Indian Child Welfare: A Jurisdictional Approach

Mack T. Jones

The future of the Indian[1] in American society is dependent upon whether the reservation will continue to be the center of Indian tribal culture. Prior to 1968, the United States followed a policy of assimilation with regard to Indians,[2] submerging the distinct identity and culture of tribal Indians in the melting pot of American society.[3] The battle to preserve Indian society and culture in its natural state has necessarily involved Indian children; for the children of any people are the bearers of culture from one generation to the next. At present, Indian children are being placed in foster care, adoptive care, special institutions, and federal boarding schools in a far greater proportion than their non-Indian counterparts.[4] Most of the Indian children separated from their natural parents are placed in some form of care where supervision and control is exercised by a non-Indian.[5] As a result, Indian

1. The Indian Child Welfare Act of 1978 § 3(3)-(4), 25 U.S.C. § 1903(3)-(4) (West Supp. 1979) provides:

> "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43.
>
> "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

See generally U.S. SOLICITOR FOR THE DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 4-12 (1940).

2. This was the enunciated policy of the United States under Act of August 15, 1953, Pub. L. No. 83-280 ch. 505, 67 Stat. 588-90 (current version at 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976)). The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1976), reversed the policy of assimilation. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 549-51 (1975). Section 108 of the Indian Child Welfare Act of 1978, 25 U.S.C.A. § 1918 (West Supp. 1979) allows an Indian tribe which became subject to state jurisdiction through Public Law 280 to reassume child custody jurisdiction.

3. AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TRIBAL GOVERNMENT (Comm. Print. 1976). Commenting upon the assimilation policy followed by the United States until 1968, the Commission stated:

> Almost without exception, past policy of the United States towards Indians viewed them as a transient phenomenon. Indians were considered a temporary problem that eventually would solve itself by Indians being absorbed into the melting pot of America. . . . But this is clearly no longer true. What has become apparent in the last decade is the realization that Indians and Indian tribes are not going to disappear.

Id. at 292.

4. AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE AND TRIBAL JURISDICTION 179 (Comm. Print. 1976) [hereinafter cited as JURISDICTION REPORT].

5. *Id.*

customs and traditions, which are normally passed by tribal society to the child during the child's formative years, are absent from the child's upbringing. Thus, the placement of Indian children in the non-Indian environment assimilates the children into larger American society and limits the future of reservations as Indian cultural centers.[6]

In the past decade more and more tribes have sought to manage their own destiny by establishing the structure necessary for self-government.[7] As a consequence, tribal courts have attempted to assert jurisdiction over child custody procedures.[8] If tribal self-government has any meaning it must include the right, within the reservation and membership of the tribe, to provide for the care of the young.[9] Nevertheless, state courts have asserted jurisdiction over Indian children in some instances,[10] and have "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[11] Those cases in which the state court has asserted jurisdiction have usually involved a non-Indian

---

6. *Id.* at 79-81.

7. This has been done through the power of self-government confirmed by the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1976). *See* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 215-16.

8. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 387 (1976); Wakefield v. Little Light, 276 Md. 333, 344, 347 A.2d 228, 235 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 652-53, 555 P.2d 1334, 1336 (1976). Throughout this Note terms will be given the same meaning as they are given in the Indian Child Welfare Act of 1978, 25 U.S.C.A. §§ 1901-1963 (West Supp. 1979). The Act's definition of child custody proceeding is the following:

> (1) "child custody proceeding" shall mean and include
>
> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
>
> Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

Id. § 1903. Tribal court is defined as follows:

> (12) "tribal court" means a court . . . which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Id.

9. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 (W.D. Mich. 1973). *See* United States v. Quiver, 241 U.S. 602, 603-04 (1916) (the Court held that congressional policy allows the tribal authority to regulate the domestic relations of the Indians).

10. *See, e.g.*, Carle v. Carle, 503 P.2d 1050, 1052 (Alaska 1972); *In re* Duryea, 115 Ariz. 86, 88, 563 P.2d 885, 887 (1977); *In re* Cantrell, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972); *In re* Greybull, 23 Or. App. 674, 677-78, 543 P.2d 1079, 1080-81 (1975).

11. 25 U.S.C.A. § 1901(5) (West Supp. 1979).

party with physical control of an Indian child.[12] The jurisdiction of the state court is based upon either the presence[13] of the child, or his domicile[14] within the state. Thus, in those custody situations where a non-Indian is involved a difficult question is raised: Should the state court determine custody of Indian children, and if so by what standard—presence, domicile, or another—should jurisdiction be vested?

A second problem, which is procedural in nature, is presented in the Indian child welfare context. Because of tribal sovereignty the judgments of state courts concerning Indian custody have not always been enforceable on the reservations.[15] Conversely, tribal court judgments, until recently, have not always been enforceable in state courts because the full faith and credit clause was determined to be inapplicable to Indian tribes.[16] Tribal sovereignty, and the absence of full faith and credit make Indian child custody judgments generally enforceable only within the territorial jurisdiction of the issuing court.[17]

The Indian Child Welfare Act of 1978[18] offers a solution to these dual problems in Indian child custody—the jurisdictional division between state and tribal courts, and the enforceability of judgments of one court system in another. The Act provides generally that the Indian tribes shall have exclusive jurisdiction over Indian child custody proceedings where the child is domiciled on the reservation,[19] and that the tribal court shall have exclusive jurisdiction over all proceedings relating to foster care placement of, or termination of parental rights to, a nondomiciliary Indian child,[20] unless there is "good cause to the con-

12. *See, e.g., In re* Duryea, 115 Ariz. 86, 87, 563 P.2d 885, 886 (1977); *In re* Cantrell, 159 Mont. 66, 68, 71, 495 P.2d 179, 180, 182 (1972); *In re* Adoption of Doe, 89 N.M. 606, 614, 555 P.2d 906, 914 (1976).

13. Presence is defined as being "physically in the county [or state] and off the reservation." *In re* Cantrell, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972).

14. The rule of domicile requires two elements: "intent and physical presence, which must concur in time." Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973). A minor child's domicile is that of his parents; if the child's parents are separated, the domicile is that of the parent with which the child resides. *Id.*

15. *See, e.g.*, United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940); Adams v. Murphy, 165 F. 304, 308-09 (8th Cir. 1908); Annis v. Dewey County Bank, 335 F. Supp. 133, 135-36 (D.S.D. 1971).

16. Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 197, 571 P.2d 689, 694 (1977); *In re* Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962); Begay v. Miller, 70 Ariz. 380, 386, 222 P.2d 624, 628 (1950). *Contra*, Jim v. CIT Financial Serv. Corp., 87 N.M. 362, 362, 533 P.2d 751, 752 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 663, 555 P.2d 1334, 1342 (1976). *See* U.S. CONST. art. IV, § 1; Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 139-41 (1977).

17. *See* JURISDICTION REPORT, *supra* note 4, at 87-88, U.S. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 214-15 (Comm. Print. 1976).

18. 25 U.S.C.A. §§ 1901-1963 (West Supp. 1979). For a more complete discussion see text & notes 133-76 *infra*.

19. 25 U.S.C.A. § 1911(a) (West Supp. 1979).

20. To be considered an "Indian child" a person must either be a member of a tribe or be eligible for membership and be the biological child of a tribal member. *Id.* § 1903(4). *See* note 1 *supra*. This definition minimizes the problems of forcing a nondomiciliary into tribal court. *See* text & notes 153-56 *infra*.

trary."[21] Additionally, the Act provides that an Indian tribe's action respecting child custody proceedings is entitled to full faith and credit by other Indian tribes, states, and the United States and its possessions and territories.[22]

This Note will address the jurisdictional and the procedural problems confronted by tribal and state courts in determining and enforcing child custody adjudications. Initially, the Note will elaborate upon the extent of the Indian child-welfare problem. Next, the law and policy behind the allocation of child custody jurisdiction between tribal and state courts prior to statutory reform will be discussed. The jurisdictional standards expressed in the Indian Child Welfare Act of 1978 will then be critically analyzed to determine whether the standards sufficiently meet the jurisdictional problem without raising new and even more perplexing questions.

