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STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF C.I. MORRIS,
Minor Child

Supreme Court No.: 142759

DEPARTMENT OF HUMAN SERVICES,

Court Of Appeals No.: 299471

Petitioner-Appellee,

Lower Court No.: 08-483,987

-vs-

DAVID L. MORRIS

Respondent-Appellant,

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#1

APPELLEE-LAWYER GUARDIAN AD-LITEM'S BRIEF
ORAL ARGUMENT NOT REQUESTED

Respectfully Submitted,

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Dated: December 16, 2011

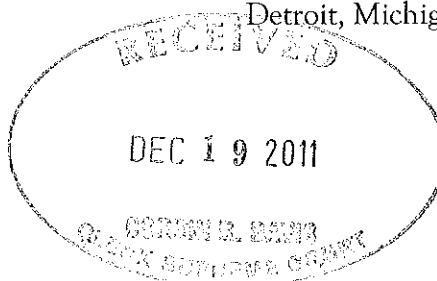


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STATEMENT OF JURISDICTION

Appellee-Lawyer Guardian Ad-Litem (LGAL) concurs with the Statement of Jurisdiction as set forth in the in the Brief of Appellant David Morris.

COUNTER-STATEMENT OF QUESTION PRESENTED

When a trial court enters an order terminating parental rights without first giving proper notice to an Indian tribe as required by 25 USC 1912(a), is the use of “conditional affirmance” appropriate to remedy the notice violation?

Petitioner-Appellee says: “Yes”

Respondent-Appellant says: “No”

Appellee-LGAL says: “Yes”

Court of Appeals: “Yes”

Trial Court did not address this question.

Amicus Curiae says: “No”

COUNTER-STATEMENT OF FACTS & PROCEEDINGS

Appellee-LGAL accepts the Statement of Facts as set forth in the Brief of the Petitioner-Appellee.

ARGUMENT

- I. The ICWA directs that the failure to provide notice pursuant to 25 USC 1912(a) is remedied through rendering proceedings involving Indian children voidable. “Conditional Affirmance” comports with the strict protections afforded by the ICWA while eliminating an unnecessary delay in the permanent placement of non-Indian children.

A. Standard of Review

This court reviews issues involving the application and interpretation of the ICWA de novo as questions of law. *In re JL*, 483 Mich 300, 318; 770 NW2d742 (2009).

Unpreserved issues are reviewed for plain error that affects substantial rights. *People v. Carines*, 460 Mich 750, 763, 774: 579 NW2d130 (1999). Three requirements must be met to withstand forfeiture under the plain error rule, to wit: (1) the error must have occurred, (2) the error must have been plain, i.e., clear or obvious, and (3) the plain error must have affected substantial rights. Reversal is only required if plain error affected the fairness, integrity, or public reputation of judicial proceedings. *Id* at 763. Because Morris failed to raise the following issue, this Court reviews the Court of Appeal’s conclusion for plain error.

B. Analysis

The main goal of statutory interpretation is to give effect to the intent of the legislature. *McCormick v. Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010); *Holyfield*, 490 US at 43. When the language of a statute is clear and unambiguous, it is presumed the legislature intended the meaning expressed in the statute, and judicial construction is neither required nor permitted. *McCormick*, *supra*, at 191-192. Just as important is the

interpretation of a statute as a whole so as not to construe it in such a way as it would impair or otherwise render a provision meaningless. *People v. Peals*, 476 Mich 636, 643; 720 NW2d 196 (2006). Further, *US v. Pelzer*, 312 US 399, 403 (1941) admonishes courts to “look to the purpose of the statute to ascertain what is intended.”

