts be made aware of the Act’s required safeguards.

*B. “Indian Country” Becomes Increasingly Urban*

As the number of Americans that self-identify as Indians has increased, so too has the percentage of Indians residing in off-reservation urban areas. In 1950, only 13 percent of Indians lived in cities.<sup>39</sup> By 1990, 56 percent of the total national Indian population lived in urban areas.<sup>40</sup> This trend raises serious concerns about the fate of urban Indian children that reside in unstable homes.<sup>41</sup> Indian children living in urban areas are more likely to have parents of mixed race, both Indian and

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(noting that in the 1980 United States Census, 1,420,400 persons self-identified as American Indian, Alaska Native, or Aleut).

37. See CHEROKEE NATION CONST. art. IV, § 1; WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) CONST. art. II, § 2; MASHANTUCKET PEQUOT (WESTERN) TRIBE CONST. art. IV, § 2; see also *Tribal Membership: Requirements as of April, 1998*, NATIVE AMERICAN CONSTITUTION AND LAW DIGITIZATION PROJECT, <http://thorpe.ou.edu/OILS/blood.html> (last visited Oct. 20, 2010) (listing blood quantum requirements for enrollment in tribes located in Oklahoma).

38. See 25 U.S.C. § 1903(4) (2006).

39. ALVIN M. JOSEPHY ET AL., *RED POWER: THE AMERICAN INDIANS’ FIGHT FOR FREEDOM* 260 (1999).

40. *Id.*

41. The idea of the rural and isolated “Reservation Indian” is fairly recent in the history of Native America. American Indians have been “urban” for a long time. For example, the oldest settled communities in North America are the large southwestern communities of the Pueblo peoples. Editor’s Report, *The American Indian Rural-Urban Continuum*, INDIAN COUNTRY TODAY, July 14, 2005, at A2.

non-Indian. Therefore, there is a much greater likelihood that non-Indian extended family members privately may seek custody. Without an awareness of ICWA's applicability to those custody actions, these urban Indian children can find themselves cut off from their Indian families, tribes, and tribal culture.

The significant increase in the percentage of Indians in urban areas is largely a product of the federal government's post-World War II policy to assimilate Indians and terminate Indian tribes as distinct political entities by moving Indians off-reservation.<sup>42</sup> Through the Bureau of Indian Affairs' ("BIA") Placement Program, relocation of tribal people to urban areas occurred informally for many years. However, by the early 1950s, the BIA felt the process needed to be expedited.<sup>43</sup> In 1950, only 13 percent of Indians lived in cities.<sup>44</sup> To alleviate the shortage of land and rampant levels of tribal unemployment on the reservations, the BIA determined that the reservation era needed to end through an even broader application of the Placement Program.<sup>45</sup>

As a means to reach its goals, the BIA formally instituted the "Voluntary Relocation Program."<sup>46</sup> To encourage tribal members to relocate, Congress provided funds for vocational training, transportation to urban areas, living costs during a period of "adjustment," and other expenses incidental to relocation.<sup>47</sup> In 1951, the BIA requested a large increase in the annual appropriation for the placement program: from \$279,546 in 1951, to \$1,664,800 in 1952.<sup>48</sup> With this additional funding, the BIA was able to dramatically increase the number of Placement Offices on reservations, which encouraged and facil-

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42. See generally David George Neal, *The Voluntary Relocation Program: Problems of Indian Employment in the 1950s* iii-viii (Aug. 1971) (unpublished M.A. thesis, University of South Dakota) (on file with the National Indian Law Library).

43. *Id.* at 14.

44. JOSEPHY, *supra* note 39, at 260.

45. For an excellent review of the history of American Indians in Colorado, see Cassia Furman, *What Brought Them Here: Establishment of the Urban Indian in Colorado* (2004) (unpublished externship paper, University of Colorado Law School) (on file with the author).

46. GALE RESEARCH, *THE NATIVE NORTH AMERICAN ALMANAC* 50-51 (Duane Champagne, ed., 1994); see also COMM'R OF INDIAN AFFAIRS, *ANNUAL REPORT* 375 (1951).

47. See *Interior Department Appropriations for 1952: Hearings Before a Subcomm. of the H. Appropriations Comm. on H.R. 3790*, 82d Cong. 224, 237-38 (1951).

48. *Id.* at 261.

itated relocation away from the reservation.<sup>49</sup> To establish the urban operations centers, the BIA sent representatives to four western cities: Los Angeles, Phoenix, Denver, and Salt Lake City.<sup>50</sup> These were not the first cities to be involved in BIA relocation efforts, but 1952 marked a drastic enlargement of the Program.<sup>51</sup> The role of the urban Bureau officers was to secure permanent employment for Indians and assist with their adjustment to city life.<sup>52</sup> By the close of 1953, the Voluntary Relocation Program was so popular that relocation officers received more applications than they could handle.<sup>53</sup>

Although thousands of Indians relocated under the Voluntary Relocation Program, as many as one-third of the relocatees eventually returned to their reservations.<sup>54</sup> Their returns were prompted in large measure by the urban BIA relocation offices' failure to help them adjust to urban lives.<sup>55</sup> Tribal members were enticed to the cities by the BIA's promises of training and jobs, but tribal members rarely received the necessary counseling and financial services.<sup>56</sup> Relocatees were not introduced to social service agencies already in place to serve their needs, and practically all BIA services stopped as soon as the relocatee found some sort of employment, even though steady work was often elusive.<sup>57</sup> Once tribal members arrived in cities, many found themselves alone and ill-prepared to assimilate into urban culture.<sup>58</sup> In the end, the Program was a failure. Nonetheless, these relocation efforts left a permanent mark and established significant urban Indian populations that remain today.<sup>59</sup>

In 1962, the Bureau officially changed its policy of "Relocation Assistance" to "Employment Assistance" and expanded the Program across the country.<sup>60</sup> Although the BIA ceased to actively encourage and finance relocation, tribal members still continued to relocate to urban centers in search of work. Ac-

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49. See Neal, *supra* note 42, at 11.

50. *Id.*

51. See COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT 403-04 (1952).

52. See Neal, *supra* note 42, at 6.

53. See *Interior Department Appropriations for 1955: Hearings Before a Subcomm. of the S. Appropriations Comm. on H.R. 8680*, 83d Cong. 757-58 (1954).

54. GALE RESEARCH, *supra* note 46, at 50-51.

55. Neal, *supra* note 42, at 50-51.

56. GALE RESEARCH, *supra* note 46, at 240.

57. Neal, *supra* note 42, at 13.

58. *Id.*

59. See Furman, *supra* note 45, at 10.

60. Neal, *supra* note 42, at 48.

According to BIA records, the BIA Denver Field Employment Assistance Office coordinated vocational training for over 1,800 tribal members between 1962 and 1973.<sup>61</sup> The Denver office reported that slightly more than half of this number completed the training, but it also noted that a large number of Indians moved to Denver and other urban centers without BIA assistance during this period.<sup>62</sup>

The Relocation Program is largely responsible for the fact that the greatest concentrations of urban Indians are presently in the former BIA relocation-center cities.<sup>63</sup> Large enclaves of Indian people are currently found in the original relocation cities of Chicago and Los Angeles.<sup>64</sup> New York City has the highest population of Indians in the United States, with more than 41,289 Indians calling New York home in 2002.<sup>65</sup> According to the 2000 Census, Albuquerque ranked fourth and Minneapolis ranked seventh among urban centers with the highest percentage of Indian and Alaska Native residents.<sup>66</sup> Of the more than 44,000 Indians presently residing in Colorado, approximately 21,300 reside in urban communities along the Front Range of the Colorado Rockies,<sup>67</sup> including more than 18,000 in the city of Denver.<sup>68</sup>

Given this trend toward urbanization, more Indian children will be raised off-reservation in multi-racial and multi-ethnic families. If one of these urban-Indian children becomes the subject of a non-Indian's custody petition, and if the domestic relations judge does not apply ICWA to the proceeding, the safeguards set in place to protect and preserve familial and tribal relationships will be absent.

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61. J. DONALD HUGHES, *AMERICAN INDIANS IN COLORADO* 104 (2d ed. 1987).

62. *Id.*

63. See STELLA U. OGUNWOLE, *CENSUS 2000 BRIEF: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000* 8 tbl.3 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>. The cities of New York, Los Angeles, and Phoenix have the largest Indian and Alaska Native populations. *Id.*

64. *Id.*

65. See *id.* at 8 tbl.3. An additional 45,952 New York City residents reported themselves as Indian and Alaska Native in combination with one or more races. Jason Begay, *Native New Yorkers (The Original Kind): American Indians of Many Tribes Work to Preserve Identity in City*, N.Y. TIMES, Aug. 29, 2002, at B1.

66. See OGUNWOLE *supra* note 63, at 9 fig.4.

67. COLO. COMM'N OF INDIAN AFFAIRS, *COLORADO DIRECTORY OF AMERICAN INDIAN RESOURCES 2004-2005*, at 14-15 (2005), [http://www.cde.state.co.us/artemis/gov3\\_10/gov51010internet/gov51010200405internet.pdf](http://www.cde.state.co.us/artemis/gov3_10/gov51010internet/gov51010200405internet.pdf).

68. *Id.*

### C. *Trends in Indian Child Parentage*

In addition to the urbanization of Indians, there has been a shift in the racial composition of families with Indian children. According to the 1980 federal Census, 49 percent of Indian men and approximately 42 percent of Indian women are married to non-Indians.<sup>69</sup> These percentages may be misleading, however, as they reflect the population average rather than distinguishing between Indians living on- and off-reservation.<sup>70</sup> The norm for Indians residing on reservations—particularly in the Southwest—is racial endogamy.<sup>71</sup> Nearly 99 percent of on-reservation Indians marry other Indians.<sup>72</sup> Conversely, the off-reservation statistics exhibit a different result. In California, for example, which has a large percentage of urban Indians, 77 percent of married Indians have non-Indian spouses.<sup>73</sup> Given the relative size of the Indian population in relation to other groups in urban areas, the overwhelming percentage of potential marriage partners and co-parents are non-Indian. Thus, given the trend of Indians moving to urban areas, intermarrying with non-Indians and having children with them, the likelihood of custody conflicts between Indian parents (and Indian custodians) and non-Indians greatly increases. Due to the off-reservation nature of these disputes, state courts will have jurisdiction to hear these cases. Therefore, state judges must be alert to the applicability of ICWA to these custody disputes. Without judicial awareness of the familial and tribal protections intended by Congress to protect Indian children, there is a risk of emotional and psychological damage to Indian children resulting from being raised by non-Indians as they become distanced from their tribal identities.

### D. *Changes in the Indian Child-Welfare Landscape*

In the three decades since ICWA's enactment, the child-welfare landscape of the United States as a whole has also significantly changed. Due to a variety of factors detailed below, an increasing number of American children need out-of-home

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69. Susan Lobo, *Is Urban a Person or a Place? Characteristics of Urban Indian Country*, in *AMERICAN INDIANS AND THE URBAN EXPERIENCE* 182 (Susan Lobo & Kurt Peters eds., 2001).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 182–83.

placements, and Indian children compose a disproportionately high percentage of those children. Simultaneously, the number of foster and adoptive homes has shrunk dramatically. This Section investigates why so many parents are unable to care for their children, why states are exploring alternative custody procedures, and why these developments may disparately impact Indian children. These factors, along with Sections A through C, combine to show why awareness about, and application of, ICWA is increasingly important for state court judges.

Subsection 1 first explores the factors leading to a rapidly increasing number of children in foster care, including increases in parental substance abuse and the imposition of longer sentences for drug-related crimes. The non-parent caregivers' economic need for foster-care payments by non-parent caregivers is also raised as a motivating factor for placing children in formal foster care. Next, Subsection 2 investigates possible reasons why Indian children comprise a disproportionately high number of the national foster-care figures, including the intergenerational effect of the abuse Indian parents suffered while attending government or church-operated boarding schools.

1. Increase in the Number of Indian Children In Need of Care

As discussed in Part I, in the 1970s Congress determined that approximately 25 percent of all Indian children nationally were placed out-of-home in foster or adoptive families.<sup>74</sup> Unfortunately, there are no statistics on the number of children, both Indian and non-Indian, who were in formal foster care<sup>75</sup> in

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74. S. REP. NO. 95-597, at 11 (1977).

75. The commonly understood meaning of the term "foster care" varies significantly from ICWA's definition. Most state juvenile judges and caseworkers would be familiar with the following definition of "foster care":

Foster care is care provided for children in state custody who are unable to remain safely in their homes. Children in foster care stay with a family that provides safety, nurturing, and support. Foster care is part of a process that leads to a permanent home for the child. If a child is a temporary ward, then the goal is to return home. When this is not possible, the child becomes a permanent ward, and the outcome goal is adoption.

Robert Kornegay, *Findings Brief: Children in Foster and Kinship Care at Risk for Inadequate Health Care Coverage and Access*, ACAD. HEALTH, July 2004, at 2.

In comparison, ICWA defines "foster care placement" as any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a

1978, the year that ICWA was enacted.<sup>76</sup> The U.S. Department of Health and Human Services, Administration for Children and Families, Adoption and Foster Care Analysis and Reporting System (“AFCARS”) collects data on all children in foster care for whom a state child-welfare agency has responsibility for placement, care, or supervision, and on children who are adopted under the auspices of the agency.<sup>77</sup> The first AFCARS reports, however, were not generated until 1995.<sup>78</sup> According to non-AFCARS sources, 276,000 children were in foster care in 1985.<sup>79</sup> By 1999, this number had increased to a staggering 568,000.<sup>80</sup>

A 2006 study revealed that the leading contributor to the rise in the number of children in foster care figures was the substantial increase in the number of women incarcerated, and the longer length of their sentences, as a consequence of the 1986 Anti-Drug Abuse Act.<sup>81</sup> These incarcerations led to 31 percent of the increase.<sup>82</sup> The study also determined that most children of incarcerated mothers resided with relatives other than their fathers.<sup>83</sup> This study further concluded that the second largest contributor, accounting for 15 percent of the increase, resulted from decreasing Aid for Dependent Children (“AFDC”) and Temporary Assistance for Needy Families

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guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

25 U.S.C. § 1903(1)(i) (2006).

76. Despite its best efforts, the American Indian Policy Review Commission found it difficult to document the exact number of Indian children who had been removed or adopted at the time of its investigation in 1977. AM. INDIAN POLICY REVIEW COMM’N, *supra* note 14, at 46. The Commission complained that “[d]ata is often incomplete, omitting crucial information such as whether placements are made to Indian or non-Indian homes. Information is often not available on all the factors which affect the placement issue, such as private agencies.” *Id.* (emphasis added). The Commission did, however, include some valuable statistics regarding Indian child placement for the years 1973 to 1976. *Id.*

77. *About AFCARS*, ADMIN. FOR CHILDREN AND FAMILIES, <http://www.acf.hhs.gov/programs/cb/systems/afcars/about.htm> (last visited Aug. 24, 2010).

78. *Child Maltreatment Report 1995*, ADMIN. FOR CHILDREN AND FAMILIES, <http://www.acf.hhs.gov/programs/cb/pubs/ncands/index.htm>, (last visited Aug. 24, 2010).

79. Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 309 (2006), available at <http://muse.jhu.edu/journals/demography/v043/43.2swann.html>.

80. *Id.*

81. *Id.* at 310.

82. *Id.* at 328.

83. *Id.*



(“TANF”) benefits.<sup>84</sup> The study’s researchers concluded that lower welfare benefits may increase foster-care caseloads for three reasons.