SCOPE OF THE PROBLEM

It is evident from a statistical survey[23] that the Indian child-welfare problem is so massive as to be deemed a crisis.[24] The study details the problem and concludes that "the disparity in placement rates for the Indian and non-Indian children is shocking and cries out for sweeping reform at all levels of government."[25] For example, in Arizona, Indian children are separated from their families to be placed in non-Indian care at a rate 27.3 times greater than non-Indian children.[26] Two out of every nine Indian children in Arizona are living in a non-Indian environment.[27]

In a majority of the situations in which an Indian child is separated from his family the separation is the result of the conflict between Indian and non-Indian social and legal systems.[28] This conflict is evi-

21. *Id.* § 1911(b).
22. *Id.* § 1911(d).
23. JURISDICTION REPORT, *supra* note 4, at 177-242.
24. *Id.* at 87; Comment, *American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUMAN RIGHTS L. REV. 529, 530 (1975).
25. JURISDICTION REPORT, *supra* note 4, at 179.
26. *Id.* at 185.
27. *Id.*
28. *Id.* at 180. The American Indian Policy Review Commission [AIPRC] concludes that the separation of Indian children frequently occurs in the following situations:

(1) The natural parent does not understand the nature of the documents or proceedings involved;
(2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights;
(3) the public officials involved are unfamiliar with, and often disdainful of, Indian culture and society;
(4) the conditions that led to the separation are not demonstrably harmful or are remediable or transitory in character; and
(5) responsible tribal authorities and Indian community agencies are not consulted about or even informed of the actions.

Id.

denced by the application of dependency and neglect statutes[29] by state and federal courts. For example, in the case of *In re Cantrell*,[30] an Indian child residing on the Fort Peck Indian Reservation in Montana with his mother was taken from the reservation by the putative father with the purpose of going to Idaho.[31] Three days later, the Valley County Welfare Department in Montana removed the child from the father's custody and placed it in a foster home.[32] As a result of a judicial order declaring the child "dependent and neglected" within the meaning of the Montana statute, the child was placed in the care and control of a Montana county welfare department whose officials were authorized to assent to the child's adoption.[33] The mother appealed.[34] The trial court and the appellate court found the child to be "neglected and dependent" on the basis of the child's neglected cleft palate and the unwed mother's "dismal record of arrests, living with men [while] unmarried, and general inattention."[35]

The important aspect of *In re Cantrell* is not the Montana court's determination of neglect, but the fact that the tribal court of the Fort Peck Indian Reservation had previously determined that the child was neglected and returned the child to the control of the mother approximately one year before the county welfare department intervened.[36] The child continued to be within the jurisdiction of the tribal court, but the tribal court took no subsequent action.[37] Apparently, the tribal court believed that the child was being properly cared for by the mother after the child's return. By determining that the Indian child was neglected, the *Cantrell* court acted as the final arbiter of Indian parental fitness. Consequently, the tribal court's authority was undermined by the state proceeding, and Indian parents would be justified in believing that it was necessary to conform to the state's notion of parental fitness, and not the tribe's.

It has long been recognized that the standards of non-Indian society relating to parental fitness are different from those of Indian society.[38] Nevertheless, because of their reliance on the opinion of a social

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-532 (1974); MICH. COMP. LAWS. ANN. § 701.01 (1974); N.M. STAT. ANN. § 40-7-10 (1978).
30. 159 Mont. 66, 495 P.2d 179 (1972).
31. *Id.* at 70, 495 P.2d at 181.
32. *Id.*
33. *Id.* at 67-68, 495 P.2d at 181.
34. *Id.* at 67, 495 P.2d at 180.
35. *Id.* at 70, 495 P.2d at 182.
36. *Id.* at 70, 495 P.2d at 181.
37. *Id.*
38. Carle v. Carle, 503 P.2d 1050, 1054-55 (Alaska 1972); Arizona State Dep't of Economic Security v. Mahoney, 24 Ariz. App. 534, 536, 540 P.2d 153, 155 (1975); *In re* Adoption of Doe, 89 N.M. 606, 613, 555 P.2d, 906, 914-15 (Ct. App. 1976). *See* 25 U.S.C.A. § 1901(5) (West Supp. 1979).

worker who is generally unfamiliar, and often disdainful of Indian culture,[39] state courts have continued to apply Anglo-American parental fitness standards in situations where Indian culture is implicated.[40] By applying Anglo-American standards to Indian culture, which places reliance on an extended family for the upbringing of the child,[41] the parent's limited supervision may be interpreted not as a different type of child-rearing, but as an abdication of responsibility by the parent.[42] It has been observed that "the tribal court's insight into tribal cultural values and way of life . . . make it the best forum" for a determination of child custody regardless of who legally has jurisdiction.[43]

TRADITIONAL NOTIONS OF CHILD CUSTODY JURISDICTION

The jurisdictional division between state and tribal courts of Indian child welfare matters has been the subject of confusion. This confusion has resulted because courts have balanced the state's and the tribe's interest in the welfare of the Indian child differently.[44] The state's interest in the welfare of the child is great,[45] but control of child welfare is a significant vestige of tribal self-government.[46] The jurisdictional dispute between the state and tribe involves the fundamental role of the tribe in modern society, with the child caught in the middle. Both the state and tribe have legitimate interests in the welfare of the child, but confusion in the jurisdictional area is to his or her detriment.[47]

Tribal authorities have had jurisdiction in child custody disputes when the Indian child resides or is domiciled on the reservation.[48] In

39. JURISDICTION REPORT, *supra* note 4, at 79.

40. *See, e.g.*, Carle v. Carle, 503 P.2d 1050, 1054 (Alaska 1972); *In re* Duryea, 115 Ariz. 86, 89, 563 P.2d 885, 888 (1977) (concurring opinion); *In re* Cantrell, 159 Mont. 66, 70, 495 P.2d 179, 182 (1972); *In re* Adoption of Doe, 89 N.M. 606, 613, 555 P.2d 906, 913 (Ct. App. 1976). *See also Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs, United States Senate*, 93d Cong., 2d Sess. 17-21 (April 8, 1974); Comment, *supra* note 24, at 531.

41. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 726 (W.D. Mich. 1973).

42. *See In re* Cantrell, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972); *In re* Adoption of Doe, 89 N.M. 606, 615, 555 P.2d 906, 915 (Ct. App. 1976).

43. *In re* Duryea, 115 Ariz. 86, 89, 563 P.2d 885, 888 (1977) (concurring opinion).

44. *Compare* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 (W.D. Mich. 1973) *and* Wakefield v. Little Light, 276 Md. 333, 342-44, 347 A.2d 228, 234 (1975) *with In re* Duryea, 115 Ariz. 86, 88, 562 P.2d 885, 887 (1977) *and In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976).

45. *In re* Duryea, 115 Ariz. 86, 88, 562 P.2d 885, 887 (1977); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976).

46. Wakefield v. Little Light, 276 Md. 333, 343, 347 A.2d 228, 234 (1975).

47. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31 (1973); Reese, *Obstacles to the Psychological Development of Indian Children*, 9 FAM. L.Q. 573, 579-80 (1975).

48. The Navajo Tribal Code provides that the Navajo will have original jurisdiction over "[a]ll cases involving the domestic relations of Indians, such as divorce or adoption matters." NAVAJO TRIBAL CODE § 7-253(3) (1977).

