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THE INDIAN CHILD WELFARE ACT: GUIDING THE DETERMINATION OF GOOD CAUSE TO DEPART FROM THE STATUTORY PLACEMENT PREFERENCES

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Abstract: Since 1978, custody proceedings involving Indian children have been subject to the provisions of the Indian Child Welfare Act. The substantive provisions of the Act set forth placement preferences for state courts to follow when determining adoptive, preadoptive, and foster care placement of Indian children. While the Act directs that the preferences are to be followed in the absence of good cause to the contrary, it does not include a corresponding definition of what constitutes good cause. The result under this vague standard has been a lack of uniformity in state court treatment of the "good cause" determination. This Comment surveys the articulated policy and structure of ICWA, examines the disparities in state court applications of the "good cause" standard, and then proposes that the guidelines issued by the Bureau of Indian Affairs be uniformly instituted by Congress as binding regulations limiting state court discretion and guiding the "good cause" determination.

Each individual is an amalgam of the predominant religious, linguistic, ancestral and educational influences existent in his or her surroundings. Indian people, whether residing on a reservation or not, are immersed in an environment which is in most respects antithetical to their traditions. Furthermore the cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated or adequately protected in our society. . . . Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.[1]

The consistent failure of state agencies to recognize the unique values of Indian[2] culture, coupled with shocking statistics indicating copious and often unwarranted removal of Indian children from their families and tribal communities, led Congress to adopt the Indian Child Welfare Act of 1978 (ICWA or "the Act").[3] This Comment addresses one facet of the statutory regulation of Indian child welfare—the state court

1. *In re* M.E.M. Youth in Need of Care, 635 P.2d 1313, 1316 (Mont. 1981).

2. Because this Comment concerns the Indian Child Welfare Act of 1978, the term "Indian," as used by Congress in the statute, will be used in lieu of the term "Native American."

3. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (1988 & Supp. 1993)).

determination of whether good cause exists to depart from the explicit placement preferences of the Act. State courts often incorporate discretionary standards in this determination that conflict with the object and intent of ICWA. To effectively protect the rights guaranteed by the Act, state court discretion must be circumscribed in a manner consistent with the primary goals of the Act to protect the interests of Indian children and the security of Indian tribes.

This Comment begins with an examination of the history of ICWA, including the congressional policy pronounced within the text and design of the Act. Part II sets forth the Bureau of Indian Affairs' (BIA) interpretation of the relevant provisions of the Act. Part III outlines the U.S. Supreme Court's interpretation of ICWA and the corresponding implications for state courts. Part IV surveys differing practices of state courts resulting from the Act's failure to define what constitutes good cause to depart from the statutory placement preferences. It further examines how a court's use of discretionary standards conflicts with the articulated policy of the Act. Finally, part V recommends that Congress codify the BIA Guidelines to direct the "good cause" determination in a manner consistent with the policy of ICWA.

I. THE INDIAN CHILD WELFARE ACT OF 1978

The Indian Child Welfare Act constitutes an edict by Congress that was meant to preserve the Indian tribes by establishing standards to protect Indian children and keep them within their families and communities whenever possible. Evidence of this purpose is clear in the policy concerns articulated during congressional hearings preceding the Act's passage and in the procedures constructed to implement the Act.

A. History of ICWA

Recognition of the need to establish a federal policy regarding Indian child welfare led Congress to enact ICWA. Beginning in 1973, Congress conducted an assessment of the placement of Indian children in foster care, institutions, and adoptive settings.[4] The studies included statistical

4. The sponsor of the legislation, Representative Morris Udall, summarized the four years of congressional hearings, oversight, and investigation as illuminating "a serious problem in Indian child welfare which approaches crisis proportions." 124 Cong. Rec. 38,102 (1978) (statement of Rep. Udall).

data disclosing that placements regularly removed[5] a high percentage of Indian children from their homes and communities.[6] The studies expressly concluded that such removals often constituted unwarranted actions by non-tribal agencies.[7]

Proponents of the Act cited the inherent bias for non-Indian values exhibited by state agencies and officials in the placement process as a major factor leading to a crisis in Indian child welfare.[8] In assessing the congressional investigation, the bill's sponsors asserted that the prevailing problem in many placement determinations appeared to be the failure to consider cultural and social differences between Indian and non-Indian communities.[9]

Custody cases involving Indian children had recognized this "inherent bias" prior to the legislative action. In *Carle v. Carle*,[10] the trial court's determination of custody between bi-cultural parents was found to be premised on the assertion that the child would be more emotionally and economically secure residing in a non-Indian, urban culture.[11] In reversing the custody decision, the Alaska Supreme Court indicated that the placement decision was based on inappropriate cultural assumptions reflecting primarily the values of the dominant culture and that it was not the court's job to homogenize Alaskan society.[12] Justice Douglas's

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5. The statistical data and expert testimony presented in an early Senate oversight hearing held in 1974 included a comment by one witness, William Byler, that current practices were akin to "'[t]he wholesale removal of Indian children from their homes.'" Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (quoting Byler).

6. Studies conducted in 1969 and 1974 revealed that 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Holyfield*, 490 U.S. at 32 (citing studies by the Association on American Indian Affairs, presented at *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 15 (1974). Statistical surveys from individual states indicated that a majority of Indian children were placed in non-Indian homes. 124 Cong. Rec. 38,102 (1978) (statement of Rep. Udall). Some figures demonstrated that up to 95% of the children in some states were placed in non-Indian foster or adoptive homes. *Id.* (statement of Rep. Lagomarsino citing statistical survey published in 1976 by the Association on American Indian Affairs).

7. *See* 25 U.S.C. § 1901(4) (1988).

8. 124 Cong. Rec. 38,102 (1978) (statements by Rep. Udall and Rep. Lagomarsino).

9. *Id.*

10. 503 P.2d 1050 (Alaska 1972).

11. *Id.* at 1053.

