FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA

MAYNARD HAWK and JUNE HAWK,

Appellants/Petitioners,

Vs.

LEIGHTON REUM and DONETTA REUM,

Appellees/Respondents.

Appeal No. 043

O P I N I O N

THIS APPEAL is from a Decree of Adoption granting Appelles' Petitions for Adoption of E.S.G. and denying the Petition of Appellants in the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Lawyer Judge Julian H. Brown presided.

FOR APPELLANTS: Lewellyn J. Cantrell, Lay Counselor, P.O. Box 1442, Poplar, Montana 59255 and Mr. Robert A. LaFountain, Attorney at Law, 208 North 29th Street, Billings, Montana 59101.

FOR APPELLEES: Clayton Reum, Lay Counselor, 821 6th Avenue, Wolf Point, Montana 59201, and Mary Zemyan, Attorney at Law, Wolf Point, Montana 59201.

Appellant filed a brief with the Clerk of the Fort Peck Court of Appeals. Appellee filed no brief. At the time for oral argument, Appellant and Appellee presented oral arguments.

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Justice.

HELD: THE FINDINGS OF FACT, CONCLUSION OF LAW AND DECREE OF ADOPTION GRANTING APPELLEES' PETITION FOR ADOPTION OF E.S.G., A MINOR INDIAN CHILD, PREVIOUSLY ENTERED DID NOT VIOLATE THE PRINCIPLES OF THE INDIAN CHILD WELFARE ACT AND IS HEREBY AFFIRMED.

E.S.G., a minor Indian child, was born on June 19, 1986, at Helena, Montana, and is eligible for enrollment with the Fort Peck Tribes. Tina Maria Garfield, E.S.G's natural mother, had her parental rights terminated by order of the Fort Peck Tribal Court on August 20, 1987.

The adoption hearing was held on August 20 and 21, 1987, and was a joint hearing on two petitions. One petition was filed by Appellees, Leighton and Donetta Reum. Leighton Reum is 40 years of age, an enrolled member of the Fort Peck Tribes, and a resident of the Fort Peck Indian Reservation. Donetta Reum is 34 years of age, not of Indian descent, and a resident of the Fort Peck Indian Reservation. Leighton Reum and Donetta Reum were married on February 23, 1972, and have been and still are living together as husband wife.

The other petition was filed by Appellants, Maynard and June Hawk. Is 42 years of age, an enrolled member of the Fort Peck Tribes, and a resident of the Fort Peck Indian Reservation. Maynard and June Hawk were married June 14, 1979, and have been and still are living together as husband and wife.

A Decree of Adoption was entered on August 25, 1987 declaring E.S.G. to be adopted by the petitioners Leighton Reum and Donetta Reum. On September 4, 1984, Appellants filed a Petition for Review which set forth eight (8) issues for review. The Brief of Appellants set forth four (4) issues for review. The four (4) issues in Appellants' brief will be addressed and were as follows:

I. The Tribal court erred and abused its discretion in granting the adoption of E.S.G. to Leighton Reum, an enrolled Indian, and his wife, Donetta Reum, a non-Indian, when members of the Indian child's extended family, Maynard and June Hawk, enrolled Indians, also petitioned for adoption.

II. The order of adoption to the Reums constitutes a violation of the principles of the Indian Child Welfare Act which mandates placement of Indian Children in Indian homes with preference to the extended family.

III. The Petitioners/Appellants were denied due process of law by the tribal court's failure to consider preference for the adoption by the extended family; by its failure to determine unfitness of extended family petitioners; and, by its failure to provide a meaningful opportunity for Petitioners/Appellants to be advised of the substance of Petitioners/ Appelees' (Reums') petition for adoption, and to be fully heard.

IV. The Petitioners/Appellants Haws were denied equal protection of the law by the Tribal Court's application of preference for Respondents/Appellees Reums based on the court's desire to not change a "good situation"; by the by the court's findings of fitness of the Reums; by the court's failure to make findings of the fitness of the Hawks; by the court's failure to grant a one-year interim adoption to the Hawks; and, by the court's finding of a bonding between E.S.G. and the Reums.

