

**CIVIL PROCEDURE: NARROWED LENS, CLEARER  
FOCUS: CONSIDERING THE USE OF DE NOVO REVIEW  
IN INDIAN CHILD WELFARE PROCEEDINGS—*IN RE  
WELFARE OF CHILD OF T.T.B.***

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I. INTRODUCTION

“No man ever looks at the world with pristine eyes. He sees it edited by a definite set of customs and institutions and ways of thinking.”<sup>1</sup>

We view the world amidst the mores of our social group; in the context of closely-held traditions; with the bent of our own bias; and through the shadows of our prejudices. These cultural constructs and social ideologies color our perceptions and shape the lens with which we see the world. The legal system, carried forth by human actors, is not immune to these pervasive powers. Particularly subject to these value-based judgments are child welfare proceedings with substantive and procedural components

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1. RUTH BENEDICT, PATTERNS OF CULTURE 2 (1934).

that are inherently discretionary, often evaluated in light of the factual circumstances and needs of the child.

*In re Welfare of Child of T.T.B.*<sup>2</sup> examines the jurisdictional undercurrent in state placement proceedings for an Indian<sup>3</sup> child, and it serves as a recent example of the consequences produced when such beliefs become inappropriately woven into judicial institutions.

For years, state law infused Indian child welfare proceedings with white, middle-class standards,<sup>4</sup> resulting in a disproportionately high number of children removed from their homes.<sup>5</sup> The Indian Child Welfare Act<sup>6</sup> (ICWA) sought, by means of the tribal courts, to curb the devastating impact state biases had on native tribes.<sup>7</sup> Recognizing the irreplaceable resource children are to a tribe's vitality,<sup>8</sup> ICWA gave jurisdictional preference to tribal courts.<sup>9</sup> These venues have a special understanding of the nuances of Indian culture often misunderstood by social-service agencies,<sup>10</sup> and their position within the tribal community provide valuable insight into the devastating effects removal has on the tribe itself.<sup>11</sup>

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2. 724 N.W.2d 300 (Minn. 2006).

3. This case note uses the term "Indian" to maintain continuity with the statutory language in its discussion of the Indian Child Welfare Act, and to keep with the vernacular used by scholarship in this area.

4. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H.R. REP. NO. 95-1386, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546) (federal legislation is needed to ensure that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'").

5. *Holyfield*, 490 U.S. at 32 ("Studies undertaken by the Association on American Indian Affairs in 1969 and 1974 . . . showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."). See also Indian Child Welfare Act, 25 U.S.C. § 1901(4) (2000) [hereinafter ICWA] (discussing the "alarmingly high" instances of removal and non-Indian placement); MINN. DEP'T OF HUMAN RES., 2007 TRIBAL/STATE AGREEMENT 1 (Feb. 22, 2007), <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG> [hereinafter MN Tribal Agreement] ("Prior to 1978, Indian children were being placed in foster care at a nationwide rate ten to twenty times that for non-Indian children.").

6. 25 U.S.C. §§ 1901-63 (2000).

7. *Id.* § 1911.

8. *Id.* § 1901(3). ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . .").

9. *Id.* § 1911(a).

10. See *infra* notes 20-22 and accompanying text.

11. See *infra* notes 32-33 and accompanying text.

Gaps in the Act's language, however, led many courts to resort to state law for guidance.<sup>12</sup> In the absence of a statutory definition, the courts borrowed and applied state-law concepts to construe individual terms of the federal statute.<sup>13</sup> Yet, such borrowing seems fundamentally incongruous with the history and legislative intent surrounding ICWA's enactment—namely, avoidance of the documented bias inherent in state law.

Today, the extent to which state law can influence and supplement provisions of ICWA remains unresolved. In the recent decision of *In re Welfare of Child of T.T.B.*, the Minnesota Supreme Court held that state rules may color ICWA's "good cause" exception in considering the timeliness of a request to remove an Indian child welfare proceeding to tribal court.<sup>14</sup> This deference to state law for an important procedural component warrants thoughtful and cautionary reflection on the devastating circumstances that gave rise to the need for federal legislation; the Act's emphatically remedial nature; and the consequences a return to state law may bring.

This note first summarizes the history behind ICWA and the role of state courts in facilitating the cultural crisis leading to its enactment.<sup>15</sup> It then reports on the holding of *T.T.B.*,<sup>16</sup> followed by an analysis of the Minnesota Supreme Court's methodology.<sup>17</sup> Finally, the note proposes a solution to the arguably precarious expansion of state law in Indian child welfare proceedings that decisions like *T.T.B.* potentially herald.<sup>18</sup> Through a *de novo* standard of review, coupled with a lens of interpretive narrowness, courts can best safeguard against future discord between state law and native tribes in Indian child welfare proceedings by reducing the opportunities available for majoritarian influence.<sup>19</sup>

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12. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (holding that "well-settled" state law can aid in interpreting an undefined term).

13. See *infra* Part II.B discussing the *Holyfield* case and construction of the term "domicile."

14. *Id.* at 307–08.

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Parts IV–VI.

19. See *infra* Parts IV–VI.

## II. HISTORY

The current disconnect concerning the welfare of Indian children carries forward dark echoes of a tumultuous past:<sup>20</sup>

From the earliest contact with Europeans, the security of Indian families has been constantly tested . . . . Just as their connection to the land was seen as an impediment to assimilation, which had to be broken through the reservation and allotment policies, the close bonds of extended Indian families were also deemed obstacles which had to be removed. . . . [T]he integrity of Indian families was attacked by social, cultural, and economic forces which were intended to break the familial bonds.<sup>21</sup>

The near annihilation of native tribes and cultures through government policies designed to force assimilation with the Euro-American majority bore down not only on the more tactile matters of land, but also on the intangible essence of Indian families.<sup>22</sup>

Most shocking, however, is the number of Indian children removed from their homes pursuant to state child welfare policies lacking cultural sensitivity to alternative forms of child-rearing.<sup>23</sup>

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20. See generally Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17 (1996).

21. *Id.* at 22 (recounting the history of federal interference with Indian family structures).

22. See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 602–03 (1994) (“According to the analysis of a Bureau of Indian Affairs social worker, the family welfare branch of the Euro-American legal system might have depleted tribal populations because of ‘profound prejudice and discrimination’ as part of a deliberate campaign ‘to undermine Indian mores and values,’ just as Euro-America’s imperialist agenda had undermined Native America’s geographical integrity.”).

23. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603–04 (2002) (“Testimony before Congress preceding the enactment of the ICWA indicated that state child welfare officials were insensitive to traditional Indian approaches to child rearing, in particular the widespread practice of involving members of a child’s extended family in significant care giving. Applying majoritarian middle-class values, state workers often construed such practices as neglect or even abandonment.”). See also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–35 (1989). In 1978, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified before the Subcommittee on Indian Affairs and Public Lands. *Id.* at 32–34. He observed that

[o]ne of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life

In the late 1960s and 1970s, between twenty-five and thirty-five percent of all Indian children nationwide were separated from their families and living in an adoptive family, foster care, or an institution. Approximately eighty-five percent of these Indian children were placed with non-Indian families. Two studies concluded that Indian children were placed in foster care five times more often than non-Indian children.<sup>24</sup>

Statistics lay bare Minnesota's own contribution to the crisis, finding "one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971–1972 nearly one in four infants under one year of age was placed for adoption."<sup>25</sup>

A. *The Indian Child Welfare Act*

In 1978, Congress passed the Indian Child Welfare Act,<sup>26</sup> responding to the unnervingly high number of Indian children removed from their families by non-tribal social service agencies and placed in non-Indian homes and institutions.<sup>27</sup> By its enactment, Congress "attempted to educate the Anglo-American judicial system on issues of Indian culture when dealing with Indian child custody matters."<sup>28</sup>

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and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful [sic] of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

*Id.* at 34–35 (citation omitted). High instances of poverty and alcoholism were also frequently used to justify removal. Atwood, *supra*, at 604. *Cf.* MN Tribal Agreement, *supra* note 5, at 4 ("recogniz[ing] that the necessary understanding of an individual tribe's history, religion, values, mores, and child-rearing practices is best obtained from each tribe").

24. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 818 (2000) (citing *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 93d Cong. 15 (1974); H.R. REP. NO. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531). *See also supra* note 5.

25. *Hobyfield*, 490 U.S. at 32.

26. ICWA, 25 U.S.C. §§ 1901–63 (2000).

27. *Id.* § 1901(4). *See also Hobyfield*, 490 U.S. at 32; Carriere, *supra* note 22, at 600 ("Congress recognized that state social welfare systems, influenced by the cultural bias that informed assimilationist policies, removed Native American children from their families and tribes in extraordinary numbers.").

28. Wahl, *supra* note 24, at 820.

ICWA recognized Congress' role in preserving native tribes and the parasitic effect state removal proceedings had on the tribes' sustainability.<sup>29</sup> As a result, individual tribes received a substantial interest in child welfare proceedings, nearly akin to the child's parents, under the Act.<sup>30</sup>

Yet, ICWA conferred more power on the tribe than simply that of a weighted intervening party. The Act articulated a federal preference for Indian child welfare proceedings to be handled through the child's tribal court.<sup>31</sup> "It is precisely in recognition of this relationship [between the tribe and its children] . . . that ICWA designates the tribal court . . . for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children."<sup>32</sup> Furthermore, ICWA also tacitly acknowledged the corrosive effect continuous state interference had on tribal sovereignty.<sup>33</sup>

In essence, ICWA's power resonates from procedural mechanisms favoring tribe involvement in order to prevent further disruption of Indian families.<sup>34</sup> Two aspects of the Act are particularly powerful: (1) notice to the tribe of the proceeding coupled with rights of intervention, and (2) a presumption of tribal jurisdiction.<sup>35</sup> As one commentator noted, ICWA "recognize[s] that tribes have a serious stake in the welfare of their children and empower[s] those tribes with expansive jurisdiction over Indian

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29. See 25 U.S.C. §§ 1901(2), (5) ("Congress . . . has assumed responsibility for the protection and preservation of Indian tribes . . . [and] 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.").

30. See *In re Adoption of Holloway*, 732 P.2d 962, 969 (Utah 1986) ("[T]he tribe has an interest in the child which is distinct from but on parity with the interest of the parents.").

31. See 25 U.S.C. § 1911 (2000).

32. *Holloway*, 732 P.2d. at 969-70. Cf. MN Tribal Agreement, *supra* note 5, at 3 ("The foundation of this Agreement is the acknowledgement that Indian people understand that their children are the future of their tribes and vital to their very existence. An Indian child is sacred and close to the creator.").

33. See *Holloway*, 732 P.2d. at 966 ("The importance of tribal primacy in matters of child custody and adoption cannot be minimized, for the ICWA is grounded on the premise that tribal self-government is to be fostered and that few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children." (citing H.R. REP. NO. 95-1386, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541)).

34. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37 (1989).

35. 25 U.S.C. §§ 1911-12.

child custody proceedings in order to prevent further discrimination and destruction of tribal and family interests.”<sup>36</sup>

Determining proper jurisdiction under the Act was more ambiguous, however, when the child was not closely connected to the tribe’s reservation.<sup>37</sup> Known as “transfer jurisdiction,” a state proceeding involving a child not residing within or domiciled on the reservation could be transferred to the tribal court upon request, *absent good cause to the contrary*.<sup>38</sup> ICWA, however, failed to define “good cause.”<sup>39</sup>

In 1979, roughly a year after ICWA’s enactment, the Bureau of Indian Affairs (BIA) addressed the issue of “good cause” and provided additional interpretive commentary by publishing a set of guidelines (the Guidelines) to assist state courts.<sup>40</sup> While not binding, they “offer some structure to state courts.”<sup>41</sup> The Guidelines identify four factors for determining whether “good cause” exists to deny a jurisdictional transfer, including that “the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.”<sup>42</sup> Significantly, the Guidelines noted that “good cause” was intended “to provide state courts with flexibility . . . .”<sup>43</sup>

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36. Kunesh, *supra* note 20, at 18 (summarizing the principles behind ICWA’s enactment).

37. ICWA § 1911(b).

38. *Id.* Jurisdiction is transferable provided neither parent objects and the tribal court consents to jurisdiction. *Id.*

39. *Id.* See also *In re Custody of S.E.G.*, 521 N.W.2d 357, 361 (Minn. 1994) (noting that nothing in the language of ICWA itself or its legislative history defines “good cause”).

40. BIA Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584–95 (Nov. 26, 1979) [hereinafter *The Guidelines*].

41. *S.E.G.*, 521 N.W.2d at 361. See also *In re Welfare of S.N.R.*, 617 N.W.2d 77, 81 (Minn. Ct. App. 2000) (“While the BIA Guidelines are not binding on courts, unless Congress specifically invests the bureau with the authority to implement rules pursuant to the Act, Minnesota appellate courts have consistently utilized the Guidelines to answer as a matter of law questions unanswered by the language of the ICWA itself.”) (citations omitted).

42. *The Guidelines*, 44 Fed. Reg. at 67,591. The Guidelines also cite objection by the subject child if twelve years of age or older; undue hardship in presenting evidence; and the unavailability of the child’s parents paired with little or no contact with the child’s tribe as “good cause” reasons to deny the transfer. *Id.*

43. *The Guidelines*, 44 Fed. Reg. at 67,584.

### B. Mississippi Band of Choctaw Indians v. Holyfield

Over a decade after the Act's passage, the U.S. Supreme Court had the opportunity to weigh in on the provisions of ICWA. In the seminal case of *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>44</sup> the Court confronted the extent to which state law could bridge the Act's definitional deficits. The Court affirmed tribal jurisdiction as the paramount feature of ICWA<sup>45</sup> and held that Mississippi law could not be used to determine the key but undefined term of "domicile."<sup>46</sup> The state law definition effectively supplanted tribal court jurisdiction in favor of the state court, negating ICWA's express purpose.<sup>47</sup>

The situation in *Holyfield* began when a member of the Mississippi Band of Choctaw Indians, then living on the tribe's reservation, gave birth to twins 200 miles away from the reservation property.<sup>48</sup> Immediately after their birth, the mother consented to their adoption.<sup>49</sup> The Holyfields filed an adoption petition six days later,<sup>50</sup> and the infants' adoption was finalized less than a month after their birth.<sup>51</sup>

When the tribe sought to set aside the adoption, the state trial court overruled the motion, finding the tribe had "never obtained exclusive jurisdiction over the children."<sup>52</sup> This conclusion was based on the mother's extensive efforts to ensure that the children were born far from the reservation and her arrangement for their immediate adoption by the Holyfields.<sup>53</sup> Furthermore, the court also considered that the children had never "resided on or physically been on the Choctaw Indian Reservation."<sup>54</sup>

The Supreme Court disagreed. The acts of one individual should not be allowed to circumvent ICWA's remedial purposes.<sup>55</sup>

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44. 490 U.S. 30 (1989).