12. *Id.* at 1054–55 ("We think it is not permissible . . . to decide a child's custody on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture. Such judgments are, in our view, not relevant to the determination of custody issues.").

dissenting opinion in *DeCoteau v. District County Court*[13] demonstrates a similar concern about accounting for unique cultural considerations in such custody determinations. Justice Douglas expressed the view that the welfare of a child necessarily must be considered with an understanding of the relevant family structure and background culture.[14]

The legislative history of the Act indicates that many determinations regarding the welfare of Indian children resulted from misapplication of non-Indian standards to the Indian social system.[15] Decisions made under these standards led to findings that many Indian parents were not only socially irresponsible, but also possessed inadequate child-rearing capabilities.[16] These conclusions often were received with disbelief by the Indian community where cultural perceptions of child-rearing may vary fundamentally from non-Indian standards.[17]

For instance, social workers often perceive that a child taken care of by someone outside of the nuclear family constitutes evidence of neglect by the child's parents.[18] However, reliance on the network of family members as responsible caregivers is common in Indian families, in contrast to mainstream child-rearing practices.[19] The legislative history of the Act recognized that decisions in Indian child welfare cases often were affected by state agencies' ignorance of such fundamental considerations.[20]

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13. 420 U.S. 425 (1975).

14. *Id.* at 465 n.8 (Douglas, J., dissenting).

15. "[W]itnesses reiterate time and again the failure or inability of State agencies, courts, and procedures to fairly consider the differing cultural and social norms in Indian communities and families." 124 Cong. Rec. 38,102 (1978) (statement of Rep. Lagomarsino).

16. "[S]ocial workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

17. *Id.*

18. *Id.*

19. Carolyn Attneave, *The Wasted Strengths of Indian Families*, in *The Destruction of American Indian Families* 29, 30 (Steven Unger ed., 1977) [hereinafter Unger]; Aileen Red Bird & Patrick Melendy, *Indian Child Welfare in Oregon*, in Unger at 43. *See also* Evelyn Blanchard, *The Question of Best Interest*, in Unger at 57, 59 (stating that composition of Indian family is more than mother, father, and children, rather it includes large network of relationships).

20. H.R. Rep. No. 1386, *supra* note 16, at 10–11, *reprinted in* 1978 U.S.C.C.A.N. at 7532–33.

B. *ICWA's Presumption of Serving the Best Interests of Indian Children*

Extensive discussion in ICWA's legislative history addresses the impact wrought by decisions that placed Indian children outside of their native culture. Specific concern was directed to findings that placement of Indian children in non-Indian settings had both a detrimental effect on the long-term survival of individual tribes and on the social and psychological health of many Indian children.[21]

Having determined that state courts and agencies often failed to recognize Indian cultural standards,[22] Congress stated in the preamble of ICWA that the Act was intended

> 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.[23]

C. *ICWA Provides Preferred Procedures To Effectively Implement Its Policy*

1. *Preference for Tribal Courts*

To effectively accommodate the unique values of Indian culture, ICWA designates tribal courts as the preferred forum for adjudicating Indian child welfare cases. The Act provides that an Indian tribe will have exclusive jurisdiction in child custody proceedings involving an Indian child residing or domiciled on a reservation.[24] In cases where a state court exercises jurisdiction over an Indian child not domiciled on a

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21. American Indian Policy Review Commission, *Report on Federal, State, and Tribal Jurisdiction* (Comm. Print 1976), *reprinted in* S. Rep. No. 597, 95th Cong., 1st Sess. 41, 52 (1977) [hereinafter *AIPRC Report*].

22. 25 U.S.C. § 1901(5) (1988).

23. 25 U.S.C. § 1902 (1988).

24. 25 U.S.C. § 1911(a) (1988). This section of the Act includes an exception where Federal Law PL 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 28 U.S.C. § 1360 (1988)), has vested jurisdiction over reservations in civil and criminal matters in the state. Commentary in the legislative history indicates the recognition that the choice of forum has considerable influence in custody proceedings as a result of the bias inherent in the decisionmaker's culture. *AIPRC Report*, *supra* note 21, *reprinted in* S. Rep. No. 597, at 44.

reservation, the Act requires transfer to the appropriate tribal court upon the request of the parents or the Indian tribe.[25] The Act further provides that state courts may retain jurisdiction in instances where there is good cause not to transfer the proceeding to a tribal court,[26] when either parent objects to the transfer, or when the tribal court itself declines jurisdiction.[27]

2. *Preference for Placement in Indian Homes and Communities*

When a state court retains jurisdiction over an adoptive placement proceeding involving an Indian child, ICWA delineates explicit placement preferences to guide the state court's placement determination.[28] Specifically, 25 U.S.C. § 1915(a) provides:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[29]

The Act specifies similar preferences for foster and preadoptive placements.[30] In meeting the Act's preference requirements, state courts—pursuant to 25 U.S.C. § 1915(d)—must adhere to the prevailing social and cultural standards of the Indian community in which the

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25. 25 U.S.C. § 1911(b) (1988).

26. The Act itself fails to define what constitutes "good cause" for denying transfer to the tribal court.

27. 25 U.S.C. § 1911(b).

28. 25 U.S.C. § 1915 (1988). The legislative history of the Act specifically states that subsections 1915(a) and (b) further the federal policy that an Indian child should remain, where possible, in the Indian community, but that the subsections are not to be read as precluding placement of an Indian child with a non-Indian family. H.R. Rep. No. 1386, *supra* note 16, at 23, *reprinted in* 1978 U.S.C.C.A.N. at 7546. Justice Brennan's majority opinion in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), identified § 1915(a) as the most important substantive requirement imposed on state courts by ICWA. *Id.* at 36. *See* discussion *infra* notes 51–53 and accompanying text.

29. 25 U.S.C. § 1915(a) (1988).

30. 25 U.S.C. § 1915(b) (1988) provides:

> In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with— (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

parent or extended family resides or maintains social and cultural ties.[31] Thus, the directive in § 1915(d) limits the discretion of state agencies in placement decisions.[32]

3. *ICWA Fails To Define "Good Cause" To Depart from the Placement Preferences of 25 U.S.C. § 1915*

ICWA does not define the circumstances that constitute "good cause" to deviate from the placement preferences of 25 U.S.C. § 1915(a) and (b). Both the text of ICWA and the legislative history fail to specify when a court may justly depart from the Act's explicit placement preferences. The only guidance is a statement from the legislative history explaining that § 1915 establishes a federal policy of keeping Indian children within Indian communities whenever possible.[33]

II. BIA INTERPRETIVE GUIDANCE TO STATE COURTS DECIDING INDIAN CHILD CUSTODY PROCEEDINGS

The Act specifically directs the Secretary of the Interior to promulgate regulations implementing ICWA.[34] Instead, the Bureau of Indian Affairs issued guidelines to provide interpretive guidance and assistance to state courts applying the Act. The introductory statement accompanying the guidelines sets forth that many of the guidelines provide procedures to assure that the rights guaranteed by the Act are protected.[35] The guidelines were not issued as regulations as they were not intended to be binding.[36] Despite ICWA's failure to define "good cause," the guidelines issued by the BIA will, if applied, overcome the Act's deficiency.