Appellants' issues are extremely important in that they raise questions regarding the intent of the Indian Child Welfare Act of 1978 and the adoption provisions in the CCOJ. However, before addressing any of the issues, it is important to discuss the circumstances surrounding the number of Justices hearings this matter and the extent of this Court's jurisdiction herein.

Title I, Section 203, of the Fort Peck Tribal Comprehensive Code of Justice establishes the number of Justices at three, a Chief Justice and two Associate Justices and there are usually three Justices that hear an appeal. This matter had originally been set for oral arguments on November 6, 1987. at the request of Appellant's recently retained counsel, the matter was rescheduled for oral arguments on November 20, 1987. On November 11, 1987, Appellants objected to Associate Justice Schauer hearing this matter in that he was a first cousin to Leighton Reum. Appellants requested that Justice Schauer be disqualified.

Telephone conferences were held with each of the Justices. It was discussed and agreed that Justice Schauer has acted as a fair and impartial Justice in all hearings before the Court of Appeals. Although the above was agreed upon, it was unanimously agreed that Justice Schauer would not hear this matter and that he would disqualify himself.

Rule 11 of the Rules of Appellate Procedure for the Fort Peck Tribal Court of Appeals governs matters involving the disqualification of a Justice and the appointment of substitute Justice. This rule reads as follows:

> "Rule 11. DISQUALIFICATION. If any party to a case challenges the impartiality of a Justice, and the Justice does not disqualify himself, the Chief Justice may determine that the Justice should nonetheless be disqualified. In the event of disqualification, a substitute Justice may be appointed for that case by the Tribal Executive Board, or by the Court (using a random selection procedure) from a list of substitute Justices approved in advance by the Tribal Executive Board."

This Court has never received a list of substitute Justices approved in advance by the Tribal Executive Board or a Justice approved by the Tribal Executive Board and the time for the oral arguments were scheduled. Because of time constraints, the Tribal Executive Board could not be approached for a list of substitute Justices.

In this situation, the Court was guided by I CCOJ 202 © which states, "[T]he Court of Appeals or the Chief Justice alone, shall have jurisdiction . . . to make any order appropriate to preserve the status quo or to protect any ultimate judgment of the Court of Appeals." An order was made by the Chief Justice that oral arguments would be heard as scheduled by two Justices, Gary James Melbourne, Associate Justice, and Arnie A. Hove, Chief Justice, and that all subsequent orders and opinions shall be signed by them.

At oral arguments, the parties stipulated and agreed that in the event the two Justices could not reach a unanimous decision, the Tribal Executive Board would be requested to appoint a third Justice or provide a list of substitute Justices and the matter rescheduled for additional oral arguments. In regard to jurisdiction, this Court has jurisdictions of appeals as granted in I CCOJ 202 which reads as follows:

Jurisdiction of Court of Appeals.

> "The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Tribal Court on maters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. . . "

The Court of Appeals does have jurisdiction of an appeal taken from a Decree of Adoption. This Court will review de novo the determinations of the Tribal Court on matters of law and the factual determinations of the Tribal Court. It goes without saying that to permit the adoption of a child by someone other than a member of the extended family when a member of the extended family is willing to adopt the chills is a serious matter. If, however, the law was properly followed and the factual determinations of the Tribal Court are supported by substantial evidence by way of testimony and exhibits, the Decree of Adoption will be upheld.

I

> "The Tribal Court erred and abused its discretion in granting the adoption of E.S.G. to Leighton Reum, and enrolled Indian, and his wife, Donetta Reum, a non-Indian, when members of the Indian child's extended family, Maynard and June Hawk, enrolled Indians, also petitioned for adoption."

Appellants' first issue requires a detailed analysis of applicable law to determine whether the Tribal Court erred and abused its discretion and requires a rather extensive and detailed analysis of Chapter 1, Title VI, of the CCOJ.