45. *Id.* at 36 (citing tribal jurisdiction as the mainstay of ICWA).

46. *See id.* at 45-47.

47. *See id.* at 51-53.

48. *Id.* at 37.

49. *Id.* at 37-38.

50. *Id.* at 38.

51. *Id.* Of note, Mississippi law generally provides a six-month waiting period before a final adoption decree is entered. *Id.* at 38 n.10. However, the Chancellor, at his or her discretion, may waive this period and immediately enter the decree, as occurred here. *Id.*

52. *Id.* at 39.

53. *Id.* (citation omitted).

54. *Id.* (citation omitted).

55. *Id.* at 49 ("Tribal jurisdiction under § 1911(a) was not meant to be

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Moreover, state law could not be used to displace tribal court jurisdiction.<sup>56</sup> Congress had spoken: tribal courts were the preferred forum for custody proceedings involving Indian children.<sup>57</sup>

The Supreme Court recounted many of the statistics leading up to ICWA's enactment while simultaneously acknowledging the great historical disjoint between state institutions and the needs of Indian children.<sup>58</sup> Based on such commanding congressional findings, the Court emphatically declined to use the state construction, as it would undermine congressional intent<sup>59</sup> by allowing individual tribe members to defeat ICWA's jurisdictional provisions.<sup>60</sup> State law should not control ICWA proceedings since it was the caustic divide between the state courts and the tribes which first necessitated federal legislation.<sup>61</sup>

In addition, the Court was troubled by the lack of uniformity that would result if each state considered ICWA in light of its own laws.<sup>62</sup> The Court also worried about the potentially drastic measures parties might use to ensure their preferred result, essentially forum-shopping among the states.<sup>63</sup>

Thus, in its very first ICWA case, the Supreme Court resounded the inherent remedial purposes of the Act, refusing to permit jurisdictional encroachment by state courts on account of language ambiguities.

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defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of large numbers of Indian children adopted by non-Indians.”).

56. *See id.* at 45 (“[I]t is most improbable that Congress would have intended to leave the scope of the statute’s key jurisdictional provision subject to definition by state courts as a matter of state law.”).

57. *See id.* at 42 (“In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.”); *see also id.* at 36 (ICWA “creates concurrent but *presumptively* tribal jurisdiction in the case of children not domiciled on the reservation . . .”) (emphasis added).

58. *See id.* at 44–45, 50 n.24.

59. *Id.* at 44 (“First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary.”).

60. *Id.* at 52.

61. *Id.* *See also* 25 U.S.C. § 1901(5) (2000); *supra* note 57.

62. *Holyfield*, 490 U.S. at 45.

63. *Id.* at 46 (“[D]ifferent rules apply[ing] from time to time to the same child . . . cannot be what Congress had in mind.”).

C. *Considering Minnesota*

Minnesota subsequently passed its own legislation reflecting the principles and provisions of ICWA. In 1985, the Minnesota Indian Family Preservation Act<sup>64</sup> (MIFPA) was enacted. MIFPA “emphasiz[ed] the State’s interest in supporting the preservation of the tribal identity of an Indian child and recogniz[ed] tribes as the appropriate entities to provide direction to the State as to the best interests of tribal children.”<sup>65</sup> The struggle continued, however, in the juxtaposition between state law and the undefined terms of the paramount federal statute.

The leading Minnesota case of *In re Custody of S.E.G.*<sup>66</sup> further examined this interplay in the context of adoptive placement. In *S.E.G.*, the struggle arose from ICWA’s permissive but ambiguous “good cause” exception,<sup>67</sup> and the extent to which state courts could deviate from the Act’s placement preferences via state-law principles.<sup>68</sup>

*S.E.G.* involved three Indian children, two of whom were deemed to have extraordinary emotional needs.<sup>69</sup> Beginning in February 1988, two of the children were moved six times, and the third child five times, before placement in a non-Indian foster home in August 1991.<sup>70</sup> Roughly five months later, the children were placed in an Indian pre-adoptive home.<sup>71</sup> Poor planning, however, resulted in the children’s return after just nine days.<sup>72</sup>

In October, the children transferred to an Indian foster home, but placement lasted less than two months.<sup>73</sup> Subsequently, the children were placed in the care of a different Indian foster home.<sup>74</sup> The trial court heard testimony from numerous expert and lay witnesses regarding the benefits and challenges of continued placement in the Indian foster home versus the pending

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64. MINN. STAT. §§ 260.751–835 (2006 & Supp. 2007).

65. MN Tribal Agreement, *supra* note 5, at 1.

66. 521 N.W.2d 357 (Minn. 1994).

67. *See id.* (“At issue is whether the placement preferences provision of the Indian Child Welfare Act (ICWA), provides a ‘good cause’ exception . . .”). *Id.* at 358.

68. *See id.* at 361–63.

69. *Id.* at 360.

70. *Id.* at 359.

71. *Id.*

72. *Id.* at 360.

73. *Id.*

74. *Id.*

adoption petition of the former non-Indian foster family.<sup>75</sup> The court concluded that “the children’s ‘need for permanence’ was an extraordinary emotional need and that no suitable [Indian] family was available for placement . . . .”<sup>76</sup> The adoption petition was granted in the best interests of the children.<sup>77</sup>

Setting aside the petition, the Minnesota Supreme Court found that the state’s “best interests of the child” standard for determining placement tended to subvert the intent of ICWA. The standard involved a subjective evaluation generally grounded in “values of majority culture.”<sup>78</sup> Instead, the court utilized factors listed in the Guidelines coupled with a *de novo* standard of review as to whether the factors were properly weighed and considered.<sup>79</sup>

Improperly weighed factors were deemed issues of law and thus subject to the more stringent standard of *de novo* review.<sup>80</sup> Considering the testimony presented, the Minnesota Supreme Court concluded there was an insufficient basis to determine that the children had extraordinary emotional needs that were not satisfied in their current Indian foster home.<sup>81</sup> “Most of the testimony . . . which tended to establish that the children had extraordinary physical or emotional needs was *not* presented by qualified expert witnesses.”<sup>82</sup> Instead, the experts “tended to show that the children were not ready to be adopted and needed to stabilize before being placed in an adoptive home and that their need for stability was being met in [the home of their Indian foster parent].”<sup>83</sup> Since the trial court did not have the strong expert basis requisite for an “exceptional” non-Indian adoptive placement under the Guidelines, the matter was reversed.<sup>84</sup>

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75. *See id.* at 365–66 (“Our decision today is not meant in any way as a criticism of the trial court’s handling of the matter. By contrast, it was because of that court’s careful decisions at trial, which lasted six days, and the court’s thorough findings of fact and thoughtful memorandum that we were able to review this case effectively.”).

76. *Id.* at 360–61.

77. *See id.* at 361, 364.

78. *Id.* at 363 (stating that “[t]he best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture”).

79. *Id.*

80. *Id.* at 363. *See also infra* notes 157–58 and accompanying text.

81. *Id.* at 364–65.

82. *Id.* at 365.

83. *Id.*

84. *Id.* at 364–66 (failing to find good cause to deviate from ICWA preferences in adoptive placement).