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31. 25 U.S.C. § 1915(d) (1988).

32. The explicit statement in the House Report regarding subsection (d) is that "[a]ll too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family." H.R. Rep. No. 1386, *supra* note 16, at 24, *reprinted in* 1978 U.S.C.C.A.N. at 7546. *See also AIPRC Report*, *supra* note 21, *reprinted in* S. Rep. No. 597, at 45. Statements in the legislative history discounted assertions by non-Indian agencies that Indian foster and adoptive parents were difficult to find. Rather, studies indicated that the home-approval criteria utilized by these agencies was inappropriate in relation to the financial status and lifestyles of many Indian families. As a result, suitable relatives and other Indian families were often eliminated in placement considerations. *Id.*

33. H.R. Rep. No. 1386, *supra* note 16, at 23, *reprinted in* 1978 U.S.C.C.A.N. at 7546.

34. 25 U.S.C. § 1952 (1988).

35. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,584 (1979) [hereinafter BIA Guidelines].

36. *Id.*

The guidelines are predicated on an explicit policy statement recognizing ICWA as an expression of Congress's preference to keep Indian children with their families or tribes.[37] Where a state court determining an Indian child's custody renders a decision contrary to the express preferences, the guidelines indicate that the court must justify its decision by following strict procedures.[38] Further, the guidelines indicate that liberal rules of construction should be applied to the Act, its implementing regulations, the recommended guidelines, and to any state statutes to achieve a result consistent with the preferences expressed by Congress.[39]

For purposes of foster care, preadoptive, or adoptive placement under 25 U.S.C. § 1915, the BIA Guidelines describe a procedure for state courts to follow in determining whether good cause exists to deviate from the placement preferences. Specifically, § F.3(a) of the guidelines states:

> [A] determination of good cause not to follow the order of preference . . . shall be based on one or more of the following considerations: (i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.[40]

The guidelines further recommend that because the Act contains a clear preference for placements within tribal culture, the party seeking an exception to the statutory placement preferences should bear the burden of proving that such an exception is necessary.[41]

The BIA Guidelines specifically outline the necessary attributes that qualify an expert witness to determine whether a child's extraordinary physical or emotional needs constitute "good cause."[42] Qualified experts

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37. *Id.* § A(1).

38. *Id.*

39. *Id.* The policy statement further specifies that any ambiguities are to be resolved in favor of the result most consistent with the congressional preference of keeping Indian children with their families or tribes. *Id.*

40. *Id.* § F.3(a).

41. *Id.* § F.3 Commentary.

42. The legislative history indicates that the phrase "qualified expert witness" is intended to refer to those individuals possessing expertise beyond the "normal social worker qualifications." H.R. Rep. No. 1386, *supra* note 16, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 7545. Essentially, for an individual to testify in a placement proceeding as a qualified expert, the guidelines deem it necessary

include members of the Indian child's tribe recognized as knowledgeable in tribal customs of family organization and child-rearing practices,[43] lay experts with substantial experience in Indian family services and knowledge of the prevailing cultural standards and child-rearing practices of the child's tribe,[44] and professional persons having substantial education and experience within that individual's specialty.[45]

III. THE U.S. SUPREME COURT'S INTERPRETATION OF ICWA

The U.S. Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*[46] suggests that the BIA Guidelines are in accord with the Court's perception of the policy concerns underlying ICWA.[47] In discussing the need for a uniform definition of "domicile" to effectuate ICWA's goals, the *Holyfield* Court engaged in an extensive discussion and analysis of the text and legislative history of the Act.

The Court specifically found that the Act, read in its entirety, demonstrates a purpose to curtail state authority.[48] Having this purpose in mind, the Court found it illogical to assume that Congress would have intended to rely on state law to define "domicile," a critical term that would determine the scope of the Act's key jurisdictional provision.[49] Further, the Court found that Congress could not have intended a lack of

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for the court to determine that the person has sufficient knowledge of tribal culture and child-rearing practices. BIA Guidelines, *supra* note 35, § D.4 Commentary.

43. BIA Guidelines, *supra* note 35, § D.4(b)(i).

44. *Id.* § D.4(b)(ii).

45. *Id.* § D.4(b)(iii).

46. 490 U.S. 30 (1989).

47. The opinion focused on the meaning of "domicile" in the Act to determine jurisdiction over proceedings involving Indian children. In holding that individual state law definitions of domicile defeat the objectives of the federal statute, the Court found that this critical term of the Act required a uniform definition. *Id.* at 43–47.

48. *Id.* at 45 n.17 (citing 25 U.S.C. §§ 1901, 1911–1916, 1918). Notably, the Court stated:

> [T]he purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term . . . . It is clear from the very text of the ICWA, not to mention its legislative history . . . that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. . . . Congress perceived the States and their courts as partly responsible for the problem it intended to correct.

Id. at 44–45.

49. *Id.* In interpreting the statute, the Court began with the general principle that without an express indication to the contrary, federal statutes are intended to have uniform nationwide application. The intent and purpose of the statute further must be considered to determine if application of state law would impair the federal program. *Id.* at 43–44 (citing Jerome v. United States, 318 U.S. 101, 104 (1943)).

nationwide uniformity resulting from varying state law definitions to control jurisdiction under the Act, as this would result in a statute under which different rules could apply to a child moved from one state to another.[50]

The Court recognized that congressional concern regarding state court and agency practices in Indian child custody proceedings played a significant role in the formulation of the protections contained in the Act.[51] Specifically, the Court noted that 25 U.S.C. § 1915 was designed to establish standards for state court proceedings to promote ICWA's goals.[52] This conclusion was further premised on the congressional statement that state courts often failed to consider the unique culture of the Indian community when making placement decisions regarding Indian children.[53]

The Court determined in *Holyfield* that it was implausible for Congress to have designed the statute in a way that would allow varying state law definitions of domicile to compromise the intended effect of federal regulation.[54] This analysis logically extends to address the problem of defining "good cause."[55] As with domicile, "good cause" as used in § 1915 is not defined in ICWA and must be interpreted in a manner consistent with congressional intent.