First, to the extent that recipients are not working, lower welfare benefits decrease family income and increase the likelihood that children are maltreated or reported to child welfare officials. Second, lower welfare payments may induce caregivers to become formally involved with the foster-care system in order to qualify for foster-care maintenance payments. Finally, foster care may be a direct substitute for welfare.<sup>85</sup>

As these national foster-care figures have continued to rise, so too has the overrepresentation of Indian children within the foster care system.<sup>86</sup> The 2000 Census reported that there were approximately 901,250 Indians under the age of nineteen.<sup>87</sup> In 2009, 423,773 children were in publicly supported foster care, including 8,491 Alaskan Native or American Indian children.<sup>88</sup> Indians only make up approximately 1 percent of the national population but comprise nearly 2 percent of the national foster-care population.<sup>89</sup> With so many Indian children involved in the public foster-care system, it is possible that an equally high number of Indian children are being cared for through informal means by relatives and family friends. As will be discussed below, many of these caregivers are reluctant to entrust the Indian children, and themselves, to state child welfare systems.

There are likely several reasons for the overrepresentation of Indian children in the national foster-care system, including parental abuse and neglect resulting from alcohol and substance abuse.<sup>90</sup> The use of drugs by parents increases a child’s

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84. Swann & Sylvester, *supra* note 79, at 328.

85. *Id.* at 329.

86. See ALFRED PÉREZ, KASIA O’NEIL & SARAH GESIRIECH, DEMOGRAPHICS OF CHILDREN IN FOSTER CARE, 2 & fig.2 (2003), <http://pewfostercare.org/research/docs/Demographics0903.pdf>.

87. See U.S. Census Bureau, DP-1, Profile of General Demographic Characteristics 2000, Data Set: 2000 American Indian and Alaska Native Summary File (AIANSF)-Sample Data, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-reg=DEC\\_2000\\_SFAIAN\\_DP1:01A|50A;&-qr\\_name=DEC\\_2000\\_SFAIAN\\_DP1&-ds\\_name=DEC\\_2000\\_SFAIAN&-geo\\_id=01000US&-lang=en&-format=&-CONTEXT=qt](http://factfinder.census.gov/servlet/QTTable?_bm=y&-reg=DEC_2000_SFAIAN_DP1:01A|50A;&-qr_name=DEC_2000_SFAIAN_DP1&-ds_name=DEC_2000_SFAIAN&-geo_id=01000US&-lang=en&-format=&-CONTEXT=qt) (last visited August 24, 2010).

88. U.S. Dept. of Health and Human Servs., Administration for Children and Families, *The AFCARS Report* (July 29, 2010), [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report17.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.htm) (preliminary FY 2009 estimates as of July 2010).

89. *Id.*

90. GENERATIONS UNITED, METH AND CHILD WELFARE: PROMISING

risk of abuse threefold, and their risk of neglect fourfold, over those children whose parents abstain.<sup>91</sup> In the latter half of the 1980s, one significant contributing factor to the rise of children in need of care was the introduction of crack cocaine into many low-income communities.<sup>92</sup> This epidemic resulted in a flood of young children into foster care as drug involvement severely compromised parents' ability to care for their children.<sup>93</sup>

In the last decade, methamphetamine ("meth") use by parents has again caused a sharp increase in foster-care placements.<sup>94</sup> State and county agencies report dramatic increases in the overall number of children in care due to parental meth use.<sup>95</sup> For example, Cass County Social Services in Minnesota saw the number of annual foster-care placements involving meth rise from 1 to 2 percent to 25 to 30 percent.<sup>96</sup> Dennis Sutton, CEO of the Children's Home Society of West Virginia, made this poignant observation: "In most cases of violence or abuse, a child may be removed from one parent. With meth, children often go into foster care because they lose both of their parents to the drug."<sup>97</sup>

The meth epidemic hit tribes and Indian families particularly hard. When the Osage Nation of Oklahoma enacted the Osage Nation Anti-Methamphetamine Act, outlawing possession and use of the highly addictive drug, the Osage were responding to what they saw as a dramatic rise in meth addiction.<sup>98</sup> In 2006, 69 percent of the tribe's child welfare cases were meth related.<sup>99</sup> In 2007, 65 percent of Osage tribal mem-

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SOLUTIONS FOR CHILDREN, THEIR PARENTS AND GRANDPARENTS 11 (2006), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster\\_care\\_reform/hhs\\_foster\\_care\\_gu\\_meth\\_report.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/hhs_foster_care_gu_meth_report.pdf).

91. *Id.* at 18.

92. Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care, the Growth of Kinship Foster Care*, 8 PROTECTING CHILD. FROM ABUSE & NEGLECT 72, 74 (1998); see also Swann & Sylvester, *supra* note 79, at 314.

93. Berrick, *supra* note 92, at 74.

94. See GENERATIONS UNITED, *supra* note 90, at 9.

95. See *id.*

96. Bob Reha, *Methamphetamine Use Driving an Increase in Foster Care*, MINN. PUB. RADIO, May 3, 2005, [http://news.minnesota.publicradio.org/features/2005/03/31\\_rehab\\_methfoster](http://news.minnesota.publicradio.org/features/2005/03/31_rehab_methfoster).

97. GENERATIONS UNITED, *supra* note 90, at 10.

98. Michele Tirado, *Osage Nation Outlaws Meth*, AM. INDIAN REP., March 2007, at 5.

99. *Id.*

bers receiving in-patient treatment were struggling with meth addiction.<sup>100</sup>

With so many tribal parents battling substance abuse and addiction, many Indian children are left without proper parental care and nurturing. In many tribes, when parents are unable to care for their children, the responsibility traditionally falls to the relatives, especially grandparents. That responsibility, coupled with the antipathy that many Indians feel toward state foster care, often prompts an Indian child's extended family or other non-relatives to step forward as caregivers without necessarily involving state agencies.<sup>101</sup> As a result, ICWA's application to these private actions is imperative if it is to cover all Indian children.

## 2. Indian Boarding School Attendees as Parents

In addition to the factors that have contributed to the exponential growth of the number of all American children in foster care, Indian children suffer from the intergenerational effects of the Indian boarding-school system. The complex legacy left by the boarding-school experience not only negatively impacts the relationship of Indians with governmental agencies, but it also highlights the need for ICWA's preference for Indian custodians. Part of the federal government's assimilation plan was an effort to indoctrinate Indian children in "white man's ways," primarily through government-managed education programs.<sup>102</sup> In 1877, the United States entrusted the establishment of the first Indian boarding school, the Carlyle Indian Industrial School, to Captain Richard Henry Pratt, who articulated his philosophy regarding Indian people as follows:

A great general has said that the only good Indian is a dead one, and that the high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a

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100. *Id.*

101. See generally Charles Horejsi, Bonnie Heavy Runner Craig & Joe Pablo, *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, 71 CHILD WELFARE 329, 329 (1992) (describing Indian families' distrust of child protection agencies).

102. Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 53 (2006); see also 1 AM. INDIAN POLICY REVIEW COMM'N, *supra* note 14, at 422 (1977) ("The policy of removing Indian children from their homes and tribal settings to 'civilize' them began in the 1880's with the advent of boarding schools.").

sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.<sup>103</sup>

Once the state forcibly removed children from their Indian parents and families and placed them in boarding schools, the process of stripping them of their cultural identity began. These schools employed a variety of means to effectuate the complete assimilation of the Indian children including stripping the children of their Native style clothing and possessions, cutting or shaving their hair, renaming each child with an Anglo-Saxon name, and forbidding the children to speak their native languages.<sup>104</sup> The curriculum, using books that only reflected white, middle-class culture, worked to make the Indian children ashamed of their cultural identity.<sup>105</sup> What perhaps even more deeply affected the children was the loss of their spirituality as it was replaced by teaching Christian values.<sup>106</sup> As a Lakota tribal member noted: “[S]pirituality is the basis of our culture; if it is stolen, our culture will be dissolved. If our culture is dissolved, Indian people, as such, will cease to exist.”<sup>107</sup> The psychological assault on the children’s identity was embedded in every aspect of their lives at boarding school.<sup>108</sup> The government believed that the goal of “civilizing” the Indian attendees could only be achieved by complete separation from their parents.<sup>109</sup>

By the end of the 1970s, Congress recognized that the federal boarding school and dormitory programs were contributing “to the destruction of Indian family and community life.”<sup>110</sup> As explained in the House Report to H.R. 12533—the text of which was subsumed in Senate Bill 1214, which was then eventually passed as ICWA<sup>111</sup>: “[i]n addition to the trauma of separation from their families, most Indian children in placement or in in-

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103. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in OFFICIAL REP. OF THE 19TH ANN. CONF. OF CHARITIES AND CORRECTION 46 (1882), reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 260–61 (1973).

104. Curcio, *supra* note 102, at 59–60.

105. *Id.* at 60–61.

106. *Id.* at 61.

107. *Id.*

108. *Id.* at 59–62.

109. *Id.* at 61.

110. H.R. REP. NO. 95-1386, at 9 (1978).

111. Indian Child Welfare Act, PUB. L. NO. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–63 (2006)).

stitutions have to cope with the problems of adjusting to a social and cultural environment much different than their own.”<sup>112</sup> Another report recited the Committee’s finding that

[t]he separation of Indian children from their natural parents, especially their placement in institutions and homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime.<sup>113</sup>

The House Report also referred to the BIA’s 1971 school census, which noted that 34,538 children lived in its facilities instead of at home.<sup>114</sup> This figure “represent[ed] more than 17 percent of the school-age Indian population of federally-recognized reservations and 60 percent of the children enrolled in BIA schools.”<sup>115</sup> The Navajo Nation accounted for a striking portion of this figure as 20,000 children from the reservation lived at boarding schools.<sup>116</sup>

Boarding school attendees, now grown with children and grandchildren of their own, still feel the traumatic effects today. In May 2005, Negiel Bigpond Sr. testified before the Senate Committee on Indian Affairs about his experience at the Chilocco Boarding School, recounting that: “We would try to stop the anger and bad feelings by drinking, or by sniffing glue, paint, or lighter fluid.”<sup>117</sup> As Bigpond’s testimony suggests, many boarding school attendees developed alcoholism and substance abuse problems later in life.<sup>118</sup> This assumption is confirmed by a 2003 study revealing that Indians who have been abused and Indians who were sent to boarding schools are more likely to abuse alcohol as adults.<sup>119</sup>

Removed from their families and raised by government or church officials under a military-style regime, Indian boarding

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112. H.R. REP. NO. 95-1386, at 9.

113. S. REP. NO. 95-597, at 1–2 (1977).

114. H.R. REP. NO. 95-1386, at 9.

115. *Id.*

116. *Id.*

117. *Acknowledgment and Apology: Hearing Before the Comm. on Indian Affairs on S.J. Res. 15 to Acknowledge a Long History of Official Depredations and Ill-Conceived Policies by the U.S. Government Regarding Indian Tribes and Offer an Apology to All Native Peoples on Behalf of the United States*, 109th Cong. 23 (2005) (statement of Negiel Bigpond Sr.).

118. Curcio, *supra* note 102, at 73–74.

119. *Id.* at 73.

school attendees were deprived of appropriate parental role models. Consequently, when these children became parents, they were unable to provide proper care and nurturing for their own children.<sup>120</sup> State child welfare agencies have frequently used this lack of parenting skills, coupled with Indian parents' alcoholism and substance abuse, as the basis for removing Indian children from their parents.<sup>121</sup>

Further compounding this trauma, boarding school attendees also suffered a high incidence of sexual abuse.<sup>122</sup> In a 1995 study, Marc Irwin and Samuel Roll found that Indian children are at higher risk of suffering sexual abuse than non-Indians. This is a result of Indian children's status as members of an oppressed minority, the prevalence of familial alcohol abuse and high morbidity, and mortality rates.<sup>123</sup> They found that Indian boys are more profoundly affected by sexual abuse than non-Indian victims.<sup>124</sup> The study concluded "that these factors, combined with the close community structure of American-Indian life, may increase the likelihood of victims in turn abusing another generation."<sup>125</sup>

The damage inflicted on Indian children forced to attend boarding schools is deep and extends across generational lines.<sup>126</sup> The boarding school experience has impacted not only individual attendees but their tribes as well.<sup>127</sup> Only recently has the federal government admitted responsibility for the harm inflicted by this policy.<sup>128</sup> It is unknown how many Indian children are in need of care because of parental abuse or neglect. Nonetheless, it seems quite likely that the traumatic

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120. *See id.*

121. *Id.* at 74.

122. *Id.* at 74–75 (citing Marc H. Irwin & Samuel Roll, *The Psychological Impact of Sexual Abuse of Native American Boarding-School Children*, 23 J. AM. ACAD. OF PSYCHOANALYSIS 461 (1995)).

123. *Id.*

124. *Id.* at 74.

125. *Id.* at 75 (internal quotations omitted).

126. *Id.* at 73, 75.

127. *See id.* at 75.

128. When President Obama signed the 2010 Defense Appropriations Bill into law, it included a footnote entitled Section 8113, otherwise known as "Apology to Native Peoples of the United States." The footnote states that the Nation is sorry "for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States." H.R. 3326, 111th Cong. § 8113 (2010); *see also* Kevin Gover, *Remarks of Kevin Gover, Assistant Secretary-Indian Affairs: Address to Tribal Leaders*, 39 J. AM. INDIAN EDUC. 4, 6 (2000), available at <http://jaie.asu.edu/v39/V39I2A1.pdf> (apologizing on behalf of the Bureau of Indian Affairs, rather than the federal government as a whole).

and isolating boarding school experiences of Indian parents contribute to their own present-day failure to adequately care for their children. The intergenerational impact of the boarding school experience may explain the disproportionately high rate of Indian children in the foster care system.<sup>129</sup>

Due to the scarcity of available foster homes, the children and grandchildren of boarding school attendees in need of care may very well become the subjects of non-parent private custody actions. Just as the boarding school attendees suffered long-term emotional and psychological damage from being raised outside of their tribal culture, these present day Indian children face a similar risk without the ICWA's protections in these cases.

*E. Shrinking Supply of Foster Homes and Burgeoning Caseloads*

At the same time the number of children in need of out-of-home placements is rising, the number of non-relative, state-approved foster homes is declining. This decline is one of the key forces driving the creation of new state-authorized non-parent private custody actions. From 1987 to 1990 the number of available foster homes dropped from 147,000 to 100,000 nationwide.<sup>130</sup> One study's authors concluded that this reduction in foster homes "may be due to the growth in the number of single-parent households, the increasing proportion of women employed outside the home, the increase in divorce rates, or the rising costs of child rearing."<sup>131</sup> All of these factors make it much more difficult for any parent to undertake the burden of caring for children in addition to his or her own.<sup>132</sup>

In addition to the decreasing availability of foster homes, large caseloads and high caseworker turnover rates negatively impact state child welfare systems. The General Accounting Office ("GAO") found that the child welfare system is severely understaffed and workforce issues are a significant barrier to states achieving the goals of safety, permanency, and well-being.<sup>133</sup> The Child Welfare League of America recommends

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129. See Charles Horejsi, Bonnie Heavy Runner Craig & Joe Pablo, *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, 71 CHILD WELFARE 329, 334-35 (1992).