The Tribes' expressed purpose of an adoption is set forth in VI CCOJ 101. Title VI CCOJ 101 states, "The purpose of this Part is to protect the rights and promote the welfare of Indian children, natural parents and adoptive parents." In this adoption, did the Tribal Court protect the rights and promote the welfare of E.S.G., the natural parents and adoptive parents when it granted the Reum's petititon for adoption?

The evidence before the Tribal Court was uncontradicted. Leighton Reum was an enrolled member of the Fort Peck Tribes and Donetta Reum was a non-Indian. Maynard and June Hawk were both enrolled members of the Fort Peck Tribes and June Hawk was a member of E.S.G.'s extended family. Whether the Tribal Court erred and abused its discretion in hearing the petition of an enrolled member of the Fort Peck Tribes and a non-Indian is easily determined by who is permitted to file for an adoption of Indian children in Tribal Court.

Title VI CCOJ 103 defines those who may file an adoption petition and the guidelines to be followed. This section reads in full as follows:

"Any adult may file a petition to adopt an Indian minor residing within the Reservation, or a minor tribal member not residing on the Reservation. The Court may also hear petitions transferred from state courts pursuant to 25 U.S.C. Section 1911 (b). In the case of married persons maintaining a home together, the petition shall be the joint petition of husband and wife except that if one of the spouses is the natural parent of the child to be adopted, the natural parent shall not be required to join in the petition. In any case where all persons petitioning to adopt a child are not Indians, the petition shall not be granted unless:

"(a) no Indian is available who is willing to adopt the child;"
"(b) the petitioners agree in writing that the Fort Peck Tribal Court shall retain exclusive jurisdiction over custody of the child, wherever domiciled or resident."

Title VI CCOJ 103 permits Appellants and Appellees to file petitions for adoption in Tribal Court since they all are adults.

Appellants argued "the trial court viewed this section as ambiguous (TR., p. 92, line 3), and after a tortured analysis determined that the section was not applicable as a barrier for adoption by the non-Indian petitioner, Donetta Reum, (TR., p. 88, line 17)." This Court agrees that the trial court did view VI CCOJ 103 as ambiguous and stated, "[T]he Court will rule that both couples seeking adoption and in each couple, there is some Indian, available and willing to adopt the child and therefore, the Petition can be granted, not withstanding that all persons petitioning may not be Indian. The Court therefore, denies the motion of Petitioners Hawk for dismissal of Petition of Petitioners Reum." (TR., p. 93, line 19.)

This Court does not see where the Tribal Court made any specific determination that VI CCOJ 103 was not applicable as a barrier for adoption by the non-Indian petitioner, Donetta Reum when married to an Indian. However, this Court would agree that this section is not a barrier for adoption by a non-Indian petitioner when there is no Indian available and willing to adopt the child since the only requirement appears to be that persons filing petitions for adoption be adults. Therefore, the Tribal Court did correctly find that in each couple there was some Indian available and willing to adopt the child and properly denied the motion of Appellants to dismiss Appellees' petition.

The Appellants contended that VI CCOJ 103 is clear. This Court does not agree since it was not clear how this Court was to apply subparts (a) and (b) in that there was no conjunction between them. At oral arguments, it was discussed and agreed that the proper conjunction to be inserted after subpart (a) is "or", however, a subsequent phone conference with the Indian Law Clinic indicated that the proper conjunction is "and." In this case, one or all of the petitioners on each petition are Indian, therefore, (a) and (b) would not apply although it was originally determined (b) would have to be complied with and this case was remanded to Tribal Court for such compliance.

In view of the above, the Tribal Court did not err or abuse its discretion in permitting the Reum's to file a petition for the adoption of E.S.G. and thereafter granting the same. Did, however, the Tribal Court err or abuse its discretion in granting the Reum's petition over the Hawk's petition when June Hawk was a member of E.S.G.'s extended family and members of E.S.G.'s extended family wanted the Tribal Court to grant the same?