IV. VARIATIONS IN STATE COURT APPLICATIONS OF THE 25 U.S.C. § 1915 "GOOD CAUSE" EXCEPTION

The absence of an explicit definition of "good cause" in 25 U.S.C. § 1915 has resulted in discordant applications of the term by state courts. The U.S. Supreme Court's resolution in *Holyfield* indicates disfavor for varied interpretations, especially because some state courts have

50. *Id.* at 46. The Court found that because of this result, the general rule that domicile is determined according to the law of the forum is inapplicable under ICWA. *Id.* at 46 n.21.

51. *Id.* at 32–37 (discussing various hearings, reports, and statements contained in legislative history of ICWA).

52. *Id.* at 37 n.6.

53. *Id.* at 45 (citing 25 U.S.C. § 1901(5)).

54. *See supra* notes 48–49 and accompanying text.

55. *See* 490 U.S. at 47 (using general principle that in absence of statutory definition, court will start with assumption that legislative purpose is expressed by ordinary meaning of words used, by reference to object and policy of statute). For a general discussion of using the *Holyfield* analysis to interpret provisions of ICWA, see Quinn v. Walters, 881 P.2d 795, 806–14 (Or. 1994) (Unis, J., dissenting).

interpreted "good cause" in a manner that conflicts with the statutory purpose.

A. Some State Courts Have Applied ICWA's "Good Cause" Exception in Disregard of the Act's Intent

1. Determining Good Cause Based upon a Traditional "Best Interests of the Child" Standard

In applying ICWA's placement preferences, some courts have relied almost exclusively on a traditional best interests test to determine if good cause existed to place the child outside of the Act's preference scheme.[56] The Supreme Court of Nebraska fashioned a notable statement with regard to the interplay between the placement directives and state court determinations in *In re Bird Head*.[57] The court first noted that the Act did not strictly require adherence to the designated preferences, but rather only required that the preferences be followed in the absence of good cause to the contrary.[58] The court further stated that state court use of the "good cause" provision was in accord with a directive in the legislative history of ICWA that state courts were to have flexibility in determining the placement of Indian children.[59] Finally, the court concluded that ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."[60]

The lower court in *Bird Head* had made specific findings to conclude that good cause existed to deny custody to the child's aunt.[61] However, the state supreme court noted that the lower court made no findings as to why statutorily preferred placements with other available family or tribal members were not considered over placement with a non-Indian foster couple.[62] The Supreme Court of Nebraska remanded the case for

56. One commentator formulated a succinct statement of the "best interest" standard generally employed by state courts as being a measure using middle class values to determine a setting that will best protect the child from physical or emotional injury while also enriching the child physically, emotionally, and educationally. Racial, ethnic, and religious factors are viewed as subordinate concerns in this determination. Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonz. L. Rev. 353, 368 (1991/92).

57. 331 N.W.2d 785 (Neb. 1983).

58. *Id.* at 790.

59. *Id.* at 791.

60. *Id.*

61. *Id.* at 788–89.

62. *Id.* at 790.

consideration of whether good cause existed to not place the child with other family or tribal members. However, the remand was tempered by the court's emphasis that ICWA did not trump the traditional "best interests" test.[63]

A similar imposition of a traditional "best interest" standard is illustrated by *In re Maricopa County Juvenile Action No. A-25525.*[64] In *In re Maricopa County*, the Gila River Indian Community challenged the continued adoptive placement of an infant by an Arizona social service agency with a non-Indian mother, contending that the trial court had erroneously weighed the bond between the adoptive parent and child against the interest of maintaining the child's ties to the tribal community.[65] While recognizing that the Act seeks to maintain the child's connection with his or her tribe, the Arizona appellate court emphasized that the child's best interests were of primary concern.[66] The court refused to vacate the adoption order after considering the child's best interests in view of the parent-child relationship that had developed with the adoptive mother.[67]

Such use of a traditional "best interests" standard is in direct conflict with the Act.[68] The "best interests of Indian children" must be viewed within the context of ICWA.[69] The explicit policy statement in the Act is to "protect the best interests of Indian children . . . by the establishment of minimum Federal standards for the removal of Indian children from

63. *Id.* at 791. *See also In re* N.L., 754 P.2d 863 (Okla. 1988). The Oklahoma Supreme Court directed that to adequately determine the "good cause" question in preadoptive placement, an inquiry must be made as to whether the tribe had an available foster home. However, the court further stated that consideration of the "good cause" exception of § 1915 should be exercised according to the child's best interest. *Id.* at 870 (citing *Bird Head*, 331 N.W.2d at 791).

64. 667 P.2d 228 (Ariz. Ct. App. 1983).

65. *Id.* at 233.

66. *Id.* at 234. "Congress envisioned situations in which the child's best interest may override a tribal or family interest—the preferences for placement are to be followed absent 'good cause to the contrary.'" *Id.* (quoting 25 U.S.C. § 1915(a), (b)).

67. *Id.*

68. Russel L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 Hastings L.J. 1287, 1297 (1980) (stating that "best interest" standard incorporates cultural and family values which are often in opposition to those values held by Indian family) (citing American Indian Policy Review Commission, Report on Federal, State, and Tribal Jurisdiction (Comm. Print 1976), *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 57–58 (statement of Drs Carl Mindell and Alan Gurwitt)); Blanchard, *supra* note 20, at 58 (recognizing that difficulties arise when decision-makers interpret child's best interests only within context of their own value systems, which limits evaluation to only small segment of Indian child's life experience).

69. Dale, *supra* note 56, at 370. *See also* H.R. Rep. 1386, *supra* note 16, at 23–24, *reprinted in* 1978 U.S.C.C.A.N. at 7546.

their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."[70] This statement mandates consideration of the Indian cultural value system as central to the determination of what is in the best interest of an Indian child.[71]

As recognized in ICWA's congressional findings, state agencies often fail to consider the cultural and social standards of Indian communities in Indian child custody proceedings.[72] Indian culture has been recognized as fundamentally distinct in some instances from mainstream standards.[73] Accordingly, a court's adherence to mainstream standards will be inconsistent with the policy considerations set forth in ICWA.

2. *Application of a Multi-Factorial Analysis for Determining Good Cause*

Some state courts have devised analyses that consider various discretionary factors, in conjunction with the child's best interests, to determine whether good cause exists to abandon the placement preferences. Like the traditional "best interests" test, this approach also fails to implement the policy behind ICWA.