130. Berrick, *supra* note 92, at 74.

131. *Id.*

132. *Id.*

133. In its March 2003 report, the General Accounting Office stated, "[s]ome of

individual caseloads of between ten and seventeen children for child protective services workers (depending on their precise responsibilities), twelve to fifteen for family foster care workers, and ten to twelve for adoption workers.<sup>134</sup> However, one study revealed that a typical child welfare caseworker handles twenty-four protective cases—more than double the recommended number.<sup>135</sup> These burgeoning caseloads contribute significantly to the rising number of informal care-giving arrangements for children who might otherwise be protected by the public child welfare system.<sup>136</sup> Moreover, when caseloads are too high, workers have little time to investigate new allegations of abuse or neglect, to visit families, to assess a child's safety, or to make timely decisions for a child. Many informal kinship and non-relative placements arise because workers cannot reach the child in time or because there are already so many children in the system that only the most egregious situations of abuse or neglect become official child welfare system cases.<sup>137</sup>

The extraordinarily high child welfare caseworker turnover rate places additional strain on the state system<sup>138</sup> and undermines public confidence in it.<sup>139</sup> Every year, an estimated 30 to 40 percent of child welfare workers leave their positions.<sup>140</sup> Such departures disrupt the trust between the child welfare agency and the child and family. The new caseworker will require time to become acquainted with the children and families entrusted to his or her care. The turnover can result

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the caseworkers we interviewed handle double the number of cases recommended by advocacy organizations and spend between 50 and 80 percent of their time completing paperwork, thereby limiting their time to assist children and families.” U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE: HHS COULD PLAY A GREATER ROLE IN HELPING CHILD WELFARE AGENCIES RECRUIT AND RETAIN STAFF 3 (2003), *available at* <http://www.gao.gov/new.items/d03357.pdf> [hereinafter GAO HHS REPORT].

134. See CHILD WELFARE LEAGUE OF AMERICA, CHILD WELFARE STANDARDS OF EXCELLENCE: GUIDELINES FOR COMPUTING CASELOAD STANDARDS (2003), <http://www.cwla.org/programs/standards/caseloadstandards.htm>.

135. THE ANNIE E. CASEY FOUNDATION, THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE 9 tbl.1 (2003), *available at* [http://www.aecf.org/upload/publication\\_files/the\\_undefined\\_challenge.pdf](http://www.aecf.org/upload/publication_files/the_undefined_challenge.pdf) [hereinafter CHALLENGE OF SYSTEM REFORM].

136. See GAO HHS REPORT, *supra* note 133, at 1.

137. See Christine Vestal, *States Expand Kinship Care Programs*, STATELINE.ORG, May 25, 2006, <http://www.stateline.org/live/details/story?contented=115131>.

138. See GAO HHS REPORT, *supra* note 133, at 3.

139. See CHALLENGE OF SYSTEM REFORM, *supra* note 135, at 19.

140. GAO HHS REPORT, *supra* note 133, at 5.



in children and families falling between the cracks and not receiving needed rehabilitative services, as well as court delays, changes in placements, lags in achieving permanent placement, and other transition delays.<sup>141</sup> The decrease in available foster homes, large caseloads, high turnover of caseworkers, and a general lack of funding place a heavy strain on the American child welfare system, causing states to look for legal and practical alternatives for children in need of care.

As the numbers of orphaned, abused, and neglected children rise, states have increasingly turned to grandparents, relatives, and friends—i.e., private actors—to take on the role of caregivers. These relatives provide homes for the vast majority of children whose parents can no longer care for them.<sup>142</sup> As of 2000, at least 4.5 million children across the United States live in households headed by grandparents or other relatives—an increase of 30 percent from 1990.<sup>143</sup> Use of these informal kinship care arrangements saves an estimated \$6.5 billion per year in child welfare costs.<sup>144</sup> About 126,000 of the children being raised by grandparents or other relatives are in foster care.<sup>145</sup> Although this number represents almost a quarter of all children in foster care, it is only one-twentieth of all the children being raised by grandparents and other relatives with no parents in the home.<sup>146</sup> It is clear that the foster care system would be overwhelmed if even half the remaining children being raised by grandparents or relatives with no parents in the home were to enter the child welfare system.<sup>147</sup>

In recognition of the importance and increasing involvement of grandparents in their grandchildren's daily lives, all fifty states have enacted grandparent visitation statutes.<sup>148</sup> Many grandparents find themselves, however, as the primary caregivers for their grandchildren by default. Grandparents

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141. *Id.* at 19–20.

142. Vestal, *supra* note 137.

143. AARP, GRAND FACTS: A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: COLORADO 1 (Sept. 2005), available at [http://assets.aarp.org/rgcenter/general/kinship\\_care\\_2005\\_co.pdf](http://assets.aarp.org/rgcenter/general/kinship_care_2005_co.pdf) [hereinafter *Colorado AARP Fact Sheet*].

144. Vestal. *supra* note 137.

145. GENERATIONS UNITED, GRANDFAMILIES: CHALLENGES OF CARING FOR THE SECOND FAMILY 1 (2007), [http://www.gu.org/documents/A0/Challenges\\_Fact\\_Sheet\\_2007.pdf](http://www.gu.org/documents/A0/Challenges_Fact_Sheet_2007.pdf).

146. *Id.*

147. *Id.*

148. See generally M. KRISTINE TAYLOR WARREN, GRANDPARENT VISITATION RIGHTS: A LEGAL RESEARCH GUIDE (2001).

and other caregivers outside the system who have not gained legal responsibility for a child through adoption, guardianship, or other type of legal custody proceeding often have difficulty accessing social services and welfare programs.<sup>149</sup> They may not be able to consent to medical treatment for the child, and they may be prevented from adding the child to their private health insurance coverage or from accessing public health coverage for the child through Medicaid or the Children's Health Insurance Program.<sup>150</sup> Caregivers without a custody order may also have problems enrolling children in school.<sup>151</sup> In response to this situation, by 2005 eighteen states had expanded their kinship care<sup>152</sup> programs, and another nine states had pending proposals to do the same.<sup>153</sup> These states are making efforts to reduce paperwork, provide support services, and increase funding for relative caregivers.<sup>154</sup>

Some states, like Colorado and New Mexico, have expanded the definition of "kin" to include family friends and acquaintances to whom parents have entrusted care of a child.<sup>155</sup> Many states have also passed laws to make it easier for grandparents and other family members to gain the legal right to enroll children in school and secure their medical care.<sup>156</sup> Over the past five years, states have begun to enact laws to make

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149. Ana Beltran, *Kinship Care Providers: Some Permanency Options*, ADOPTALK (2001), available at <http://www.nacac.org/adoptalk/kinship.html> (last visited Sept. 1, 2010).

150. *Id.*

151. *Id.*

152. "Kinship care" is a generic term used broadly to describe formal and informal arrangements where children are living with and being raised by relatives, or even close family friends, who are not their parents. Formal kinship care arrangements apply to children reported to the child protective agency, removed from the care of a parent or guardian, and placed in state custody with the local department of social services. The department is then responsible for providing support services and supervision to the children while they are cared for in a kinship care placement. These children fall under the care and protection of the formal child welfare system. Informal kinship care is care provided by a relative or family friend without the involvement of the local department of social services. Often, these children have not come to the attention of the social services agency and live among family members that have agreed to handle all family matters internally. Kornegay, *supra* note 75, at 2.

153. Vestal, *supra* note 137.

154. *Id.*

155. See N.M. STAT. § 40-10B-5(A)(2)-(3) (2010); COLO. REV. STAT. § 14-10-123(b)-(c) (2010).

156. See, e.g., N.M. STAT. § 40-10B-5(A)(2)-(3); COLO. REV. STAT. § 14-10-123(b)-(c).

grandparents de facto legal guardians of grandchildren who already live with them.<sup>157</sup>

Although problems persist with ICWA compliance by state child welfare agencies, these agencies are more likely to be cognizant of the law than private persons. However, if an increasing number of non-parents privately gain legal custody of Indian children without the involvement of state child welfare agencies and juvenile judges, who will perform the gatekeeping function for purposes of ICWA compliance?

#### *F. Indian Aversion to State Child Welfare Systems*

Compounding the problems of increasing numbers of children in need of care and the lack of foster homes, a shift in public policy has pushed for quicker permanent, non-parental placements for children. This shift poses a particular danger to the future of Indian children. Given the documented risk to Indian children who are placed with non-Indian caregivers, which ICWA aims to prevent, decisions regarding Indian child placement must not be rushed. Moreover, the trend in federal policy, as implemented by state courts, to speed up adoption by terminating parental rights, fails to take into account the impact such severing has on not only the Indian child, but on the future and security of the Indian child's tribe as well.

Enacted in 1997, the federal Adoption and Safe Families Act ("AFSA")<sup>158</sup> fundamentally changed the United States child welfare system and established two major goals for all children: first, to make a child's safety the most important consideration in child welfare decisions, and second, to compel child welfare systems to make timely decisions regarding adoption or other permanent arrangements for children who cannot be safely returned home.<sup>159</sup> One AFSA provision that conflicts with the interests of Indian parents and tribes is the "15 of 22" provision, which requires the state to file a petition to terminate parental rights if a child has been in foster care for fifteen of the most recent twenty-two months unless: (1) it is not in the child's best interest, (2) the state has not provided necessary reunification services, or (3) the child is in the care of a relative.<sup>160</sup> Tribal

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157. See, e.g., MINN. STAT. § 257C.01, subdiv.2 (2009).

158. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 8111 Stat. 2115 (1997).

159. GAO ICWA REPORT, *supra* note 35, at 8-9.

160. *Id.* at 29.

cultural beliefs sometimes conflict with ASFA's "15 of 22" provision.<sup>161</sup> Many tribes do not believe that the connection between parent and child could or should be severed, and therefore they do not believe in the termination of parental rights.<sup>162</sup> Thus, knowing that a possible end result of state intervention is the termination of parental rights, non-parent caretakers of Indian children may avoid the system at all costs.

These fears are not without foundation. In its deliberations preceding the enactment of ICWA in 1978, Congress noted that "[d]iscriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since [the standards] are based on middle-class values."<sup>163</sup> As a consequence of applying discriminatory criteria, Congress found that "non-Indian parents continue to furnish almost all the foster and adoptive care for Indian children."<sup>164</sup> The GAO's 2005 report revealed that a shortage of Indian foster and adoptive homes persists.<sup>165</sup>

The GAO disclosed that Indian families often failed state licensing standards for a variety of reasons.<sup>166</sup> In some instances, their homes did not meet the physical standards, such as having no more than two children share a bedroom or ensuring that each child has a separate bed.<sup>167</sup> In response, tribes complained that the state foster home licensing standards did not take into account the communal living situations common in Indian communities and consequently excluded appropriate Indian caregivers.<sup>168</sup> Some potential Indian foster families were disqualified because of previous criminal records or reports of child abuse or neglect.<sup>169</sup> However, the GAO noted that automatic disqualification for any past criminal history often unjustly eliminated otherwise qualified candidates.<sup>170</sup> Some of these offenses occurred many years prior to the review or simply did not reflect poorly on an "individual's fitness to serve as a potential foster or adoptive parent."<sup>171</sup> Fear of being

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161. *Id.*

162. *Id.*

163. H.R. REP. NO. 95-1386, at 11.

164. *Id.*

165. GAO ICWA REPORT, *supra* note 35, at 21.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 21-22.

170. *Id.*

171. *Id.*

rejected as a foster parent, coupled with the consequence that the Indian child in their care will be thrust into the wide, non-Indian pool of stranger foster homes, understandably leads many Indian caregivers to avoid involving state child welfare agencies.

Tribal officials who participated in the GAO study identified Indians' perception of the state processes as intrusive and insensitive as another obstacle to successfully recruiting Indian foster and adoptive families.<sup>172</sup> Many non-Indians who have been involved with the state foster care process share this view. Shirley M. Berens, M.A., is the president and founder of the Grandparents Resource Center, a non-profit organization that provides kinship care support services to families across the country, but primarily in the Denver metropolitan area. Berens was motivated to found the Grandparents Resource Center because of her own horrific experience with Colorado's foster care system as she tried to gain custody of her two grandsons:

My own grandchildren were physically abused by their foster parents and foster family during the eight years they were in foster care. In my attempt to work with the system to remove my own grandchildren from foster care, I was subjected to [five] psychological evaluations, denied rights of visitation and spent over \$75,000 in legal fees. After eight long years of legal battling, I was able to obtain custody, and I have now adopted my two grandsons.<sup>173</sup>

In response to grandparents seeking temporary or permanent placement of their at-risk grandchildren, the Grandparents Resource Center established their Family Group Conferencing Program to "avoid the involvement of social services, which almost always leads to the placement of children in foster care."<sup>174</sup> Although Berens is non-Indian, her experience mirrors that of many Indian children caretakers who have found themselves enmeshed in the state foster care system.

Despite all of these misgivings and obstacles, the limited access to services and programs outside of the state foster care can force relative caregivers to pursue adoption, become guar-

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172. *See id.* at 22.

173. Shirley M. Berens, *Who Protects the Children? An Organizational Response by the Grandparents Resource Center*, GRANDPARENTS RESOURCE CENTER, May 30, 2005, [http://www.grc4usa.org/articles/articles\\_7.php](http://www.grc4usa.org/articles/articles_7.php).

174. *Id.*

dians, or gain legal custody through another type of private action such as a petition for allocation of parental responsibilities.<sup>175</sup> Many caregivers are reluctant to take these steps because they must sue the child's parents—one of whom may be the caregiver's own relative—to prove that they are unfit and that a change in custody is in the child's best interest.<sup>176</sup> This process creates an adversarial situation that threatens to tear a family apart. Regardless, the caregiver often has no choice but to enter the legal arena in order to secure what the child needs. Indian relatives and non-Indian caregivers alike find themselves filing private custody actions so they can obtain the government benefits and services necessary to adequately care for the Indian children in their homes. Concern arises when a non-Indian caregiver's petition is adjudicated without regard to the mandates of ICWA. The higher standards necessary to obtain custody of that child to the exclusion of the Indian parent(s), and the requirement that active efforts be made to assist in the rehabilitation and reunification of the family, will not be applied. The preference for Indian caregivers will be ignored. An Indian child whose custody is decided in the absence of ICWA's application will not have his or her best interest considered in the manner Congress truly intended.

### III. CHILD CUSTODY PROCEEDINGS GOVERNED BY ICWA

In the hypothetical posed at the beginning of this Article, the Mexican-American grandparents want to obtain custody over their grandson. The situation is special because the child is eligible for membership in an Indian tribe. If the grandparents are granted legal and physical custody of their grandson, his ties to his Indian parent and his tribe will be greatly strained—if not entirely broken. ICWA was enacted in response to this unique risk facing Indian children. State child welfare agencies and judges hearing child welfare cases are familiar with the applicability of ICWA to neglect and abuse cases involving Indian children. Likewise, judges adjudicating guardianship petitions in the probate court setting may also be aware that ICWA governs a case involving an Indian child. This Part will discuss why ICWA should apply to a custody ac-

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175. See, e.g., COLO. REV. STAT. § 14-10-123 (2010).

176. Ann Beltran, *Kinship Care Providers: Some Permanency Options*, N. AM. COUNCIL ON ADOPTABLE CHILDREN, Winter 2001, <http://www.nacac.org/adoptalk/kinship.html>.

tion brought privately by non-Indian relatives of an Indian child in a domestic relations court.

Section A discusses the types of child custody proceedings that are governed by ICWA and the minimum federal standards that state courts must apply. The argument that a non-parent private custody action, such as the situation presented in the hypothetical, meets the definition of an “Indian child custody proceeding” subject to ICWA’s provisions is set forth in Section B. Section C discusses the applicability of ICWA to child custody disputes between family members, even Indian ones.

### A. *Indian Child Custody Proceedings*

ICWA governs child custody proceedings involving Indian children.<sup>177</sup> Under the Act, an “Indian child” is “any unmarried person who is under the age of 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.”<sup>178</sup> “Child custody proceedings” include “foster care placements,” termination of the parent-child relationship, pre-adoptive placements, and adoptive placements.<sup>179</sup> This section focuses on the broad term “foster care placements.” A “foster care placement” is defined as

any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.<sup>180</sup>

It must be noted that ICWA does not limit the term “foster care placement” to situations in which the Indian child is in state custody.<sup>181</sup>

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177. 25 U.S.C. § 1903(1) (2006).