The Tribal Court has certain guidelines to be followed before entering a final decree of adoption. The last sentence of VI CCOJ 108 concludes "Where the child had not been in the custody of the petitioners for one year, the Court shall enter an interim decree, and place the child in the legal custody of the petitioners for a period of not less than one year prior to entering a final decree of adoption." In the findings of Fact the Tribal Court pointed out that E.S.G. had been in foster care with Leighton Reum and Donetta Reum since June 22, 1986 when she was 4 days old." E.S.G. is now fourteen (14) months old, therefore, the one year requirement was already and only fulfilled by Appellees.

In addition to the above, VI CCOJ 107 requires an investigation and written report to the Court and reads in full as follows:

> "Within five (5) days after the filing of a petition for adoption, the Court shall request a juvenile officer, social worker, or similar employee fo the Bureau of Indian Affairs or the Tribes to inquire into, investigate, and report in writing to the Court as to the suitability of the child for adoption, the financial ability, fitness and general background of the adoptive home and of the adoptive parent or parents, and to make recommendations on the proposed adoption."

The written report to the Court is clearly designed to provide expert unbiased guidance in the form of recommendations on the various factors on a proposed adoption. There were two petitions for the adoption of E.S.G. and home studies were conducted by the BIA on each proposed adoptive home. Wilma Desjarlais, Social Services Representative with BIA, conducted the home studies and provided written reports to the court of the same. The BIA reports recommended that E.S.G. remain in the home of Leighton Reum and Donetta Reum and that their petition for adoption be granted.

The home studies and testimony established that placement of E.S.G. in Appellees' home would protect the rights of and promote the welfare of this Indian child, the child's mother and the adoptive parents, Appellees thus fulfilling the purpose set forth in VI CCOJ 101. Testimony by Appellee

Donetta Reum also established that the placement of E.S.G. in Appellee's home would promote the stability and security of the Fort Peck Indian Tribes. The pertinent testimony as to the child's assimilation into Appellees family and acceptance in their home read in part as follows:

"CLAYTON REUM: Do you see … would you say Emily Sue has become attached to the family there?"
"DONETTA REUM: Yes."
"CLAYTON REUM: In what way?"
"DONETTA REUM: We are all she knows. I've never .. I've left her with two babysitters the whole 14 months that I had her. I'm always with her."
"CLAYTON REUM: How does she act with the other children?"
"DONETTA REUM: They all love her. There is no difference. You can't tell that she isn't one of our own."
"CLAYTON REUM: What is her attitude towards them?"
"DONETTA REUM: She loves them."
"CLAYTON REUM: Does she show it?"
"DONETTA REUM: You bet! The kids can get her to laugh and play around. Play peek-a-boo with them. Wink at them. She loves them as much as we love her."
"CLAYTON REUM: If this court were to grant adoption, are you able (sic) to provide for the child?."
"DONETTA REUM: Yes. . . . " [TR., p. 132, lines 10-26]

The pertinent testimony as to Appellees' involvement in their children's lives and directing their upbringing, which includes teaching the Indian culture, read in part as follows:

"RON ARNESON: Do you have any plans for your (sic) children in terms of their education." (sic) [TR. p. 134, lines 27-28]
"DONETTA REUM: to finish high school and to go on to college."
"RON ARNESON: Are (sic) you interested in encouraging your children to further their education?"
"DONETTA REUM: Yes."
"RON ARNESON: Do you participate in school activities?"
"DONETTA REUM: Yes."
"RON ARNESON: And do you encourage your children to participate in school activities?"
"DONETTA REUM: Very much so."
"RON ARNESON: What are some of things that some of your kids are involved in?"
"DONETTA REUM: Choir, football, wrestling, basketball, track . . . all of the sports."
"RON ARNESON: Lots of things. Do you . . . how do you encourage your children to handle their homework and those kinds of activities. (sic) How do you handle that?"
"DONETTA REUM: I have tried to instill into mu kids when they were old enough to have the responsibilities . . . if they have homework to do, and they know it, they are to get that done before they go play or whatever . . . if they have problems then they have always asked their Dad and I for help. If they had a problem with their homework."
"RON ARNESON: So you work with them if they have problems or if they need help? _ _ _ Those kinds of (sic) things."
"DONETTA REUM: Anything."
"RON ARNESON: How do you encourage the Indian culture (sic) in your home."
"DONETTA REUM: Our (sic) daughter dances, Leighton dances. We have all kinds of Indian things in our home. Books, things that hang on the wall, knick-knacks."
"RON ARNESON: Do you consider your home an Indian home?"
"DONETTA REUM: Yes." [TR. p. 135, lines 1-28]
"RON ARNESON: And do you encourage your children to be involved in all kinds of general Indian activities?"
"DONETTA REUM: Yes."
"RON ARNESON: Do you encourage to take courses (sic) in school related to that?"
"DONETTA REUM: What courses there is, yes."
"RON ARNESON: Do you encourage them to become familiar with the Indian heritage?"

"DONETTA REUM: Yes. We have learned a lot since their dad has been adopted into Hunkapillar home and he is being raised here on the reservation when he was a little boy . . . he's taught us all a lot of things."
"RON ARNESON: Do you discouraged (sic) any association with the Indian culture?"
"DONETTA REUM: No."

The pertinent testimony as to Appellees' ability to provide for their present children and E.S.G. and their philosophy as to discipline of the children read in part as follows:

"RON ARNESON: In terms . . . of Emily Sue's future . . . do you feel that you can economically provide for her?"
"DONETTA REUM: Yes."
"RON ARNESON: Do you see any problems in that area?"
"DONNETTA REUM: No. "
"RON ARNESON: I'm not sure . . . I have an impression that the home is large [TR. p. 136, lines 23-28] and spacious and it is not over crowded (sic). Would you say that is accurate?"
"DONETTA REUM: Yes. "
"RON ARNESON: No serious problems, that you are aware of?"
"DONETTA REUM: None of our kids have been in trouble with the law and no delinquencies or nothing . ." (sic)
"RON ARNESON: What would you say your general terms of philosophy (sic) in terms of discipline?"
"DONETTA REUM: Leighton and I have raised our kids to have respect for their elders. If Leighton . . . the kids respect Leighton, their Dad, very much so as well as they do me. There isn't many times that I have had to get after them. They listen to their Dad if he tells them to do something, they do it, as well as to me." [TR. p. 137, lines 1-14]

In view of the recommendations in the home studies and testimony, the Tribal Court did not err or abuse its discretion in granting the adoption of E.S. G. to Appellees, an enrolled Indian and a non-Indian, when members of the Indian child's extended family, Appellants, also petitioned for adoption.

II

> "The order of adoption to the Reums constitutes a violation of the principles of the Indian Child Welfare Act which mandates placement of Indian Children in Indian homes with preference to the extended family."

The Appellants' argument that the order of adoption to the Reums constitutes a violation of the principles of the ICWA demonstrates a misunderstanding of the same. The ICWA does not mandate placement by Tribal Courts of Indian Children in Indian homes with preference to the extended family. Because of the future bearing this opinion will have on subsequent adoptions in Tribal Court, a discussion of the ICWA is in order.

Congress made a declaration of policy in the ICWA of 1978 at Title 25, Section 1902 of the United States Code [25 USC 1902], which reads as follows:

> "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."

Congress declared policy is ". . . to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." Congress determined that the best interests of Indian children were not served by removing them from their families. In the ICWA, Congress attempts to regulate State courts and their handling of the placement of Indian children in adoptive and foster homes, not Tribal Courts. In support of the above in the ICWA, Congress made several findings which are set forth at 25 USC 1901. This section reads in full as follows:

"Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds:

> "(1) that clause 3, section 8, article I, of the United States Constitution provides that 'The Congress shall have Power . . . To regulate Commerce with Indian Tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> "(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> "(3) that there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are member of or are eligible for membership in an Indian tribe;
>
> "(4) that an alarming high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are place in non-Indian foster and adoptive homes and institutions; and
>
> "(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."

