CHAPTER FIVE — CHILD ABUSE, NEGLECT AND DEPENDENCY

Custody Provisions of the Indian Child Welfare Act of 1978: The Effect on California Dependency Law

States currently remove Indian children from their homes and place them in foster care at an alarmingly high rate. Prompted by the seriousness of the problem, Congress recently adopted minimum federal standards for the removal of Indian children from their homes. This article reviews the custody provisions of the Indian Child Welfare Act of 1978 and analyzes the Act's effect on California's dependency system.

A national child welfare crisis faces American Indian families.[1] Nontribal public and private agencies annually remove an alarmingly high percentage of Indian children from their families.[2] These agencies most often place Indian children in non-Indian foster and adoptive homes and institutions.[3] The disproportionate removal[4] of Indian children from their homes has created

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[1] The national scope of the crisis first came to public attention during congressional hearings held before the Senate Subcommittee on Indian Affairs in 1974. At the urging of Indian tribes and organizations, Congress called the hearings to study the problems that American Indian families face in raising their children. Testimony by Indian witnesses from throughout the United States, as well as national survey data, revealed that the problem of involuntary removal of Indian children from their homes was a growing crisis. *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs,* 93rd Cong., 2d Sess. 1 (1974) [hereinafter cited as *1974 Hearings*].

[2] For a congressional finding to this effect, *see* Indian Child Welfare Act of 1978, Pub. L. No. 90-608, § 2(4), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1901).

[3] *Indian Child Welfare Act of 1977: Hearing Before the United States Senate Select Comm. on Indian Affairs on S. 1214,* 95th Cong., 1st Sess. 538 (1977) [hereinafter cited as *1977 Hearing*] (statistical survey by Assn. of Am. Indian Affairs).

[4] Indian children face much greater risks of involuntary removal from their families than are typical of society as a whole. *See* text accompanying notes 19-25 *infra.*

a crisis because of its destructive impact on the Indian family and its threat to the very existence of the tribe.

The reasons for this crisis are no doubt complex. Nonetheless, social workers who have spent years working with Indian communities and legal practitioners who have defended Indian family life in the courts believe that existing state regulations contribute to this crisis.[5] Both current state standards and procedures which define when a child is neglected or dependent and in need of foster care placement[6] fail to recognize the cultural and social standards prevailing in Indian communities.[7] State law also fails to recognize the importance of tribal ties to Indian people.[8]

Prompted by the seriousness of the crisis, Congress recently established minimum federal standards and procedures for the removal of Indian children from their families.[9] The Indian Child

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[5] William Byler, Executive Director of the Association on American Indian Affairs, testified before Congress that, based upon the Association's many years of experience of working with Indian communities and with the legal system, the crisis will continue until revision of state standards defining child neglect. The Association is a national non-profit organization, founded in 1923 to assist American Indian communities achieve full social and economic equality. *1974 Hearings, supra* note 1, at 15-18 (statement of William Byler). The Association has been active in providing legal assistance to many Indian families attempting to maintain or recover custody of their children. *See* Indian Family Defense, July, 1976, at 3, col. 2.

[6] Throughout this Article the term "foster care placement" refers to any action removing children from their parents or custodians for temporary placement in foster homes, group homes, or institutions where the parents or custodians cannot have the children returned upon demand, but where parental rights have not been terminated. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 4(1)(i), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1903).

[7] In investigating Indian child welfare problems, Congress found that "the states . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 2(5) (to be codified in 25 U.S.C. § 1901).

[8] *Id.* Indian concern with tribal ties and cultural existence is perhaps one of the values least understood or accepted by non-Indians. A reported interview with a non-Indian social worker captures this sentiment: "What the tribe is saying is that it is more important than the child. I think the welfare of the child is paramount to that of the tribe. . . ." McDowell, *The Indian Adoption Problem,* Wall St. J., July 12, 1974, at 6, col. 3. But what most non-Indians fail to understand is that Indian children's welfare is intimately bound up with their existence as Indians. *See* text accompanying notes 36-38 *infra.*

[9] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (to be codified in 25 U.S.C. §§ 1901-1963). It should be noted that federal legislation with respect to Indian people is not the result of congressional concern for American Indians as a racial or ethnic group. Rather, such legislation results from congressional recognition of the unique relationship between the United

Welfare Act of 1978[10] (the Act) preempts[11] state law regulating the removal of Indian children from their homes whenever state law is less stringent than federal law.[12] The most significant provisions of the Act concern jurisdiction over Indian children and services that the state must provide before removing Indian children from their homes.[13] The Act also addresses the standard of evidence which must be shown before Indian children may be removed from their homes.[14] In those cases where removal is needed, the Act directs that Indian children be placed within an Indian environment.[15]

The effect of the Act's preemption of California's laws for the removal of Indian children is uncertain. Congress clearly intended the Act to provide greater protection than currently available under state law to the familial rights of the Indian child, family unit, and tribe.[16] Since, in California, the removal rate of Indian children far exceeds that of non-Indian children,[17] the Act

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States and the Indian tribes and their members and acknowledges the federal responsibility to Indian people. *Id.* § 2 (to be codified in 25 U.S.C. § 1901).

[10] *Id.*

[11] For a treatment of the general problem of federal preemption, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-94 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623 (1975).

[12] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 111, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1921). This section provides that preemption will not occur in any case where state law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under the Act. *Id.*

It is important to note that the Act does not cover all Indian children. The Act defines an "Indian child" as any unmarried person who is under the age of 18 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. *Id.* § 4(4) (to be codified in 25 U.S.C. § 1903). Therefore, Indian children who do not have the requisite quantum of blood to qualify for tribal membership according to the laws of the tribe are not covered by the Act. "Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. REP. No. 1386, 95th Cong., 2d Sess. 20 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7719 [hereinafter cited as H.R. REP.].

[13] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, §§ 101(a)-(b), 102 (d), 92 Stat. 3069 (to be codified in 25 U.S.C. §§ 1911, 1912).

[14] *Id.* § 102(e) (to be codified in 25 U.S.C. § 1912).

[15] *Id.* § 105(b) (to be codified in 25 U.S.C. § 1915).

[16] In describing the national policy underlying the Act, Congress expressly declared its intent to provide greater protection to the best interests of Indian children and "to promote the stability and security of Indian tribes and families . . . ." *Id.* § 3, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1902).

[17] *See* text accompanying notes 21-25 *infra.*

should necessitate revision of existing California standards and procedures.

This article discusses the Act's effect on California's neglect and dependency laws. To provide an understanding of the reasons which prompted Congress to enact the Act, this article first depicts the national and statewide dimensions of the Indian child welfare crisis. The next section reviews the Act's custody provisions. Subsequent sections summarize the current California dependency provisions by which children may be removed from their homes and analyze the Act's potential effect on the California system.

I. THE CRISIS

A great disparity exists between the numbers of Indian and non-Indian children that states remove from their homes and place in homes or institutions of dissimilar ethnic backgrounds. The disproportionate numbers of Indian children removals intensify the damaging impact that separation has on the Indian child, family, and tribe.