178. *Id.* § 1903(4).

179. *Id.* § 1903(1).

180. *Id.* § 1903(1)(i).

181. See *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007) (“[W]e recognize that Congress enacted the ICWA to address rising concerns over the consequences to Indian children and tribes of abusive state and county child welfare practices . . . . Nevertheless, the ICWA’s plain language is not limited to action by a social services department.”).

The text of the Act makes two specific exclusions from the definition of “child custody proceeding”: (1) placements “based upon an act which, if committed by an adult, would be deemed a crime”—in other words, an act of juvenile delinquency—and (2) placements “based on an award, in a divorce proceeding, of custody to one of the parents.”<sup>182</sup> In 1979, the BIA promulgated guidelines for state courts to “help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters.”<sup>183</sup> The guideline discussing the exclusion from coverage of a custody award pursuant to a divorce suggests that the statutory term “divorce proceeding” should be construed to include “other domestic relations proceedings between spouses” such as separate maintenance actions.<sup>184</sup> The guideline explains that Congress included the “divorce proceedings” exclusion in part because the Department of the Interior believed that the protections provided by the Act are not needed in proceedings between parents.<sup>185</sup> In the case *In re Defender*, the South Dakota Supreme Court held that ICWA did not apply to a situation in which unmarried Indian parents sought custody orders concerning their Indian daughter because the “placement of [the minor child] with either of her natural parents does not fit within the definition of a custody proceeding and thus does not implicate the ICWA.”<sup>186</sup> Consistent with the exclusion for divorce proceedings between an Indian child’s parents, ICWA does not therefore apply to other types of private custody actions between parents.

To address the risks of psychological harm and loss of tribal-member children that gave rise to the enactment of ICWA, the Act establishes a host of procedural protections for Indian parents, Indian custodians, Indian children, and tribes when state courts hear these cases. The procedural protections of ICWA include: (1) the right of intervention for Indian parents, Indian custodians, and tribes;<sup>187</sup> (2) the tribe’s right to notice of involuntary proceedings where the court has reason to know or to believe that an Indian child is involved;<sup>188</sup> (3) appointment of

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182. 25 U.S.C. § 1903(1).

183. BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

184. *Id.* at 67,588, § B.3.

185. *Id.*

186. *In re Defender*, 435 N.W.2d 717, 721 (S.D. 1989).

187. 25 U.S.C. § 1911(c).

188. *See id.* § 1912(a); *B.H. v. People ex rel. X.H.*, 138 P.3d 299, 303 (Colo. 2006).



counsel for indigent parents or Indian custodians in any removal, foster care placement, or termination proceeding;<sup>189</sup> (4) the right to transfer a state court proceeding to a tribal court;<sup>190</sup> and (5) a requirement that state courts give full faith and credit to tribal court proceedings and records relating to Indian child custody proceedings.<sup>191</sup>

Additionally, ICWA mandates standards of proof for state court Indian child custody proceedings. Any person or entity seeking a foster care placement or termination of parental rights must demonstrate to the court that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”<sup>192</sup> Courts have held that, even where the party seeking the foster care placement or the termination of parental rights to an Indian child is a private person, the party must show that he or she has made active efforts to provide remedial and rehabilitative services to prevent the Indian family’s breakup.<sup>193</sup> In a Colorado stepparent adoption case, *In re N.B.*, the Court of Appeals upheld the denial of an adoption petition, concluding that “the burden of proving fulfillment of the active efforts requirement applies to private petitioners such as [sic] stepmother.”<sup>194</sup> In addition, ICWA still applies even though a child may remain in the custody of one of the parents after a stepparent adoption.<sup>195</sup>

As an additional protection for Indian parents and Indian custodians, ICWA heightens the burden of proof ordinarily applied by state statutes in child welfare cases.<sup>196</sup> Under many state laws the “preponderance of the evidence” standard governs temporary removal of a child from his or her home<sup>197</sup> and parental rights terminations are governed by the “clear and convincing evidence” standard.<sup>198</sup> Under ICWA, for foster care

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189. 25 U.S.C. § 1912(b).

190. *Id.* § 1911(b).

191. *Id.* § 1911(d).

192. *Id.* § 1912(d).

193. *In re N.B.*, 199 P.3d 16, 24 (Colo. App. 2007).

194. *Id.*

195. *See id.* at 20.

196. *See* 25 U.S.C. § 1912(f).

197. *See, e.g.*, COLO. REV. STAT. § 19-3-505(1) (2010); ME. REV. STAT. ANN. tit. 22, § 4053(2) (2010).

198. *See, e.g.*, COLO. REV. STAT. § 19-3-604(1); *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004) (construing MINN. STAT. § 260C.301 (2004)); *accord* N.M. STAT. §§ 32A-4-28 to -29 (2010); N.Y. FAM. CT. ACT § 1051(c) (McKinney 2010); *see also In re Arianna OO.*, 814 N.Y.S.2d 779, 779–80 (N.Y.

placements, the state court must find by clear and convincing evidence that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.<sup>199</sup> In termination of parental rights proceedings, the Act imposes the highest burden of proof. In these cases, the state court may not order termination of parental rights unless it determines by evidence beyond a reasonable doubt, supported by testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.<sup>200</sup> Furthermore, the state court must find beyond a reasonable doubt that active efforts to reunify and rehabilitate the Indian family have been made and have failed.<sup>201</sup>

Other procedural protections under ICWA apply to voluntary proceedings, where the parent consents to foster care placement or termination of parental rights.<sup>202</sup> Under the Act, parental consent must be in writing and must be accompanied by a judge's certificate that the terms and consequences of the consent were fully explained to and understood by the parent.<sup>203</sup> A parent may withdraw his or her consent to a foster care placement at any time.<sup>204</sup> At any time prior to the court entering a final decree of termination or adoption, a parent may withdraw his or her consent to a termination of parental rights.<sup>205</sup>

In keeping with ICWA's policy goal of keeping Indian children with their families and, where possible, in their Indian communities, Congress imposes mandatory Indian child placement preferences for foster care and adoptive placements on state courts.<sup>206</sup> In *Mississippi Band of Choctaw Indians v. Holyfield*, the United States Supreme Court called the placement preferences "[t]he most important substantive requirement imposed on state courts."<sup>207</sup> Absent "good cause" to the contrary, courts must make foster care placements preferen-

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App. Div. 2006).

199. 25 U.S.C. § 1912(e) (2006).

200. *Id.* § 1912(f).

201. *People In re R.L.*, 961 P.2d 606, 609 (Colo. App. 1998).

202. *See* 25 U.S.C. § 1913(a), (c).

203. *Id.* § 1913(a).

204. *Id.* § 1913(b).

205. *Id.* § 1913(c).

206. *See* *B.H. v. People ex rel. X.H.*, 138 P.3d 299, 303 (Colo. 2006) (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36–37 (1989)).

207. *Miss. Band of Choctaw Indians*, 490 U.S. at 36–37.

tially in the following order: (1) members of the child's extended family, (2) a foster home licensed, approved, or specified by the Indian child's tribe, (3) a tribally-approved or Indian-operated children's institution, or (4) a children's institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.<sup>208</sup> The foster care placement should also be the least restrictive option available, approximate a family if feasible, and meet the child's special needs, if any.<sup>209</sup> The child's tribe may establish a different order of preference by tribal resolution.<sup>210</sup> Where appropriate, the court is directed to consider the preference of the Indian child or parent.<sup>211</sup>

A key provision ensuring compliance of state courts with ICWA's mandates is the retroactive right of Indian children, their parents or Indian custodians, and their tribes to challenge involuntary or voluntary foster care placements or terminations of parental rights whenever state courts act in violation of the Act's jurisdictional or procedural requirements.<sup>212</sup> Thus, it is critically important to the future stability of the Indian child's placement that all requirements of ICWA be satisfied.

#### *B. ICWA's Applicability to Private Non-Parent Actions*

There is no dispute that ICWA applies where a state or county child welfare agency petitions to remove an Indian child from his or her Indian parent or Indian custodian for placement in foster care.<sup>213</sup> The Act's applicability to a case involving a petition for guardianship of an Indian child is clear because any action involving placement of an Indian child in the home of a guardian is specifically included in ICWA's definition of "child custody proceeding."<sup>214</sup> A private adoption proceeding also falls squarely within the Act's coverage.<sup>215</sup> The applicabil-

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208. 25 U.S.C. § 1915(b).

209. *Id.*

210. *Id.* § 1915(c).

211. *Id.* This provision may be helpful to non-parents who are left caring for Indian children due to their parent abandoning them. It can be argued that leaving the child with the non-parent was an act of implicit preference for that non-parent.

212. *Id.* § 1914.

213. *See id.* § 1903(1)(i).

214. *See id.*

215. *See id.* § 1903(1)(iv).

ity of ICWA may be uncertain when a non-parent files a private action that is called something other than a guardianship or adoption. This section analyzes the language and intent of ICWA and argues for a broad reading of the definition of “foster care placement” to extend the Act’s provisions to these subsequently established custody actions.

As previously mentioned in Part I, throughout the 1970s, the American Indian Policy Review Commission sought to obtain “a full picture of the dimensions of [the Indian child placement] problem” by gathering data on the number of Alaska Native and Indian children who were in foster care, the number who had been adopted, and the number who were adopted by non-Indians.<sup>216</sup> The Commission had great difficulty compiling these statistics from state agencies because “[d]ata [was] often grossly incomplete, omitting crucial information such as whether placements [were] made to Indian and non-Indian homes.”<sup>217</sup> The Commission noted that private agency placements were crucial pieces of information but were frequently not available.<sup>218</sup>

In explaining the Committee amendments to Senate Bill 1214, the Senate Committee articulated that one of the purposes of the Act was “to establish standards and guidelines to [govern] the placement of Indian children when the parents or extended family members oppose the loss of custody.”<sup>219</sup> The Committee did not evince any intent to limit the applicability of the Act solely to situations involving public agency removal of a child.<sup>220</sup> The final text of the Act memorializes the Committee’s intent by noting that the problem sought to be remedied was the “alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by nontribal public and *private* agencies.”<sup>221</sup> Moreover, the Congressional findings to ICWA specifically state that

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216. See AM. INDIAN POLICY REVIEW COMM’N, *supra* note 14, at 81.

217. *Id.*

218. *Id.*

219. S. REP. NO. 95-597, at 16 (1977).

220. See *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007) (“[T]he ICWA’s plain language is not limited to action by a social services department.”); accord *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) (holding that private adoptive placement of Indian children is a “child custody proceeding” as defined by 25 U.S.C. § 1903(1)(iv)).

221. 25 U.S.C. § 1901(4) (emphasis added).

both public and private agency removal of Indian children was a concern to be addressed by the Act.<sup>222</sup>

In *Holyfield*, the United States Supreme Court applied the provisions of the Act to the private adoption of Indian twin babies.<sup>223</sup> Even though no state child welfare agency was involved in the state court proceeding, the Court still found that the case involved a “child custody proceeding” as defined by the plain language of the Act.<sup>224</sup>

Turning to the states examined in this Article, the statutory provisions allowing a non-parent to seek custody of an Indian child were enacted subsequent to ICWA’s passage.<sup>225</sup> Therefore, Congress could not anticipate these types of actions. Being neither state-initiated child protective proceedings leading to placement in a state-controlled foster home, adoptive proceedings, nor denominated explicitly as placement with a “guardian or conservator,” new non-parent private custody cases raise the question: do they fall within ICWA’s definition of “child custody proceeding?”<sup>226</sup>

When interpreting a federal statute, a court must give effect to the intent of Congress.<sup>227</sup> Remedial statutes are to be liberally construed in favor of the persons Congress intended to benefit.<sup>228</sup> “ICWA is a remedial statute designed to protect Indian children and the stability and security of Indian tribes and families.”<sup>229</sup> In order to protect the rights of Indian people, ICWA should be liberally construed, and any doubtful expressions must be resolved to favor the rights the Act was intended to afford.<sup>230</sup> As illustrated below, the practical effect of the

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222. *Id.*

223. 490 U.S. 30, 37 (1989).

224. *Id.* at 42.

225. Colorado extended the right to seek allocation of parental responsibilities to non-parents in 1998. 1998 Colo. Sess. Laws ch. 310 at 1; COLO. REV. STAT. § 14-1-123 (2010). Minnesota established its “de facto custodian” and “interested third party” actions in 2002. 2002 Minn. Sess. Law. Law Serv. ch. 304, 1–11; MINN. STAT. § 257C.01, subdiv.2, 3 (2009). New Mexico enacted its Kinship Guardianship provisions in 2001. 2001 N.M. Laws Ch. 167, 1–7; N.M. STAT. § 40-10B-2 (2010). Enacted in 2003, New York amended its Domestic Relations Law to grant grandparents standing in custody matters involving their grandchildren. N.Y. DOM. REL. § 72 (McKinney 2010); 2003 N.Y. Sess. Laws ch. 657, 1–2.

226. *See* 25 U.S.C. § 1903(1).

227. *See, e.g.,* *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 797 (Mich. Ct. App. 2008).

228. *Id.* at 800.

229. *Id.*; *see also* 25 U.S.C. § 1902; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

230. *See* *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); COHEN’S HANDBOOK OF FEDERAL INDIAN

non-parent custody actions in each state is analogous to custody actions resulting from a state agency foster care placement or guardianship. Thus, by construing the term “child custody proceeding” broadly, and by construing ICWA to protect Indian children and stabilize and secure Indian tribes and families, these new proceedings should fall within ICWA’s protections.

In determining whether ICWA governs a custody case, the “focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act.”<sup>231</sup> For example, in Colorado, ICWA is most likely to arise in the context of a dependency and neglect case brought under the Colorado Children’s Code.<sup>232</sup> Jurisdiction over dependency and neglect actions rests exclusively with the juvenile court.<sup>233</sup> The Colorado legislature has also created a separate private cause of action for the “allocation of parental responsibilities” (“APR”), by which unmarried parents and certain other caretakers of children may petition to become a child’s legal custodian.<sup>234</sup> These APR actions are within the separate jurisdiction of the domestic relations division of the district court.<sup>235</sup> The division in which a custody action is brought, however, is not determinative. So long as the action meets ICWA’s definition of a “child custody proceeding,” the Act’s requirements and protections apply.

As previously mentioned in Part III.A, ICWA applies to any child custody proceeding concerning an Indian child that fits the definitions of a foster care placement, a pre-adoptive placement, an adoption, or a termination of parental rights. A foster care placement includes actions where an Indian child is removed from either the parent or the child’s “Indian custodian.”<sup>236</sup> “Parent” under the Act means “any biological parent or parents of an Indian child or any Indian person who has

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LAW 119 (Nell Newton et al. eds., 2005) (“The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians.”) (internal citation omitted).

231. MARY J. RISLING, CALIFORNIA JUDGES’ BENCHGUIDE: THE INDIAN CHILD WELFARE ACT 7 (2000).

232. COLO. REV. STAT. §§ 19-1-101 to -6-106 (2010).

233. *Id.* § 19-1-104(1).

234. COLO. REV. STAT. § 14-10-123(1) (2010).

235. *Id.*

236. 25 U.S.C. § 1903(1)(i) (2006). Orders allocating parental rights may also be entered by the juvenile court pursuant to section 19-1-104(6) of the Colorado Revised Statutes.

lawfully adopted an Indian child, including adoptions under tribal law or custom.”<sup>237</sup> Relevant to private custody cases is ICWA’s definition of an “Indian custodian,” which means “any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”<sup>238</sup> The original Senate bill proposed that the definition of “Indian custodian” only include those extended family members having temporary physical custody given by a parent or those having custody in accordance with tribal law or custom.<sup>239</sup> The final Act broadened coverage to include “any Indian person,” not merely extended family members to whom legal custody is given by state law or by tribal custom or tradition.