As seen from the above, when exercising jurisdiction State failed to recognize cultural and social standards in Indian communities and families and were placing Indian children in non-Indian foster and adoptive homes and institutions. In 25 USC 1911(a), the ICWA limited State Court jurisdiction by granting exclusive jurisdiction over Indian child custody proceedings to the Indian tribes. This section read as follows.

> "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 of domicile of the child."

The ICWA recognized that there would be continued adoptive and foster placement of Indian children under State laws. In order to protect and preserve Indian tribes from assimilation of their children into other societies and cultures, States were mandated to follow placement preferences adopted by Congress. Title 25 USC 1915 set forth guidelines for placement of Indian children by State Courts and specifically addresses adoptive, foster care, preadoptive and Tribal resolution placement preferences; the social and cultural standards to be applied; and the records to be dept and made available to Indian child's tribe. The section reads as follows:

> "(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 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 preference.

"(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."

It is obvious that 25 USC Section 1915 (a), as well as parts (b) and (c) set forth the preferences to be applied by State courts in adoptive, foster dare or preadoptive placements of Indian children under State law. As for 25 USC 1915 (d), the State Courts are required to apply social and cultural standards of the Indian community in which the parent or extended family resides. 25 USC Section 1915 does not mandate that Tribal Courts follow any order of preference or that the Tribes' own social and cultural standards be applied.

In the present case, E.S.G. was placed into a foster home approximately four (4) days after being born. E.S.G. remained in this foster home for over a year and until it was determined her natural mother was unable to care for her. E.S.G. was then adopted into the family of the foster home, which testimony revealed was the only family the child had known and was in every respect an Indian home although one of the parents, the mother, was a non-Indian.

In the Matter of the Adoption of Baby Boy L, 643 P.2d 168 at 175 (Kan. 1982) the Court in evaluating the policy and intent of Congress in adopting the ICWA stated, "[T]he underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. . . "This Court agrees with the above evaluation of the ICWA as to the policy and intent of Congress. Furthermore, the Court refused to apply the ICWA and stated, "[W]e are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them. . . ." Id. This Court also is of the opinion that to apply the Act, as the Appellants contend the same should be applied, would be to violate the policy and intent of Congress rather than uphold them.

The Tribal Court was not mandated by the ICWA to follow the adoptive preferences therein and place E.S.G. in an Indian home with preference to the extended family. Therefore, the order of adoption by the Tribal Court to the Appellees does not constitute a violation of the principles of the ICWA or the order of preference specified therein.

III

"The Petitioners/Appellants were denied due process of law by the tribal court's failure to consider preference for the adoption by the extended

family; by it failure to determine unfitness of extended family petitioners; and, by it failure to provide a meaningful opportunity for Petitioners/ Appellants to be advised of the substance of Petitioners/Appellees' (Reums') petition for adoption, and to be fully heard."

Appellants contend that they were denied due process of law by the Tribal Court by its failure to consider preference for adoption by the extended family. The Appellants contend the Court erred in its failure to consider the ICWA preference for the extended family adoption and in its failure to apply the preference of V CCOJ 306 (d) (2) of the Juvenile Code. As addressed above, the ICWA does not require Tribal Courts to follow the preferences set forth therein. In addition, the provisions of the CCOJ dealing with the Family Code do not refer to or require application of V CCOJ 306 (d) (2) and the preferences set forth therein. Therefore, Appellants' contention is without merit.