Fisher v. District Court[49] the United States Supreme Court held that jurisdiction with regard to adoption matters is exclusive as to the tribal courts when the natural parents, prospective adoptive parents, and child are Indian and all reside on the reservation.[50] The Court noted that the Tribal Court of the Northern Cheyenne Tribe had found that Alva Fisher, an enrolled tribal member residing on the reservation, had neglected her child, and the Tribal Court awarded temporary custody to Josephine Runsabove, another tribal member.[51] Subsequently the tribal court reinvested temporary custody in Alva Fisher.[52] Before the entry of the new custody order, however, Josephine Runsabove initiated an adoption proceeding in a Montana court.[53] After the Montana Supreme Court held that the trial court could entertain the adoption proceeding,[54] Fisher appealed.[55] The United States Supreme Court stated that state court jurisdiction would interfere with the powers of self-government conferred upon the Northern Cheyenne tribe.[56] This interference would create a substantial risk of conflicting adjudications, thereby causing a decline in the authority of the tribal court.[57] The Court concluded, therefore, that if the Indian child is domiciled on the reservation, the tribal court has jurisdiction.[58]

The holding of *Fisher* has been extended by some courts to cases where the litigants are both non-Indian and Indian.[59] Thus, the tribal courts have generally had jurisdiction over child custody proceedings where the Indian child resided or was domiciled on the reservation, but two states have asserted jurisdiction when the Indian child is present in the state and non-Indian parties are involved in child custody proceedings.

Former Jurisdictional Standards: Presence and Domicile

Prior to the enactment of the Indian Child Welfare Act of 1978, two state courts asserted jurisdiction in Indian child welfare disputes based on the mere presence of the child in the state regardless of his true domicile. Arizona and Montana held that the mere presence of

49. 424 U.S. 382 (1976).
50. *Id.* at 389.
51. *Id.* at 383.
52. *Id.*
53. *Id.*
54. Firecrow v. District Court, 167 Mont. 139, 143, 536 P.2d 190, 193 (1975), *rev'd sub nom.*, Fisher v. District Court, 424 U.S. 382 (1976).
55. 424 U.S. at 383.
56. *Id.* at 387.
57. *Id.* at 389.
58. *Id.*
59. *See, e.g.*, Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 349-51, 347 A.2d 228, 237-38 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 661-62, 555 P.2d 1334, 1341 (1976).

the child within the state and off the reservation was sufficient to confer jurisdiction upon the state court.[60] Other state courts, believing that "child-rearing is an essential tribal relation,"[61] have refused to assert jurisdiction in child welfare cases unless the Indian child is domiciled off the reservation.[62]

In *In re Duryea*,[63] the Arizona Supreme Court determined that the state could exercise jurisdiction over proceedings to terminate the parent-child relationship of reservation Indians.[64] The Indian children and their parents were domiciled on Indian reservations, but the children had been placed in foster care off the reservation.[65] Noting that the Arizona dependency and neglect statute allowed jurisdiction when the child was physically present within the state (and off the reservation), the court went on to consider the children's domicile.[66] Relying on *In re Cantrell*,[67] the *Duryea* court determined cursorily that the children were not domiciled on the reservation because they had been "voluntarily and purposely removed [from the reservation] and placed with petitioners, off the reservation. The conduct of the parents in leaving the children took place completely off the reservation."[68] The holding, although couched in domicile terms,[69] is actually based on presence, as there is no showing that the parents established a new domicile within the state and off the reservation.[70] The domicile of a

60. Cobell v. Cobell, 503 F.2d 790, 794-95 (9th Cir. 1974); *In re* Duryea, 115 Ariz. 86, 87, 563 P.2d 885, 886 (1977); *In re* Cantrell, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972). See text & notes 30-37 *supra*. The fact that Montana and Arizona were the only states that used the presence jurisdictional standard was significant, as these states accounted for approximately 17% of the Indian children in foster and adoptive care, and 22% of the Indian child population within the continental United States in 1976. *See* JURISDICTION REPORT, *supra* note 4, at 180-81.

61. Wakefield v. Little Light, 276 Md. 333, 343, 347 A.2d 228, 234 (1975).

62. *Id.* at 351, 347 A.2d at 238; Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 733 (W.D. Mich. 1973); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976); *In re* Greybull, 23 Or. App. 674, 677-78, 543 P.2d 1079, 1080-81 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 661, 555 P.2d 1334, 1341 (1976).

63. 115 Ariz. 86, 563 P.2d 885 (1977).

64. *Id.* at 88, 563 P.2d at 887.

65. *Id.* at 87, 563 P.2d at 886. Stephen Lupe, a child involved in the action, had been placed by his mother, who resided on the reservation, in the foster care of non-Indians who lived off the White Mountain Apache Reservation. *Id.* Shirley Joe, another child involved in the litigation, had been placed in foster care after her parents had been sent to prison off the reservation. *Id.* After Shirley Joe's parents were released from prison, they took the child back with them to the reservation, but later returned her to the foster home. *Id.* Lupe's mother visited her child only once after he had been placed in foster care. *Id.* The prospective adoptive parents brought an action for termination of the parent-child relationship pursuant to the Arizona dependency and neglect statute. *Id.* See text & note 66 *infra*.

66. 115 Ariz. at 87, 563 P.2d at 886. ARIZ. REV. STAT. ANN. § 8-532 (1974) provides:

> A. The juvenile court shall have exclusive original jurisdiction over petitions to terminate the parent-child relationship when the child involved is present in the state.
>
> B. The juvenile court shall continue to have exclusive original jurisdiction when the juvenile is in the legal custody of the juvenile court although the physical placement of the child is in another state pursuant to court order.

67. 159 Mont. 66, 71, 495 P.2d 179, 182 (1972). See discussion at text & notes 31-37 *supra*.

68. 115 Ariz. at 88, 563 P.2d at 887.

69. *Id.*

70. It is generally held that a domicile is not abandoned until a new one is established. Wis-

child remains that of his parents until the parent-child relationship is severed.[71] Thus, *Duryea* is arguably a presence case because the domicile of the children had remained that of the parents.[72]

The rationale of the presence standard is that the state has a "very substantial interest in all the children within its boundaries."[73] The key question in child custody cases, is to determine who is best qualified to promote the child's welfare. Courts that used the presence standard believed that the court having physical access to the child could best protect and promote the child's welfare.[74] However valid such a rationale in child custody cases may generally be, it ignores the inherent bias of non-Indian society against Indian culture, and fails to protect the Indians' right of self-government.[75]

Domicile, an alternative standard, has been applied by state courts to insure that "the Indian tribe is afforded significant protection from losing its essential rights of child-rearing and maintenance of tribal

---

consin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971). In *Duryea*, the court determined that the domicile of the children had changed, even though the parents retained a reservation domicile. 115 Ariz. at 88, 563 P.2d at 887.

71. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 349-50, 347 A.2d 228, 238 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 660, 555 P.2d 1334, 1340 (1976). See note 14 *supra*.

72. The Arizona Supreme Court and non-Indian custodians of Indian children in other cases have placed great emphasis on DeCoteau v. District County Court, 420 U.S. 425 (1975), for the principle that jurisdiction can be maintained when the child is physically present within the state. *See In re* Matter of Duryea, 115 Ariz. 86, 88, 563 P.2d 885, 887 (1977); Wakefield v. Little Light, 276 Md. 333, 351, 347 A.2d 228, 239 (1975). In *DeCoteau*, the Supreme Court held that in certain situations state courts may assert jurisdiction over Indian children. 420 U.S. at 449. There the state, through dependency proceedings, separated a child from her Indian mother. *Id.* at 428-29. The Court reasoned that because the woman was living on land that was no longer a part of the Indian reservation, assertion of state jurisdiction was valid. *Id.* at 429 n.3.