A. The Disparity in Removal Rates for Indian Children

The removal of Indian children from their homes by nontribal agencies is common in Indian communities. Surveys of states with significant Indian populations[18] indicate that these states separate approximately 25 percent of all Indian children from their families and place them in foster homes, adoptive homes, or institutions.[19] While these states remove children from their homes in non-Indian communities at a rate of 1 out of every 51 children, they remove children from Indian communities at rates

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[18] States included in the survey were: Alaska, Arizona, California, Idaho, Maine, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *1977 Hearing, supra* note 3, at 539 (statistical survey by Assn. of Am. Indian Affairs). There are approximately 827,000 American Indians and Alaskan Natives in the United States. Nearly two-thirds live in just eight states. In descending order of population, these states are: Oklahoma, Arizona, California, New Mexico, Alaska, North Carolina, South Dakota, and Washington. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, A STUDY OF SELECTED SOCIO-ECONOMIC CHARACTERISTICS OF ETHNIC MINORITIES BASED ON THE 1970 CENSUS: VOLUME III: AMERICAN INDIANS, at i (1974) [hereinafter cited as U.S. DEP'T OF HEALTH].

[19] *1977 Hearing, supra* note 3, at 1 (statement of Senator James Abourezk).

varying from 5 to 25 times higher.[20]

California significantly contributes to the national crisis.[21] California already has placed over eight times as many Indian children as non-Indian children in adoptive homes.[22] California public agencies place over 90 percent of Indian children subject to adoption in non-Indian homes.[23] One out of every 124 Indian children in the state is in foster care.[24] By comparison, one out of every 337 non-Indian children is in foster care.[25]

Several factors underlie the disparity in removal rates between Indian and non-Indian children. Too often non-Indian state officials who are insensitive to Indian culture and society make the decisions regarding the best interests of Indian children in removal and placement situations.[26] Moreover, most state neglect statutes define neglect or dependency in broad, vague terms.[27] Such vagueness permits and may even encourage state officials to make neglect or dependency determinations on the basis of personal values and moral systems which are likely to reflect the dominant white society.[28] This bias has a particularly devastating effect on American Indian families because of their distinct cultural heritage and value systems.[29] By disregarding Indian stan-

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[20] *Id.*

[21] Data from other states indicate that the removal problem is widespread. Minnesota, for example, removes Indian children from their homes at a per capita rate five times greater than non-Indian children. In Montana and South Dakota, the ratio of Indian foster care placement is at least 13 times as great as that of non-Indian placements. McCartney, *The American Indian Child Welfare Crisis: Cultural Genocide or First Amendment Preservations,* 7 COLUM. HUMAN RIGHTS L. REV. 529, 530 (1975).

[22] *1977 Hearing, supra* note 3, at 548 (statistical survey by Assn. of Am. Indian Affairs). California data are based on statistics supplied by the California Department of Health. *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] For a finding to the effect that state officials are often ignorant of or insensitive to cultural values, *see* TASK FORCE IV, INDIAN POLICY REVIEW COMMISSION: FEDERAL, STATE, AND TRIBAL JURISDICTION 78 (1976) [hereinafter cited as TASK FORCE IV]; *see generally* Wantland, *An Essay: The Ignorance of Ignorance: Cultural Barriers Between Indians and Non-Indians,* 3 AM. INDIAN L. REV. 1, 1 (1975).

[27] The vagueness of such statutes has been frequently noted. *See* Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U. PITT. L. REV. 1, 17 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 STAN. L. REV. 985, 1000 (1975).

[28] *See* Wald, *supra* note 27, at 998, 1001-02.

[29] The distinctiveness of American Indians is apparent by their established

dards in evaluating the fitness of a particular Indian family, the state may determine that a child is receiving inadequate care and should be removed from the home. For example, state officials may fail to understand or accept the customary Indian practice of sharing child care responsibilities among members of the extended family.[30] Thus, state officials may conclude that a parent's action of leaving a child with non-nuclear family members is indicative of neglect or lack of concern. Such a conclusion, however, may be wholly inappropriate in the context of Indian family life and may result in the unwarranted removal of a child.[31]

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way of life and many symbols of group identity. McCartney, in describing the cultural differences between Indians and non-Indians, noted that these differences "intersect areas which include occupation, economy, domestic relations, child rearing, politics, language, religion, race, cultural heritage, and geography." McCartney, *supra* note 21, at 532; *see generally* Wantland, *supra* note 26, at 1. For a discussion of cultural traits with respect to child rearing, *see* note 31 *infra*.

[30] For a discussion of the extended family's role in tribal societies, *see* note 31 *infra*.

[31] Unwarranted conclusions regarding Indian family life on the part of state officials result from their failure to consider cultural traits. Two important cultural traits are the continuing importance of family kinship and of tribal ties. The extended family is a trait common to most tribes. Indian children may have scores of relatives who they count as close members of the family. Indian children may make no distinction between the nuclear and extended family: family is family. *See* CENTER FOR SOCIAL RESEARCH AND DEVELOPMENT, DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, INDIAN CHILD WELFARE: A STATE-OF-THE-FIELD STUDY 346-47 (1976). Thus, while the state may regard long-term parental placement of Indian children with non-parents as indicative of neglect by the parents, the Indian community regards the children as properly living with their families. For an example of a state court's failure to recognize this trait, *see* In re Alto, No. J360948 (Super. Ct. Juv., Cal., Nov. 27, 1972), *cited in* McCartney, *supra* note 21, at 536 n.34, where Indian children were declared dependent minors of the court although they were living with their grandmother in accordance with their tribe's custom. A related difference concerns a child's relationship to the community. Because much of an Indian person's sense of identity and belonging comes from the relationship to the tribe, a child living with other tribal members but not with the immediate family may nonetheless receive the benefits of normal child rearing. CENTER FOR SOCIAL RESEARCH AND DEVELOPMENT, DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS [SOCIAL AND REHABILITATION SERVICE] CHILD WELFARE SERVICES ON INDIAN RESERVATIONS 29 (1975) [hereinafter cited as LEGAL AND JURISDICTIONAL PROBLEMS]. State officials may misinterpret other Indian child rearing practices as inadequate parental conduct. For example, Indian children are often given greater responsibility at an earlier age than in Anglo society. They may remain unsupervised or undertake the responsibility of younger children at an early age. Additionally, the traditional basic philosophy underlying child rearing in many tribes has not changed. In line with this philosophy,

Another factor contributing to the disparity in removal rates between Indian and non-Indian children is the poverty level of Indian families. Forty-eight percent of all rural Indians and 26 percent of urban Indians live below the official poverty level.[32] Many of these impoverished families receive welfare assistance and are thereby subject to social work supervision.[33] The increased exposure to persons who are obligated to report instances of perceived child care deficiencies is likely to result in more complaints concerning Indian children as compared to non-Indian children.[34] Such complaints may lead to court proceedings to declare these children neglected and may result in their removal from their homes.[35]

B. The Impact of Removal on the Indian Child, Family and Tribe

Because Indian children usually are placed in non-Indian settings, they must cope with adjusting to a social and cultural environment much different from their own, in addition to the trauma accompanying separation from their families. Clinical evidence indicates that placement of Indian children in non-Indian homes hampers their later emotional and intellectual development.[36] Particularly in adolescence, removal subjects Indian

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Indian parents often exert little pressure upon their children and seldom punish their children. These more "permissive" child rearing practices may result in an appearance that the parents do not care or are providing inadequate supervision. *See* CENTER FOR SOCIAL RESEARCH AND DEVELOPMENT, DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE 35, 53 (1976).