Together, MIFPA and *S.E.G.* demonstrate Minnesota's own struggle with the "good cause" exception and its conscientious attempts to conduct Indian child welfare proceedings within the spirit and letter of ICWA. Despite these efforts, cases like *In re Welfare of Child of T.T.B.* show "good cause" remains a tenuous and unresolved issue under Minnesota law.<sup>85</sup>

*D. The Dangers of "Good Cause"*

Illustrated in part by *Holyfield, S.E.G.*, and later by *T.T.B.*,<sup>86</sup> case law is rife with evidence demonstrating the difficulties courts encounter when attempting to apply ICWA's undefined terms. The concept of "good cause" concerning jurisdictional transfers is particularly troublesome.<sup>87</sup> "[S]tate courts continue to create their own definitions for several key terms of the ICWA . . . [including] 'good cause' not to transfer jurisdiction to the tribe . . . ."<sup>88</sup> Within the four factors set forth in the Guidelines,<sup>89</sup> courts have imported a variety of judicial devices to determine whether good cause exists to deny the transfer, such as *forum non conveniens*<sup>90</sup> and, less commonly, a "best interests of the child" analysis.<sup>91</sup>

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85. See *infra* Parts III–IV.

86. See *supra* Parts II.B–II.C and *infra* Part III.

87. See Wahl, *supra* note 24, at 825 ("Good cause is an ambiguous, continually litigated concept. The only apparent dispositive factor in opposition to transfer is the absence of a transferee tribal court."). *But cf.* Atwood, *supra* note 23, at 644 ("State courts are sharply divided as to the weight to be given the BIA's guidelines, but the disagreements reflect a more fundamental discord about the appropriate role of state judges in making substantive dispositions in Indian child welfare proceedings.").

88. Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 420 (1998).

89. See *supra* note 42 and accompanying text.

90. The doctrine of *forum non conveniens* provides that "an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY 680 (8th ed. 2004). See Metteer, *supra* note 88, at 440–41 (discussing the possible hardships imposed if matters are transferred to tribal court under the standard of *forum non conveniens*). See also *In re Armell*, 550 N.E.2d 1060, 1067 (Ill. App. Ct. 1990) ("[L]iberal expansion of the *forum non conveniens* doctrine would preclude transferring jurisdiction to tribal courts except in cases where the child resides on or near a reservation. . . . [This] would be contrary to the Congressional findings and goals incorporated into ICWA.").

91. Metteer, *supra* note 88, at 442–44 (discussing use of the "best interests of the child" standard in evaluating motions to transfer jurisdiction). This approach is generally rejected as according too much deference to state courts, which

Similarly, there is no bright-line test to gauge timeliness under the Guidelines to determine whether the proceeding is at an advanced stage and if the tribe acted promptly in requesting the transfer.<sup>92</sup> Evaluated on a case-by-case basis,<sup>93</sup> requests to transfer jurisdiction have been denied when filed five months after the tribe received notice of the proceedings,<sup>94</sup> but also granted in situations where the request came more than a year after the tribe was notified.<sup>95</sup> Without clear standards, “good cause” faces repeated attack as a legal loophole allowing state courts too much latitude in express contradiction to the Act.

Critiquing the inclusion of “good cause” in the Act’s jurisdictional provision, Jeanne Louise Carriere asserts that “[section 1911(b)] subjects the value of tribal involvement to Euro-American appraisal through the proviso that the state court can refuse to transfer a case for good cause unspecified in the statute.”<sup>96</sup> Carriere also sharply observes:

The legislative history identified, as a principal source of the Native American child welfare crisis, the cultural one-

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directly conflicts with the purposes of ICWA. *See Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995). In *Yavapai-Apache Tribe*, the Texas appellate court

reject[ed] the best interest standard because it is relevant to issues of placement, not jurisdiction. The only issue in cases involving motions to transfer is the determination of the proper tribunal to resolve the custody issue. Thus, the question of whether a parent or guardian is abusive, neglectful, or otherwise unfit is irrelevant at this point. For a court to use this standard when deciding a purely jurisdictional matter, alters the focus of the case, and the issue becomes not what judicial entity should decide custody, but the standard by which the decision itself is made. The utilization of the best interest standard and fact findings made on that basis reflects the Anglo-American legal system’s distrust of Indian legal competence by its assuming that an Indian determination would be detrimental to the child.

*Id.* (citations omitted). *Accord Armell*, 550 N.E.2d at 1065 (“considerations involving the best interests of the child are relevant *not to determine jurisdiction* but to ascertain placement”) (emphasis added).

92. *See supra* text accompanying note 43.

93. *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003) (“Whether a motion for transfer jurisdiction is timely is determined on a case-by-case basis . . .”).

94. *See Metteer, supra* note 88, at 439–40. *See also A.B.*, 663 N.W.2d at 632–33 (citing cases in which transfer petitions were considered untimely filed, ranging from the morning of trial to after the matter had concluded).

95. *See Metteer, supra* note 88, at 440. *See also infra* Part V, discussing *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348 (Minn. Ct. App. 2007), which upheld a transfer to the tribal court when the request was filed two years after the tribe received notice of the proceeding.

96. Carriere, *supra* note 22, at 599.

sidedness of state child welfare systems, including state courts, coupled with their power to judge Native American families by Euro-American standards. By including the language of good cause in section 1911(b), Congress in effect allowed entities that had gone on record denying a Native American subjectivity to have discretion on that issue.<sup>97</sup>

Similarly, one scholar aptly describes the “good cause” exception as a “statutory battleground for jurisdiction.”<sup>98</sup> Another calls for its removal in order to “take away any possibility that the state courts will variously define [good cause] and make exceptions to provisions regarding tribal jurisdiction and the placement of Indian children which are the heart of ICWA.”<sup>99</sup>

ICWA was specifically enacted to avoid use of state law in Indian child welfare proceedings. The “good cause” statutory ambiguity creates a large loophole for courts to easily insert the old adages of state law. Such use threatens to subvert the remedial purposes of the statute.

#### *E. Summary*

In brief, the Indian Child Welfare Act endeavored to reduce the staggering number of Indian children removed from their homes by state systems whose laws failed to properly account for tribal customs and values. When confronted with the use of state law to supplement ICWA’s definitional deficits, courts have repeatedly found that such overlap often leads to the very state-subjective assessment and bias the Act sought to avoid. To date, the “good cause” provision remains particularly vulnerable to inconsistent application and state-subjective interpretation.

### III. *IN RE WELFARE OF CHILD OF T.T.B.*

*In re Welfare of Child of T.T.B.*<sup>100</sup> chronicles the lengthy placement proceedings of an Indian child. While a typical child welfare proceeding already faces a complicated and delicate

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97. *Id.* at 648. *See also id.* at 610 (“In leaving questions open for Euro-American courts to answer, Congress entrusted determinations of the substance and value of Native American family culture to the state courts that it earlier had found to be culturally inadequate to make these determinations.”).

98. Atwood, *supra* note 23, at 612.

99. Metteer, *supra* note 88, at 471.

100. 724 N.W.2d 300 (Minn. 2006).

calculus of competing interests, the tenets of ICWA introduce an additional set of variables in those cases involving Indian children. Congress sought to remove much of this complexity from the realm of state law and the historical bias of state courts by establishing a jurisdictional preference: such matters ought to be transferred to the appropriate tribal court. The continuing struggle lies, however, in the distinct but often overlapping legal spheres these two forums share. As demonstrated by *T.T.B.* and its progeny,<sup>101</sup> the question of jurisdiction lies far beyond bright-line rules and absolutes.

In essence, *T.T.B.* is a case about balancing: When does a mid-proceeding transfer from state court to tribal court do greater harm through the inevitable procedural delay (and consequently belated resolution for the child) than continuing to adjudicate the matter in state court, risking the historical bias of state law?