Reliance by the Arizona court upon *DeCoteau* as precedent for its assertion of jurisdiction where the Indian child is physically present within the state is misplaced. Although the language of *DeCoteau* is favorable, the Court held "that the 1891 Act terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction over conduct on non-Indian lands within the 1867 reservation borders." *Id.* at 427-28. The principal question considered was not the jurisdictional standards applicable to child custody, but the existence of the reservation. *Id.* at 427. The land on which the Indian woman and her children lived was deemed not to be part of an Indian reservation. *Id.* at 427-28. It necessarily follows that, knowingly or unknowingly, the woman and her children were domiciled off the reservation and within the state. *Id. See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18, Comment h (1969). *DeCoteau* does not imply that mere physical presence of the child in the state is sufficient for state jurisdiction, but that where an Indian child is domiciled within the state, the state has jurisdiction concerning child custody matters.

This interpretation of *DeCoteau* squares with the language in *Fisher v. District Court*, 424 U.S. 382 (1976): "In a proceeding such as an adoption, which determines the permanent status of litigants, it is appropriate to predicate jurisdiction on the residence of the litigants rather than the location of particular incidents of marginal relevance. . . ." *Id.* at 389-90 n.14.

73. *In re* Duryea, 115 Ariz. 86, 88, 563 P.2d 885, 887 (1977).

74. *See* Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925). Justice Cardozo in *Finlay* stated: "The jurisdiction of a state to regulate the custody of infants *found within its territory* does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless." *Id.* at 431, 148 N.E. at 625 (emphasis added). *See also* Note, *Jurisdictional Bases of Custody Decrees*, 53 HARV. L. REV. 1024, 1025 (1940).

75. 25 U.S.C.A. § 1901(5) (West Supp. 1979). See text & notes 133-36 *infra*.

identity."[76] The domicile concept protects the tribe's interest in the Indian child if the child has maintained his permanent residence on the reservation. The domicile concept thus reflects the rationale that tribal ties will not be broken by temporary absences from the reservation.

In *Wisconsin Potowatomies v. Houston*,[77] the court applied the domicile concept in making a determination, as between the plaintiff tribe and the state of Michigan, of the right and power to provide for permanent custody of three orphaned children, even though the court recognized that the state of Michigan had jurisdiction from its presence statute.[78] The court held jurisdiction could be asserted only where the Indian child is domiciled off the reservation, because state jurisdiction over children domiciled on the reservation would present a threat to the Indians' right of tribal sovereignty.[79]

Both the presence and domicile standards provided methods for delineating state and tribal jurisdiction. Nevertheless, neither method sufficiently considered the tribe's interest in self-government, nor did these methods fully appreciate significant cultural differences.[80]

The Problems with the Presence and Domicile Standards

The concept of presence was inadequate in that jurisdiction was dependent upon the location of the child at a single instant in time, that instant being the moment the child welfare matter came before the court.[81] Presence jurisdiction allowed the state to intrude into the Indian parent-child relationship without the slightest regard for the different cultural views of parental responsibility, or for the possible harm to Indian self-government. Furthermore, presence allowed forum shopping and consequently the possibility of contradictory adjudications. In *In re Cantrell*,[82] the trial court was held to have validly asserted jurisdiction where the Indian minor was on a trip off the

76. Wakefield v. Little Light, 276 Md. 333, 350, 347 A.2d 228, 238 (1975).

77. 393 F. Supp. 719 (W.D. Mich. 1973).

78. *Id.* at 732. *See* MICH. STAT. ANN. § 25-383 (1974).

79. 393 F. Supp. at 730. The court stated:

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity. . . . It would seem to the court that while physical presence within or without the reservation may for most purposes be sufficient to dispose of the issues of jurisdiction, it is not sufficient to resolve the issues presented here. . . . These issues go deeper and ought not to be controlled solely by either the situs of the parents' death or by the situs of the children's presence when they were taken into initial custody by the probate court.

Id. at 730-31. *See also* Wakefield v. Little Light, 276 Md. 333, 339, 347 A.2d 228, 234 (1975); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976); *In re* Greybull, 23 Or. App. 674, 677, 543 P.2d 1079, 1080 (1975).

80. *See* 25 U.S.C.A. § 1901(5) (West Supp. 1979).

81. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 731 (W.D. Mich. 1973); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (1976).

82. 159 Mont. 66, 495 P.2d 179 (1972).

reservation with his father.[83] The Montana Supreme Court allowed state court jurisdiction to determine the mother's parental fitness even though the tribal court had already considered her parental fitness.[84] The state court eventually determined the mother unfit in direct opposition to the tribal court's decision.[85] The non-Indian plaintiff was allowed to forum shop which increased the chance of a favorable adjudication.[86]

The continued exercise of the presence doctrine left open the possibility of state court jurisdiction whenever the Indian child was physically present in the state. The rationale behind the presence approach—easy access to a forum[87]—had little practical benefit in the child welfare situation. The goal should not be to find an easily accessible forum, but to determine the most appropriate. In only the most fortuitous of circumstances was this goal achieved by strict application of the presence concept.[88]

Domicile was an inherently more reasonable concept than presence, as it reflected that a child's tribal ties may be more important than his physical location at any moment.[89] Tribal ties, however, were sufficient to defeat state court jurisdiction only when the child or his custodial parents had the intent to reside permanently on the reservation.[90] The domicile concept thus acknowledged that the tribe's right of child-rearing exists, but only when the child was domiciled on the reserva-

83. *Id.* at 70-71, 495 P.2d at 181-82.

84. *Id.*

85. *Id.* See text & notes 30-37 *supra*; note 86 *infra*.

86. That the possibility of forum shopping is not confined to non-Indians is illustrated in Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, Sharp v. Cobell, 421 U.S. 999 (1975). The subject of the custody battle in *Cobell* was two children whose parents were enrolled members of the Blackfeet tribe. *Id.* at 791. In 1971, the Cobells were divorced in a Montana state court, with temporary custody of the children awarded to the father. *Id.* at 791-92. In 1972, the original state court modified the divorce decree transferring custody to the mother. *Id.* at 792. Pursuant to the revised decree the mother took the children to the Blackfeet reservation. *Id.* Nevertheless, on appeal the Montana Supreme Court reversed the revised order and reinvested temporary custody in the father, but the mother refused to surrender the children. *Id.* At this point, the Blackfeet Tribal Court intervened, issuing a temporary restraining order prohibiting the children's removal from the reservation. *Id.* The federal courts became involved in the custody dispute when the father filed a petition for and was granted a writ of habeas corpus securing the release of the children.

The Ninth Circuit, confronted with the arduous task of creating some coherence out of this situation, held that by voluntarily invoking state court jurisdiction for the divorce, the Cobells implicitly submitted the issue of child custody to the state. *Id.* at 795. Child custody jurisdiction, once vested, continues regardless of the physical location of the child. *Id.* In conclusion, the court held that the Blackfeet Tribal Court was without jurisdiction to determine custody of the Cobell children, and the father regained custody. *Id.*

87. See text & notes 73-74 *supra*.

88. Note, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Financial Approach*, 54 TEX. L. REV. 1008, 1014-15 (1976).

89. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 731 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 343, 347 A.2d 228, 234 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 661-62, 555 P.2d 1334, 1341 (1976).

90. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973).

tion.[91] To a limited extent, therefore, the domicile approach promoted tribal sovereignty and made the tribe's cultural standards the barometer by which the individual Indian's parent-child relationship was measured.[92] Indian families who moved back and forth between the reservation and neighboring communities were subject to the tribal court, with that court's presumed understanding of Indian family life, so long as the family maintained its domicile on the reservation.[93] Forum shopping problems were avoided, since the child could have only a single domicile at a given point in time.[94]

The policy underlying the domicile rule, protection of the tribe's right to regulate child-rearing, was at times defeated by the rule's application. The domicile concept implicitly recognized that the "essential" right of child-rearing exists only within the confines of the reservation.[95] If the child were domiciled within the state, jurisdiction would be exclusive to the state no matter how great the tribe's interest in the Indian child's welfare nor how close were the child's familial and social ties to the tribe.[96]

In *In re Adoption of Doe*,[97] these shortcomings are evident. The mother of an Indian child, who along with the child was domiciled in New Mexico put the child up for adoption.[98] Both the father and the maternal grandfather argued that they maintained close ties to the reservation, and on that ground objected to both the adoption, and New Mexico's assertion of jurisdiction.[99] Recognizing that the Navajo custom would confer custody to the grandfather,[100] the state court still allowed the adoption because in its view the child would be best served by placement with the non-Indian family.[101] The important aspect of *Doe* is that the geographical location of the child's domicile determined jurisdiction. Consequently, geographical location determined the standards used in ascertaining the child's best interest. The *Doe* court minimized the importance of ethnic heritage and customs,

91. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 731 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 339, 347 A.2d 228, 234 (1975); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976).

92. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973).

93. JURISDICTION REPORT, *supra* note 4, at 86.

94. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973). *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 19 (1971).

95. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 731 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 342-43, 347 A.2d 228, 234 (1975); *In re* Adoption of Doe, 89 N.M. 606, 616, 555 P.2d 906, 916 (Ct. App. 1976); *In re* Adoption of Buehl, 87 Wash. 2d 649, 661, 555 P.2d 1334, 1341 (1976).

96. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 732 (W.D. Mich. 1973).

97. 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976).

98. *Id.* at 610, 555 P.2d at 910.

99. *Id.* at 616, 620, 555 P.2d at 916, 920.

100. Navajo custom generally confers child custody to the maternal grandparents. *Id.* at 613, 555 P.2d at 913.

101. *Id.* at 621-22, 555 P.2d at 921-22.

whereas a tribal court would have likely considered the child's ethnic identity to be of great import in determining the best interests of the child.[102]

While strict adherence to the domicile standard helped prevent forum shopping and to a limited extent recognized the essential tribal right of child-rearing, the standard's analytical framework did not account for the child's ties to the tribe.[103] Indeed, both the presence and domicile concepts totally disregarded the ethnic identity of the child.[104] These standards perpetuated a feeling among the tribes of having little, if any, control over the future of their cultural identity.[105] When non-Indian courts placed Indian children in non-Indian environments, where the children became culturally disassociated from the tribe, this feeling of powerlessness was unavoidable.[106] The jurisdictional problems fostered by application of the presence and domicile standards were exacerbated by the fact that tribal court judgments were not generally entitled to full faith and credit by state courts.[107] To assure that a tribal court judgment would be enforced the tribe had to have the Indian child physically within its territorial jurisdiction.

FULL FAITH AND CREDIT

A problem related to the jurisdictional question has been whether a tribal or state court judgment will be given effect when a party seeks its enforcement in the parallel court system. When a party has sought to have a state court judgment enforced in tribal court, and the tribal court has refused, the party has generally been unable to force the tribal court to effectuate judgment because of tribal immunity.[108] Tribal immunity prohibits the assertion of claims against a recognized Indian tribe.[109] Conversely, state courts quite often have refused to give full faith and credit to judgments of Indian courts on the grounds that the enabling legislation[110] of the full faith and credit clause[111] does not so

102. *Id.* at 614-15, 555 P.2d at 914-15.
103. JURISDICTION REPORT, *supra* note 4, at 86.
104. *See* text & notes 60-94 *supra*.
105. JURISDICTION REPORT, *supra* note 4, at 79-80.
106. *Id.* at 86.
107. *Id.*
108. *See, e.g.*, United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940); Turner v. United States, 248 U.S. 354, 357-58 (1919); Adams v. Murphy, 165 F. 304, 308-09 (8th Cir. 1908); Thebo v. Choctaw Tribe, 66 F. 372, 375 (8th Cir. 1895).
109. *See* cases cited note 108 *supra*.
110. 28 U.S.C. § 1738 (1976) provides in pertinent part:
> [T]he Acts, records and judicial proceedings [of the legislature of any State, Territory or Possession of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

111. U.S. CONST., art. IV, § 1, cl. 2.

provide.[112]

The two leading cases reviewing the enabling act of the full faith and credit clause as it pertains to Indian tribes, *Jim v. CIT Financial Services Corp.*[113] and *Brown v. Babbitt Ford, Inc.*,[114] reach opposite conclusions on substantially identical facts. In *Jim* the plaintiff had bought a truck off the reservation, which was then repossessed on the reservation under the Uniform Commercial Code self-help provision.[115] Jim then brought suit in state court for damages because CIT Financial Services had not complied with the Navajo Tribal Code provision that requires either written consent by the individual or a tribal order before a party can repossess personal property on the reservation.[116] The trial court dismissed for failure to state a cause of action.[117] The Supreme Court of New Mexico reversed on the ground that Navajo nation's laws are entitled to full faith and credit, because the Navajo tribe is a territory within the meaning of the enabling act of the full faith and credit clause.[118] On essentially the same facts as *Jim*, the Arizona Supreme Court in *Brown* held that full faith and credit was not applicable to the Navajo tribe, because the tribe was not a territory within the meaning of the enabling act.[119]

Jim relied on language in an earlier Supreme Court case for the proposition that the word "territory" in 28 U.S.C. § 1738 includes the Indian tribes.[120] The *Brown* court agreed that the language was per-

112. *E.g.*, Annis v. Dewey County Bank, 335 F. Supp. 133, 136 (D.S.D. 1971); Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 197, 571 P.2d 689, 694 (Ct. App. 1977); *In re* Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962); Begay v. Miller, 70 Ariz. 380, 386, 222 P.2d 624, 628 (1950). *Contra*, Jim v. CIT Financial Serv. Corp., 87 N.M. 362, 363, 533 P.2d 751, 752 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 663, 555 P.2d 1334, 1342 (1976). *See generally* Ragsdale, *supra*, note 16; Casenote, *The Application of Full Faith and Credit to Indian Nations*, 20 ARIZ. L. REV. 1064 (1978).

113. 87 N.M. 362, 533 P.2d 751 (1975).

114. 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

115. 87 N.M. at 363, 533 P.2d at 752. *See* N.M. STAT. ANN. § 55-9-503 (1978).

116. 87 N.M. at 363, 533 P.2d at 752. Jim brought suit pursuant to NAVAHO TRIBAL CODE § 7-607 (1977).

117. 87 N.M. at 363, 533 P.2d at 752.

118. *Id.* See text & note 110 *supra*. Since full faith and credit was applicable to the Navajo tribe, a valid question as to the choice of law, Navajo or New Mexico, was raised. The Supreme Court of New Mexico remanded the case to the tribal court for consideration of this issue. 87 N.M. at 364, 533 P.2d at 753.

119. *Compare* Brown v. Babbitt Ford, Inc., 117 Ariz. at 193-94, 571 P.2d at 690-91 *with* Jim v. CIT Financial Serv. Corp., 97 N.M. at 363, 533 P.2d at 752. Plaintiff, Alice Brown, brought suit in superior court seeking civil penalties prescribed by NAVAHO TRIBAL CODE § 7-609 against Babbitt Ford who failed to comply with NAVAHO TRIBAL CODE § 7-607 in repossessing the pick-up truck of Brown. 117 Ariz. at 193-94, 571 P.2d at 690-91. The tribal court dismissed for failure to state a claim, and plaintiff appealed. *See id.* at 195-96, 571 P.2d at 692-93.