[32] U.S. DEP'T OF HEALTH, *supra* note 18, at 67.

[33] Indian families have the lowest median income of any group in the United States; at the same time they have the most family members to support. *Id.* at 26, 67. Consequently, nearly one-fifth of all Indian families receive public assistance. This is 3.5 times the national average. *Id.* at iv, 73.

[34] *See* Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 STAN. L. REV. 623, 629 n.21 (1976); Kay & Phillips, *Poverty and the Law of Child Custody,* 54 CALIF. L. REV. 717, 773 (1966).

[35] Kay & Phillips conclude: "A special problem for poverty-stricken families appears to be that, because of the difference in socio-economic class attitudes toward parental competence, children may be removed from the home too soon. Kay & Phillips, *supra* note 34, at 736.

[36] *See* Mindell & Guritt, *The Placement of American Indian Children—The Need for Change,* in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 61, 63 (S. Unger ed. 1978). This essay was adopted as an official paper by the American Academy of Child Psychiatry on Jan. 25, 1975. *Id.* at 61.

children to ethnic confusion and a pervasive sense of abandonment.[37] Absence of an Indian peer group and an Indian family intensifies this identity crisis.[38]

Separation of Indian children from their homes can cause a similar loss of the Indian parents' self-esteem and can aggravate the conditions which may have contributed initially to the family breakup.[39] Indian parents often withdraw, become depressed and begin or resume intensive drinking once placement of their children has been initiated by state officials.[40]

The impact of removal, however, extends beyond the individual child and family and strikes at the heart of tribal existence. Failure to recognize the right of Indian families to raise their children according to their own cultural ways poses a serious threat to Indian life.[41] Moreover, the tribe's ability to perpetuate itself decreases in proportion to the number of Indian children that the states remove to non-Indian homes and institutions.[42]

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[37] *Id.*

[38] *See 1974 Hearings, supra* note 1, at 49 (testimony of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota). In a report of its findings, the Senate Select Committee on Indian Affairs concluded that loss of identity and self-esteem by Indian children separated from their families contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. *1977 Hearing, supra* note 3, at 25.

[39] Dr. Joseph Westermeyer, psychiatrist at the University of Minnesota, studied in depth eight Indian families who lost children pursuant to state removal. He concluded that removal of the children had the same effect in all eight cases. "It effectively destroyed the family as an intact unit. The parents invariably separated. It exacerbated the problems of alcoholism, unemployment, and emotional duress among the parents." Westermeyer, *The Ravage of Indian Families in Crisis,* in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 47, 54 (S. Unger ed. 1978).

[40] *1974 Hearings, supra* note 1, at 102 (statement of Dr. James H. Shore & William Nichols). The words of a social worker testifying before a congressional committee described the despair felt by parents experiencing the separation of their children: "It seems to me like once an Indian family loses a child, they give up. They don't try anymore." *Id.* at 151 (statement of Mary Ann Lawrence).

[41] In testimony before the Senate Select Committee, Calvin Issac of the National Tribal Chairmen's Association expressed the sentiments of the Association on the effect the Indian child welfare crisis has on the tribe: "If Indian families continue to be disrespected and their parental capacities challenged by non-Indian social agencies . . . then the tribe [and] Indian culture have little meaning or value for the future." *1977 Hearing, supra* note 3, at 152 (statement of Calvin Issac). *See also* Woodward, *The Rights of Reservation Parents and Children: Cultural Survival or the Final Termination?,* 3 AM. INDIAN L. REV. 21, 23 (1975).

[42] This is particularly true in California, where many of the tribes are small.

The Act attempts to eliminate this threat by according the tribe an active role in Indian child custody proceedings.[43]

II. Custody Provisions of the Indian Child Welfare Act

In passing the Act,[44] Congress recognized that current state standards and procedures were leading to the wholesale destruction of Indian families and the unwarranted removal of Indian children from their homes.[45] To minimize this effect, Congress authorized increased tribal participation in Indian child custody matters and imposed stricter prerequisites for removing Indian children from their homes.[46]

Consequently, the removal of one child becomes particularly significant to the tribe. Interview with Dave Risling, Coordinator of Native American Studies, University of California, Davis, in Davis, California (April, 1978).

[43] For a discussion of the tribe's role in child custody matters under the provisions of the Act, *see* text accompanying notes 47-64 *infra*.

[44] The Indian Child Welfare Act of 1978 is comprised of three titles. This article is concerned only with those provisions within Title I which affect dependency proceedings. However, Title I also includes provisions regulating termination of parental rights and adoption of Indian children. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, §§ 101-107, 92 Stat. 3069 (to be codified in 25 U.S.C. §§ 1911-1917). Title II of the Act authorizes the Secretary of the Interior to make grants to tribes and Indian organizations for the purpose of assisting them in developing family programs to prevent the breakup of Indian families and to ensure that a child is removed from his or her family only as a last resort. *Id.* § 201(a) (to be codified in 25 U.S.C. § 1931). Title II allows the tribes to license foster homes, hire counselors, hire social workers, train court employees, subsidize adoptions, and pay for legal representation for Indian families involved in child custody proceedings. *Id.* § 201(a)(1)-(8). Title III of the Act requires state courts to provide records of Indian child adoptive placements to the Secretary of the Interior. *Id.* § 301(a) (to be codified in 25 U.S.C. § 1951). This title provides that, upon request of an adopted Indian child over age 18, an adoptive or foster parent of an Indian child, or an Indian child's tribe, the Secretary shall release such information as may be needed for enrollment of the child in his or her tribe or for otherwise protecting the child's rights as an Indian. *Id.* § 301(b). Additionally, Title III directs the Secretary to submit to Congress a plan for the provision of schools located near the homes of Indian children. *Id.* § 401(b) (to be codified in 25 U.S.C. § 1961). This provision is intended to help eliminate federal boarding schools which have required Indian children to leave their families for years of education. Currently, more than 10,000 Navajo children in grades 1 to 8 are in such federal boarding schools. H.R. Rep., *supra* note 12, at 27, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7708, 7728.

[45] *See* H.R. Rep., *supra* note 12, at 8-11, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7708, 7708-12.

[46] With the exception of those provisions relating to the tribe's assertion of jurisdiction, the child custody provisions of the Act do not affect state proceed-

A. Jurisdiction of Tribal Courts Over Indian Child Custody Proceedings

In recognition of Indian tribal sovereignty,[47] Congress acknowledged the authority of Indian tribes and tribal courts[48] over child custody proceedings involving minor tribal members. The Act vests the tribe with exclusive jurisdiction[49] of such proceedings when the Indian child involved is residing or is domiciled within the reservation except when another federal law otherwise vests such jurisdiction in the state.[50] Jurisdiction over most Indian matters in California is vested in the state. Public Law 280,[51] passed by Congress in 1953, transferred civil and criminal jurisdiction over Indian lands to California.[52] Indian children living on California reservations, therefore, are subject to state juvenile laws to the same extent as non-Indian children.