1. **After failure to provide the required notice in proceedings which involve Indian children, 25 USC 1914 of the ICWA does not invalidate those proceedings, but renders them voidable.**

The plain language of 25 USC 1914 does not invalidate proceedings due to a notice violation as required by § 1912(a). Contrarily, § 1914 opens such proceedings up to invalidation upon petition of at least one of four clearly defined parties: [1] [a]ny Indian child who is the subject of any action for... termination of parental rights under State law, [2] any parent, or [3] Indian custodian from whose custody such child was removed, and [4] the Indian child’s tribe...” 25 USC 1914. Though such proceedings are *voidable* and exposed to a collateral attack by these eligible parties, § 1914 stipulates that invalidation is only employed upon an actual “showing that such action violated any provision of sections...1912...” *Dwayne P v Superior Court*, 103 Cal App 4th 247, 254; 126 Cal Rptr 2d 639 (2002); *Doe v Mann*, 285 F Supp 2d at 1240.

Congressional intent was not to deprive a State court of jurisdiction for a violation of § 1912(a), as proffered by Respondent-Appellant in his suggestion that such proceedings are *automatically invalidated* as opposed to *merely voidable*. If this had have been their goal, they could have expressly done so. “If Congress intended that a trial court judgment be void, instead of merely voidable, for a failure to comply with section 1912(a), it could have included language to that effect. Instead, section 1914 provides a clear

remedy for a failure to comply with the notice provisions and names the parties who can pursue that remedy.” *Carson v Carson*, 170 Or App at 269 “[H]ad Congress intended state-law definition of domicile [in the ICWA], it would have said so.” *Holyfield*, 490 US at 47 n 22

a) Application of section 1914 of the ICWA is only permissible when proceedings involve an actual Indian child.

Use of the Conditional Affirmance remedy here is in concordance with the ICWA’s plain language. The procedural provisions of the ICWA do not apply to a termination proceeding until § 1912(a) notice is complete and the court actually determines that an “Indian child” is involved. *In re NEGP*, 245 Mich App 126, 133; 626 NW2d 921 (2001); *In the Matter of the Adoption of a Child of Indian Heritage*, 111 NJ 155, 171; 543 A2d 925 (1988). § 1914 does not apply until it is confirmed the proceedings involved an Indian child. *Nielson*, 640 F3d at 1122-1124. As the ICWA does not limit a court’s authority to retroactively remedy a § 1912(a) notice violation in a case that is pending, future challenges regarding the validity of its orders are avoided.

b) The legislative history of the ICWA confirms that notice violations pursuant to § 1912(a) are voidable, not void.

After careful consideration, the US Legislature rejected a provision that would have caused for the automatic invalidation of proceedings held without proper tribal notification. Early drafts of the ICWA reveal that Congress originally included language which decreed a child’s placement would not be “valid or given any legal force and effect” minus the tribal notification. *Indian Child Welfare Act of 1977: Hearing before the United*

Sates Senate Select Committee on Indian Affairs, 95th Cong, 1st Sess, on S 1214, pp 34-35 (Attachment) Such a provision would have caused for all such proceedings to be automatically invalidated once the failure to notify pursuant to § 1912 was discovered. However, as Congress never intended to automatically void proceedings of this nature, it deleted the provision and instead chose to inject § 1914. 124 Cong Rec 38109-38112 (1978) (Attachment)

Holyfiled, 490 US at 44, directs that legislation should be interpreted consistent with its purpose. The purpose of the ICWA is to preserve Indian families. 25 USC 1902 The solution chosen by Congress for a notice violation (rendering of such proceedings merely voidable) serves a dual purpose in that it ensures Indian families will receive the substantive protections offered by the ICWA without causing for a disruption of proceedings involving non-Indian families. The “automatic reversal” concept, especially in cases which involve non-Indian families, fails to serve the purpose of the ICWA towards preservation of Indian families.

2. Conditional Affirmance, as adopted by the Court of Appeals in *In re IEM*, is a proper remedy for an ICWA notice violation when a child’s Indian status is unknown.