In *State ex rel. Juvenile Department v. England*, the Supreme Court of Oregon ruled that an extended family member who received physical custody of an Indian child not from a parent, but from the Oregon Children’s Services Division as a foster parent, did not qualify as an “Indian custodian” for purposes of the Act.<sup>240</sup> The *England* court reviewed the Act’s legislative history describing the reasoning behind allowing Indian custodian status to some persons other than those accorded formal legal custody under state or tribal law:

Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.<sup>241</sup>

The court found that ICWA’s express provision allowing for “Indian custodian” status to Indian persons given physical custody by a parent is necessary because “[t]his informal custom

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237. 25 U.S.C. § 1903(9).

238. *Id.* § 1903(6).

239. S. REP. NO. 95-597, at 2–3 (1977).

240. 640 P.2d 608, 613 (Or. 1982).

241. *Id.* at 612 (quoting H.R. REP. NO. 95-1386, at 20 (1978)).

would not yield such status unless expressly so provided by the ICWA.”<sup>242</sup> Therefore, if a parent entrusts physical care and custody to an Indian person, that person is an “Indian custodian” and is entitled to the Act’s protections.

Unlike the terms “parent” and “Indian custodian,” the terms “guardian” and “conservator” are not specifically defined by ICWA. State courts have relied on definitions and powers granted to guardians and conservators under state law when determining whether a certain placement constitutes a guardianship or conservatorship for purposes of applying ICWA.<sup>243</sup> In the case *In re Custody of S.B.R.*, the Court of Appeals of Washington opined that, “[w]hile ‘guardian’ and ‘conservator’ are not defined by the Act, the rights acquired by the Browns as S.B.R.’s custodians under RCW 26.09.250 include them within any definition of those terms.”<sup>244</sup> The commentary to the BIA guideline discusses whether a placement is covered by the Act: “The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis.”<sup>245</sup> Thus, in the opening hypothetical, even though the grandparents’ custody action does not involve the state child welfare agency and is not a guardianship case, because the practical effect is to put them in charge of raising their grandson, ICWA’s provisions apply.

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242. *Id.*

243. For an in-depth review of the applicability of ICWA to guardianships, see Richard B. Maltby, Note, *The Indian Child Welfare Act of 1978 and the Missed Opportunity to Apply the Act in Guardianships*, 46 ST. LOUIS U. L.J. 213 (2002). Note, however, that the use of state-by-state definitions of guardianships may effectuate exactly what the United States Supreme Court in *Mississippi Band of Choctaw v. Holyfield* was trying to avoid:

We start, however, with the general assumption that in the absence of a plain indication to the contrary . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law. . . .

One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. . . . Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.

490 U.S. 30, 43–45 (1989) (internal citations and quotations omitted).

244. 719 P.2d 154, 156 (Wash. Ct. App. 1986).

245. BIA Guidelines for State Courts, Indian Child Proceedings, 44 Fed. Reg. 67,587 (Nov. 26, 1979).



C. *Applicability of ICWA to Intrafamilial Disputes*

Although it is well established that ICWA does not apply to custody actions between parents, the weight of the case law supports the conclusion that ICWA nonetheless does apply where the custody dispute is an intrafamilial one.<sup>246</sup> The first, now long-discredited, case to decide this issue in the negative was *In re Bertelson*.<sup>247</sup> In *Bertelson*, a non-Indian mother of an Indian child gave custody of her child to the paternal grandparents, who were both enrolled members of the Chippewa Cree Tribe.<sup>248</sup> When the mother sought to regain custody, the grandparents refused to return the child.<sup>249</sup> Without relying on any specific provision of ICWA, the Montana Supreme Court held that this dispute did not fall within the scope of the Act.<sup>250</sup> Subsequently, numerous courts have expressly refused to follow *Bertelson*.<sup>251</sup> Both the Alaska and Oklahoma Supreme Courts found that the analysis employed by the *Bertelson* court was contrary to the express provisions of ICWA.<sup>252</sup> Reasoning that because Congress explicitly excluded certain internal family disputes from the Act and that “[t]hese exceptions were clearly expressed,” the Alaska Supreme Court found “no compelling basis for implying any others” through the creation of a “judicial exception.”<sup>253</sup> Similarly, in *In re Guardianship of Q.G.M.*, the Oklahoma Supreme Court stated that “[r]ecognition of a third exception—that the Act will not apply to intra-family custody disputes—would require judicial legislation rather than statutory interpretation.”<sup>254</sup>

Even if the custody dispute is between an Indian parent and an Indian custodian, ICWA’s provisions still apply. In *In re Custody of A.K.H.*, the Minnesota Court of Appeals, following

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246. Cf. *In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (holding that ICWA was applicable when a stepparent petition was brought against American Indian biological mother).

247. 617 P.2d 121 (Mont. 1980).

248. *Id.* at 124.

249. *Id.*

250. *Id.* at 125–26.

251. See, e.g., *In re Marriage of Skillen*, 956 P.2d 1, 15 (Mont. 1998); *In re Crystal K.*, 276 Cal. Rptr. 619, 624 (Cal. Ct. App. 1990); *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 n.6 (Alaska 1982), *cert denied*, 461 U.S. 914 (1983); *D.J.C. v. P.D.C. (State ex rel. D.A.C.)*, 933 P.2d 993, 1000–01 (Utah Ct. App. 1997).

252. See, e.g., *A.B.M.*, 651 P.2d at 1173 n.6; *In re Guardianship of Q.G.M.*, 808 P.2d 684, 686 n.2 (Okla. 1991).

253. *A.B.M.*, 651 P.2d at 1173.

254. 808 P.2d at 688.

the lead of the Alaska and Oklahoma Supreme Courts and referring to their decisions as “better-reasoned,” firmly rejected *Bertelson*.<sup>255</sup> The *A.K.H.* court found that the provisions of the Act applied in a custody dispute between parents and the grandmother of an Indian child where all the parties were enrolled members of the same tribe.<sup>256</sup> The maternal grandmother had petitioned for custody of the child but did not seek termination of parental rights.<sup>257</sup> The *A.K.H.* court held that “the placement of [the child] with her grandmother would be placement in the home of a ‘guardian or conservator’ within the meaning of the Indian Child Welfare Act.”<sup>258</sup> In concluding that no third exception to the Act existed for intrafamilial disputes, the court noted that, “[t]he fact that all the people seeking custody of [the minor child] are members of an Indian tribe does not suggest that each of the proposed custodians is equally capable of raising [the minor child] to respect the unique social and cultural environment of Indian life.”<sup>259</sup>

In *In re Mahaney*, the Washington Supreme Court considered the situation in which an Alaska Native mother initially voluntarily placed her two children (who were eligible for membership in Alaska Native tribes) with their paternal non-Indian grandmother.<sup>260</sup> The children lived with their grandmother for nine years before their mother brought an action for the return of their custody.<sup>261</sup> The Washington Supreme Court followed the other state courts in finding that because the Indian children could not be returned to their Indian parent on demand, their placement with grandparents “amounted to foster care placement under ICWA.”<sup>262</sup> Finally in 2004, the South Dakota Supreme Court, in *In re Guardianship of J.C.D.*, adhered to the reasoning of the *A.K.H.* and *S.B.R.* courts when determining the issue of whether a private guardianship sought by the paternal grandparents of a child born to Crow Creek tribal members was governed by ICWA.<sup>263</sup> The *J.C.D.* court held that where the parent cannot have the child returned from the guardian on demand and the parent’s only re-

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255. 502 N.W.2d 790, 794 (Minn. Ct. App. 1993).

256. *Id.* at 792–93.

257. *See id.* at 792.

258. *Id.* at 793.

259. *Id.* at 795.

260. 51 P.3d 776, 779 (Wash. 2002).

261. *Id.*

262. *Id.* at 782.

263. 686 N.W.2d 647 (S.D. 2004).

course is to seek to modify the guardianship decree, “this [is] a placement proceeding contemplated by ICWA.”<sup>264</sup> It is now well established that even where the petitioning non-parent is a relative of the Indian child or the Indian child’s parents, the rights ICWA affords are still in force without exception.

#### IV. THE EMERGENCE OF THE NON-PARENT PRIVATE CUSTODY ACTION

Traditionally, state welfare agencies institute divorce proceedings, guardianships, and child welfare actions to decide the custody of children. However, in recent years, state statutory schemes have been enacted that authorize the award of physical and legal custody to non-parents and even non-relatives. For example, such private causes of action have been established in Colorado, Minnesota, New Mexico, and New York.<sup>265</sup> This section analyzes the effect of each of these state statutes on the hypothetical involving the Mexican-American grandparents described in the introduction and looks at whether each state’s statutory scheme recognizes ICWA’s applicability to the action. Such a comparison highlights the dangers of not applying ICWA to recently created private custody actions. ICWA must be applied to all private custody actions to ensure that the best interests of Indian children are honored and to carry out its legislative intent.

##### A. *Colorado’s Allocation of Parental Responsibilities Action*

As one of the BIA relocation cities, Denver, Colorado, presently has a historically high urban concentration of Indians; it also has a high number of children living in kinship situations. In Colorado, 51,235 children, or approximately 5 percent of all children, live in a household that is headed by a grandparent.<sup>266</sup> An additional 19,230 children in the State live in households headed by other relatives.<sup>267</sup> Of these children, 28,185 residing in households headed by grandparents or other

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264. *Id.* at 649.

265. These acts have various names, depending on the state: “allocation of parental responsibilities” (Colorado); “de facto custodian” and “interested third party” petitions (Minnesota); “kinship guardianship” (New Mexico); and award of custody based on “extraordinary circumstances” (New York).

266. *Colorado AARP Fact Sheet*, *supra* note 143, at 1.

267. *Id.*

relatives live there without either parent present.<sup>268</sup> Given the great number of children living in kinship situations, it was prudent for Colorado to create a mechanism to keep children with their extended families without involving the state child welfare system and to empower their caregivers with the legal authority necessary to care for these children.

If the hypothetical grandparents resided in Colorado, they would be able to file a petition for allocation of parental responsibilities. The grandparents would merely have to show that they had been caring for the child in their home without either parent present and that an allocation order is in their grandson's best interest. Without recognizing that ICWA applies to the case, the higher standards of the Act—requiring proof by clear and convincing evidence, supported by expert testimony, that the toddler would be likely to suffer serious emotional or physical harm if he remained in his parents' custody—would not apply. The Indian mother, who took the major step of leaving her child's father, would not be offered any rehabilitative measures to help her reunify with her son. The Indian child's tribe would not be notified of the proceedings, nor afforded a chance to intervene in the matter or to petition to transfer the case to tribal court. Without ICWA's application, it would be relatively easy for the Colorado-resident grandparents to obtain parental responsibilities for their grandson and not return him to his mother.

In 1999, the Colorado legislature replaced the term "custody" with "parental responsibilities."<sup>269</sup> In so doing, Colorado joined a recent trend among state legislatures to change the nomenclature used to describe the process and components of custody disputes.<sup>270</sup> In addition to parents, certain non-parents, including grandparents and even non-relatives, can seek an order from a Colorado district court allocating to him or her parental responsibilities ("APR") for a minor child.<sup>271</sup> Enacting the APR provisions reflects that "Colorado has ad-

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268. *Id.*

269. COLO. REV. STAT. § 14-10-103(4) (2010).

270. LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:10 (2009). The trend is toward using less pejorative, non-adversarial terms. No longer are children to be treated as property and apportioned between the parents, and accordingly, courts are replacing the term "custody" with use "parental rights and responsibilities" and in some instances, "visitation" with "parenting time."

271. *See* COLO. REV. STAT. § 14-10-123(1).

hered to a liberalized view as to the standing of non-parents to commence and participate in custody proceedings.”<sup>272</sup>

Colorado’s Dissolution of Marriage Act establishes a legal process for the allocation of parental responsibilities.<sup>273</sup> A parent can commence the action by filing a petition for dissolution or legal separation or, in the case of unmarried parents, by filing a petition for allocation of parental responsibilities in the county where the child permanently resides or is otherwise found.<sup>274</sup> A person other than a parent has standing to file an APR action if the child is not in the physical care of one of his or her parents.<sup>275</sup> If the non-parent has had physical care of the child for a period of six months or more, the non-parent may file an APR petition within six months of the termination of the non-parent’s care.<sup>276</sup> A juvenile court may also allocate parental responsibilities to a non-parent in the course of a dependency or neglect case.<sup>277</sup> Colorado’s APR procedure is a private action akin to a guardianship proceeding, but it has significantly fewer procedural and reporting requirements.<sup>278</sup>

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272. *In re Custody of C.C.R.S.*, 872 P.2d 1337 (Colo. App. 1993) (referring to COLO. REV. STAT. § 14-10-123).

273. COLO. REV. STAT. § 14-10-124.

274. Colorado Revised Statute, section 14-10-123 allows a proceeding concerning allocation of parental responsibilities to be commenced in the district court by: (a) a parent; (b) a person other than a parent if the child is not in the physical care of one of the child’s parents; (c) a person other than a parent who has had the physical care of a child for six months or more if the action is commenced within six months of the termination of such physical care; or (d) a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order. For the purpose of this Article, the focus is on the standing conferred on a non-parent.

275. COLO. REV. STAT. § 14-10-123(b).

276. *Id.* § 14-10-123(c).

277. *Id.* § 19-1-104(6). For additional discussion of the various ways, under Colorado law, in which rights and responsibilities of children in non-traditional families may be addressed, see Kimberly R. Willough & Sherilyn Rogers, *Family Law Newsletter: Legal Protection of Children in Nontraditional Families*, 29 COLO. LAW. 79 (Nov. 2000).

278. In Colorado, the Probate Court (either the Denver Probate Court or the District Court sitting as the Probate Court) has exclusive original jurisdiction over guardianships. See COLO. CONST. art. VI, § 9 (3). As part of the process, a person petitioning to be appointed the guardian of a minor must submit a current criminal background report and credit report. See State of Colorado Judicial Branch, *Instructions for Appointment of Guardian-Minor*, at 1–2, available at [http://www.courts.state.co.us/Forms/PDF/JDF\\_823\\_Instructions\\_for\\_Minor\\_Guardianship.pdf](http://www.courts.state.co.us/Forms/PDF/JDF_823_Instructions_for_Minor_Guardianship.pdf). A guardian appointed under Colorado law is required to report to the court periodically as ordered by the court or upon application of a person interested in the ward’s welfare. See COLO. REV. STAT. § 15-14-207 (2010). Neither the criminal nor credit check reports are required in APR proceedings. See COLO. REV. STAT. § 14-10-123 (2010).

To obtain custody of an Indian child, the non-parent must prove by a preponderance of the evidence that an APR order is in the best interest of the child.<sup>279</sup> The district court then must determine the APR—including parenting time<sup>280</sup> and decision-making responsibilities—“in accordance with the best interests of the child giving paramount consideration to the physical, mental, and emotional conditions and needs of the child.”<sup>281</sup> The district court may order that parental responsibilities be mutually shared by the parties caring for the child, allocated to one party, or allocated to one party to the exclusion of the other where the other party has been a perpetrator of child abuse, child neglect or spousal abuse.<sup>282</sup> The primary physical residence of the child, decision-making responsibility regarding health care and education, and religious upbringing and practices are parental responsibilities that may be wholly allocated to non-parents.<sup>283</sup> The court also has the power to determine if and when the parent or parents are able to exercise parenting time with their child.<sup>284</sup>

Through the APR process, a non-parent can stand in the traditional position of a parent with complete authority to act on the child’s behalf.<sup>285</sup> Once this responsibility is conferred on the non-parent, a parent can face significant challenges in trying to persuade the court to reallocate those parental rights and duties back to him or her.<sup>286</sup> The parent or parents may be unable to effectuate the return of those rights for two years without the consent or acquiescence of the non-parent custodian or a detrimental change in the child’s living situation.<sup>287</sup> The court may entertain a motion for modification only if the court finds that “a continuation of the prior decree of custody or order allocating decision-making responsibility may endanger the child’s physical health or significantly impair the child’s

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279. See COLO. REV. STAT. §§ 14-10-123.4, -124(1.5); see also *In re Custody of A.D.C.*, 969 P.2d 708, 710 (Colo. App. 1998).