Child X.T.B. was born in November 2003.<sup>102</sup> Although his parents both resided in Minnesota, his birth took place in Rhode Island.<sup>103</sup> X.T.B.'s mother, T.T.B., is a member of the Oglala Sioux Tribe.<sup>104</sup> His father, G.W., is a member of the Yankton Sioux Tribe.<sup>105</sup>

X.T.B. was taken into protective custody in Rhode Island almost immediately based on active child welfare proceedings in Minnesota concerning his half-sibling, A.G.<sup>106</sup> Hennepin County later filed a separate action concerning X.T.B., requesting either termination of T.T.B.'s and G.W.'s parental rights or permanent placement with a more suitable guardian.<sup>107</sup> The Minnesota district

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101. *See infra* Part V.

102. *T.T.B.*, 724 N.W.2d at 301.

103. *Id.* The record indicates A.G.M., the former foster care provider of X.T.B.'s mother, *id.* at 301 n.1, lived in Rhode Island, and X.T.B.'s parents had gone to visit her a month prior to X.T.B.'s birth. *Id.* at 301. While X.T.B.'s parents initially preferred their child be placed with A.G.M., Rhode Island found A.G.M. to be unsuitable, "based in part on [A.G.M.'s] involvement with the questionable circumstances that led to [T.T.B.] giving birth in Rhode Island instead of Minnesota." *In re Welfare of Child of T.T.B.*, 710 N.W.2d 799, 803 (Minn. Ct. App. 2006).

104. *T.T.B.*, 724 N.W.2d at 302.

105. *Id.*

106. *Id.* at 301. In April 2003, child protection proceedings began concerning A.G., X.T.B.'s half-sister, daughter of T.T.B. and M.G. *Id.*

107. *Id.* at 301–02. Hennepin County added X.T.B. to the matter involving A.G. on November 21, 2003. *Id.* T.T.B. and M.G. later voluntarily terminated their parental rights to A.G. and X.T.B. was dismissed from his half-sister's case. *Id.* at 302 n.3. On December 31, 2003, the county filed the present action solely concerning X.T.B. *Id.* at 302. T.T.B. was a minor at the time of X.T.B.'s birth and the record suggests she was diagnosed with depression and post-traumatic stress

court subsequently ordered that X.T.B. be placed in protective custody, and he was brought to Minnesota in late December 2003.<sup>108</sup> Mother T.T.B., the Oglala Sioux tribe, and the Yankton Sioux tribe<sup>109</sup> were notified in early January 2004 of the separate action, and X.T.B.'s mother and father appeared at an initial hearing in mid-February.<sup>110</sup>

Early proceedings came in fits and starts.<sup>111</sup> A pre-trial hearing was set for June 10, 2004, and the trial scheduled for July 22, 2004.<sup>112</sup> A subsequent family group conference failed to reach a consensus concerning X.T.B.'s placement, and the district court announced deadlines for the exchange of witness and exhibit lists, submission of pre-trial motions, and the trial date itself.<sup>113</sup> A scheduling conflict, however, prompted the court to extend the deadline for witness and exhibit lists, as well as for pre-trial motions, to July 22, 2004,<sup>114</sup> and the ensuing trial was postponed.<sup>115</sup>

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syndrome. *T.T.B.*, 710 N.W.2d at 802. X.T.B.'s father, G.W., allegedly had chemical health issues. *Id.*

108. *T.T.B.*, 724 N.W.2d at 302. The same day Hennepin County filed an amended petition to add X.T.B. to the existing matter involving his half-sister, A.G., and the county also moved ex parte to place X.T.B. in protective custody. *Id.* at 301-02. As a result, X.T.B. was placed with A.G. under the care of A.G.'s paternal grandmother. *Id.* at 302.

109. *Id.* In matters involving foster care placement or termination of parental rights, state courts are obligated to notify the child's tribe(s) of the proceeding and the right to intervene. ICWA, 25 U.S.C. § 1912(a) (2000).

110. *T.T.B.*, 724 N.W.2d at 302. It is unclear whether father G.W. was served with the petition concerning X.T.B. *Id.* He did, however, receive notice of the proceeding based on his appearance at the initial hearing held on February 17, 2004. *See id.* Overall, X.T.B.'s placement proceedings were somewhat delayed pending an interstate transfer from Rhode Island, X.T.B.'s birthplace. *Id.* at 302 n.3. Rhode Island deferred to Minnesota based on the open case involving X.T.B.'s half-sister, A.G. *Id.* at 302-03.

111. The initial admit/deny hearing was held on February 17, 2004. *Id.* at 302. Mother T.T.B. entered a denial and father G.W. received a continuance until April 20, 2004, as a result of newly appointed counsel. *Id.* At the hearing on April 20, T.T.B. favored transfer of custody to her former informal foster care provider in Rhode Island, whereas G.W. considered a potential care arrangement and permanent placement of X.T.B. with his mother, B.W. *Id.* at 302. As of April 20, G.W. had still not entered a formal denial. *Id.*

112. *Id.* at 302-03.

113. These dates were originally July 8, 15, and 22, 2004, respectively. *Id.* at 303.

114. *Id.*

115. *Id.* The district court indicated the new trial date would be set at a later time upon agreement of the parties and that the "delay would likely be a matter of 'several weeks.'" *Id.*

Hennepin County filed an amended petition on July 16, 2004,<sup>116</sup> and on July 21, G.W. moved for dismissal, “claiming the court lacked jurisdiction and disputing grounds for termination of his parental rights.”<sup>117</sup>

The following day, roughly six months after the proceedings began, T.T.B. and G.W. moved to transfer the matter to a tribal court.<sup>118</sup> On August 12, the district court denied G.W.’s motion to dismiss,<sup>119</sup> but deferred ruling on the jurisdictional transfer,<sup>120</sup> thereby “allow[ing] the Yankton Sioux tribe additional time to file a written acceptance of jurisdiction.”<sup>121</sup> It was not until September 24, 2004, that the Yankton Sioux tribe individually moved to transfer jurisdiction,<sup>122</sup> despite previous motions by both the Yankton and Oglala Sioux tribes to intervene and participate in the proceedings.<sup>123</sup> The district court subsequently denied the transfer request, concluding the “hardship” of the 400-mile distance to the tribal court and the advanced nature of the proceedings constituted “good cause” under the Guidelines.<sup>124</sup> The matter remained in state court, and legal custody of X.T.B. was ultimately transferred to S.G., X.T.B.’s interim guardian and the paternal grandmother of his half-sister.<sup>125</sup>

The Minnesota Court of Appeals quickly laid aside the district court’s “hardship” finding.<sup>126</sup> The participants had neither

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116. *Id.* The petition added additional personal information concerning G.W.; supplemented the procedural history dating back to the original petition in December 2003; and provided additional grounds for the termination of T.T.B. and G.W.’s parental rights. *Id.*

117. *Id.* G.W. also moved to transfer custody to A.G.M. in Rhode Island, now agreeing with T.T.B. concerning placement of X.T.B. *Id.* Cf. *supra* note 112.

118. *T.T.B.*, 724 N.W.2d at 303. X.T.B.’s parents moved to transfer the matter to the Yankton Sioux Tribal Court. *Id.* The joint motion came six days after the county filed an amended petition to terminate parental rights. *See id.*

119. *Id.* The district court held the county’s petition was sufficient to establish a prima facie case. *In re Welfare of Child of T.T.B.*, 710 N.W.2d 799, 802 (Minn. Ct. App. 2006).

120. *T.T.B.*, 724 N.W.2d at 303.

121. *Id.*

122. *Id.* at 304.

