Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings

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Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings
This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary – Indian Affairs by 209 DM 8.

There was published in the Federal Register, vol. 44, No. 70/Monday, April 23, 1979 a notice entitled *Recommended Guidelines for State Courts-Indian Child Custody Proceedings*.

This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq. A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administration Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. , 432 U.S. 416, 424-425 (1977) *Batterton v. Francis*

In other words, when the Department writes rules needed to carry out responsibilities congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for resumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092. Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. rep. No. 95-597, 95 Cong., 1 Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines. Some commenters asserted that congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to

all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step. Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act.

Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances. The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department’s interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act. In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

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A. Policy

A1. Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and nay state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

A2. In any child custody proceedings where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a). When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b) (i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

i. Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

a. Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

i. Any party to the case, Indian tribe Indian organization or public or private agency informs the court that the child is and Indian child.

ii. Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

iii. The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

iv. The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
v. An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.2. Determination of Indian Child's Tribe

a. Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.
b. The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.
c. In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:
i. length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
ii. child's participation in activities of each tribe;
iii. child's fluency in the language of each tribe;
iv. whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
v. residence on or near one of the tribe's reservation by the child's relatives;
vi. tribal membership of custodial parent or Indian custodian;
vii. interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and
viii. the child's self identification.
a. The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.
b. If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even thought the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.3. Determination That Placement Is Covered by the Act

a. Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.
b. Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.
c. Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.4. Determination of Jurisdiction

a. In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.
b. If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Sections B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.5. Notice Requirements

a. In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.
b. In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

i. The name of the Indian child.
ii. His or her tribal affiliation.
iii. A copy of the petition, complaint or other document by which the proceeding was initiated.
iv. The name of the petitioner and the name and address of the petitioner's attorney.
v. A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

vi. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.
vii. A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.
viii. The location, mailing address and telephone number of the court.
ix. A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.
x. The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.
xi. A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

b. The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.
c. The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.
d. Notice may be personally served on any person entitled to receive notice in lieu of mail service.
e. If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian in not already a party) to intervene in the proceedings.
f. If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.6. Time Limits and Extensions

a. A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an

additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

b. The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the parent or Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(vi) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

c. The time limits listed in this section are minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

B.7. Emergency Removal of an Indian Child

a. Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

b. When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody

matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

b. If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case whichever is earlier.

c. Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

B.8. Improper Removal From Custody

a. If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

b. If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.2. Criteria and Procedures for Ruling on 25 U.S. C. § 1911(b) Transfer Petitions

a. Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to

such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

b. If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.

C.3. Determination of Good Cause to the Contrary

a. Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

b. Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

(i) 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.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

b. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

c. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.4. Tribal Court Declination of Transfer

a. A tribal court to which transfer is requested may decline to accept such transfer.

b. Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

c. Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

d. If the case is transferred the state court shall provide the tribal court with all available information on the case.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.3. Standards of Evidence

a. The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child/s continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

b. The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

c. Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the casual relationship between the conditions that exist and the damage that is likely to result.

D.4. Qualified Expert Witnesses

a. Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak

specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or motional damage to the child.

b. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

c. The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.2. Content of Consent Document

a. The consent document shall contain the name and birthday of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

b. A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through who the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

c. A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.4. Withdrawal of Consent to Adoption
A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any pre-adoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

F. Dispositions

F.1. Adoptive Placements

a. In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

(i) A member of the Indian child's extended family;
(ii) Other members of the Indian child's tribe; or
(iii) Other Indian families, including families of single parents.

b. The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

c. Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.2. Foster Care or Pre-adoptive Placements
In any foster care or pre-adoptive placement of an Indian child:

a. The child must be placed in the least restrictive setting which

(i) most approximates a family;
(ii) in which his or her special needs may be met; and
(iii) which is in reasonable proximity to his or her home

b. Preference must be given in the following order, absent good cause to the contrary, to 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, whether on or off the reservation;
(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 met the child's needs.

c. The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.3. Good Cause To Modify Preferences

a. For purposes of foster care, pre-adoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above 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.

b. The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (a) shall be on the party urging that the preferences not be followed.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

a. Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of parental rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such content was obtained by fraud or duress.

b. Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.2. Adult Adoptee Rights

a. Upon application by an Indian individual who has reached the age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

b. The section applies regardless of whether or not the original adoption was subject to the provision of the Act.

c. Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where

necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.3. Notice of Change in Child's Status

a. Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

b. A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of evocation.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, pre-adoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

Forrest J. Gerrard,
Assistant Secretary, Indian Affairs
November 16, 1979.