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ings which were initiated or completed prior to 180 days after the Act's enactment (November 8, 1978). Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 113, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1923). The Act's provisions, however, apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the same child. *Id.*

[47] American Indian tribes retain many of the attributes of sovereignty available to the states. These powers include the right of tribes to adopt their own form of government; to define tribal membership; to tax; and to govern the conduct of tribal members via tribal laws enforced through tribal courts. LEGAL AND JURISDICTIONAL PROBLEMS, *supra* note 31, at 5. The sovereign status of Indian tribes was first articulated by Chief Justice John Marshall in the seminal case of Worcester v. Georgia, 31 U.S. 515 (1832). For an excellent discussion of tribal sovereignty, *see* M. PRICE, LAW AND THE AMERICAN INDIAN 1-181 (1973); Ziontz, *After Martinez: Indian Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979). *See also* Martone, *American Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976).

[48] Except where federal law has transferred jurisdiction to state governments, most tribes of any size have tribal courts and codes. In 1976 there were 117 tribal courts operating on Indian reservations. These courts handled approximately 70,000 cases in 1973. TASK FORCE IV, *supra* note 26, at 124.

[49] The Act's provision on exclusive jurisdiction recognizes the developing federal and state case law holding that a tribe has exclusive jurisdiction over an Indian child living or domiciled on the reservation. Fisher v. Dist. Court, 424 U.S. 382 (1976); Wisconsin Potowatomies v. Houston, 396 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

[50] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1911).

[51] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590 (codified as amended in scattered sections of 18, 28 U.S.C.).

[52] *Id.* For a critical analysis of P.L. 83-280, *see* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

This jurisdictional framework, however, may change for some Indian children in California. The Act authorizes an Indian tribe which has lost jurisdiction over child custody matters pursuant to any federal law to reacquire such jurisdiction upon petition to the Secretary of the Interior.[53] The new federal legislation allows for partial retrocession of jurisdiction.[54] The state and tribe are authorized to enter into mutual agreements to provide for case-by-case transfer of jurisdiction or for concurrent jurisdiction.[55] Additionally, the Act permits tribes to exercise jurisdiction over minor tribal members who are not domiciled or living within the reservation under certain conditions.[56] Section 101(b)[57] requires that upon petition of an Indian child's parent, Indian custodian,[58] or tribe, any proceeding to establish foster care placement of an Indian child be transferred to the tribal court of the child's tribe[59] in the absence of good cause to the contrary.[60] The parents are given the right to veto such transfers.[61] Also, the tribe may decline jurisdiction.[62] Further, the Act extends the protection of the full faith and credit clause[63] to the public acts, records, and judicial proceedings in child custody proceedings of any Indian tribe.[64]

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[53] Indian Child Welfare Act of 1978, Pub. L. 95-608, § 108(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1918).

[54] *Id.* § 108(b)(2).

[55] *Id.* § 109(a) (to be codified in 25 U.S.C. § 1919).

[56] *Id.* § 101(b) (to be codified in 25 U.S.C. § 1911).

[57] *Id.*

[58] The term "Indian custodian" refers to 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 child's parent. *Id.* § 4(6) (to be codified in 25 U.S.C. § 1913).

[59] "Indian child's tribe" refers to (a) the Indian tribe in which an Indian child is a member or is eligible for membership or (b) in the situation where a child is a member of or eligible for membership in more than one tribe, the tribe with which the child has had the more significant contacts. *Id.* § 4(5).

[60] *Id.* § 101(b) (to be codified in 25 U.S.C. § 1911). Congress intended this subsection to permit a state court to apply a modified version of *forum non conveniens,* in appropriate cases, to ensure that the rights of the Indian child, parent or custodian, and the tribe are fully protected. H.R. REP., *supra* note 12, at 21, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7722.

[61] Indian Child Welfare Act of 1978, Pub. L. No. 95-608 § 101(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1911).

[62] *Id.*

[63] U. S. CONST. art. IV, § 1.

[64] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(d), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1911).

B. Standards for Removal of Indian Children in State Court Proceedings

The Act establishes minimum federal standards which apply in state court proceedings designed to prevent the unwarranted removal of Indian children from their homes. It confers intervention rights to the Indian custodian and to the child's tribe and provides for tribal receipt of notice of state proceedings involving a tribal minor.[65] The state is mandated to provide court-appointed counsel for indigent Indian parents and Indian custodians.[66] Further,the state must provide remedial social services to prevent the breakup of Indian families.[67] Finally, the Act establishes evidentiary standards[68] for the removal of Indian children and sets forth placement preferences within Indian settings if removal is needed.[69]

Under the Indian Child Welfare Act, the Indian custodian and the child's tribe have the right to intervene in any state court proceeding for the foster care placement of an Indian child.[70] To ensure that an Indian child does not slip through the state system unnoticed, the party seeking removal of an Indian child must notify the child's parents or the Indian custodian, if any, and the child's tribe of the pending proceedings and of their right to intervene.[71] In the case where the state cannot reasonably determine the location of the above parties, notice must be given to the Secretary of the Interior.[72] The notice requirement applies whenever the state court has actual or constructive knowledge of the child's Indian affiliation.[73]

In addition to the intervention and notice provisions, the Act also provides that an indigent Indian parent or Indian custodian

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[65] *Id.* §§ 101(c), 102(a) (to be codified in 25 U.S.C. §§ 1911, 1912).

[66] *Id.* § 102(b) (to be codified in 25 U.S.C. § 1912).

[67] *Id.* § 102(d).

[68] *Id.* § 102(c).

[69] *Id.* § 105(b) (to be codified in 25 U.S.C. § 1915).

[70] *Id.* § 101(c) (to be codified in 25 U.S.C. § 1911).

[71] *Id.* § 102(a) (to be codified in 25 U.S.C. § 1912).

[72] Congress expects the Secretary to make diligent efforts to notify the parent or custodian and the child's tribe. H.R. REP., *supra* note 12, at 21, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7722.

[73] The party seeking the foster care placement of an Indian child is required to give such notice whenever the state court knows or has reason to know that the child involved is Indian. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912). This requirement should compel state officials to become more sensitive to the cultural backgrounds of the children with whom they deal.

shall have a right to court-appointed counsel in any involuntary state proceeding for foster care placement or termination of parental rights.[74] If state law makes no provision for such counsel, the Secretary of the Interior is authorized to pay reasonable fees and expenses of counsel.[75] The court may also appoint counsel to represent the child if the court finds that such appointment is in the best interest of the child.[76]

Another provision of the Act is designed to ensure that removal of a child is the only solution to the family problem. Section 102 (d)[77] provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide remedial services to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[78] In adopting this requirement, Congress recognized that while state law may require remedial measures prior to the initiation of an out-of-home placement, in practice these services are rarely provided.[79]

The Act also establishes evidentiary standards for foster care placement or termination of parental rights. As originally introduced, the legislation required proof "beyond a reasonable doubt" for both actions.[80] While this standard remains for termination actions, the Act adopts a clear and convincing standard for foster care placement.[81] No foster care placement is to be ordered in the absence of a showing, supported by clear and convincing evidence, that the continued custody by the parent or Indian custodian is likely to result in serious physical or psychological damage to the child.[82] Such a showing must include the testimony of qualified expert witnesses, whose expertise extends beyond the normal qualifications for social workers.[83]

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[74] *Id.* § 102(b).