123. *See id.* at 303 n.4. The Oglala Sioux Tribe moved to intervene in February 2004, followed by the Yankton Sioux Tribe in late April 2004. *Id.* Both tribes were consulted regarding X.T.B.’s initial placement in the home of his half-sister’s paternal grandmother. *Id.* at 302. Each tribe was also invited to attend a family group conference. *Id.* at 303 n.4.

124. *T.T.B.*, 710 N.W.2d at 803. *See also* The Guidelines, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979).

125. *T.T.B.*, 724 N.W.2d at 304.

126. *See T.T.B.*, 710 N.W.2d at 806.

objected to the transfer because of the distance nor stated it would hamper their ability to participate in the proceeding.<sup>127</sup> “Without evidence of undue hardship, distance alone cannot defeat a transfer of jurisdiction to a tribal court.”<sup>128</sup> The appellate court found the transfer request was properly filed, coming six days after the county filed an amended petition to transfer legal custody, and was submitted by the pretrial motion deadline.<sup>129</sup> Because the district court did not indicate that the request was untimely at the pretrial hearing, and even allowed the tribe to submit whether it would accept jurisdiction, the appellate court reasoned the proceedings were not advanced.<sup>130</sup> Therefore, good cause to deny the transfer did not exist because the tribe’s motion of September 24 indicated the tribal court would accept jurisdiction.<sup>131</sup>

The Minnesota Supreme Court, however, evaluated the nature of the proceedings under a different judicial timeline. The court concluded that the county’s motion merely updated the present proceeding.<sup>132</sup> These periodic updates are required in juvenile placement proceedings and, in this matter, did not substantively affect the case.<sup>133</sup> Since the transfer request was filed on the same day that witness lists, exhibit lists, and other pretrial motions were due, the supreme court determined the proceedings had reached an advanced stage.<sup>134</sup> Additionally, the advanced nature of the matter was further evident in the lapse of Minnesota’s six-month deadline governing child placement proceedings for children less than eight years old.<sup>135</sup>

The Minnesota Supreme Court reinstated the district court order denying the transfer, emphasizing the lengthy involvement of both X.T.B.’s parents and the tribes prior to the transfer requests.<sup>136</sup> Further, while acknowledging the remedial intent of ICWA and the

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127. *Id.*

128. *Id.* *Cf. supra* note 91 and accompanying text regarding use of the standard of forum non conveniens.

129. *T.T.B.*, 710 N.W.2d at 806.

130. *Id.*

131. *Id.*

132. *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 308 (Minn. 2006).

133. *Id.*

134. *Id.*

135. *Id.* at 307–08. *See* MINN. STAT. § 260C.201, subdiv. 11(a) (2006) (requiring that permanency hearings for children under the age of eight shall commence no later than six months after placement).

136. *T.T.B.*, 724 N.W.2d at 308–09.

preference for tribal court jurisdiction,<sup>137</sup> the court concluded the flexible nature of the “good cause” provision permitted state rules to determine whether the proceedings had reached an advanced stage.<sup>138</sup> As a result, the drawn-out nature of the case authorized the court to find good cause existed to deny the transfer.<sup>139</sup>

In contrast, the dissent, authored by Justice Page, questioned the majority’s willingness to adopt a more liberal construction of “good cause.” The majority, the dissent argued, espoused unwarranted confidence in the ability of state courts to effectuate the goals of ICWA, while relying on assertions of substantial compliance and progress without corresponding proof.<sup>140</sup>

Justice Page observed that such progress has not been shown in Minnesota, again emphasizing Minnesota’s significant historical role in removal proceedings.<sup>141</sup> Absent solid quantitative proof of advancement, Justice Page found that the “good cause” exception should be interpreted narrowly. And as “the goals of the ICWA appear to be unfulfilled and because, as the court notes, the good-cause exception . . . may operate as a mechanism for easy circumvention of the ICWA,” the exception is inapplicable here.<sup>142</sup>

#### IV. ANALYSIS

*In re Welfare of Child of T.T.B.* precariously skirts the edge of presumptive tribal court jurisdiction in child protection proceedings involving Indian children not residing within or domiciled on reservations. By evaluating the transfer motion’s timeliness according to a state-prescribed timeline,<sup>143</sup> the Minnesota Supreme Court risks infusing the proceedings with the very state-law bias ICWA sought to avoid.<sup>144</sup>

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137. See *id.* at 304, 309 (“[W]e must defer to the experience, wisdom, and compassion of the . . . tribal courts to fashion an appropriate remedy.”) (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (quoting *In re Adoption of Holloway*, 732 P.2d 962, 972 (Utah 1986))).

138. See *T.T.B.*, 724 N.W.2d at 305, 307–09.

139. See *id.* at 307–08.

140. *Id.* at 310 (Page, J., dissenting).

141. *Id.* See also *supra* note 5.

142. *T.T.B.*, 724 N.W.2d at 310 (Page, J., dissenting).

143. See *supra* note 136 and accompanying text.

144. 25 U.S.C. § 1901(5) (2000); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44–45 (1989) (“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.”).

As pointed out by the dissent, the majority relied rather significantly on an observation that most state courts have made substantial progress effectuating ICWA.<sup>145</sup>

Consider the following:

A January 1992 study in Hennepin County, Minnesota, makes clear that greater attention to ICWA is necessary in many areas in order to comply with federal law. In particular, the study revealed that efforts to keep Indian children with their families were minimal in forty-eight percent of the cases examined. Also of concern is the continued failure of the courts to follow ICWA placement preferences once an initial custody determination is made. Finally, the study noted that noncompliance with laws respecting cultural heritage is more prevalent with Indian child custody proceedings than with any other ethnic group.<sup>146</sup>

In 2005, a Minnesota Supreme Court study concluded “not only that Native American children continue to be disproportionately placed out of home, but also that the number of such out-of-home placements is increasing.”<sup>147</sup> Based on data collected during 2000 to 2004,<sup>148</sup> the 2005 study speaks to an ongoing reverberation of the troublesome bias of earlier decades. Given Minnesota’s haunting past, such statistics should command significant pause to the use of state law in ICWA cases.<sup>149</sup>

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145. *T.T.B.*, 724 N.W.2d at 310 (Page, J., dissenting). *Cf.* Carriere, *supra* note 22, at 589–90. Carriere writes:

The publicly avowed purpose of the ICWA was to end forced acculturation of Native American children into Euro-American society by recognizing a predominantly tribal jurisdiction over tribal child welfare cases. Close examination of the Act’s application in the area of concurrent jurisdiction reveals the limits on the dominant culture’s willingness to abandon its own representation of the subordinate culture and its control over it.

*Id.*

146. Wahl, *supra* note 24, at 836–37.

147. *T.T.B.*, 724 N.W.2d at 310 (Page, J., dissenting). *See also* Minnesota Supreme Court, *Minnesota’s Court Performance in Child Protection Cases: A Reassessment Under the Federal Court Improvement Program 24* (Dec. 2005) [hereinafter *Reassessment*] (finding a general increase in out-of-home placement among Indian children between 2000 and 2004).

148. *Reassessment*, *supra* note 147, at 24.

149. *But cf.* Atwood, *supra* note 23, at 655. Atwood suggests that [r]ather than blaming state courts for the continuing high rate of placement of Indian children in non-Indian homes and institutions, reformers might look to the persistence of severe socioeconomic problems on Indian reservations and among urban Indian populations.