120. 87 N.M. at 363, 533 P.2d at 752. *Jim* relied on Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855), where a Cherokee Nation's letter of appointment for testamentary purposes was held entitled to full faith and credit. The Court observed:

> The [Cherokees] are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the federal government as a territory did in its second grade of government under the ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress, and its

suasive, but deemed that it was not controlling.[121] Instead the court analyzed "the historical developments and the legal concepts associated with both territories of the United States and lands set aside for the use of Indian tribes within the United States"[122] and concluded that Congress did not intend that the word "territory," as used in the enabling act, to include Indian tribes.[123]

The problems concerning enforcement of tribal judgments are significantly important in the child welfare context because of the mobility of Indian children.[124] The following scenario has been typical: A tribal court determines temporary child custody, whereupon the child leaves the reservation with his temporary guardian, and the issue of permanent child custody is sought to be litigated in state court.[125] In *In re Adoption of Buehl*[126] the Washington Supreme Court, relying on *Jim*, held that "[t]ribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states."[127] Specifically, the *Buehl* court held that the tribal court's order was entitled to full faith and credit, because the Indian child was domiciled on the tribal reservation, and therefore the tribal court had jurisdiction of the child custody proceeding.[128] Although there are no cases in the Indian child context that reach a contrary conclusion,[129] the Montana Supreme Court in *In re Cantrell* did not feel compelled to abide by a tribal court's ruling of

---

inhabitants were subject to the Constitution and acts of Congress. . . . This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the union.

Id. at 103.

The *Jim* court also referred to Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 437-38 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), in which a default judgment of a Puerto Rico tribunal was given full faith and credit by New Jersey. The Third Circuit noted, "[T]he term 'Territories' has been considered susceptible of interpretation—that is, it does not have a fixed and technical meaning that must be accorded to it in all circumstances." *Id.* at 436.

121. 117 Ariz. at 195, 571 P.2d at 692.

122. *Id.* at 196, 571 P.2d at 693. The court viewed the concept of "territory" as referring to that land which has yet to achieve the formal status accorded states. *Id. See* Kopel v. Bingham, 211 U.S. 468 (1909). *Contra*, Americana of Puerto Rico Inc. v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967) (Puerto Rico, although a "commonwealth," accorded territorial status under 28 U.S.C. § 1738 (1976)). The rights of Indian tribes are of "use and occupation" and qualitatively different from that of a "territory," Brown v. Babbitt Ford, 117 Ariz. 192, 197, 571 P.2d 689, 694 (Ct. App. 1977). Thus, the "Indian reservations have never been considered a 'territory' within the meaning of the laws of the United States, but simply they are the homes of the Indians." *Id.* at 197, 571 P.2d at 694. The court's conclusion relied heavily on the discussion of states *vis a vis* territories in Ex parte Morgan, 20 F. 298, 305-06 (D. Ark. 1883). 117 Ariz. at 197, 571 P.2d at 694.

123. 117 Ariz. at 197, 571 P.2d at 694.

124. *See* JURISDICTION REPORT, *supra* note 4, at 87.

125. *See* Wakefield v. Little Light, 276 Md. 333, 336, 347 A.2d 228, 230 (1975); *In re* Adoption of Buehl, 87 Wash. 2d 649, 652, 555 P.2d 1334, 1336 (1976).

126. 87 Wash. 2d 649, 555 P.2d 1334 (1976).

127. *Id.* at 663, 555 P.2d at 1342.

128. *Id.*

129. In Wakefield v. Little Light, 276 Md. 333, 349-51, 347 A.2d 228, 237-38 (1975), the Maryland court, when confronted with a situation comparable to the text's scenario, avoided the full faith and credit issue by determining that the child retained his domicile on a reservation in a

parental fitness.[130] Since the issue was not considered, *Cantrell* does not directly support the proposition that tribal courts are not entitled to full faith and credit.[131]

Nevertheless if the *Cantrell* court had applied the full faith and credit doctrine, the state court would have abided by the tribal court's adjudication rather than making an independent review of the facts.

After analyzing *Jim* and *Brown*, one arrives at the conclusion that the *Buehl* holding, that tribal court child custody adjudications are entitled to full faith and credit by the states, rests on mixed authority at best.

These jurisdictional problems of Indian child welfare, primarily the dissolution of Indian families without adequate justification, when analyzed in terms of Indian society and the erosion of tribal government, necessitated legislative action. Congress responded to these problems by passing the Indian Child Welfare Act of 1978.[132]

THE INDIAN CHILD WELFARE ACT OF 1978

In the Indian Child Welfare Act of 1978, Congress recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[133] The policies of the Act are to protect Indian children and to promote the stability and viability of Indian tribes and families.[134]

The Act relieves the problems associated with the presence and domicile standards.[135] Jurisdiction will no longer be predicated on geographical factors, but on the ethnic identity and tribal ties of the child. Tribal court judgments are given equal standing with state court judgments,[136] and consequently tribal courts will have real authority to adjudicate child custody issues.

Initially the Act provides in section 101(a) that the Indian tribes shall have exclusive jurisdiction over all child custody proceedings concerning an Indian child who is domiciled on the reservation.[137] This

different state. Although the child resided in Maryland with his temporary guardian, the state court was without personal jurisdiction. *Id.*

130. 159 Mont. 66, 71, 495 P.2d 179, 182 (1972).

131. See text & notes 30-37, 82-84 *supra*.

132. Pub. L. No. 95-608, 92 Stat. 3069 (to be codified at 25 U.S.C. §§ 1901-1963).

133. 25 U.S.C.A. § 1901(3) (West Supp. 1979).

134. *Id.* § 1902.

135. See text & notes 81-88, 103-07 *supra*.

136. 25 U.S.C.A. § 1911(d) (West Supp. 1979). See text & notes 173-77 *infra*.

137. 25 U.S.C.A. § 1911(a) (West Supp. 1979). Section 1911(a) provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

statute changes the existing prior law in that presence can no longer be used as a jurisdictional standard in Indian child welfare cases.[138] If the Indian child is domiciled on the reservation, the mere physical location of the child at a given moment is irrelevant; the tribe will have jurisdiction.[139]

Even if the child is not domiciled on the reservation, section 101(b) of the Act requires state courts to transfer proceedings involving the severance of the Indian parent-child relationship[140] to the appropriate tribal court unless one of the child's parents objects, the tribal court declines jurisdiction, or there is "good cause" not to transfer the proceeding.[141] Again, jurisdiction hinges upon the ethnic identity and tribal membership of the child, rather than the geographical location of the child's domicile. This reflects Congress' recognition of the fact that tribal ties extend beyond the boundaries of the reservation.[142]

Limitations on Tribal Extraterritorial Jurisdiction

There are three general limitations upon the tribe's extraterritorial jurisdiction in child custody cases: only those cases involving severance of the parent-child relationship may be transferred,[143] an Indian parent may forestall transfer by objecting, or the state may refuse to transfer because "good cause" is present.[144]

Section 101 does not provide for exclusive tribal jurisdiction when jurisdiction "is otherwise vested in the State by existing federal law." 25 U.S.C.A. § 1911(a) (West Supp. 1979). This language refers to the custody jurisdiction the Congress conferred on the states by the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, *as amended by* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 401(a), 82 Stat. 78 (1968). H.R. REP. No. 1386, 95th Cong., 2d Sess. 40, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7562-63. Section 108 of the Act provides that any Indian tribe which is subject to state jurisdiction pursuant to Public Law 280, may reassume child custody jurisdiction if it proposes an acceptable plan to exercise jurisdiction to the Secretary of the Interior. 25 U.S.C.A. § 1918 (West Supp. 1979).

138. See text & notes 60-75 *supra*.

139. 25 U.S.C.A. § 1911(a) (West Supp. 1979).

140. The term "severance" of the Indian parent-child relationship includes within its meaning "foster care placement" and "termination of parental rights," but not the terms "adoptive placement" and "preadoptive placement." For definition of these and other terms, see discussion note 8 *supra*.