280. In 1993, the Colorado legislature substituted the term “parenting time” for the term “visitation.” See COLO. REV. STAT. § 14-10-103(3).

281. *Id.* § 14-10-124(1.5).

282. *Id.* § 14-10-124(1.5)(b).

283. See *id.* § 14-10-124 annots.; COLORADO JUDICIAL BRANCH, PARENTING PLAN FORM § A (2010), available at [http://www.courts.state.co.us/Forms/PDF/JDF1113 Parenting Plan.pdf](http://www.courts.state.co.us/Forms/PDF/JDF1113%20Parenting%20Plan.pdf).

284. COLO. REV. STAT. § 14-10-124(1.5)(a).

285. See *id.* § 14-10-123.

286. See *id.* § 14-10-131.

287. See *id.* §§ 14-10-129(1.5)–(2), -131(1).

emotional development.”<sup>288</sup> The court is only permitted to modify an APR order under four circumstances: (1) new facts come to light subsequent to the issuance of the order; (2) the facts were not known when the order was first issued; (3) there is a change in the circumstances of the child or the child’s custodian, or (4) the party to whom the decision-making responsibility was allocated demonstrates that a modification is necessary to serve the best interests of the child.<sup>289</sup> The court must retain the prior allocation of decision-making unless:

(a) the parties agree to the modification; (b) the child has been integrated into the family of the petitioner with the consent of the other party and such situation warrants modification of the allocation of decision-making responsibilities; (b.5) there has been a modification in the parenting time order . . . that warrants a modification of the allocation of decision-making responsibilities; (b.7) a party has consistently consented to the other party making individual decisions for the child . . . ; or (c) the retention of the allocation of decision-making responsibility would endanger the child’s physical health or significantly impairs the child’s emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.<sup>290</sup>

The primary consequence of an APR proceeding granting a non-parent allocation of parental responsibilities for an Indian child is that the child is removed from his or her parent for placement with a guardian. Even though the parent’s rights are not terminated, the parent cannot have the child returned on demand.<sup>291</sup> This mirrors the essential elements of a “foster care placement” under 25 U.S.C. § 1903(1).<sup>292</sup> Thus, the APR is the type of placement proceeding contemplated by ICWA.

Turning to the Indian toddler hypothetical, under Colorado law, in the absence of the application of ICWA, a Colorado district court may allocate some or all of the parental responsibilities, including primary physical residence and parenting time, to the grandparents, as long as they have had physical care of their grandson for more than six months at the time they file

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288. *Id.* § 14-10-131(2).

289. *Id.*

290. *Id.* § 14-10-131(2)(a)–(c).

291. *See id.* §§ 14-10-123(b)–(c), -124(1.5)(a)–(b), -131 (2010).

292. 25 U.S.C. § 1903(1) (2006).

their APR petition and can demonstrate that it is in the best interest of the child.<sup>293</sup>

In an effort to improve compliance with ICWA in Colorado court proceedings,<sup>294</sup> the Colorado General Assembly amended the Colorado Children's Code in 2002 by adding new procedural and notice requirements for certain juvenile delinquency proceedings, dependency or neglect proceedings, termination of parental rights proceedings, and pre-adoptive and adoption proceedings.<sup>295</sup> Missing from the list of enumerated, covered proceedings are APR cases.<sup>296</sup> The APR provisions appear in Title 14, the Uniform Dissolution of Marriage Act,<sup>297</sup> not in Title 19, the Colorado Children's Code,<sup>298</sup> and thus arguably the Colorado ICWA compliance enhancements on their face do not apply to APR proceedings.<sup>299</sup> The list of proceedings is not exhaustive, however, and the language of C.R.S. § 19-1-126(1) appears to be inclusive enough to capture private non-parent initiated APR actions that otherwise fall within ICWA's ambit.<sup>300</sup> Though there are no reported cases in Colorado where an appellate court has explicitly ruled that ICWA applies to non-parent APR petitions, a few trial courts have been willing to do so in recent cases.<sup>301</sup> If the hypothetical grandparents file

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293. See COLO. REV. STAT. § 14-10-124(1.5).

294. For an informative overview of the development and intent of Colorado's legislation implementing Colorado's ICWA, see Brenda Bellonger, *Colorado Moves Toward Full Compliance with Federal Indian Child Welfare Act*, 31 COLO. LAW. 77 (Nov. 2002).

295. See, e.g., COLO. REV. STAT. § 19-1-126 (2010) (requiring that the petitioning or filing party in dependency and neglect proceedings and termination of parental rights proceedings "[m]ake continuing inquiries to determine whether the child who is the subject of the proceeding is an Indian child and, if so, shall determine the identity of the Indian child's tribe"). Colorado's implementing legislation also includes enhanced tribal notice provisions, which emphasize the importance of early and effective notice to tribes and provisions to improve communication regarding a child's Indian status when the child is the subject of a petition for dependency or neglect, motions for termination, petitions for relinquishment procedures, and petitions for adoption. See *id.* § 19-1-126(1)(b). While the Colorado-implementing legislation does add duties in the areas of tribal notice and a continuing obligation to inquire about a child's Indian status, these are small burdens with great potential for vastly improving compliance with ICWA in Colorado state court proceedings.

296. See *id.* § 19-1-126.

297. *Id.* § 14-10-101.

298. *Id.* § 19-1-101.

299. See *id.* § 19-1-126.

300. *Id.*

301. See, e.g., *In re the Parenting Responsibilities of S.M.C.*, No. 09-DR-3392 (Denver Dist. Ct. May 6, 2009) (applying ICWA to the caretaker of Indian boy petitioning for sole allocation of parental responsibilities after two years of no con-



a petition for APR for their grandson in Colorado, the Indian mother may need to educate the domestic relations division court about why the action meets the definition of a foster care proceeding governed by ICWA. In light of the lack of reported Colorado decisions on the issue and the relative novelty of the argument outside the juvenile court arena, that educational process may prove to be challenging.

Thus, in Colorado, the grandparents will have little difficulty presenting evidence that they have been caring for their grandson without either parent present and that, due to the parents' history of drinking, domestic violence, and neglect, it is in their grandson's best interest to allocate them parental responsibilities and primary physical residence. In the absence of ICWA's application, no consideration will be given to whether the grandparents engaged in active efforts to maintain the Indian family. The Indian toddler's relationship with his mother will at best be strained, if not almost completely severed, when the APR petition is granted. He will be raised in a non-Indian home far removed from his tribe and culture.

*B. Minnesota's Standby, Temporary, and De Facto Custodian and Interested Third Party Actions*

The State of Minnesota is home to eleven federally recognized tribes and an Indian population of approximately 35,300.<sup>302</sup> More than one-third of Indians living in Minnesota reside in Minneapolis and St. Paul, with an additional 15 percent living in the suburbs.<sup>303</sup> It is very possible that an Indian child such as the hypothetical toddler could be found living in Minneapolis with his non-Indian grandparents. In Minnesota, the hypothetical grandparents could seek custody of their

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tact by parents); *In re* the Parenting Responsibilities of W.C. & M.C., No. 07-DR-524 (Denver Dist. Ct. Feb. 15, 2007) (applying ICWA in awarding sole allocation of parental responsibilities to a maternal grandmother for two grandsons left in her care for over a year); *In re* the Parenting Responsibilities of S.L.J., No. 05-DR-124 (Denver Dist. Ct. May 3, 2005) (applying ICWA to the maternal grandmother petitioning for sole allocation of parental responsibilities for six of the eleven grandchildren that she had physical care for years, some since their births); see also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218 (Aug. 11, 2009).

302. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218 (Aug. 11, 2009).

303. SENATE COUNSEL & RESEARCH, *Twin Cities American Indian Community*, in AMERICAN INDIAN COMMUNITIES IN MINNESOTA (1998), <http://www.senate.leg.state.mn.us/departments/scr/report/bands/tc.htm>.

grandson by way of two different statutory paths: (1) the stand-by or temporary custodian designation process,<sup>304</sup> or (2) by appointment as a de facto custodian or interested third party.<sup>305</sup>

The discussion below will show that, if the grandparents in the hypothetical situation live in Minnesota, they have an “interested third parties” procedure available to them to secure a custody order. If the usual Minnesota provisions apply, the grandparents will have little difficulty meeting their burden to prove by a preponderance of the evidence that the toddler’s parents have neglected the child or exhibited such disregard for his well-being that he will be harmed by living with them. Alternatively, they can assert that the parent’s lifestyle places the toddler in physical and emotional danger, and that placement with the grandparents takes priority over preserving the parent-child relationship. If the toddler was non-Indian, then the grandparents would only need to demonstrate to the state court that it is in the child’s best interest to be placed with them. Minnesota, however, has explicitly provided in state law that such a non-parent custody action brought by an interested third party is governed by ICWA. Given that the grandparents have not made any efforts to assist the parents with rehabilitation in order to be reunified with their son, their interested party petition for custody must fail. By the simple act of including a reference to the federal law in the governing state statutes, state judges and petitioners are on immediate notice that ICWA’s protections and mandates are in full force and effect.

In Minnesota, 33,975 children—approximately 2.5 percent of all children in the state—live in grandparent-headed households.<sup>306</sup> Another 14,008 children, slightly over 1 percent of all children in the state, live in households headed by other relatives.<sup>307</sup> Of these children, 19,053 are living without either parent present.<sup>308</sup> Seven percent of the 17,683 grandparents who have their grandchildren living with them are Indian.<sup>309</sup> Due to the large number of Indian and non-Indian children being cared for in non-parent-headed households, Minnesota

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304. MINN. STAT. §§ 257B.01–.10 (2009).

305. *Id.* §§ 257C.01–.08.

306. AARP, GRAND FACTS: A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: MINNESOTA 1 (Sept. 2007), [http://www.grandfactsheets.org/doc/Minnesota\\_07\\_New\\_Template.pdf](http://www.grandfactsheets.org/doc/Minnesota_07_New_Template.pdf).

307. *Id.*

308. *Id.*

309. *Id.*

acted to give caregivers access to necessary benefits and services and to provide them with the legal authority to make decisions for these children.

In 2000, Minnesota enacted its first of several legislative provisions that assist grandparents, relatives, and certain other third parties in obtaining legal recognition of their roles as custodian.<sup>310</sup> The “Stand-by Custodian” provisions are akin to a durable power of attorney.<sup>311</sup> They allow a parent or legal custodian with legal and physical custody of a child to provide written documentation designating another adult as a stand-by or temporary custodian of his or her child.<sup>312</sup> The stand-by custodian assumes the duties of co-custodian or custodian of a child, and his or her “authority becomes effective upon the incapacitation, debilitation and consent, or death of the child’s parents.”<sup>313</sup> A parent may also designate a temporary custodian to assume the duties of co-custodian or custodian for up to twenty-four months.<sup>314</sup> A parent or legal custodian with legal and physical custody may only designate a standby or temporary custodian if: (1) the other legal parent’s parental rights have been terminated, (2) the other parent’s whereabouts are unknown, or (3) the other parent is unwilling or unable to carry out the daily custodial care and make decisions concerning the child.<sup>315</sup>

The commencement of a stand-by custodian’s authority, either by consent or by the occurrence of a triggering event, “does not, by itself, divest a parent or legal custodian or any parental and custodial rights.”<sup>316</sup> A hearing is required when a parent with parental rights, other than the one designating the stand-by custodian, objects to the designation.<sup>317</sup> In such a contested situation, the court must hold a hearing and apply the “best interest of the child” standard ordinarily used in custody proceedings.<sup>318</sup> The Minnesota “best interest of the child” analysis includes consideration of such factors as: (1) the parent’s wishes

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310. 2000 Minn. Sess. Law. Law Serv. ch. 404, 1-7; MINN. STAT. §§ 257C.01, subdiv.2, 3 (2009); 2002 Minn. Sess. Law. Law Serv. ch. 304, 1-11; MINN. STAT. §§ 257C.01, subdiv.2, 3.

311. MINN. STAT. §§ 257B.01–.10.

312. *Id.*

313. *Id.* § 257B.01, subdiv.12.

314. *Id.* § 257B.01, subdiv.13.

315. *Id.* § 257B.03(a).

316. *Id.* § 257B.06, subdiv.1, 5.

317. *Id.* § 257B.05, subdiv.6.

318. *Id.*

as to custody, (2) the child's preference, (3) the "intimacy of relationship" between each child and parent, and (4) the "permanence, as a family unit, of the existing or proposed custodial home."<sup>319</sup> If, after considering the relevant factors, the court finds that it is in the best interest of the child, the court may accept the designation of a non-parent to serve as stand-by or temporary custodian.<sup>320</sup> As a result, a stand-by or temporary custodian's authority would supersede that of the objecting parent and thus infringe on the rejected parent's right to legal and physical custody of the child.<sup>321</sup> Notably, the designating parent is not required to prove by evidence beyond a reasonable doubt that continued custody of the child by the objecting parent is likely to result in serious emotional or physical damage to the child as required by ICWA.<sup>322</sup>

Under ICWA, in involuntary proceedings, Indian parents and tribes enjoy more procedural rights than in the voluntary proceeding context, such as stand-by or temporary custodian designations.<sup>323</sup> For example, where the removing party acts in opposition to the parent's wishes, the Indian child's tribe is entitled to notice of the proceedings<sup>324</sup> and has the right to petition to transfer the proceeding to tribal court<sup>325</sup> or to intervene in the state court proceeding.<sup>326</sup> In involuntary proceedings, section 1912(a) of ICWA requires that the party seeking placement of an Indian child provide notice to the Indian child's parent or Indian custodian and the Indian child's tribe.<sup>327</sup> Thus, the plain language of ICWA does not require notice to the Indian child's tribe in a stand-by or temporary custodian proceeding.<sup>328</sup>

The designation of a stand-by or temporary guardian must be signed by the designator and two witnesses.<sup>329</sup> The designation may be approved by the court without a hearing, "if the designator is the sole surviving parent, the parental rights of the other parent have been terminated, or both parents consent

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319. MINN. STAT. § 518.17, subdiv.1 (2009).

320. *Id.* § 257B.05, subdiv.6.

321. *Id.*

322. 25 U.S.C. § 1912(f) (2006).

323. *See* MINN. STAT. § 257B.03; 25 U.S.C. §§ 1912, 1913.

324. 25 U.S.C. § 1912(a).

325. *Id.* § 1911(b).

326. *Id.* § 1911(c).

327. *Id.* § 1912(a).