In the instant case, the Court of Appeals first applied the conditional affirmance remedy in 1999. *In re IEM*, 133 App 438. The Court concluded that the trial court erred in it’s failure to notify the named Indian tribe. With the exception of the notice violation, the trial court had properly terminated the respondent’s parental rights. *Id.* at 446, 449-450. The Court would not invalidate the termination order even at the Respondent’s urging. *Id.* at 449-450. On remand, if “the trial court...concludes that the ICWA does

not apply, the original orders will stand. If the trial court does conclude that the ICWA applies, further proceedings consistent with the Act will be necessary.” *Id* at 450, quoting *In re MCP*, 153 Vt 289.

Given that it has not been established that Christina is an Indian child, § 1914’s cannot automatically invalidate the order terminating Morris’ parental rights. The ICWA defines “parent” as “any biological parent or parents of any Indian child.” 25 USC 1903(9) *Nielson v Ketchum*, 640 F3d 1117, 1122-1124 (CA 10, 2011) (because child was not an Indian child, mother could not invalidate the voluntary termination of her parental rights under § 1914); *Carson*, 170 Or App at 269 (“Having imposed federal requirements on state court actions in section 1912, Congress may also limit the persons who can challenge the failure to comply with those statutory requirements.”) Similarly the Supreme Court of South Dakota in *In re CH*, 510 NW2d 119, 123 (SD, 1993), held that conditional affirmance is the appropriate remedy for a § 1912(a) notice violation when the child’s status as an Indian child has not been resolved. *Id* at 124-125.

- a) **Conditional affirmance complies with the plain language of the ICWA while protecting the best interest of non-Indian children.**

Conditional affirmance, as adopted by the Court *In re IEM*, 233 Mich App 439, protects both Indian and non-Indian children alike. Such remedy ensures that the strictures as outlined in the ICWA are followed while concurrently providing for the permanency for children who are not entitled to the heightened standards of the act. Contrarily, adopting alternative remedies such as automatic reversal, causes potentially

detrimental delays to the permanency and stability of non-Indian children. As seen in the case at bar, conditional affirmance served to protect Christina's adoption from future scrutiny by ensuring proper tribal notice should it later be determined that she was indeed an Indian child. Here, conditional affirmance serves a dual purpose in protecting the best interest of the child irregardless as to her possible Indian heritage by not delaying her placement in a suitable home.

While the Respondent-Appellant's appeal was pending, the Department did extend notice to the Cherokee tribes as required by the ICWA. However, all three tribes responded that Christina was not eligible for membership and was not considered to be an "Indian Child." Several jurisdictions lend insight into proper handling of similar matters to the degree which the child's best interest may be considered and preserved. *In re Brook C*, 127 Cal App 4th at 385, the Appellate Court agreed that reversal of an order terminating parental rights would be contrary to the best interest of the child if they are not Indian. *In re REKF*, 698 NW2d at 151 n 5, another Court held that it would be wrong to delay matters further only to find that the ICWA does not apply, and therefore adopted conditional affirmance to be "clearly in the best interest of the child." The Court *In re Fransisco W*, 139 Cal App 4th 695, 704; 43 Cal Rptr 3d 171 (2006), also supports this position in its ruling that conditional affirmance supports prompt resolution of cases. The Court noted that requiring a full rehearing of the matter, (as conditional reversal would necessitate) "could easily age a child out of adoptability...which is the least favored permanent plan."

b) ICWA notice violations amount to harmless error in cases where non-Indian children are involved.

Once a tribe has established that a child is of non-Indian heritage, an ICWA notice violation amounts to harmless error. *In re Brooke C.*, 25 Cal.Rptr.3d 590, 127 Cal.App.4th 377 the Court held that “if, after proper notice is given under the ICWA, the child is determined not to be an Indian child and the ICWA does not apply, prior defective notice becomes harmless error.” Further, adoption of the automatic reversal method in such a case would cause for a misuse in judicial resources in requiring the relitigation of all proceedings. In *People v. Graves*, 458 Mich. 476, 581 N.W.2d 229 (Mich. 1998) the Court disfavors automatic reversal: “As this Court recently reiterated in *People v. Belanger*, 454 Mich. 571, 575, 563 N.W.2d 665 (1997), “[r]ules of automatic reversal are disfavored, for a host of obvious reasons...Indeed, the automatic reversal rule...is inconsistent with this Court's modern harmless-error jurisprudence. Further, not to adopt this view is to countenance a misuse of judicial resources.”