141. 25 U.S.C.A. § 1911(b) (West Supp. 1979). Section 1911(b) provides:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceedings to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

142. *See* 25 U.S.C. § 1901(5) (West Supp. 1979).

143. See note 140 *supra*.

144. 25 U.S.C.A. § 1911(b) (West Supp. 1979). An additional limitation upon the tribe's extraterritorial jurisdiction is provided by judicial interpretation of the due process clause. International Shoe Co. v. Washington, 326 U.S. 310 (1945), expresses the concepts that define the outer limits of in personam jurisdiction over nonresident defendants. For a more complete discussion see generally, Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction on World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861 (1978). There must be "minimum contacts" between the forum and defendant such that "maintenance of

The Act, by vesting exclusive jurisdiction in tribal courts as to severance proceedings, recognizes that determining the fitness of an Indian parent is the most difficult decision state courts confront in Indian child welfare.[145] Consequently, jurisdiction is vested in the tribal court system which has the most knowledge and understanding of the Indian parent-child relationship.[146] Although the state may create a parent-child relationship with proper guidance from section 105,[147] the tribe is better prepared to sever the existing parent-child relationship.

Although the Act does not provide for extraterritorial tribal jurisdiction over those Indian child custody proceedings involving adoptive or preadoptive placement,[148] the Act does contain substantive provisions regarding such proceedings that protect the integrity of tribal culture and promote the child's sense of community with the tribe.[149] The state court must comply with the following order of preference in any adoptive placement: a member of the child's extended family, other

---

the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. at 316. Domicile is clearly such a minimum contact, Milliken v. Meyer, 311 U.S. 457, 462-63 (1940), so that when the child is domiciled on the reservation the tribal court may exercise jurisdiction. Where the tribal court exercises jurisdiction pursuant to § 101(b) of the Act, the due process limitation of *in personam* jurisdiction arises. The tribal court may exercise jurisdiction only over Indian children who are either "(a) a member of an Indian tribe or (b) . . . eligible for membership . . . and . . . the biological child of a member of an Indian tribe." 25 U.S.C.A. § 1903(4) (West Supp. 1979).

The jurisdictional requirements contained in the Act are sufficient minimum contacts to allow imposition of in personam jurisdiction as to the Indian child. Tribal membership can be analogized to an individual's citizenship. By maintaining American citizenship, one is subject to in personam jurisdiction in the federal court system regardless of whether the individual is domiciled in the United States. Blackmer v. United States, 284 U.S. 421, 438-43 (1932); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 31 (1971). Tribal membership, like citizenship, should be viewed as a sufficient contact for the tribe to assert jurisdiction over the Indian child independent of domicile.

Additionally, the parents may object to the assertion of tribal jurisdiction if the child is domiciled off the reservation, so due process problems may never arise. *See* 25 U.S.C.A. § 1911(b). The Department of Justice has questioned the constitutionality of tribal jurisdiction when exercised pursuant to § 101(b) applying the Indian child definition in part (b). Fortunately, the Justice Department offers a solution:

> We are still concerned, however, that exclusive tribal jurisdiction based on the "(b)" portion of the definition of "Indian child" may constitute racial discrimination. So long as a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding, no constitutional problem arises. Where, however, legal custody of a child who is merely eligible for membership is lodged exclusively with nontribal members, exclusive tribal jurisdiction cannot be justified because no one directly affected by the adjudication is an actual tribal member. We do not think that the blood connection between the child and a biological but noncustodial parent is sufficient basis upon which to deny the present parents and the child access to State courts. This problem could be resolved either by limiting the definition of Indian child to children who are actually tribal members or by modifying the "(b)" portion to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe."

H.R. REP. NO. 1386, 95th Cong., 2d Sess. 39, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7562.

145. See JURISDICTION REPORT, *supra* note 4, at 79.

146. *Id.*

147. 25 U.S.C.A. § 1915 (West Supp. 1979).

148. For definition of "adoptive" and "preadoptive placement proceedings," see note 8 *supra*.

149. 25 U.S.C.A. § 1915 (West Supp. 1979).

tribal members, other Indian families.[150] In preadoptive or foster care placement, the state court must comply with a different order of preference: a member of the extended family, a foster home approved by the tribe, an Indian foster home approved by a non-Indian licensing authority, or an institution which meets the needs of Indian children.[151] In making a decision as to the placement of the child, the state must "apply the prevailing social and cultural standards of the Indian community."[152]

The second limitation on the tribe's extraterritorial jurisdiction is that either parent may veto the proposed transfer.[153] The parents have control over the choice of forum if the Indian child is domiciled off the reservation in proceedings relating to severing the existing parent-child relationship. If the child is domiciled within the reservation, however, the tribal court has jurisdiction notwithstanding the parents' desires.[154] Allowing the Indian parents domiciled on the reservation to object to the tribe's jurisdiction would compromise the tribe's interest in the rearing of tribal children.[155] Additionally, the Indian family residing on the reservation is totally immersed in tribal society making the assertion of tribal jurisdiction fair and reasonable. In contrast, when the Indian family resides off the reservation, it is subject to the countervailing influence of Anglo-American culture. The policy of the Act is to "promote and protect the stability and security of Indian tribes and families."[156] By allowing the Indian parents to "choose" the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the court system that most reflects the parents' familial standards.

The second justification for allowing the parents to object to extraterritorial jurisdiction is monetary. The expense the parents must incur to protect the family relationship might be prohibitive if they are forced to defend in a faraway tribal jurisdiction. The parents may choose to forego the expense by objecting to tribal jurisdiction.

The final limitation upon extraterritorial jurisdiction is when the state court determines that there is "good cause" to retain jurisdiction.[157] Although not defined in the Act, its legislative history indicates

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* § 1911(b).
154. *Id.* § 1911(a).
155. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976); Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 733 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 349-50, 347 A.2d 228, 238 (1975). See text & note 92 *supra*.
156. 25 U.S.C.A. § 1902 (West Supp. 1979).
157. *Id.* § 1911(b).

that the "good cause" exception is "intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."[158] The doctrine of *forum non conveniens* allows a court discretionary authority to resist imposition of jurisdiction.[159] In *forum non conveniens* cases, the trial court must consider whether it has ease of access to the sources of proof, whether the witnesses are available, and if so the expense involved in producing them, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."[160] Additionally, the trial court must consider the financial status of the parties and the desirability of having the court apply the law of the jurisdiction in which it sits.[161]

The legislative history specifies that state courts are to apply a "modified" doctrine of *forum non conveniens* to determine if "good cause" is present so that the state may retain jurisdiction.[162] Generally, courts applying *forum non conveniens* use it to refuse jurisdiction, and transfer the action to an alternative forum.[163] In the Indian child welfare context, however, the state court determines if the tribal court is an inconvenient forum; if so, then good cause exists to retain jurisdiction.[164] Secondly, the doctrine is modified so that in addition to considering the rights of the Indian parents or custodian, the state court must also protect the rights of the Indian child and tribe.[165] Thus, the rights of the child and tribe are additional factors which a trial court must consider to applying *forum non conveniens*.

It has been stated that practical difficulties with extraterritorial tribal jurisdiction may limit its applicability to those cases where the Indian child is in reasonable proximity to the reservation, such as a border town.[166] Applying extraterritorial jurisdiction to a child custody case concerning an Indian child in Chicago who is a member of the Navajo Nation would entail the expensive proposition of bringing witnesses to Window Rock, Arizona. If the Navajo tribe or the child's parents desired that the case be heard by the tribal court, distance from

158. H.R. REP. No. 1386, 95th Cong., 2d Sess. 21, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7544.

159. Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 527 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

160. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

161. *See* cases cited note 159 *supra*; Herbst v. Able, 278 F. Supp. 664, 666 (S.D.N.Y. 1967); Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404, 408 (D. Mont. 1960).

162. H.R. REP. No. 1386, 95th Cong., 2d Sess. 21, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7544.

163. *See* cases cited note 161 *supra*.