[75] *Id.*

[76] *Id.*

[77] *Id.* § 102(d).

[78] *Id.*

[79] H.R. REP., *supra* note 12, at 22, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7723.

[80] While Congress expressed the belief that an involuntary removal of a child from the parents is a penalty as great as a criminal penalty, it nevertheless amended the original bill to lower the standard of proof to "clear and convincing" in the case where parental rights are not terminated. *Id.*

[81] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(e), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[82] *Id.*

[83] H.R. REP., *supra* note 12, at 22, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7723.

By outlining preferences to be followed by the state when foster care is required,[84] the Act endeavors to ensure placement of Indian children within Indian settings.[85] Preference is given to placement with (1) a member of the child's extended family, (2) a foster home licensed or specified by the child's tribe, (3) an Indian foster home licensed or approved by a non-Indian licensing authority, and (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[86] Further, Indian children are to be placed within reasonable proximity to their homes.[87] The child's tribe may change the order of preference set forth in the Act,[88] and, where appropriate, the court must consider the preferences of the Indian child and the parent.[89]

The Act further requires application of the prevailing social and cultural standards of the relevant Indian community to meet the preference requirements.[90] In determining whether or not an Indian family is fit to serve as a foster home for an Indian child, state agencies often apply white, middle-class standards, which in many cases forecloses placement with an Indian family.[91]

Finally, emergency removal of Indian children is governed by section 112[92] of the new legislation. This section permits, under applicable state law, the emergency removal of Indian children from their families in order to prevent imminent physical harm to the children notwithstanding the provisions of the Act. The

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[84] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 105(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1915).

[85] With these preference requirements, Congress seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe to retain its children in its society. H.R. REP., *supra* note 12, at 23, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7724.

[86] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 105(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1915). Although this section establishes a federal policy that, whenever possible, Indian children should remain in the Indian community, it is not to be read to preclude placement with non-Indian families. H.R. REP., *supra* note 12, at 23, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7724.

[87] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 105(c), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1915).

[88] *Id.*

[89] *Id.*

[90] *Id.* § 105(d).

[91] H.R. REP., *supra* note 12, at 24, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7724.

[92] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 112, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1922).

removal is temporary; it continues only for a reasonable length of time. The state must take expeditious action to return the children to their families, transfer jurisdiction to the tribe, or institute proceedings subject to the provisions of the Act.[93]

The federal Act makes significant changes in child custody proceedings involving Indian children. To determine the potential impact of the Act upon California dependency law, it is necessary to examine the California system.

III. Dependency Provisions of California Law

Several steps are required to declare a child dependent or neglected under California law.[94] In the initial step, the court must determine whether or not the child falls within the jurisdiction of the juvenile court. Section 300 of the California Welfare and Institutions Code[95] governs such determinations. This statute authorizes the juvenile court to assert jurisdiction over children falling within four descriptive categories. The categories include children: 1) who lack proper parental care or control, 2) who are destitute or without a suitable place of abode, 3) who are physically dangerous, or 4) who are victims of parental neglect of abuse.[96]

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[93] *Id.*

[94] This article describes the statutory procedures generally applicable throughout California. However, it should be noted that, in recognition of the serious problems that exist in the current foster care system, the California legislature passed the Family Protection Act of 1976. Family Protection Act of 1976, 1976 Cal. Stat. 2280, ch. 977 (codified in scattered sections of Cal. Welf. & Inst. Code). The Family Protection Act, *inter alia,* authorizes added social services and court procedures designed to avoid the necessity of placing children in foster care and to ensure the prompt reunification of the families of children who must be removed. *Id.* § 1. In order to determine if these added services and procedures are successful in keeping families intact, the legislature mandated that these new approaches be initiated and evaluated in at least two demonstration counties prior to their statewide adoption. *Id.* Therefore, different procedures, with a focus on providing state services prior to removal, are in effect in two demonstration counties (San Mateo and Shasta Counties). *Id.* These demonstration programs are in effect until June 31, 1981, at which time, if proven effective, they may be implemented on a state wide basis. *Id.* §§ 1-2. It is interesting to note that the procedures applicable to dependency proceedings in demonstration counties closely parallel the pre-removal services and evidentiary requirements of the Indian Child Welfare Act. *Compare* Cal. Welf. & Inst. Code § 361 (West Cum. Supp. 1979) *with* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(e), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[95] Calif. Welf. & Inst. Code § 300 (West Cum. Supp. 1979).

[96] The full text of § 300 is:

California law divides dependency proceedings[97] into two distinct phases: a jurisdictional phase[98] and a dispositional phase.[99] The court first holds a hearing[100] to determine whether the child is a person described by section 300 of the Welfare and Institutions Code.[101] If the court finds that the child is such a person, the court can assume jurisdiction over the child[102] and then decide the best disposition for the child.[103] If the court does not find that

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> Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:
> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.
> (b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.
> (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.
> (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse either of his parents, or of his guardian or other person in whose custody or care he is.

CAL. WELF. & INST. CODE § 300 (West Cum. Supp. 1979).

[97] A complaint or referral to the child welfare agency by a relative, neighbor, police, or social worker is the usual means by which dependency proceedings are set in motion. Upon receiving a complaint or referral alleging neglect of a child, a social worker investigates the case to determine what steps may be necessary to protect the child and to correct the situation. The social worker may determine that the situation requires no action and decide to drop the matter. On the other hand, the social worker may decide that the situation requires some action, but that it can best be handled through a voluntary arrangement whereby the parents agree to agency services. Alternatively, the social worker may decide the situation warrants the filing of a petition to have the child adjudicated a dependent child of the court. Comment, *Dependency Hearings: What Rights for the Parents?*, 6 U.C. DAVIS L. REV. 240, 244-45 (1973).

[98] During the jurisdictional phase the court considers only the question of whether the child is a person described by section 300. CAL. WELF. & INST. CODE § 355 (West Cum. Supp. 1979).

[99] After the court finds that the child is a person described by section 300, it then proceeds to hear evidence on the question of the proper disposition to be made of the child. CAL. WELF. & INST. CODE § 356 (West Cum. Supp. 1979).

[100] CAL. WELF. & INST. CODE § 355 (West Cum. Supp. 1979).

[101] CAL. WELF. & INST. CODE § 300 (West Cum. Supp. 1979).

[102] *Id.*

[103] CAL. WELF. & INST. CODE § 356 (West Cum. Supp. 1979). Although the court may consider any relevant evidence offered by the parties to determine the best disposition, the social study of the child made by the social worker is the only evidence mandated by law. CAL. WELF. & INST. CODE § 358 (West Cum. Supp. 1979).

the child falls within section 300, however, the court must dismiss the case.[104]

The standard of proof in section 300 jurisdiction hearings is unclear. The California statute requires that a preponderance of the evidence is necessary to prove that a child is subject to the court's jurisdiction.[105] Despite the unambiguous words of the statute, the First District Court of Appeals has held that clear and convincing evidence, rather than a preponderance of evidence, is the proper standard to apply in dependency hearings.[106] The California Supreme Court has yet to rule on the issue.[107]

During the dispositional phase, the court may make any reasonable order for the care and custody of the child.[108] A child may not be taken from the physical control of the parent, however, unless the parent is unable or has failed to provide proper maintenance and training for the child, or the child's welfare requires removal.[109] In addition to these statutory requirements, the California Supreme Court has held that the juvenile court must find that continued custody by the parent would be detrimental to the child before custody can be awarded to a non-parent.[110] Because the Act contains provisions which mandate stricter standards and procedures, it significantly changes state proceedings whenever the proceedings involve an Indian child.