An example of this mixed approach is the decision of a Washington appellate court in *Doe v. Navajo Nation*.[74] The court first asserted that ICWA provides the trial court with the discretion to determine the existence of good cause for nonpreferential placement.[75] Next, the court fashioned a nonexhaustive list of factors to guide the lower court. This list included not only the best interests of the child, but also the wishes of the biological parents, the suitability of persons designated by the

70. 25 U.S.C. § 1902.

71. Dale, *supra* note 56, at 370–71. *See also In re* M.T.S., 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) ("[T]he ICWA includes standards which adequately protect the best interests of the child.").

72. 25 U.S.C. § 1901(5).

73. Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 Am. Indian L. Rev. 51, 56–57 (1979). *See also* H.R. Rep. No. 1386, *supra* note 16, at 10, *reprinted in* 1978 U.S.C.C.A.N. at 7532 (indicating ignorance of state agencies as to values and social norms of Indian culture).

74. 66 Wash. App. 475, 832 P.2d 518 (1992). The lower court had erroneously failed to apply ICWA in considering the placement of an Indian child with non-Indian adoptive parents. Before remanding the case to be adjudicated pursuant to the Act, the appellate court provided an instructive discussion of what basis the lower court could use in determining if good cause existed to depart from the placement preferences of § 1915(a).

75. *Id.* at 482, 832 P.2d at 522 (citing *In re* Maricopa County Juvenile Action No. A-25525, 667 P.2d 228, 234 (Ariz. Ct. App. 1983)).

placement preferences, the child's current ties with the tribe, and the perceived ability of the child to adjust to the culture of a particular placement.[76]

The court in *Doe v. Navajo Nation* fashioned a definition of good cause far beyond what was actually necessary to adjudicate the proceeding. The child's biological parents had selected a non-Indian adoptive couple for placement and each had executed a written consent to the adoption.[77] Application of the BIA Guidelines, which recognize the request of a biological parent as a basis for good cause, would have appropriately resolved the contested placement.[78] However, the court's act of defining good cause as a manifold tool of discretion enunciated a policy validating the imposition of mainstream values in Indian child custody proceedings.

Subsequently, the Alaska Supreme Court in *In re F.H.*[79] reiterated the position that the exercise of a trial court's discretion in determining the existence of good cause rests on the balancing of several factors.[80] After recognizing that the Act itself fails to define "good cause," the court rejected the Noatak Village's argument that the placement preferences set forth under 25 U.S.C. § 1915(a) must first be excluded as viable options before any alternate placement is considered. The court's position was that such an interpretation ignored the "good cause" exception.[81]

The placement deviation in *In re F.H.* appears facially to be in accord with the Act's structure. The court confirmed that the lower court had properly evaluated a number of factors in determining good cause. These factors included the biological mother's relinquishment of her parental rights to the adoptive parents, the bond that had developed between the adoptive mother and the child, the uncertainty of the child's future if the adoption were invalidated, and the character of the particular adoption, which provided the biological family continued access to the child.[82] The

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76. *Id.*

77. *Id.* at 476–77, 832 P.2d at 519. The litigation resulted when the Navajo Nation intervened in the action, seeking to place the child with her paternal aunt who resided on the reservation. The child's biological parents both opposed this placement option. *Id.*

78. *See supra* text accompanying note 40.

79. 851 P.2d 1361 (Alaska 1993).

80. *Id.* at 1363–64 (citing Doe v. Navajo Nation, 66 Wash. App. at 482, 832 P.2d at 522).

81. *Id.* at 1364 n.3.

82. *Id.* at 1364. A recent decision by the Alaska Supreme Court further illustrates the court's reluctance to abide by the BIA Guidelines. The court recognized the guidelines as offering "examples" of the kinds of factors that can provide a court with good cause to depart from placement

supreme court recognized that because the lower court had considered parental preference, its deliberations fell within the provisions of the BIA Guidelines for determining the existence of good cause under § 1915.[83]

An examination of the case facts, however, reveals that the breadth of discretion afforded by an ambiguous "good cause" definition will permit evasion of ICWA's express policy. The decision to place the child with a non-Indian couple was upheld despite the availability of placement with a suitable extended family member within the preferences of § 1915(a).[84] The Noatak Village argued that the mother's preference should be accorded little weight as she had made similar offers to others in the past, at one time had opposed placement with the adoptive couple, and had admitted that when she signed the relinquishment she was "so mixed up she would have signed anything."[85] The Alaska Supreme Court declined to find consideration of the biological mother's preference erroneous.[86] The court further found that all of the factors considered by the lower court were properly within the "good cause" determination,[87] suggesting that the same conclusion could have been reached even in the absence of the biological mother's request.[88]

Notably, both the Washington and Alaska courts emphasized that the list of factors that a court may consider in determining good cause is

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within the Act's preferences. The court concluded by stating that "the list is not exhaustive. Although ICWA and the guidelines draw attention to important considerations, the best interests of the child remain paramount." *In re* N.P.S., 868 P.2d 934, 936–37 (Alaska 1994) (citing *In re* Bird Head, 331 N.W.2d 785, 791 (Neb. 1983), discussed *supra* text accompanying notes 57–60).

83. 851 P.2d at 1364–65.

84. *Id.* at 1362. The Division of Family and Youth Services (DFYS) for the state of Alaska had recommended that the child be placed with the mother's cousin who resided in the Native Village of Noatak. *Id.*

85. *Id.* at 1364–65.

86. *Id.* at 1365. The court based this decision on the probate master's certification that the biological mother had understood her actions and had voluntarily relinquished her parental rights. *Id.*

87. *Id.*

88. The other factors considered also tend to evoke debate. For example, the court stressed concern with the uncertainty of the child's custody if the adoption petition was dismissed. This was despite the fact that the DFYS had recommended immediate adoptive placement with the mother's cousin. The court's concern with "uncertainty" was based upon the necessity of further legal proceedings to effect this adoption by the cousin. *Id.* The court also asserted that the character of the adoption arrangement with the non-Indian couple, allowing the biological mother continued access to the child and "exposure to her Native American heritage," supported the finding of good cause. *Id.* at 1363. However, the cousin had submitted an affidavit indicating similar willingness and the Noatak Village had offered an excerpt from a study of Northwest Alaskan Family traditions that supported such an arrangement. *Id.* On review, however, the court found it significant that it would be easier for the biological mother to visit the child in the location of the non-Indian couple than in the Village of Noatak. *Id.* at 1365.

nonexhaustive.[89] Such an analysis permits trial courts to invoke an extensive range of discretionary factors that, taken together, will frequently reflect the standards of the majority culture rather than the Indian culture. Thus, courts can appear to be in compliance with ICWA's directives, while at the same time actually perpetuating the very ills the Act was intended to correct.