164. *See* 25 U.S.C.A. § 1911(b) (West Supp. 1979).

165. See text & note 158 *supra*.

166. JURISDICTION REPORT, *supra* note 4, at 86.

the reservation in and of itself would not seem to be sufficiently "good cause" for the state court to refuse to transfer the proceeding despite the expense.[167] Indeed, in most instances the Indian parents will call witnesses residing on the reservation to rebut evidence that they are unfit parents. The state court must make a determination as to which party in the severance proceedings is most able to bear the expense of producing witnesses in faraway courts. If the state court determines that due to the unavailability of proof, the tribal court would not be able to make an informed judgment concerning parental fitness, the state court could legitimately refuse to transfer the matter because "good cause" would be present.[168] Accessibility to proof would seem to be the principal factor on which state courts could rely to retain child custody jurisdiction.

Even if the state court does find good cause[169] and retains jurisdiction over the parent-child severance proceeding, the Indian parents' tribe is protected against the possibility of state court bias against tribal culture. The Indian tribe may intervene at any point in the state child custody proceeding[170] and the Indian parent-child relationship can be

167. Under the *forum non conveniens* doctrine, the lack of great distance between the transferor and transferee courts militates against a transfer. *See, e.g.*, Paragon Int'l, N.V. v. Standard Plastics, Inc., 353 F. Supp. 88, 92 (S.D.N.Y. 1973); Holiday Rambler Corp. v. American Motors Corp., 254 F. Supp. 137, 139 (W.D. Mich. 1966); Roberts Bros., Inc. v. Kurtz Bros., 231 F. Supp. 163, 168 (D.N.J. 1964). Similarly, under the modified doctrine of *forum non conveniens* the close proximity of the tribal court makes it that much more likely that "good cause" will not exist because of the relative ease of obtaining proof.

168. *Cf.* Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1003-05 (D.S.C. 1975) (the difficulty in bringing witnesses and preparing the case for trial in South Carolina is sufficient basis for invoking *forum non conveniens* doctrine); Harrison v. Capivary, Inc., 334 F. Supp. 1141, 1142 (E.D. Mo. 1971) (substantially all the witnesses and material documents were located in Panama, thus applying the *forum non conveniens* doctrine was appropriate); Spencer v. Alcoa S.S. Co., 221 F. Supp. 343, 345-46 (E.D.N.Y. 1963) (since all of the witnesses resided in a different jurisdiction the doctrine of *forum non conveniens* was applied).

169. It must be noted that the appropriate state agency may act to protect the physical integrity of Indian children in "emergency" situations. Section 112 allows the state authority to remove an Indian child, who is a domiciliary of a reservation, but temporarily off the reservation, from the care of his parents or custodian to prevent "imminent physical damage or harm to the child." 25 U.S.C.A. § 1922 (West Supp. 1979). If state authorities can exercise emergency supervision when the Indian child is domiciled on the reservation, *a fortiori*, state courts have authority to exercise emergency jurisdiction when the child is both domiciled and present in the state. Once the state has removed the child from the physically harmful relationship, it must "expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." *Id.*

The emergency removal gives the state only temporary power to act to protect the Indian child. If the state authority initiates a child custody proceeding it must do so in tribal court unless the Indian child is domiciled within the state. Section 101(a) provides that the tribal court has exclusive jurisdiction over all child custody proceedings involving an Indian child domiciled on the reservation. *Id.* § 1911(a). Even if the child is domiciled within the state, the state court may have to transfer the child custody proceedings to the tribal court. *Id.* § 1911(b). The only question is what is the time limit in which it may be said that the state court has "expeditiously initiated" a child custody proceeding. It would seem that a month would be more than sufficient time in order to commence such a proceeding. It must be remembered that section 112 authorizes only emergency removal, but does not invest the state court with jurisdiction. *Id.* § 1922.

170. 25 U.S.C.A. § 1911(c) (West Supp. 1979). That section provides: "In any State court

terminated only by a showing of parental unfitness beyond a reasonable doubt.[171] Parental unfitness must be supported by expert testimony that continued custody would likely result in "serious emotional or physical damage to the child."[172]

The Full Faith and Credit Provision

In addition to the changed jurisdictional structure, Congress included in the Act a full faith and credit provision.[173] Section 101(d) states that the United States, the individual states, Indian tribes, and all the territories and possessions of the United States shall give full faith and credit to all matters pertaining to Indian child custody executed under the authority of the applicable tribe.[174]

If Congress had merely vested jurisdiction in tribal courts, without a corollary full faith and credit provision, the effectiveness of the changed jurisdictional structure would be compromised.[175] Without such a provision the following case could arise. An Indian child could be placed in the temporary foster care of a non-Indian by the tribal court. Subsequently, the tribal court would terminate the foster care of the Indian child, reinvesting custody in the natural parents. The parents of the child would then seek to enforce the tribal decree in the jurisdiction where the child was physically present. If the child resided in a jurisdiction such as Arizona that does not give full faith and credit to tribal judgments, the parents would have to rely on the conscience of the judge to regain custody. Thus, the efficacy of the jurisdictional standards of the Act in promoting tribal sovereignty and maintaining Indian family life would be dependent on the physical location of the child. Such a situation would result in little change from the past use of the domicile and presence concepts, since tribal control of child-rearing

proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." *Id.*

171. *Id.* § 1912(f). In the case of foster care placement, the state court cannot remove the child from his parent or Indian custodian absent a showing of clear and convincing evidence. *Id.* § 1912(e).

172. This standard also applies to foster placement proceedings. *Id.*

173. *Id.* § 1911(d). That section provides:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Id.

174. *Id.* By the very fact that Congress enacted a full faith and credit provision in the child custody context it can be inferred that the general enabling statute of full faith and credit is not applicable to Indian tribes. See text & notes 108-35 *supra*. Congress should rectify this condition by expressly including Indian tribes in 28 U.S.C. § 1738 (1976), placing the tribes' adjudications on an equal basis with those of other governmental entities of the United States.

175. *See* text & notes 132-72 *supra*.

would be constrained by geographical boundaries.[176] With the enactment of the Indian Child Welfare Act the tribal courts now will have both the jurisdiction and the enforcement power to make them the arbiters of Indian child custody proceedings.

Tribal immunity still may be a bar to the enforcement of state child custody decrees, since the state cannot sue the tribe if it refuses to honor the state's child custody decree.[177] The chances that such a case will arise are minimized by the fact that in the great majority of cases the tribe will have jurisdiction. In those rare instances where such a case may arise, however, it would be advisable that Congress add a provision waiving tribal immunity in child welfare matters.

CONCLUSION

With the enactment of the Indian Child Welfare Act of 1978 the Congress legislatively created a new jurisdictional framework in Indian child welfare. Replacing the outmoded geographical concepts of presence and domicile with a jurisdictional standard based on the ethnic origin of the child, Congress has recognized the importance of child-rearing to the tribe. The Act's jurisdictional standard avoids the problems of forum shopping and gives real authority to tribal courts to adjudicate the issues of child custody. Consequently, the tribe's integrity will be strengthened and the reservation will continue to be a cultural center. The Indian tribes will have exclusive jurisdiction over child custody save in rare instances: (1) When the Indian child is domiciled off the reservation and the parents object to assertion of tribal jurisdiction; (2) in adoptive or preadoptive placement hearings when the Indian child is domiciled off the reservation; (3) in emergencies where the Indian child's physical well-being is in danger; and (4) when the availability of proof to the tribal court prevents an informed judgment in cases concerning severance of parental rights. Additionally, the Act's provision regarding full faith and credit insures that Indian child custody decrees will be enforced in tribal courts.

176. *See* text & notes 60-107 *supra*.
177. *See* cases cited at note 108 *supra*.