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[104] CAL. WELF. & INST. CODE § 356 (West Cum. Supp. 1979).

[105] CAL. WELF. & INST. CODE § 355 (West Cum. Supp. 1979).

[106] In re Robert P., 61 Cal. App. 3d, 310, 132 Cal. Rptr. 5 (1st Dist. 1976). The court in *Robert P.* considered a mother's appeal of a juvenile court order declaring her two-year-old son to be a dependent child under subsections 300(b) and (d) and depriving her of custody.

[107] *See generally* Comment, *Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing"*, 14 SAN DIEGO L. REV. 1155 (1977).

[108] CAL. WELF. & INST. CODE § 362 (West Cum. Supp. 1979).

[109] CAL. WELF. & INST. CODE § 361 (West Cum. Supp. 1979).

[110] In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974). In this case the Supreme Court held that Cal. Civil Code § 4600 is applicable to all custody proceedings including those pursuant to juvenile law. *Id. Accord,* In re Robert P., 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1st Dist. 1976). Cal Civ. Code § 4600 provides that in any proceeding in which the custody of a child is in issue, the court may make any necessary and proper order for the custody of such child. In the case where the child is of sufficient age, the court must consider the child's wishes in making an award of custody. This section establishes an order of preference to be followed in awarding custody. The parents are given preference over non-parents. Additionally, before the court can award custody to a non-parent, it must find that an award of custody to a parent would be detrimental to the child and that the award to a non-parent is required to serve the child's best interests. CAL. CIV. CODE § 4600 (West Cum. Supp. 1979).

IV. The Effects of the Indian Child Welfare Act on California Dependency Proceedings

The Act affects several areas of California law. The first major change involves the assertion of jurisdiction by Indian tribes over Indian children domiciled on California Indian reservations. Under the Act, a tribe may elect to deprive the state of jurisdiction over child custody proceedings involving the tribe's minor members.[111] While this provision will affect many Indian children, many children will remain subject to state jurisdiction.[112] As to these children, federal law now requires California courts and state officials to apply different procedures and standards in dependency proceedings involving foster care placement.

A. Jurisdictional Changes

One significant impact of the Act is on state court jurisdiction in dependency hearings. Prior to the Act's passage, California courts and social agencies had exclusive jurisdiction to determine the dependency status and the need for removal of Indian children.[113] Now California tribes, for the first time since the state assumed jurisdiction over Indian reservations,[114] may reassert their historical role in the care and protection of Indian children.

Many Indian children, nevertheless, will remain under the jurisdiction of the state for years to come for three reasons. First, total retrocession from state jurisdiction will take time;[115] there-

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[111] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 108, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1918).

[112] *See* text accompanying notes 115-18 *infra*.

[113] P.L. 83-280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590 (codified as amended in scattered sections of 18, 28 U.S.C.), transferred jurisdiction over civil matters such as custody proceedings to the state. *Id.* The history of what has happened as a result of non-Indians making dependency and placement decisions regarding Indian children speaks for itself, nevertheless, *see* text accompanying notes 18-43 *supra*.

[114] *See* text accompanying notes 53-56 *supra*.

[115] To reassume jurisdiction over child custody matters the tribe must submit a petition, to be approved by the Secretary of the Interior, presenting a suitable plan for the tribe's exercise of such jurisdiction. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 108(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1918). In evaluating the petition and the plan's feasibility, the Secretary is to consider such factors as: whether or not the tribe maintains a tribal membership roll for identifying who would be subject to the tribe's jurisdiction, the size of the reservation, and the tribe's population base. *Id.* § 108(b)(1). If the Secretary rejects a petition, he must offer technical assistance to the tribe in order to assist it in correcting any deficiencies which may have led to the disapproval. *Id.* §

fore, even those tribes electing exclusive jurisdiction over child custody matters may continue under state procedures for some time. Second, some tribes may elect to enter into compacts with the state whereby the tribe assumes jurisdiction on a case-by-case basis or exercises concurrent jurisdiction with the state.[116] Third, the smaller, less formally organized and economically dependent reservations may elect not to contest jurisdiction.[117]

The Act's impact on state court dependency procedures is of particular significance to California Indian families for a fourth reason. Many of California's Indian children are domiciled away from reservations, particularly in urban centers.[118] Thus, these children will continue to be subject to California juvenile laws.

B. Procedural Changes

While it is clear that the Act affects California dependency proceedings,[119] uncertainty exists as to what stage in the depend-

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108(b)(2). The Act appears to give the Secretary broad discretionary power in deciding whether or not to accept a tribe's petition. *See id.* §§ 108(a)-(b). Recent experience involving the removal of state jurisdiction indicates that retrocession takes time. For example, as a result of tribal pressure, the Nevada legislature passed a retrocession statute on July 1, 1974. Nevada's retrocession profer was not accepted by the Secretary of the Interior until July 1, 1975. TASK FORCE IV, *supra* note 26, at 27. Therefore, as a result of the time a tribe will undoubtedly need to prepare a feasible plan, as well as the time lag between submission and approval of a petition, Indian children from tribes electing exclusive jurisdiction will remain subject to state jurisdiction for at least a certain length of time.

[116] *See* text accompanying note 55 *supra.*

[117] *See* TASK FORCE IV, *supra* note 26, at 24 n.1. At public hearings in Sacramento, California, on March 8, 1979, Printed Announcement by the Bureau of Indian Affairs to Hearing Participants (March 8, 1979), held to receive input to proposed federal regulations to implement the Indian Child Welfare Act, tribal representatives expressed concern about smaller reservations and rancherias being unable to reassume jurisdiction. One possible solution suggested was for such reservations to establish consortiums whereby they could exercise jurisdiction as a group. *Id.*

[118] There are approximately 39,579 Indian children in California, U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, SUBJECT REPORTS: AMERICAN INDIANS, PC(2)-1F, at 6 (1973). Nearly 40% of these children live in urban areas in California. U.S. DEP'T OF HEALTH, *supra* note 18, at 21.