While X.T.B.'s placement proceeding appears free from outward state bias,<sup>150</sup> the present decision threatens a legal backslide into times of greater state encroachment by bolstering the influence of state law in "good cause" determinations. Critics assert that the "good cause" exception often equips state courts with a convenient tool to circumvent ICWA mandates.<sup>151</sup> The peril in allowing state courts increasing deference regarding "good cause" is a return to the dominance of ill-suited state laws in Indian child welfare proceedings. The mechanisms designed to protect against state abuse risk dilution through broad common-law holdings regarding state law in ICWA proceedings, incipient steps of which *T.T.B.* conceivably represents.<sup>152</sup>

One of the ways to guard against state abuse is through a de novo standard of review. An abuse of discretion standard, overturning the trial court only on clear error,<sup>153</sup> does not promote the aims of ICWA in its purest form. Small encroachments by state courts in making discretionary "good cause" determinations go largely unnoticed in absence of obvious error, effectively removing matters from the preferred jurisdiction of the tribal court.

Alternatively, the de novo standard allows the reviewing court to approach the case anew in light of the applicable law and trial record,<sup>154</sup> enabling the greatest scrutiny of state court decisions.

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The high incidence of poverty, crime, and substance abuse among Indian communities can fundamentally undercut the goals of the ICWA . . . . [B]irth parents may choose to place their children with non-Indian families and may oppose transfer to tribal courts precisely because of the socioeconomic conditions existing on many reservations . . . .

*Id.*

150. *T.T.B.*, 724 N.W.2d at 309 ("[T]here is nothing in the record to suggest that resort to the good-cause exception was done for purposes of undermining ICWA. . . . [T]he record reflects much effort on the part of the district court and the county to comply with ICWA's directives.").

151. See Erik W. Aamot-Snapp, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1193-95 (1995) (advocating abolishment of the "good cause" exception for a "firm presumption [of tribal jurisdiction] . . . absent one of several specific exceptions"); Carriere, *supra* note 22, at 648 (arguing the "good cause" exception allows state courts to easily sidestep tribal jurisdiction).

152. *T.T.B.*, 724 N.W.2d at 310 (Page, J., dissenting).

153. BLACK'S LAW DICTIONARY 11 (8th ed. 2004) (defining abuse of discretion as "an appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.").

154. *Id.* at 94 (defining de novo review as "an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings").

The Minnesota Supreme Court already endorsed de novo review when evaluating the factors weighed by a trial court in construing ICWA's provisions, distinguishing these factors from those findings of fact not overturned unless "clearly erroneous."<sup>155</sup> Such careful scrutiny comports with Congress' original intent to rein in state influence and is ever mindful of preventing future abuse in Indian child welfare proceedings.<sup>156</sup>

Although the court utilized the de novo standard in *T.T.B.*,<sup>157</sup> another step can be made toward hastening the directives Congress set forth in ICWA's prefatory findings.<sup>158</sup> To achieve the greatest amount of protection, de novo review should be copiously applied with a lens of interpretive narrowness,<sup>159</sup> construing any inference in favor of tribal court jurisdiction and against the state.

Like so many cases that find themselves the subject of law review articles, *T.T.B.* offers an illustration of competing policy arguments rather than a formulaic solution to a complex problem. Here, the arguments of a timely resolution and spent resources in the state system collided against the lengthy distance and inevitable delay should the matter be transferred to the tribal court. Overtly, the historical bias ICWA so fiercely guarded against was not apparent. The decision was not clear-cut and the scales failed to substantially favor a particular side. It was, no doubt, a hard case.<sup>160</sup>

These are the situations in which ICWA's remedial intent should tip the scales in favor of tribal court jurisdiction. The Minnesota 2007 Tribal/State Indian Child Welfare Agreement (the Agreement) makes an important and well-heeded observation:

The [State of Minnesota and subscribing Tribes] acknowledge that, as sovereigns, they may disagree as to

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155. See *In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994) ("We will not reverse findings of fact unless clearly erroneous. 'Considering improper factors' or 'improperly weighing certain factors' are issues of law . . . which we will review de novo.").

156. See *infra* note 184. Further emphasizing the importance of close scrutiny, the Minnesota Court of Appeals held evidentiary standards in ICWA proceedings should be on par with the "beyond a reasonable doubt" standard of criminal matters, noting that "[t]he 'beyond a reasonable doubt' burden of proof is a clear and known standard; indeed, it is the highest burden of proof in our jurisprudence and we should be able to apply it here." *In re Welfare of B.W.*, 454 N.W.2d 437, 445 (Minn. Ct. App. 1990).

157. *T.T.B.*, 724 N.W.2d at 307.

158. 25 U.S.C. § 1901 (2000).

159. See *T.T.B.*, 724 N.W.2d at 310 (Page, J., dissenting).

160. See Metteer, *supra* note 88, at 472 (calling for reform "to insure that the 'hard cases' that have made bad law for nearly two decades do not continue").

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the extent of each others' authority, power, and jurisdiction in [child welfare] proceedings. The parties agree, however, that the fundamental purpose of the federal and state laws . . . is to secure and to preserve an Indian child's sense of belonging to her or his family and Band or Tribe. They agree that cooperating to combine their abilities and resources to provide effective assistance to Indian children and their families is the best means to reach this shared goal.<sup>161</sup>

The Agreement reflects Minnesota's responsibilities under both federal and state law to "protect an Indian child's sense of belonging to family and tribe."<sup>162</sup> Further, carrying out these responsibilities "require[s] collaboration with the tribes and the use of the guidance, resources and participation of a child's tribe."<sup>163</sup> Through the Agreement, the State of Minnesota and the subscribing tribes expressed their intention "to strengthen implementation of the letter, spirit and intent" of the statutory provisions.<sup>164</sup>

Thus, when an appellate court finds itself wedged between state law and a jurisdictional transfer that comports with ICWA, the *de novo* standard of review provides the greatest opportunity to reconsider the matter in light of ICWA's remedial intent.<sup>165</sup> And a lens of interpretive narrowness gives proper acquiescence to the expertise of the tribal court.<sup>166</sup> Accompanied by a lens of interpretive narrowness, *de novo* review strengthens implementation of the letter, intent, and spirit of ICWA and accords the necessary deference to the Act's historical backdrop while conscientiously promoting the preference for tribal court jurisdiction.

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161. MN Tribal Agreement, *supra* note 5, at 4.

162. *Id.* at 3.

163. *Id.*

164. *Id.*

165. *Id.* at 6 ("Minnesota case law has determined that a 'transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by [ICWA] whenever possible.'") (quoting *In re Welfare of B.W.*, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990)).

166. See *supra* note 32 and accompanying text.

V. SUBSEQUENT DEVELOPMENTS: EVIDENCE OF APPLIED  
INTERPRETIVE NARROWNESS?

Recent case law suggests a promising shift towards applying interpretive narrowness to the “good cause” exception in Indian child welfare proceedings. In July 2007, the matter of *In re Welfare of Children of R.M.B.*<sup>167</sup> came before the Minnesota Court of Appeals. The court utilized both the de novo standard of review<sup>168</sup> and, arguably, a lens of interpretive narrowness to find that good cause did *not* exist to deny the tribe’s request to transfer jurisdiction,<sup>169</sup> despite the advanced nature of the proceedings.

The children involved in *R.M.B.* were placed in foster care in October 2004<sup>170</sup> and were subsequently found to be in need of protection or services, known as a CHIPS designation, in November.<sup>171</sup> The tribe filed a motion to transfer jurisdiction to the tribal court in September 2006,<sup>172</sup> slightly two years after the CHIPS adjudication.<sup>173</sup> While the appellate court duly noted that

167. 735 N.W.2d 348 (Minn. Ct. App. 2007).