328. *See id.*

329. MINN. STAT. § 257B.04, subdiv.2.

to confirmation of the standby or temporary custodian.”<sup>330</sup> A designator parent or custodian is not required to appear if medically unable to do so.<sup>331</sup>

Minnesota’s stand-by and temporary custodian provisions, on their face, fail to include ICWA’s parental consent protections set out in § 1913(a):

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or the Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.<sup>332</sup>

Consequently, under the facts of the scenario that opened this Article, the grandparents could attempt to secure designation of their son as temporary custodian. Because the Indian mother is demanding the return of her son, it is unlikely the grandparents would be able to secure her consent to the designation. Without recognizing ICWA’s applicability to the proceedings, it appears that the grandparents could satisfy the best interest of the child standard and obtain an order confirming the designation over the objection of the child’s mother.<sup>333</sup>

If the grandparents were unable to obtain designation as a stand-by or temporary custodian, under Minnesota law, the grandparents have yet another legal avenue available to secure a custody order as an “interested third party” under section 257C.01(2). If an individual qualifies as a “de facto custodian”<sup>334</sup> or as an “interested third party,”<sup>335</sup> that individual may bring an action in family court<sup>336</sup> for legal and physical

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330. *Id.* § 257B.05, subdiv.5.

331. *Id.* § 257B.05, subdiv.7.

332. 25 U.S.C. § 1913(a).

333. *See* MINN. STAT. § 257B.05, subdiv.6.

334. *Id.* § 257C.01, subdiv.2.

335. *Id.* § 257C.01, subdiv.3.

336. 2002 Minn. Sess. Law. Law Serv. ch. 304, 1–11; *see also* MINN. STAT. § 257C.01, subdiv.2, 3.

custody of a child. A “de facto custodian” is an individual who has been the primary caretaker of a child.<sup>337</sup> The individual must have resided with the child without a parent present within the twenty-four months immediately preceding the filing of the petition and be able to demonstrate a lack of consistent participation by the parent for a period of (1) six months or more (which need not be consecutive) if the child is under three years old; or (2) one year or more (total) if the child is three years old or older.<sup>338</sup> Excluded from the definition of “de facto custodian” are individuals who have had the child placed in his or her care as a result of a custody decree, a court order, a voluntary placement agreement, or for adoption.<sup>339</sup> A parent’s “lack of demonstrated participation” is defined as:

refusal or neglect to comply with the duties imposed upon the parent by the parent-child relationship, including but not limited to, providing the child with the necessary food, clothing, shelter, health care, education, creating a nurturing and consistent relationship, and other care and control necessary for the child’s physical, mental or emotional health and development.<sup>340</sup>

In addition to a de facto custodian, persons who meet the definition of an “interested third party” may also petition for custody of a child.<sup>341</sup> An “interested third party” is a person, other than a de facto custodian, who can demonstrate “by clear and convincing evidence” that one of the following factors exist: (1) the parent has abandoned, neglected or “otherwise exhibited disregard for the child’s well-being to the extent that the child will be harmed by living with the parent;” (2) the child is in the presence of physical and emotional danger and therefore placement with the non-parent petitioner “takes priority over preserving the day-to-day parent-child relationship;” or (3) other extraordinary circumstances.<sup>342</sup>

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337. MINN. STAT. § 257C.01, subdiv.2.

338. *Id.*

339. *Id.* § 257C.01, subdiv.2(d)(1)–(3). Section 257C.07 provides that a parent can transfer legal and physical custody to a third party by a consent decree as long as the court finds that the custody arrangement is in the best interest of the child and all parties to the decree have been fully informed of the proposed decree contents and agree. The parties to the consent decree must seek a modification or termination of the consent decree in order for an adjustment of legal custody to occur. *Id.*

340. *Id.* § 257C.01, subdiv.2(c).

341. *Id.* § 257C.01, subdiv.3.

342. *Id.* §§ 257C.01, subdiv.3(a), 257C.03, subdiv.7(a).

Regardless of whether a de facto custodian or an interested third party is the petitioner, the court will apply the best interest of the child standard.<sup>343</sup> The petitioner must show by a preponderance of the evidence that it is in the child's best interest to grant custody to the de facto custodian or the interested third party.<sup>344</sup> The court is prohibited from preferring the petitioner just because he or she is a parent of the child.<sup>345</sup> The court may approve a custody order without a hearing if both parents consent by stipulation or agreement that "it is in the best interest of the child to be in the custody of the de facto custodian or interested third party."<sup>346</sup>

The Minnesota Indian Family Preservation Act was enacted in 1999 and applies to ICWA-type proceedings, including adoptive placements, involuntary foster care, pre-adoptive placements, and terminations of parental rights, with placements based upon juvenile status offenses.<sup>347</sup> Additionally, this act explicitly places de facto and third party child custody proceedings under the governance of ICWA.<sup>348</sup> With this single provision, the Minnesota legislature incorporated all the protections and mandates of ICWA and eliminated any confusion that may have otherwise existed with regard to these child custody proceedings. This approach should serve as a model to other states enacting non-parent private custody actions that concern Indian children.<sup>349</sup>

By virtue of having physical custody of their grandson for the past six months, the hypothetical grandparents have standing as interested third parties to petition for custody. They would not have standing to file as de facto guardians because

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343. *Id.* § 257C.03, subdiv.6(a)(2), 7(a)(2); *see also In re the Custody of N.A.K.*, 649 N.W.2d 166 (Minn. 2002).

344. MINN. STAT. § 257C.03, subdiv.6(a)(2), subdiv.7(a)(2).

345. *Id.* § 257C.04(c).

346. *Id.* § 257C.03, subdiv.4(a).

347. *Id.* §§ 260.751–.835. The Minnesota Indian Family Preservation Act defines "voluntary foster care placement" as

a decision in which there has been participation by a local social services agency or private child-placing agency resulting in the temporary placement of an Indian child away from the home of the child's parents or Indian custodian in a foster home, institution, or the home of a guardian, and the parent or Indian custodian may have the child returned upon demand.

MINN. STAT. § 260.755, subdiv.22.

348. *Id.* § 257C.02(a).

349. Minnesota Statutes, subdivision three of section 257C.03 specifically requires written notice of the custody petition to be provided to the child's parents, putative parents, guardian, or legal custodian, and to an Indian child's tribe.

they do not have a court order of custody, a maternal consent to the child's placement with them, or the prerequisite twenty-four months of residence with the child without a parent present. Once they file for custody as interested third parties, they must provide written notice to the parents and to their grandson's tribe. In order to prevail, they must prove by clear and convincing evidence that the parents have abandoned, neglected, or exhibited disregard for their grandson's well-being to the point that he would be harmed by living with the parents. Alternatively, the grandparents can show that the child is in the presence of physical or emotional danger, or that there are other extraordinary circumstances necessitating a custody award. Moreover, all procedural and substantive protections established by ICWA apply, including parental and tribal notice of the proceedings; the required showing by the grandparents that they had made active efforts to prevent the breakup of the Indian family; and a determination by the family court, supported by qualified expert testimony, that continued custody by the Indian mother is likely to result in serious emotional or physical damage. Given the facts of the scenario, it is unlikely that the grandparents will be successful because they cannot present evidence of their efforts to prevent the break-up of the Indian family.

### C. *New Mexico's Kinship Guardianship Action*

New Mexico has the fourth-highest population of Indians in the United States.<sup>350</sup> It also has the seventh-highest number of Indian children being served in its state foster-care system, with Indian children constituting 13 percent of the system.<sup>351</sup> Of the 24,041 grandparents in New Mexico who report that they are responsible for their grandchildren, 20 percent are Indian or Alaska Native.<sup>352</sup> As a result of these striking statistics, it is particularly important to ensure that the mandates of ICWA are applied in all private custody actions.

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350. Edna Paisano, *U.S. Census Bureau Population Profile-American Indian, Eskimo, and Aleut Populations*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/pop-profile/amerind.html> (last visited June 15, 2010).

351. GAO ICWA REPORT, *supra* note 35, at 13.

352. AARP, GRAND FACTS: A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: NEW MEXICO 1 (Apr. 2008), <http://www.grandfactsheets.org/doc/New Mexico 08.pdf> [hereinafter *New Mexico AARP Fact Sheet*].



If the situation posed in the hypothetical took place in Albuquerque, New Mexico, the grandparents might be able to prevail in their quest for their grandson's custody by filing a petition for kinship guardianship. Although New Mexico's legislature imported some references and provisions into the kinship guardianship statute indicating that ICWA may be applicable to such a petition, other important protections were omitted. Notably, the kinship guardian statute is missing any reference to the requirements of expert testimony, legal counsel for indigent parents, and active efforts to rehabilitate and reunify the Indian family. The "best interest of the child" standard may be applied instead of ICWA's more rigorous one. Although New Mexico made an effort to incorporate ICWA into its non-parent custody actions, it may not have gone far enough to ensure that the full panoply of rights provided for Indian parents, the Indian child and the Indian child's tribe will be afforded to them.

The Kinship Guardianship Act<sup>353</sup> was enacted in 2001 to create procedures for establishing a legal relationship between a child and a "kinship caregiver" when the child is not residing with either parent.<sup>354</sup> Once the Act was passed, a large number of caregivers sought status as kinship guardians.<sup>355</sup> Given that 30 percent of the grandparents in New Mexico who are their grandchildren's primary caregivers live in households without the children's parents present, it is understandable that these grandparents were eager to obtain a legal means by which they could exercise legal authority.<sup>356</sup> Kinship guardianships are not synonymous with guardianships under the New Mexico Abuse and Neglect Act.<sup>357</sup> The Kinship Guardian Act applies to cases where a child has been left by his or her parents in the care of another person for ninety consecutive days or more.<sup>358</sup> Conversely, New Mexico's ordinary guardianship proceeding may only be brought under the state probate code if "all parental rights of custody have been terminated or suspended by circumstances or prior court order."<sup>359</sup>

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353. N.M. STAT. §§ 40-10B-1 to -15 (2010).

354. *Id.* § 40-10B-2.

355. JUDICIAL EDUC. CTR., CHILD WELFARE HANDBOOK, § 30A.1 (2007), available at [http://jec.unm.edu/resources/benchbooks/child\\_law/ch\\_23.htm](http://jec.unm.edu/resources/benchbooks/child_law/ch_23.htm).

356. *New Mexico AARP Fact Sheet*, *supra* note 352, at 1.

357. JUDICIAL EDUC. CTR., *supra* note 355, §§ 23.13, 30A.1.

358. N.M. STAT. § 40-10B-2(B).

359. N.M. STAT. § 45-5-204 (2010); *see, e.g., In re the Guardianship of Ashleigh R.*, 55 P.3d 984 (N.M. Ct. App. 2002); *In re the Guardianship Petition of Lupe C.*,

A petition for kinship guardianship may be filed by a “kinship caregiver,”<sup>360</sup> a designation which includes three categories of caregivers: (1) a relative, a godparent, or a member of the child’s tribe or clan;<sup>361</sup> (2) “an adult with whom the child has a significant bond;”<sup>362</sup> and (3) a guardian appointed directly by a court under the Kinship Guardian Act.<sup>363</sup> A kinship guardian has authority to make all decisions regarding visitation between a parent and child unless otherwise ordered by the court.<sup>364</sup> The guardianship stays in effect until revoked by order of the court.<sup>365</sup>

The court may appoint a kinship guardian if there has been no guardian previously appointed under the Uniform Probate Code<sup>366</sup> and (1) a living parent of the child has consented in writing to the appointment;<sup>367</sup> (2) all parental rights have been terminated or suspended by prior court order;<sup>368</sup> or (3)

the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances . . . .<sup>369</sup>

In the third circumstance, the caregiver may be awarded the legal rights and duties of a parent absent the parent’s consent, which raises concerns regarding the applicability of ICWA.<sup>370</sup> Although the kinship guardian statute does not on its face authorize the court to remove a child from a parent’s home, it does grant the kinship guardian physical custody and the right to regulate visitation between the parent and child.<sup>371</sup> Without an additional court order, the parent cannot have the child returned upon demand from the kinship guardian.<sup>372</sup>

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812 P.3d 365 (N.M. Ct. App. 1991).

360. N.M. STAT. § 40-10B-5(A)(1) (2010).

361. *Id.* § 40-10B-3(C).

362. *Id.*

363. *Id.* § 40-10B-13(A).

364. *Id.* § 40-10B-13(B).

365. *See id.* § 40-10B-12.

366. *Id.* § 40-10B-8(B)(4).

367. *Id.* § 40-10B-8(B)(1).

368. *Id.* § 40-10B-8(B)(2).

369. *Id.* § 40-10B-8(B)(3).

370. *Id.* § 40-10B-13(A); *see also* 25 U.S.C. § 1903(1)(i) (2006).

371. N.M. STAT. § 40-10B-13(B).

372. *See id.* §§ 40-10B-12, -13.

Although the New Mexico “kinship guardian” statute explicitly provides for the appointment of a “guardian,”<sup>373</sup> ICWA employs but does not define the term “guardian.”<sup>374</sup> Therefore, the kinship guardianship proceeding should fall within ICWA’s definition of a foster care placement. However, the requirements in the state law for a successful kinship guardianship petition do not appear to require full compliance with ICWA’s mandates. The petitioner is only required to (1) include a statement in the petition for guardianship as to whether the subject child is “subject to the provisions of the federal Indian Child Welfare Act of 1978”;<sup>375</sup> (2) indicate the tribal affiliation of the child’s parents;<sup>376</sup> and (3) describe the actions the petitioner has taken to notify the parents’ tribes.<sup>377</sup> Where an Indian child is involved, the burden of proof is raised from clear and convincing evidence to proof beyond a reasonable doubt.<sup>378</sup>

Kinship guardianship proceedings may import few of ICWA’s safeguards because kinship guardianship does not specifically authorize the court to remove the child from the parents’ home.<sup>379</sup> Nonetheless, kinship guardianship empowers a non-parent to exercise absolute discretion over a child’s residence. Thus, even though the initial move of a child from the parents’ home to the caregiver’s may have been voluntary, the subsequent order granting the guardianship will result in a situation where the parents cannot have their child returned upon request.<sup>380</sup>

If a New Mexico court only applies the ICWA-referent provisions in the kinship guardian provision, the Act’s important protections will not be guaranteed. Among the potentially overlooked provisions are requirements of expert testimony and counsel for the parents. Furthermore, a court will apply the lower “best interest of the child” standard, rather than ICWA’s required proof of “likelihood of serious harm.” Thus, no active efforts to rehabilitate the parents and reunify the Indian

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373. See *id.* § 40-10B-5(A)(1).

374. See 25 U.S.C. § 1903 (where “guardian” is not defined); *but see id.* § 1903(1)(i) (using “guardian” to define “foster care placement”).

375. N.M. STAT. § 40-10B-5(B)(12).

376. *Id.* § 40-10B-5(B)(12)(a). This requirement’s focus on parental tribal affiliation differs from ICWA’s focus on the child’s membership or eligibility for membership in a tribe. 25 U.S.C. § 1903(4).

377. N.M. STAT. § 40-10B-5(B)(12)(b). ICWA, however, requires that the “Indian child’s tribe” be notified—not the parents’ tribes. 25 U.S.C. § 1912(a).

378. N.M. STAT. § 40-10B-8(C).

379. JUDICIAL EDUC. CTR., *supra* note 355, § 30A.1.

380. See 25 U.S.C. § 1903(1)(i).

family are required. Likewise, a court will not consider ICWA's placement preferences,<sup>381</sup> and the tribe may not have the opportunity to intervene.<sup>382</sup> Finally, a New Mexico state court is unlikely to consider whether a tribe may have exclusive or transfer jurisdiction over the matter.<sup>383</sup>

If the opening hypothetical occurred in Albuquerque, New Mexico, the grandparents would have standing to petition for kinship guardianship because the child has not lived with his parents for over ninety days. Unless the court found that all ICWA provisions applied, the grandparents would likely be awarded guardianship if it is found to be in the best interests of their grandson. The grandparents would not be required to make active efforts directed toward the rehabilitation and reunification of the Indian family.<sup>384</sup> Furthermore, the child could come under the complete custody of the non-Indian grandparents without his tribe ever being made aware of the proceedings.<sup>385</sup>

*D. New York's "Extraordinary Circumstances" as Basis for Custody*

In New York, approximately 143,000 grandparents are the primary caregivers for their grandchildren.<sup>386</sup> Despite this reality, New York sets a high bar for non-parents to displace a natural parent's right to care and custody. As an initial matter, the non-parent petitioner must establish that the parent surrendered the child, abandoned the child, is unfit, or has per-

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381. *See id.* § 1915(b).