[119] Prior to passing the Act, Congress explored the issue of whether it had the power, pursuant to the Indian commerce clause, U.S. CONST. art. I, § 8, cl. 3, to regulate state child custody litigations involving nonreservation Indian children and parents. H.R. REP., *supra* note 12, at 17, *reprinted in* U.S. CODE CONG. & AD. NEWS 7708, 7718. The issue arises because of the existence of a significant state interest in regulating the procedures to be followed by its courts in exercising jurisdiction over a traditional state matter. *Id.* Congress concluded that,

ency procedure its provisions apply. As described previously, California dependency proceedings are divided into two phases: a jurisdictional phase, in which dependency or neglect is determined, and a dispositional phase, in which removal or in-home state supervision may be ordered.[120] The Act indicates that its provisions apply when the state seeks removal of Indian children from their homes.[121] A strict construction of its language, however, would result in application of the Act to the dispositional phase only, and then, only when removal is sought. Such a result would be incompatible with the Act's ameliorative purpose.[122] Common sense dictates that the safeguards provided by the Act should apply from the time a dependency petition concerning an Indian child is first filed. The overall purpose of the federal law is to protect the Indian family from unwarranted state intervention which may result from the application of standards foreign to Indian ways.[123] Such state interference, even though it may not involve removal of children from their homes, has a serious effect upon Indian families.[124] Conditional custody, permitting a child to remain in the family subject to an outsider's supervison and evaluation of parental performance, harmfully leaves the family in limbo.[125] The psychological system of the family may suffer as well.[126] Additionally, submission by Indian families to non-Indian child rearing standards coerces Indian families to assimilate into the dominant white society and thus endangers the Indian peo-

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based upon an established line of U.S. Supreme Court decisions, it could, constitutionally, impose certain procedural burdens upon state courts in order to protect the substantive rights of Indian children, parents, and tribes involved in state court custody proceedings. *Id.* at 18, *reprinted in* U.S. CODE CONG. & AD. NEWS 7708, 7718-19. Congress based its conclusion on such cases as: Dice v. Akron, C.Y.Y. R.R., 342, 359 (1952); Brown v. Westery Ry. 338 U.S. 294 (1949); American Railway Express Co. v. Levee, 263 U.S. 19 (1923); Davis v. Wechsler, 263 U.S. 22 (1923); and the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). H.R. REP. *supra* note 12, at 18, *reprinted in* U.S. CODE CONG. & AD. NEWS 7708, 7718-19.

[120] *See* text accompanying notes 98-103 *supra.*

[121] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, §§ 101(b)-(c), 102 (a)-(c), 104, 105(b), 92 Stat. 3069 (to be codified in 25 U.S.C. §§ 1911-1912, 1913-1914).

[122] *See* text accompanying notes 44-46 *supra.*

[123] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2(5), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1901).

[124] For a discussion of the dynamics of the potential harm such interference poses, *see* Wald, *supra* note 27, at 993-99.

[125] *Id.*

[126] *Id.*

ples' way of life.[127] These are the very consequences that the Act was designed to prevent.

Despite the ambiguity involved in determining when the federal provisions apply, the Act makes important changes in California dependency procedures. California officials must now notify the child's tribe and Indian custodian of pending dependency proceedings and of their right to intervene at any time.[128] Although indigent parents in California already are entitled to court-appointed counsel,[129] the Act extends this right to the Indian custodian.[130] The federal provisions further mandate that the state provide remedial social services to prevent the breakup of Indian families.[131] If such services prove unsuccessful and the state seeks foster care placement of an Indian child, it must demonstrate, by clear and convincing evidence, that the continued custody by the parent will result in serious harm to the child.[132] Finally, if removal is needed, California officials are required to place Indian children within Indian homes and institutions whenever possible.[133]

The first change resulting from the Act concerns notice requirements. Under California statutory law, minors 14 or more years of age, parents, and legal guardians are entitled to notice of pending dependency proceedings.[134] If there is no parent or guardian residing within the state, or if their place of residence is unknown, notice is given to any adult relative within the county.[135] The state now must notify the Indian custodian, if there is one, and the child's tribe of the proceedings and of their right to intervene.[136] Further, if the location of these parties is not known, the state must request the Secretary of the Interior to provide such notice.[137] Failure to give such notice is grounds invalidating the court's action.[138]

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[127] *See generally* McCartney, *supra* note 21; Woodward, *supra* note 41.

[128] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[129] In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (2d Dist. 1974).

[130] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[131] *Id.* § 102(d).

[132] *Id.* § 102(e).

[133] *Id.* § 105(b)(i)-(v), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1915).

[134] CAL. WELF. & INST. CODE § 332 (West Cum. Supp. 1979).

[135] *Id.*

[136] *See* text accompanying notes 70-73 *supra.*

[137] *Id.*

[138] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 104, 92 Stat. 3069 (to be codified in 25 U.S.C. § 1914).

Under the federal law, the Indian custodian and the child's tribe have the right to intervene in any state court proceeding for foster care placement.[139] In contrast, under California law only minors 14 or more years old and parents, legal guardians or *de facto* parents[140] are entitled to be present at dependency hearings.[141] While an Indian person who has custody of an Indian child under tribal law or custom or to whom temporary physical custody had been informally given by the parents should qualify without difficulty as a *de facto* parent, the Act assures that they qualify as a matter of right.[142]

Until the Act's passage, a child's tribe had no standing in state court proceedings. By granting standing as a matter of right, Congress recognized the fact that unless a tribe is actively involved in child welfare matters, it has almost no way of knowing what is happening to its children.[143] Because a tribe's children are

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[139] *Id.* § 101(c), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1911).

[140] While statutory law does not include *de facto* parents among those entitled to be present at hearings, the California Supreme Court has extended to them participation rights. In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974). In granting standing to a foster parent, the Supreme Court defined a *de facto* parent as one who has on a day-to-day basis assumed the role of parent. *Id.* at 629, 523 P.2d at 253, 114 Cal. Rptr. at 453.

[141] CAL. WELF. & INST. CODE § 349 (West Cum. Supp. 1979).

[142] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(c), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1911). An example of an Indian custodial relationship is the recent case involving an Indian child in Southern California. Among some groups of California Mission Indians there is a ceremony in which Indian mothers pledge to care for one another's children. According to tribal custom this relationship is called *kumadre* and is akin to being a "second" mother. Frederick was ten years old when his mother was temporarily unable to care for him and placed with with his *kumadre* on the Torres Martinez Reservation in December of 1976. Subsequently, the state alleged that the mother's action constituted neglect, and petitioned the court to remove Frederick from his family. With legal assistance from the Association of American Indian Affairs, *see* note 5 *supra,* the mother was able to negate the allegations and retain custody of her son. INDIAN AFFAIRS, Aug.-Oct. 1977, at 3. Under the provisions of the new Act had the mother not been available, the *kumadre* could have represented the natural mother's interest although the *kumadre* was neither a legal guardian or relative of the child. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(a)-(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[143] The courts have increasingly recognized the crucial role which the issue of custody of an Indian child plays in the framework of tribal self-determination. "If tribal sovereignty is to have any meaning at all in this junction of history, it must necessarily include the right . . . [of a tribe] to provide for its young, a *sine qua non* to the preservation of its identity." Wisconsin Potowatomies v. Houston, 396 F.Supp. 719, 730 (W.D. Mich. 1973); *see also* note 49 *supra.*

essential to the continued existence of the tribe,[144] the right to intervene in state court proceedings is of particular importance.