B. Some State Court Determinations of Good Cause Are Consistent with ICWA's Intent

1. Recognition of ICWA's Presumption of Serving the Best Interests of Indian Children

Some state courts have acknowledged that ICWA's design incorporates the best interests of Indian children.[90] In analyzing application of a state "best interests of the child" standard, the Minnesota Court of Appeals concluded that ICWA itself presumes the child's interests are best served by placement within the directives of § 1915.[91] The appeals court affirmed a decision to place the child with his biological Indian grandmother, rather than with the non-Indian foster parents who wished to adopt him, finding that the lower court's decision complied with the Act.[92] Following the BIA Guidelines, the appeals court found that good cause to defeat ICWA's expressed preferences had not been established by the assertion that separation from the foster home would be initially painful for the child. Rather, the court held that placing the child with a suitable relative was presumptively in his best interests pursuant to the design of the Act.[93]

ICWA's presumption that the best interests of Indian children are met through protecting their tribal connection was further articulated in *In re Baby Girl Doe*.[94] The trial court had held that the biological mother's desire for anonymity in the adoptive placement of her child prevailed

89. Doe v. Navajo Nation, 66 Wash. App. 475, 482, 832 P.2d 518, 522 (1992); *In re* F.H., 851 P.2d at 1364–65.

90. *See, e.g., In re* Q.G.M., 808 P.2d 684, 685–86 n.2 (Okla. 1991) (asserting that protection of Indian child's relationship to his or her tribe was recognized by Congress as value that must be protected in the child's best interest).

91. *In re* M.T.S., 489 N.W.2d 285, 287 (Minn. Ct. App. 1992).

92. *Id.* at 288.

93. *Id.* (citing 25 U.S.C. § 1902 for proposition that "establishment of minimum federal standards is to protect the best interests of Indian children").

94. 865 P.2d 1090 (Mont. 1993).

over the tribe's attempt to enforce the placement preferences.[95] The tribe sought the mother's identity in order to determine if the child could be placed with an extended family member in accordance with the placement directives.[96] The Montana Supreme Court sided with the tribe, reasoning that the principal purpose of the Act was "'to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"[97] The court concluded that compliance with the mother's request under these circumstances would defeat the expressed intent of ICWA and would disregard the preference provided in § 1915(a)(1) for placement with an extended family member.[98]

2. *Adherence to the BIA Guidelines To Evaluate Good Cause: The* Campbell *Approach*

A recent decision by the Supreme Court of Minnesota illustrates appropriate judicial compliance with the BIA Guidelines.[99] At issue in *Campbell v. Leech Lake Band of Chippewa Indians* was whether a child's need for permanence constituted an "extraordinary emotional need"—one of the "good cause" exceptions specified in the BIA Guidelines.[100] The trial court found, pursuant to expert witness testimony, that the children involved had an extraordinary emotional need for permanence that could be met only through adoption. The trial court asserted that this, coupled with the lack of a suitable Indian family to provide adoptive placement, warranted placement outside of the Act's preferences. The court further found that the best interests of the children required immediate placement with their former non-Indian foster

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95. *Id.* at 1090. Under § 1915(c) of the Act, courts are directed to give weight to a biological parent's desire for anonymity in applying the preferences. 25 U.S.C. § 1915(c) (1988).

96. 865 P.2d at 1091.

97. *Id.* at 1094 (quoting H.R. Rep. No. 1386, *supra* note 16, at 23, *reprinted in* 1978 U.S.C.C.A.N. at 7546 and citing the U.S. Supreme Court's discussion of the legislative history accompanying § 1915(a) in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36–37 (1989), discussed *supra* notes 49–54 and accompanying text).

98. *Id.* at 1095. The court looked to the policy interpretation of the Act as articulated in *Holyfield* to reach the conclusion that to best effectuate the principal purpose for which the Act was created, compliance with the order of preferences set forth in subsections 1915(a) and (b) was required. *Id.* at 1094–95.

99. *In re* S.E.G., 521 N.W.2d 357 (Minn. 1994), *cert. denied*, Campbell v. Leech Lake Band of Chippewa Indians, 115 S. Ct. 935 (1995) [hereinafter *Campbell*].

100. *See* BIA Guidelines, *supra* text accompanying note 40.

family.[101] The state supreme court reversed, holding that while courts may consider a child's need for stability, a "need to be adopted," by itself, does not constitute good cause.[102]

The Minnesota court, citing *Mississippi Band of Choctaw Indians v. Holyfield*,[103] reiterated that the Indian child welfare crisis was in part a result of practices in state court proceedings and that ICWA mandated that Indian child welfare determinations not be based on a "white, middle-class standard."[104] Relying on the policy statement in 25 U.S.C. § 1902, the court found that the Act itself presumes that placement within § 1915's preferences is in the best interests of Indian children.[105] The court concluded that using a subjective "best interest" standard to evaluate placement would only serve to further the abuses in state court proceedings that Congress sought to eliminate through the enactment of ICWA.[106]

The *Campbell* court then adopted the BIA Guidelines as the appropriate range of factors for a state court to utilize in determining whether good cause exists to depart from the placement preferences.[107] Central to the court's resolution was the specific language of the guidelines themselves, which state that a determination of good cause "shall" be based on the factors set forth therein.[108] The court held that this unambiguous statement suggested strongly that, while the guidelines were not binding on state courts, they should be regarded as limiting the factors that should be considered in determining whether good cause in fact exists.[109]

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101. *In re* S.E.G., 507 N.W.2d 872, 880 (Minn. Ct. App. 1993), *rev'd*, 521 N.W.2d 357 (Minn. 1994), *cert. denied*, Campbell v. Leech Lake Band of Chippewa Indians, 115 S. Ct. 935 (1995). The court of appeals considered both the factors delineated in the BIA Guidelines and in case law that utilized the best interests of the child standard to affirm the determination of the trial court that good cause existed to deviate from the placement preferences. *Id.* at 879–80 (citing *In re* F.H., 851 P.2d 1361, 1363–64 (Alaska 1993)). The appellate court specifically noted that "the best interests and extraordinary needs of the children may require that alternatives be considered." *Id.* at 881.

102. 521 N.W.2d at 358.

103. 490 U.S. 30 (1989). *See supra* notes 48–53 and accompanying text.