Automatic reversal, as suggested by Morris, presents another issue as it suggests that an error in the notice requirements of the ICWA would divest the Court of its jurisdiction. We hold that violation of the 10-day period of notice required by ICWA is not jurisdictional error. *In re Antoinette S.*, 129 Cal.Rptr.2d 15, 104 Cal.App.4th 1401 the Court opined, “the very fact that notice problems are sometimes deemed harmless in ICWA cases (see, e.g., *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424 [285 Cal.Rptr. 507]) indicates such error is not jurisdictional. To the contrary, a finding of jurisdictional error would logically precede and preclude any inquiry as to whether the error was

harmless. And if error were to strip a court of its jurisdiction (a dramatic proposition for which there is no precedent in other areas of the law), then the juvenile [104 Cal.App.4th 1411] court would lose all authority over the dependent child in its care, requiring immediate return of the child to parents who have demonstrated at least temporary unfitness." The Court goes on to assert its conclusion that "[i]f a state court, as opposed to a tribal court, properly has jurisdiction over the subject matter, the court is not divested of jurisdiction simply because it fails to comply with the [A]ct." (*State ex rel. Juw. Dept. v. Charles* (1984) 70 Or.App.10, 17, fn. 5 [688 P.2d 1354, 1360 [noting Congress "specifically" acknowledged state court jurisdiction in § 1911].) For all these reasons, we hold a court's failure to comply with the notice provisions of the ICWA is not jurisdictional error."

Likewise, the best interest of Christina *In re IEM* was served through use of the conditional reversal rule by preventing the unnecessary delay in her permanency and stability, as well as negating the waste of judicial resources in a case where the notice violation amounts to harmless error.

c) A majority of jurisdictions addressing this issue, including Michigan, have held that a conditional affirmance is the proper remedy for an ICWA notice violation.

Many states allow an ICWA notice violation to be remedied through conditional affirmance, or its functional equivalent, conditional reversal. These jurisdictions found that this was the best solution as it both bars relitigation if the child is not of Indian heritage while allowing for rehearing if the child is established to have Indian heritage. *In*

re Justin S, 150 Cal App 4th 1426, 1432, 1437; 59 Cal Rptr 3d 376 (2007) conditional reversal was adopted where the child's status was unknown. *In re Francisco W*, 139 Cal App 4th at 695 the Court adopted a limited reversal remedy, consistent with the functions of conditional affirmance. *In the interest of JO*, 170 P3d 840 (Colo App 2007) where the Court vacated the termination with the provision that it be reinstated if the child was determined to be of non-Indian heritage. Each of these Courts adopt the position that voiding all proceedings would create detrimental delay and further jeopardize the best interests of the children involved.

Over the past 12 years, Michigan Courts have consistently adopted the conditional affirmance remedy through remanding to the lower court for compliance with the ICWA notification requirements. Respondent-Appellant Morris incorrectly asserts that the Courts have failed to comply with the strictures of the Act by not automatically voiding all proceedings upon discovery of the error. However, it is important to note that, in a majority of these cases, it was ultimately determined on remand that in fact the children were not Indian and the ICWA failed to apply. To take the drastic step of voiding these proceedings would only have served to further delay the permanent placement of the 37 children involved. Further, the Court would be forced to waste its already limited resources on unnecessary relitigation. (See attachments)

CONCLUSION AND RELIEF REQUESTED

Issues regarding the ICWA notice requirement rarely arise in Michigan Courts. In the limited instances where it has, Michigan, along with a number of other states, have remedied the violation through the conditional affirmance approach. Conditional affirmance comports with both the plain language and history of the ICWA and serves the best interest of all children involved, irregardless of heritage. It further lends to the conservation of judicial resources through eliminating the necessity to relitigate matters and subject children to indefinite delays in their permanent placement. This remedy both insures the ICWA's notice requirements are met while ensuring that non-Indian children are provided a timely resolution which is in their best interest. Likewise, this Court should continue to join with these several jurisdictions and hold that conditional affirmance is appropriate to address a notice violation.