A further change resulting from the Act is the availability of court-appointed counsel for the Indian custodian. Indigent parents are already entitled to free counsel in California.[145] The extension of free counsel to the Indian custodian,[146] however, enables the Indian person with whom the parent has temporarily left the child to effectively assert the rights of the absent parent.[147]

While the provisions described above help assure preservation of the Indian child's, parent's and tribe's rights in dependency proceedings, the Act's requirement of remedial social services for Indian families may eliminate the need for court action altogether. Although California law does not mandate remedial social services,[148] the Act requires such services.[149] The Act provides that "any party seeking to effect a foster care placement of . . . an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs . . . and that these programs have proved unsuccessful."[150] Thus, courts must now consider whether or not the state has made such efforts before Indian children can be removed from their homes.

Differences may arise in determining what constitutes active efforts. In deciding whether an effort has been unsuccessful under the terms of the Act, California courts may use the analysis that the Fifth District Court of Appeal used in *In re* Susan Lynn M.[151] In that case the court articulated several factors which should be considered in determining whether custody proceedings should be delayed until services are provided and evaluated.[152] First, the court should determine whether mitigating factors existed for the

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[144] *Id.*

[145] In re Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (2d Dist. 1974).

[146] American Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(b), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[147] *See* note 142 *supra.*

[148] The court in In re Susan Lynn M., 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (5th Dist. 1975), held that, while such services should be offered if deemed appropriate under the circumstances, whether they should be ordered by the court lies within the discretion of the juvenile court. *Id.* at 311, 125 Cal. Rptr. at 714.

[149] American Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(d), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912); *see* text accompanying notes 77-79 *supra.*

[150] *Id.*

[151] 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (5th Dist. 1975).

[152] *Id.* at 311-12, 125 Cal. Rptr. at 714.

failure to provide services, such as refusal of the services by the parent.[153] Second, the court should consider whether potential services would offer a solution to the problems at hand.[154] Third, the court should determine whether continued custody of the child by the parent would result in serious physical or emotional harm to the child before the services could be undertaken.[155] In any event, the Act's clear intent is to impose a greater responsibility than currently exists upon the state to provide remedial services to prevent the breakup of Indian families.[156]

In addition to demonstrating that active efforts have been made to provide social services, the state must show that the continued custody by the parent or Indian custodian is likely to result in serious physical or emotional harm to the child.[157] California law seems consistent with the clear and convincing standard enunciated by the Act. In actual practice, however, California courts do not require expert testimony[158] of serious harm to the child.[159] Instead, evidence of improper parental conduct continues to serve as sufficient grounds for the removal of children from their homes.[160] Such practice weakens the standards de-

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[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See* H.R. REP., *supra* note 12, at 22, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7723.

[157] American Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 102(e), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1912).

[158] Unlike the federal requirement for witnesses whose expertise extends beyond the normal social worker qualifications, California law only requires that a social study of the child prepared by the social worker be entered into evidence. CAL. WELF. & INST. CODE § 358 (West Cum. Supp. 1979).

[159] Section 300 of the California Welfare & Institution Code defines neglect or dependency in terms of parental conduct or home conditions without any reference to specific harm to the child. *See* CAL. WELF. & INST. CODE § 300 (West Cum. Supp. 1979) (full text cited in note 96 *supra*); Wald, *supra* note 27, at 1000-01.

[160] The California Supreme Court in discussing the requirement of a finding of detriment before a child may be removed from the home noted that a finding that a parent is unable to, or has failed to, provide proper care is a specific instance of detriment justifying an award of custody to a non-parent. In re B.G., 11 Cal. 3d 679, 697, 523 P.2d 244, 256, 114 Cal. Rptr. 444, 456 (1974). Thus, if such parental conduct is sufficient evidence of detriment to the child, it seems clear that, contrary to the Federal Act, California courts are not required to find specific serious harm to the child before removal from the home can be ordered. In re Robert P., 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1st Dist. 1976), reversing a juvenile court order, serves as a recent example of a lower court depriving a mother of custody of her child on the basis of parental conduct. The primary evidence against the mother in this case was that the home was messy, there

cared by the courts and makes California practice inconsistent with the Act.

Finally, assuming there is a valid need to remove the child from the family,[161] the Act's placement preference requirements signify a change in the procedures used for selecting the best foster case placement for an Indian child. Under California law no statutory preference exists for placement of a child within a particular cultural or ethnic setting,[162] although on an ad hoc basis a particular welfare department may attempt to place Indian children within Indian homes. The Act now compels California officials to actively seek out Indian foster homes and to work with California tribes in selecting the best placements for Indian children.

Recognizing that there may be an inadequate number of Indian placements available, the Act includes several provisions to help remedy this situation.[163] California officials are required to apply the social and cultural standards of the Indian community in evaluating the suitability of a particular home for placement.[164] This requirement is intended to increase the number of Indian homes available for foster care placement.[165] Although the Act does not provide specific guidelines for determining the prevailing standards within an Indian community, Congress clearly intended the state to apply approval criteria which are appropriate for the economy and lifestyle of the Indian community in which

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was little food in the home, and that on several occasions the mother had left her son with neighbors without returning for several days. The appellate opinion noted, however, that the mother had a good relationship with her son and that he was a normal child in every way. *Id.* at 319, 132 Cal. Rptr. at 11. This case is particularly appropriate since it involved an Indian child and parent. *Id.* (the parties were represented by the California Indian Legal Service).

[161] No statistics specifically identify the grounds upon which removal of Indian children in California is most often based. However, national statistics indicate that very few Indian children are removed from their homes on the grounds of physical abuse. *1974 Hearings, supra* note 1, at 4 (statement of William Byler). One North Dakota reservation study shows that the state alleged physical abuse in only 1% of the cases. *Id.*

[162] Section 362 of the Welfare & Institutions Code, which governs where a child may be placed, is void of any reference to the child's background. CAL. WELF. & INST. CODE § 362 (West Cum. Supp. 1979).

[163] In addition to the Act's requirement that community standards be used in evaluating potential foster homes, the Act authorizes grants to be made to tribes and Indian organizations to assist them in establishing temporary facilities for Indian children. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 201(a), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1931).

[164] *Id.* § 105(d), 92 Stat. 3069 (to be codified in 25 U.S.C. § 1915).

[165] *See* text accompanying notes 90-91 *supra.*

the parent or extended family resides or maintains social and cultural ties.[166]

Conclusion

In passing the Indian Child Welfare Act of 1978, Congress recognized that current state standards and procedures were leading to the wholesale destruction of Indian families and the unwarranted removal of Indian children from their homes. To minimize this effect, the Act authorizes increased tribal participation in Indian child custody matters. California tribes can reassert jurisdiction over child custody matters for the first time since Congress vested jurisdiction in the state in 1953. The Act also adds a new dimension to California law by granting the tribe intervention rights in state court proceedings.

To assure that Indian cultural values and social conditions are considered in the court's decisionmaking process, the Act imposes stricter prerequisites for the involuntary removal of Indian children from their homes. To this end, the new legislation sets forth minimum federal standards which the state must meet before Indian children can be placed in foster care. The state must provide remedial social services to Indian families which must prove unsuccessful before it can seek to remove children. The state must also present clear and convincing evidence, supported by the testimony of physicians and psychiatrists, that the children face serious physical or emotional damage by remaining with their families. Finally, in the event that foster care is needed, the state must seek placements within Indian settings.

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[166] *See* H.R. REP., *supra* note 12, at 24, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7708, 7724; *see* text accompanying note 90-91 *supra*.