104. 521 N.W.2d at 359 (quoting *Holyfield*, 490 U.S. at 37).

105. *Id.* at 362.

106. *Id.* at 362–63. This conclusion was premised on the assertion that the nature of a traditional "best interests" standard requires "a subjective evaluation of a multitude of factors . . . which are imbued with the values of majority culture." *Id.* at 363.

107. *Id.*

108. *See* discussion of BIA Guidelines, *supra* notes 40–41 and accompanying text.

109. 521 N.W.2d at 363.

The Minnesota Supreme Court in *Campbell* found that the lower court had erred in determining that "permanence" could be met only through adoption because the lower court had not considered that Indian cultures might define permanence differently from the dominant culture.[110] The court further stated that because § 1915(d) requires that state courts apply the prevailing social and cultural standards of the relevant Indian community when evaluating the preference requirements, the "need for permanence" should not be defined so narrowly as to threaten or substantially reduce placements in Indian homes.[111] Additionally, the court found that none of the witnesses who testified that the children had extraordinary emotional needs was a "qualified expert witness" as defined in the BIA Guidelines. As a result, the court found that the lower court erroneously relied on this testimony to find good cause.[112] The court specifically found that the need for permanence could be met in the children's current Indian foster home.[113]

Campbell demonstrates how proper use of the BIA Guidelines can restrain state court discretion and abate determinations of good cause that are predicated on mainstream values. By using the guidelines to accommodate tribal social and cultural standards, the Minnesota court correctly identified a placement meeting the best interests of the Indian children consistent with the statutory intent of ICWA.

V. CLARIFYING THE DETERMINATION OF GOOD CAUSE

Despite its intended purpose, the Act is subject to varying interpretations that give state courts considerable latitude in deciding whether to follow the placement preferences.[114] The *Campbell* court's

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110. *Id.* at 364.

111. *Id.* One witness in the custody proceeding testified that permanence for one of the children could be accomplished through an ongoing attachment to the tribe. The supreme court opinion cites the record of the 1974 Senate hearings to support the tribe's claim that permanency is defined differently in Native American cultures. *Id.* Additionally, the opinion refers to a statement made by the Minnesota Commissioner of Human Services asserting that preferring adoption over other placement options such as permanent foster care as criteria for finding "suitable families for placement" may result in more placements outside of Indian communities. *Id.* at 363–64.

112. *Id.* at 365. The state supreme court specifically noted that among the experts who had been properly qualified under the guidelines, there was no testimony that the children's extraordinary emotional needs were not being met in their current placement. *Id.*

113. *Id.*

114. Barsh, *supra* note 68, at 1320 (stating that undefined "good cause" phrase in § 1915 allows state courts to continue pre-ICWA practices of applying inappropriate cultural standards to placement decisions involving Indian children).

analysis illustrates how one court was able to determine good cause in a manner consonant with the Act's intent. Consistent criteria should be established to resolve current disparate practices and to set the proper limits on the amount of discretion that state courts may employ when determining good cause under 25 U.S.C. § 1915. If the BIA Guidelines were codified, this would reduce state courts' discretion and guide the "good cause" determination.

A. Case Law Illustrates the Appropriateness of Using the BIA Guidelines To Further the Intent of ICWA

The *Campbell* court's embrace of the BIA Guidelines is compelling.[115] The alternative, permitting each state to craft its own definition of a critical term in ICWA, defeats the goal of curtailing state authority by allowing state courts to apply a malleable tool of discretion predicated on mainstream values. This axiom is supported by the *Holyfield* statement that a single definition of "domicile" is necessary to comport with the policy of the Act, as opposed to allowing each state court to define the term.[116] ICWA's undefined use of "good cause" in § 1915 should be interpreted accordingly to effect uniform implementation of federal regulation under the Act.[117]

Some state courts have recognized that ICWA is predicated on an assumption that adherence to the placement preferences is in the best interests of Indian children.[118] This assumption follows from the explicit policy statement contained in 25 U.S.C. § 1902 and the corresponding legislative history articulating that the controlling precept of the Act is the best interests of the Indian child.[119] As the *Campbell* court stated, it seems "'most improbable' that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests."[120]

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115. *See supra* notes 103–13 and accompanying text.

116. *See supra* notes 48–50 and accompanying text. *See also Campbell*, 521 N.W.2d at 362–63 (recognizing statement in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989), that the Act and its legislative history read together demonstrate effort to curtail state authority, Minnesota Supreme Court asserted that allowing state court to use subjective "best interest of the child" standard is similar to allowing differing state definitions of domicile).

117. *See supra* notes 54–55 and accompanying text.

118. *See, e.g.*, *Campbell*, 521 N.W.2d at 362 (citing 25 U.S.C. § 1902); *In re* M.T.S., 489 N.W.2d 285, 287 (Minn. Ct. App. 1992); *In re* Baby Girl Doe, 865 P.2d 1090, 1095 (Mont. 1993).

119. H.R. Rep. No. 1386, *supra* note 16, at 19, *reprinted in* 1978 U.S.C.C.A.N. at 7542.

120. 521 N.W.2d at 363 (citing *Holyfield*, 490 U.S. at 45). *See* discussion *supra* notes 104–06 and accompanying text of *Campbell*'s recognition that subjective evaluations by state courts contradict

Congress intended to establish a uniform federal law to alleviate unwarranted removal of Indian children from their tribal communities.[121] In view of the underlying policy of ICWA[122] and the definite statement in the BIA Guidelines § F.3 as to what constitutes good cause,[123] any discretion exercised by state courts should be limited to a finding pursuant to the guidelines' listed factors.

B. Using the BIA Guidelines Will Ensure Correct Application of ICWA in State Court Proceedings

Codifying the BIA Guidelines § F.3 to determine appropriate circumstances of good cause to deviate from the placement preferences will lead to the uniformity necessary to accomplish the goals of the Act. Commentators have recognized that the BIA Guidelines provide an effective means for implementing ICWA.[124] Because the guidelines represent the BIA's interpretation of ICWA, they are useful in interpreting its provisions.[125] This is particularly compelling where an analysis of the pertinent issues indicates that the guidelines are designed to effectuate the primary aims of ICWA.[126]

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the intent of ICWA to remedy the Indian child welfare crisis identified as resulting in large part from the practices of state agencies.

121. *See supra* notes 4–7 and accompanying text. The Court in *Holyfield* interpreted the congressional findings to draw an "inescapable" conclusion that the statute read in whole dictated an attempt to curtail state authority. 490 U.S. at 45 (citing 25 U.S.C. §§ 1901, 1911–1916, 1918).