Wherefore, the Appellee Lawyer Guardian Ad-Litem respectfully requests that this Court affirm the Court of Appeals' May 19, 2011 opinion on remand conditionally affirming the termination of Morris' parental rights while remanding tot eh trial court for compliance with the ICWA's notice requirements.

Respectfully Submitted,

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Dated: December 16, 2011

INDIAN CHILD WELFARE ACT OF 1977

HEARING

BEFORE THE

UNITED STATES SENATE

SELECT COMMITTEE ON INDIAN AFFAIRS

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1214

TO ESTABLISH STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES

AUGUST 4, 1977



1 jurisdiction of the tribal court over the placement of an
2 Indian child.

3 (b) In the case of an Indian child who resides within
4 an Indian reservation which possesses but does not exercise
5 jurisdiction over child welfare matters, no child placement,
6 by any nontribal public or private agency shall be valid or
7 given any legal force and effect, except temporary placements
8 under circumstances where the physical or emotional well-
9 being of the child is immediately and seriously threatened,
10 unless such jurisdiction is transferred to the State pursuant
11 to a mutual agreement entered into between the State and
12 the Indian tribe pursuant to subsection (j) of this section.
13 In the event that no such agreement is in effect, the Federal
14 agency or agencies servicing said reservation shall continue to
15 exercise responsibility over the welfare of such child.
16 (c) In the case of any Indian child who is not a resi-
17 dent of an Indian reservation or who is otherwise under the
18 jurisdiction of a State, if said Indian child has significant
19 contacts with an Indian tribe, no child placement shall be
20 valid or given any legal force and effect, except temporary
21 placements under circumstances where the physical or emo-
22 tional well-being of the child is immediately and seriously
23 threatened, unless the Indian tribe with which such child
24 has significant contacts has been accorded thirty days prior
25 written notice of a right to intervene as an interested party

1 in the child placement proceedings. In the event that the
2 intervening tribe maintains a tribal court which has juris-
3 diction over child welfare matters, jurisdiction shall be trans-
4 ferred to such tribe upon its request unless good cause for
5 refusal is affirmatively shown.

6 (d) In the event of a temporary placement or removal
7 as provided in subsections (a), (b), and (c) above, imme-
8 diate notice shall be given to the parent or parents, the custo-
9 dian from whom the child was taken if other than the parent
10 or parents, and the chief executive officer or such other person
11 as such tribe or tribes may designate for receipt of notice.
12 Such notice shall include the child's exact whereabouts, the
13 precise reasons for his or her removal, the proposed place-
14 ment plan, if any, and the time and place where hearings
15 will be held if a temporary custody order is to be sought. In
16 addition, where a tribally operated or licensed temporary
17 child placement facility or program is available, such facili-
18 ties shall be utilized. A temporary placement order must be
19 sought at the next regular session of the court having juris-
20 diction and in no event shall any temporary or emergency
21 placement exceed seventy-two hours without an order from
22 the court of competent jurisdiction.
23 (e) If for the purposes of this Act, an Indian child shall
24 be deemed to be a resident of the reservation where his parent
25 or parents, or the extended family member in whose care he

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.

(d) 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.

Sec. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary. *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have 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.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Sec. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of paren-

tal rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effectuated under the provisions of this subsection unless otherwise permitted under State law.

Sec. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102 and 103 of this Act.

Sec. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child

or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Sec. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Sec. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Sec. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) (1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101