168. *Id.* at 351 (citing *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 307 (Minn. 2006) (“But the application of ICWA to undisputed facts presents a question of law, which we review de novo.”)).

169. *Id.* at 354.

170. *Id.* at 349.

171. *Id.* The “CHIPS” acronym denotes a “child in need of protection or services.” See generally MINN. STAT. § 260C.007, subdiv. 6 (2006) (describing the circumstances in which a child may receive a CHIPS designation).

172. *R.M.B.*, 735 N.W.2d at 350.

173. Evidence in the record suggests that the tribe filed its petition in anticipation of the county filing a permanent-placement petition. The timing of the petition to transfer jurisdiction is consistent with ICWA’s purpose of maintaining an Indian child’s cultural and tribal ties and promoting the “stability of Indian tribes and families” . . . which may not have been implicated at an earlier stage in the CHIPS proceeding.  
*Id.* at 354 (citation omitted).

In fact, there was some confusion in the district court over whether a CHIPS proceeding fell within the types of child welfare proceedings that ICWA governed. The original district court order granting the tribe’s request to transfer jurisdiction “includ[ed] a finding that the proceeding is not at an ‘advanced stage’ because it ‘continues to be a CHIPS case’ in that neither a petition to terminate parental rights nor a petition for permanent placement is pending.” *Id.* at 350.

The appellate court subsequently ruled that “[w]hen the district court concluded that a CHIPS proceeding was not at an advanced stage because neither a [petition to terminate parental rights] nor a permanent-placement petition was pending, it improperly conflated two proceedings that are distinct under ICWA.” *Id.* at 352. Instead, the “proper inquiry [was] . . . whether the CHIPS proceeding was at an advanced stage.” *Id.*

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“[t]he lapse of time between [the foster-care placement, the CHIPS proceeding, and the tribe’s motion] makes evident the strength of the argument that the CHIPS proceeding was at an advanced stage,”<sup>174</sup> it still chose to affirm the district court’s decision to transfer jurisdiction.<sup>175</sup>

The appellate court ruled that even if the lower court found the CHIPS proceeding had reached an advanced stage, this was not an *absolute* prohibition against the tribe’s request to transfer jurisdiction.<sup>176</sup> “ICWA does not mandate, and the Guidelines do not suggest, denial of a petition to transfer jurisdiction even when good cause for denial exists.”<sup>177</sup> The court emphasized the compulsory nature of “shall” in ICWA’s section 1911(b) transfer provision,<sup>178</sup> juxtaposing it against the permissive “may” present in the Guidelines, as to whether the advanced nature of a proceeding necessarily forced a finding of good cause and subsequent denial of the transfer request.<sup>179</sup>

In essence, the appellate court first used the de novo standard of review to find the CHIPS proceeding properly within the scope of ICWA and then applied a lens of interpretive narrowness. As a result, the court held that the advanced nature of a proceeding, despite qualifying as a “good cause” exception, did not *expressly* bar

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Thus, confusion as to what type of proceedings fell within ICWA’s coverage could easily explain the timing of the tribe’s petition to transfer jurisdiction—late in terms of the on-going CHIPS proceeding, but timely in light of the impending county action to terminate parental rights—a proceeding clearly covered under ICWA. *See* 25 U.S.C. § 1911(b) (2000). Although the county filed a petition for permanent placement following the request to transfer jurisdiction, it was withdrawn at the November 30, 2006 hearing on the tribe’s petition. *R.M.B.*, 735 N.W.2d at 350.

174. *R.M.B.*, 735 N.W.2d at 352 n.7.

175. *Id.* at 353.

176. *Id.*

177. *Id.* *See also In re Welfare of Children of B.W.*, No. A07-612, 2007 WL 2417331, at \*2 (Minn. Ct. App. Aug. 28, 2007) (“Appellants’ argument focuses exclusively on demonstrating that good cause to deny the transfer exists in this case. But appellants’ premise is flawed . . . [ICWA] does not mandate . . . denial of a petition to transfer even when good cause for denial exists.”).

178. *R.M.B.*, 735 N.W.2d at 353 (“Specifically, ICWA provides that, ‘in the absence of good cause to the contrary, [the district court] *shall* transfer . . . jurisdiction [to] the tribe.’”) (modification in original).

179. *Id.* (“Similarly, the BIA guidelines provide that ‘[g]ood cause not to transfer the proceeding *may* exist if . . . [t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.’”) (modification in original).

a transfer to tribal court under the Act; therefore, the matter should be transferred.

Finally, the court also reiterated “that ‘ICWA and Minnesota law recognize concurrent but *presumptively tribal jurisdiction* allowing the child’s tribe to intervene “at any point” in the state court proceedings.’”<sup>180</sup>

Thus, notwithstanding the fact that the advanced nature of the CHIPS proceeding sufficiently placed the matter within one of ICWA’s “good cause” exceptions, the court’s willingness to narrowly construe the statute and interpretive Guidelines properly effectuated the congressionally-espoused preference for tribal court jurisdiction.

## VI. CONCLUSION

ICWA is a remedial statute. Through its enactment, Congress sought to assuage the cultural erosion and abuse of native tribes through state systems that were fundamentally incongruent with and ignorant of social workings within Indian tribes.<sup>181</sup>

The procedural mechanisms of presumptive tribal court jurisdiction and intervention recognize a tribe’s critical interest in the welfare of its children.<sup>182</sup> As *In re Welfare of Children of R.M.B.* demonstrates, methods of construction can help avoid the risk of inappropriate “good cause” determinations and facilitate resolution of the hard cases like *In re Welfare of Child of T.T.B.* Pairing the de novo standard of review with a lens of interpretive narrowness effectively advances the aims of ICWA by critically reviewing the application of state law and further championing the

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180. *Id.* at 353–54 (emphasis in original) (quoting *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 305 (Minn. 2006)). Of note, the appellate court pointed out that tribal values may play a role in the timing of a petition to transfer jurisdiction:

[A]lthough good cause to deny a transfer petition may exist if the “petition is inexcusably filed when the proceeding is already at an advanced stage,” a district court must recognize that “fundamental tribal values may guide the timing by a tribe to petition for a transfer” of jurisdiction to the tribal court.

*Id.* at 354 (quoting MN Tribal Agreement, *supra* note 5, at 6–7).

181. See ICWA, 25 U.S.C. § 1901(5) (2000); see also Atwood, *supra* note 23, at 654 (“The central role of the federal and state governments in the decimation of Indian tribes and Indian families is an undisputed historical fact, and the continued impact of the policies of termination is starkly evident in the grave socioeconomic problems facing many Indian populations today.”).

182. See *supra* notes 35–36 and accompanying text.

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overwhelmingly accepted idea that tribal courts are most often the best forum for Indian child welfare proceedings.<sup>183</sup>

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183. See *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 309 (Minn. 2006); see also *In re Welfare of S.N.R.*, 617 N.W.2d 77, 83 (Minn. Ct. App. 2000) (quoting The Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,591, 67,584–85 (1979) (“The ICWA is to be ‘liberally construed in favor of a result that is consistent’ with ‘deferring to tribal judgment’ and furthering Congressional purposes in passing the statute.”)); *In re Welfare of B.W.*, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990) (“[I]t is essential to the purposes of the ICWA to allow appropriate tribal authorities to determine these matters according to tribal law, customs and mores best known to them. Since . . . state social service agencies and state courts are part of the problem, transfer of jurisdiction . . . is mandated by the ICWA whenever possible.”).