122. *See supra* note 23 and accompanying text.

123. *See supra* note 40 and accompanying text.

124. *E.g.*, Peter W. Gorman & Michelle T. Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 Law & Ineq. J. 311, 321–22 (1992) (postulating that as goal of ICWA was to establish minimum standards, many portions of the Act prescribe only bare outlines of recommended procedures, and guidelines operate to fill gaps left in these outlines to provide direction as to what Congress intended).

125. *See In re* Maricopa County Juvenile Action No. A-25525, 667 P.2d 228, 232 n.4 (Ariz. Ct. App. 1983) (finding BIA Guidelines useful source of information to answer questions regarding implementation of ICWA); Department of Social Serv. v. Diana L. (*In re* Junious M.), 193 Cal. Rptr. 40, 43–44 & n.7 (Cal. Ct. App. 1983) (finding BIA Guidelines to be correct interpretation of the Act to guide determination of whether child was an "Indian child" within meaning of the Act); People *ex rel.* J.L.P., 870 P.2d 1252, 1257 (Colo. Ct. App. 1994) (using guidelines to determine whether good cause exists to not transfer jurisdiction pursuant to directives of 25 U.S.C. § 1911); *In re* Armell, 550 N.E.2d 1060, 1065 (Ill. App. Ct.) (finding that BIA guidelines, while not controlling, must be accorded great weight in construing ICWA), *appeal denied sub nom.* Armell v. Prairie Band of Potawatomi Indians, 555 N.E.2d 374 (Ill.), *cert. denied*, Armell Through Murphy v. Prairie Band of Potawatomi Indians, 498 U.S. 940 (1990).

126. *See In re* M.E.M. Youth in Need of Care, 635 P.2d 1313, 1317–18 (Mont. 1981) (adhering to BIA Guidelines in decision regarding proper foundation for expert opinion; court's employment of guidelines was premised on statement that guidelines "comport with the spirit of the Indian Child

A uniform application of the guidelines could eliminate the use of subjective evaluation standards that contradict the goal of ICWA to curtail state authority. While state courts are advised to consider the guidelines,[127] they are currently free to act contrary to the guidelines if they believe that the statute itself does not require that the guidelines be followed.[128]

C. *A Proposal for Regulated Implementation of the BIA Guidelines and Statutory Clarification To Define "Good Cause"*

A concise statement by Congress to guide the determination of good cause is needed to effectuate the goals of ICWA, which fails to provide specific guidance to determine good cause. As a result, state courts may dutifully acknowledge the preferences, then nonetheless apply a discretionary analysis often rooted in subjective conclusions to find good cause for nonpreferential placement.[129] Uniform implementation of the structure delineated in the BIA Guidelines could effectively cabin state court discretion and eliminate current practices that misapply mainstream values to Indian child welfare determinations.

Thus, Congress should require, by legislative action, that state courts follow the BIA Guidelines § F.3. If Congress does this, § D.4 of the guidelines also should be included to clarify the qualifications of an expert witness who may testify that the child has extraordinary physical or emotional needs warranting nonpreferential placement.[130]

Further, if this amendment to the Act is undertaken, Congress should consider clarifying the relationship of the statement in § 1915(d) to the section as a whole. Section 1915(d) requires that state courts adhere to the prevailing social and cultural standards of the relevant Indian community in meeting the preference requirements of § 1915.[131] The purpose of § 1915(d) is to limit the states' discretion in placement

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Welfare Act" and thus are applicable); *see also* Quinn v. Walters, 881 P.2d 795, 811 (Or. 1994) (Unis, J., dissenting) (stating that BIA Guidelines should be considered to further congressional intent of ICWA as guidelines represent what BIA has determined is required to protect rights granted by ICWA in state court proceedings).

127. *See supra* note 35 and accompanying text.

128. *See supra* notes 38–39 and accompanying text. This discretion applies where primary responsibility for interpreting language such as "good cause" remains with the courts pursuant to the Act. The adequacy of the state court procedures in protecting the rights guaranteed by the Act (which differs from that recommended in the guidelines) will have to be judged on their own merits.

129. *See* discussion *supra* part IV.A.

130. *See* discussion of BIA Guidelines *supra* part II.A.

131. *See supra* notes 31–32 and accompanying text.

decisions[132] and technically should apply in corresponding fashion to the "good cause" determination.[133] Congress could clarify this by simply inserting the phrase "and in determining good cause to the contrary" into § 1915(d).[134] Mandatory application of the guidelines would clarify the statutory language and ensure that good cause determinations are consistent with ICWA's intent.

A statement by the U.S. Supreme Court, similar to the *Holyfield* edict defining the application of domicile pursuant to the Act,[135] would further clarify the appropriate exercise of the good cause exception in § 1915. State courts would be obligated to follow the Court's construction. However, given that the Court recently denied certiorari in *Campbell*,[136] such an explicit directive is not likely to appear in the near future.

VI. CONCLUSION

Using the BIA Guidelines to determine good cause pursuant to 25 U.S.C. § 1915 will assure the proper application of ICWA. The Act's failure to provide a definition of good cause leaves a gap that the guidelines can fill to secure protection of the rights guaranteed by ICWA. ICWA presumes that the best interests of an Indian child will be served by placement within the statutory preferences. A court's finding of good cause for nonpreferential placement should be limited to the factors delineated in the guidelines to adequately protect "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[137] Congressionally regulated adherence to the BIA Guidelines can effectively limit discretion that often is predicated on mainstream standards and will ensure that the

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132. *See supra* notes 31–32 and accompanying text.

133. The *Campbell* court was cognizant of this implication in reaching its decision that as permanence may be defined differently in Native American cultures, it did not constitute a good cause exception based upon extraordinary emotional needs. *See supra* note 112 and accompanying text.

134. The amended statement as a whole would read:

> The standards to be applied in meeting the preference requirements of this section *and in determining good cause to the contrary* shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

135. *See* discussion *supra* part III.

136. An appeal from the decision of the Minnesota Supreme Court in *Campbell* was denied certiorari on January 23, 1995. *See* discussion *supra* part IV.B.2.

137. H.R. Rep. No. 1386, *supra* note 16, at 23, *reprinted in* 1978 U.S.C.C.A.N. at 7546.

statutory intent of ICWA is properly complied with by each state court charged with determining the future of an Indian child.