382. *See id.* § 1911(c).

383. It should be noted, however, that the State of New Mexico has proactively amended the New Mexico Children's Code governing cases in which there are allegations that a child is abused or neglected, and Children, Youth and Families Department (CYFD) files a petition to initiate custody proceedings to ensure that each child's cultural heritage is protected and that cases involving Indian children comply with ICWA. In some instances, the New Mexico Children's Code goes beyond the requirements of ICWA. For example, the Children's Code requires that whenever a child is placed in CYFD's custody, CYFD must investigate whether the child is eligible for enrollment as a member of an Indian tribe and, if so, must pursue enrollment on the child's behalf. N.M. STAT. § 32A-4-22(I) (2010).

384. *See* 25 U.S.C. § 1912(d) (prescribing such efforts).

385. *See id.* § 1912(a) (requiring that the party seeking the foster care placement of, or termination of parental rights to, an Indian child notify the Indian child's tribe).

386. *See* AARP, GRAND FACTS: A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: NEW YORK 1 (Mar. 2008), [http://www.grandfactsheets.org/doc/New\\_York\\_08\\_New\\_Template.pdf](http://www.grandfactsheets.org/doc/New_York_08_New_Template.pdf) [hereinafter *New York AARP Fact Sheet*].

sistently neglected the child.<sup>387</sup> Only then does the court reach the issue of the child's best interest.<sup>388</sup> In New York's landmark case on non-parent custody actions, *Bennett v. Jeffreys*,<sup>389</sup> the Court of Appeals held that a parent may not be deprived of the custody of a child unless:

[T]here is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. It is only on such premise that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground.<sup>390</sup>

If the hypothetical situation discussed in the introduction took place in New York, the grandparents could make a strong case for custody under a 2004 legislative amendment to the state's domestic relations law that grants them standing to bring an action in family court. There is no reference to ICWA in either the statutory language or in the associated New York case law. Consequently, the grandparents may only need to demonstrate to the court that the prolonged separation of the child and his parents, paired with allegations of persistent neglect, constitute extraordinary circumstances warranting an award of custody. None of the protective and remedial provisions of ICWA would apply. The parents would not be entitled to counsel or benefit from efforts made on their behalf to rectify the circumstances that lead to the child living with the grandparents. The court may not require the petitioner grandparents to prove by clear and convincing evidence, including expert testimony, that their grandson faces a likelihood of serious harm if he remains in his parents' custody. His tribe will not receive notice of the proceedings and therefore will be deprived of the ability to ensure court compliance with ICWA and that the Indian boy's tribal connection is maintained.

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387. *Merritt v. Way*, 446 N.E.2d 776, 776 (N.Y. 1983).

388. *Id.*

389. 356 N.E.2d 277 (N.Y. 1976).

390. *Id.* at 283. The case involved an "unsupervised private placement" in which a fifteen-year-old mother was pressured by the infant's grandmother to transfer her newborn to a former classmate of the infant's grandmother. *Id.* at 280-81. The Court of Appeals was required to break new ground because no statute was directly applicable, and thus the case was of first impression. *See id.* at 281.

New York courts do not find extraordinary circumstances often. The vast majority of reported cases have resulted in the denial of the non-parent's petition for legal custody of the child. In *Dickinson v. Lascaris*, the Court of Appeals reversed the trial court and granted a father's petition to regain custody of his children, whom he had entrusted to a non-parent.<sup>391</sup> The court rejected a passive abandonment theory based on the father's failure to maintain regular contact or make child support payments for a period of two years.<sup>392</sup> Similarly, a mother's voluntary relinquishment of her child to his father and the father's new wife, while continuing to visit the child weekly, was found not to constitute a voluntary surrender of the child to a nonparent and did not constitute "extraordinary circumstances" in *Tyrell v. Tyrell*.<sup>393</sup>

In a few instances, however, the New York courts have found extraordinary circumstances warranting the grant of custody to a non-parent. In *In re McDevitt v. Stimpson*, the court found extraordinary circumstances existed where the paternal grandmother had been caring for her grandson since his birth.<sup>394</sup> In granting the grandmother's petition for custody, the court found that the child's mother had persistently neglected the child and abdicated her parental responsibilities.<sup>395</sup> In addition, the grandmother and her husband were the primary providers of the child's financial, educational, medical, and psychological needs.<sup>396</sup> In contrast, the mother had very limited and sporadic contact with her son.<sup>397</sup> Extraordinary circumstances were also found in *Vann v. Herson*, where the granddaughter's mother suffered from mental illnesses that required multiple psychiatric hospitalizations, and the father was unable to provide a home for his daughter upon his release from prison.<sup>398</sup> As a final example, the Court of Appeals in *Benitez v. Llano* ruled against a mother who sought to regain custody of her son from relatives on the grounds that it would be

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391. 423 N.E.2d 361, 364 (N.Y. 1981).

392. *Id.* at 362-64.

393. 415 N.Y.S.2d 723, 724-25 (N.Y. App. Div. 1979), *aff'd*, 393 N.E.2d 1041 (N.Y. 1979); *see also* Milli v. Morreale, 443 N.Y.S.2d 960 (N.Y. App. Div. 1981); Kranzberg v. Cunningham, 444 N.Y.S.2d 258 (N.Y. App. Div. 1981); Lehman v. Lehman, 442 N.Y.S.2d 268 (N.Y. App. Div. 1981).

394. 767 N.Y.S.2d 507, 508-09 (N.Y. App. Div. 2003).

395. *Id.* at 509.

396. *Id.*

397. *Id.*

398. 768 N.Y.S.2d 44, 46-47 (N.Y. App. Div. 2003).

cruel to change his custody when he was within months of reaching the age of majority.<sup>399</sup>

As of January 2004, New York has conferred standing to grandparents to seek custody, either in supreme court by writ of habeas corpus or special proceeding, or in family court under section 72(2) of the New York Domestic Relations Law and section 651 of the Family Court Act.<sup>400</sup> To be awarded custody rights, the grandparents must demonstrate to the court that “extraordinary circumstances” exist.<sup>401</sup> While on its face this would seem to be a codification of the *Bennett* standard, the statute goes further by providing that “an extended disruption of custody” constitutes an extraordinary circumstance.<sup>402</sup> An extended disruption is characterized by “a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents.”<sup>403</sup> The court may, however, also find that a separation of less than twenty-four months constitutes extraordinary circumstances.<sup>404</sup> Apart from a prolonged separation, the legislature does not provide any other guidance as to what might constitute an extraordinary circumstance.<sup>405</sup> In the 2005 case *Tolbert v. Scott*,<sup>406</sup> the Court of Appeals stated that “extraordinary circumstances” includes situations where a parent is mentally or physically unfit to have custody, where there has been a protracted separation between parent and child, or “where the attachment of the child to the custodian is so strong that separation threatens destruction of the child.”<sup>407</sup>

New York statutes and case law contain no discussion of the possible applicability of ICWA. If the opening hypothetical occurred in New York, the grandparents could bring an action for custody by arguing that there was a prolonged separation during which the mother had voluntarily relinquished the child

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399. 384 N.E.2d 775, 778–79 (N.Y. 1976).

400. N.Y. DOM. REL. LAW § 72(2) (McKinney 2010); N.Y. FAM. CT. ACT § 651(b) (McKinney 2010).

401. N.Y. DOM. REL. LAW § 72(2)(a).

402. *Id.*

403. *Id.* § 72(2)(b).

404. *Id.*

405. *See id.* § 72(2).

406. 790 N.Y.S.2d 495 (N.Y. App. Div. 2005).

407. *Id.* at 498; *see also In re McDevitt v. Stimpson*, 767 N.Y.S.2d 507 (N.Y. App. Div. 2003); *In re Benjamin B.*, 651 N.Y.S.2d 571 (N.Y. App. Div. 1996).

to them for a period of six months. Although there is a statutory benchmark of twenty-four continuous months of parent-child separation, a court may find “extraordinary circumstances” to exist in a shorter period of time.<sup>408</sup> Six months of separation coupled with allegations of abandonment and “persistent neglect” could make the grandparents’ custody action viable. The grandparents could be awarded full and unfettered custody rights to their grandson as long as it is found to be in his best interest.<sup>409</sup> Thus, although such a situation meets the definition of a “foster care placement” as defined by ICWA, there is no guarantee that a New York state court would apply the substantive and procedural safeguards mandated by ICWA.<sup>410</sup>

#### V. THE RAMIFICATIONS OF THE APPLICABILITY OR INAPPLICABILITY OF ICWA

In each of the four states considered above, the private non-parent custody action is filed in a court or a division of the trial court that does not have jurisdiction to hear child abuse and neglect petitions. Rather, these private custody actions are brought in the domestic relations division or family court—where divorces are heard. Because ICWA does not apply to such divorce proceedings or other custody actions between the parents, family court and domestic relations judges are very unlikely to have had much exposure to the federal law. Moreover, even state case workers and juvenile court judges assigned to hear abuse and neglect cases receive little ongoing training in the application of ICWA, which raises significant concerns. Private persons and family law judges handling a domestic relations docket are even less likely to be aware of the Act’s applicability, requirements, and overall purpose to prevent the breakup of Indian families.<sup>411</sup>

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408. N.Y. DOM. REL. LAW § 72(2)(b).

409. *Id.*

410. See 25 U.S.C. § 1903(1)(i) (2006).

411. See GAO ICWA REPORT, *supra* note 35, at 51–55 (noting numerous concerns about ICWA implementation, including the Administration of Children and Families’ review of seventy-two cases involving children in formal state foster care finding that states did not implement one or more ICWA provisions in the period of 2002 to 2004).

The concern that family law judges are unprepared to recognize the applicability of ICWA to non-parent private custody cases is lent credence by the ruling of a Denver District Court judge hearing the domestic relations docket in the case *In re the Parental Responsibilities of M.S.*, No. 01DR1004 (Denver Dist. Ct. Oct. 30, 2003). This case involved an APR petition by paternal non-Indian grand-



In the hypothetical posed at the beginning of this Article, the grandparents, non-Indians from a different cultural background different from the Indian mother and child, seek to separate the child from his nuclear family. Not only is the child to be removed from his Indian family, but he stands to have his tribal ties cut as well. With the exception of a case filed in Minnesota, without a broad reading of ICWA his tribe will likely have no notice of his situation and no ability to intervene in the decisions regarding his custody and future. This is despite the fact that the plain language and legislative intent of ICWA supports its application in any custody action brought by the grandparents under state law.

Under ICWA, if the parent or Indian custodian voluntarily agrees to grant custody to the non-parent petitioner, then that consent must be executed in writing before a judge, and the same judge must certify, also in writing, that the terms and consequences of the consent were fully explained and understood by the Indian child's parent or Indian custodian.<sup>412</sup> Also under ICWA, in an involuntary or contested custody proceeding, an indigent Indian child's parent or Indian custodian is entitled to court-appointed counsel.<sup>413</sup> Congress recognized that state law may not provide for appointment of counsel in certain Indian child custody proceedings—such as the one contemplated by the hypothetical—and thus the Act requires the Secretary of the Interior, upon certification of the presiding state judge, to pay the attorney's fees and reasonable expenses in such situations.<sup>414</sup> In a contested case, petitioners must pro-

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parents regarding their grandson who was an enrolled tribal member. *Id.* at \*1. The district judge ruled that ICWA did not apply to the APR proceeding, stating that:

3. In the present case, the Petitioners who are the grandparents of the Minor Child, have petitioned the Court for allocation of parental responsibilities. They are not petitioning for termination of parental rights of the Respondents nor are they asking Social Services to place the child in Foster Care. Social Services is not involved in this case in terms of placement of the minor child. This Court further finds that the Indian Child Welfare Act (ICWA) does not apply in this case.

4. As stated above, this is not a termination of parental rights or foster care placement case. This is not a juvenile court proceeding. *All pertinent Colorado case law involving ICWA relates to juvenile cases, not domestic cases.*

*Id.* at \*1–\*2 (emphasis added).

412. 25 U.S.C. § 1913(a) (2006).

413. *Id.* § 1912(b).

414. *Id.*

vide notice to the parents and to the grandchild's tribe,<sup>415</sup> and grant the opportunity for both to intervene.<sup>416</sup> The parents and the child's tribe both will then have the right to seek a transfer of the proceeding to tribal court.<sup>417</sup> The parents or Indian custodian will have the right to court-appointed counsel.<sup>418</sup> If the court finds that it is in the best interests of the child to have representation, the court has the discretion to appoint counsel.<sup>419</sup> The court must also review the placement preferences established for foster care placement under the Act to ensure that the granting of the APR to the grandparents will be in compliance with ICWA.<sup>420</sup>

If ICWA applies, the most significant hurdles to the grandparents' continued custody will be proving (1) active efforts to prevent the breakup of an Indian family and (2) the likelihood of serious harm to the child if the parents are granted custody. The grandparents must demonstrate that they have engaged in active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts have proved unsuccessful.<sup>421</sup> Before a state court may enter a custody order effectuating removal of the child, the grandparents must also prove by clear and convincing evidence—supported by the 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.<sup>422</sup> The "likelihood of serious harm" standard also creates a higher hurdle than the "best interest of the child" test that is ordinarily applied in private custody cases.<sup>423</sup>

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415. *Id.* § 1912(a).

416. *Id.* § 1911(c).

417. *Id.* § 1911(b).

418. *Id.* § 1912(b).

419. *Id.*

420. Even the non-Indian grandparents would qualify as a preferred placement because the definition of "extended family" is not limited to Indian family members. *Id.* §§ 1903(2), 1915(b)(i).

421. *Id.* § 1912(d).

422. *Id.* § 1912(e).

423. *Id.* § 1912(f); see also Alissa M. Wilson, Note, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in In re S.S. and R.S.*, 28 LOY. U. CHI. L.J. 839, 852–53 (1997).

## CONCLUSION

Private non-parent custody actions available under state law give grandparents, other relatives, and other unrelated caregivers of Indian children a valuable means by which they may gain formal legal authority to care for these children without involving the already overwhelmed child-welfare system. Given the increasing number of children (both non-Indian and Indian) in need of care, a corresponding number of them will be the subjects of private non-parent custody actions. However, the Indian children who are the subjects of private proceedings are entitled to the same familial and cultural protections of ICWA as those children in abuse or neglect proceedings and guardianships. In privately filed actions, there is no child-welfare agency involvement and the judges who usually adjudicate privately filed custody cases are unlikely to be familiar with the provisions of ICWA. Indian parents and custodians, Indian tribes, and family law practitioners who are involved in these cases will therefore need to educate (and possibly persuade) the domestic relations courts as to why the Act applies. Without strict adherence to ICWA's provisions in these new private actions, Indian children are at risk of being easily removed from their Indian parents and families, and dangerously distanced from their tribal culture and identities. They stand to suffer not only the usual emotional distress from being removed from their parents, but also long-term emotional harm from being raised outside their culture. The stability and security of tribes are jeopardized as they lose touch with their tribal member children. These are the very harms that Congress sought to prevent by enacting ICWA. Diligence in enforcing ICWA's vitally important substantive and procedural safeguards in private custody actions filed by non-parent petitioners is therefore essential to fulfilling Congress's trust responsibility to protect the best interests of Indian children, families, and tribes.