Appellants contend that they were denied due process of law by the Tribal Court's failure to determine unfitness of extended family petitioners. The Tribal Court made no finding of the unfitness of Appellants; however, there is no requirement that the same be made. The report of the Bureau of Indian Affairs submitted to the Tribal Court deals with determining the suitability of the child for adoption, The financial ability, fitness, and general background of the adoptive home and of the adoptive parent or parents and to make recommendations on the proposed adoption. The report does not necessarily have to contain a specific finding of unfitness of Appellants. Therefore, Appellants' contention is without merit.

Appellants contend that they were denied due process of law by the Tribal Court's failure to provide a meaningful opportunity for Appellants to be advised of the substance of Appellees' petition for adoption and to be fully heard. The transcript demonstrates and Appellants admit that they were permitted to present testimony regarding their own petition. Again, there was no requirement that Appellants be made aware of the arguments, substance of testimony or witnesses expected on behalf of Appellees. Therefore, Appellants contention is without merit in that they were given an opportunity to be heard at the adoption of E.S.G..

In VI CCOJ 105, consents to adoption are required from the child's parents, any legal guardian, and, if twelve years of age or older, the child. The CCOJ requires no consents to adoption from any other members of an extended family. The CCOJ does not define or declare any rights of members of an extended family to the custody of a child by way of placement preferences. Furthermore, the CCOJ does not require any notice be given members of an extended family.

In attempting to support their position, Appellants cited several cases wherein State Courts have dealt with adoptions of Indian children under ICWA. These cases do not support Appellants' position. In the Matter of the Adoption of John Doe, 555 P.2d 906 (N.M. 1976), the Court stated,

"The grandfather's asserted right to continued custody and his desire to maintain his ethnic heritage and customs are not the paramount interests involved in this case. The paramount interest is the best interest of the child, and that interest is determined on the basis of facts presented to the trial court. . . . Any constitutional right in the grandfather (we do not attempt to define or declare such a right in connection with the child's custody) is necessarily subordinate to the best interests of the child. Any other rule opens the possibility of a return to peonage. . . ."

The above Court did not recognize a grandfather's asserted right to continued custody of the child as a constitutional right and indicated that if there was such a right it would be subordinate to the best interest of the child. As stated previously, the CCOJ gives no rights to members of an extended family as to preference for custody of a child which would circumvent fact finding by the Tribal Court as to the best interest of the child in determining custody in adoption proceedings. This Court will not attempt to define or declare such a right.

In conclusion, when the Tribal Court granted the petition of the Appellees to adopt E.S.G., Appellants were not denied due process of law.

IV

The Petitioners/Appellants Hawks were denied equal protection of the law by the tribal court's application of preference for Respondents/Appellees Reums based on the court's desire to not change a "good situation"; by the court's findings of fitness of the Reums; by the court's failure to make finding of the fitness of the Hawks; by the court's failure to grant a one-year interim adoption to the Hawks; and, by the court's finding of a bonding between E.S.G. and the Reum.

Appellants and Appellees were both given a opportunity to present evidence on their petitions for the adoption of E.S.G.. There was also a report to the Court on the homes of Appellants and Appellees as required by VI CCOJ 107. Therefore, Appellants were not denied equal protection of the law when the Tribal Court's order granted Appellees' petition. THE Tribal Court's failure to grant a one-year interim adoption to the Appellants when E.S. G. had already lived with Appellees for over a year seems appropriate under the circumstances.

IT IS THE UNANIMOUS DECISION OF THIS COURT TO HOLD THAT THE FINDING OF FACT, CONCLUSIONS OF LAW, AND DECREE OF ADOPTION GRANTING APPELLANTS' PETITION FOR ADOPTION OF E.S.G., A MINOR INDIAN CHILD, PREVIOUSLY ENTERED DID NOT VIOLATE THE PRINCIPLES FO THE INDIAN CHILD WELFARE ACT AND IS HEREBY AFFIRMED.

DONE this 25th day of January, 1988.

THE COURT OF APPEALS

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ARNIE A. HOVE, Chief Justice

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GARY JAMES MELBOURNE, Justice