

Comment,

**A BRIEF OVERVIEW OF THE INDIAN  
CHILD WELFARE ACT, STATE COURT  
RESPONSES, AND ACTIONS TAKEN IN  
THE PAST DECADE TO IMPROVE  
IMPLEMENTATION OUTCOMES**

Since the Indian Child Welfare Act (hereafter ICWA) was adopted in 1978 by the U.S. Congress, various courts have struggled with its application, at times coming to different conclusions regarding various terms in the statute and producing different outcomes by state.<sup>1</sup> Differences among state court decisions range from philosophical differences as to the purpose and need for a law like ICWA to issues with statutory construction.<sup>2</sup> These disparities result in vastly differing placements for Indian children as ordered by the various state courts. There have been recent attempts both within the states and nationally to address these issues, some set forth in this paper. The U.S. Supreme Court recently issued an opinion in *Adoptive Couple v. Baby Girl*, only the second ICWA case to be heard by the Court.<sup>3</sup> The Court's decision may serve to clarify some of the competing implementation schemes administered state to state.<sup>4</sup>

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<sup>1</sup> State *ex rel.* C.D., 200 P.3d 194, 197 (Utah 2008); *see generally*, Dennis Puzz, Jr., *Indian Law: Untangling the Jurisdictional Web: Determining Indian Child Welfare Jurisdiction in the State of Wisconsin*, 36 WM. MITCHELL L. REV. 724 (2010) (explaining this issue in the context of the State of Wisconsin); *see also*, Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 LAW & INEQ. 311, 313 (1992); Solangel Maldonado, *Race, Culture and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).

<sup>2</sup> *See* Gorman & Paquin, *supra* note 1, at 313.

<sup>3</sup> *See* *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (U.S. 2013).

<sup>4</sup> *See id.*; *see also* Sections III, IV, V, and VI in this Comment for the different implementation schemes set forth in each state and the state and federal responses.

## **I. The Historical Treatment of Indian Families and the Resulting Need for a Federal Response**

The United States government has a “troubled past” with regard to Native Americans.<sup>5</sup> For hundreds of years, federal Indian policy has been “cyclic . . . . Even more fundamentally, federal Indian policy has always been the product of the tension between two conflicting forces - separatism and assimilation.”<sup>6</sup> The Civilization Fund Act of 1819 was passed by Congress in an effort to assimilate Native American children into the larger white society by “introducing among them the habits and arts of civilization.”<sup>7</sup> This was accomplished by providing federal funds to specific schools that rid Native American children of their traditions and customs and taught them reading, writing, and arithmetic.<sup>8</sup> This was followed by the Indian Removal Act of 1830 which authorized the President to enter into negotiations with tribes in the South to determine the exchange of native lands for the tribe’s removal to federal territories in the West.<sup>9</sup>

In 1887 the Dawes Act passed allowing the President to divide tribal lands into property allotments of specified acreage for individuals from certain tribes.<sup>10</sup> Many saw this Act as federal encouragement to break up tribes and further assimilate those who received the parcels of land.<sup>11</sup> Another controversial program came from the Bureau of Indian Affairs by way of its Relo-

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<sup>5</sup> Amanda B. Westphal, *An Argument in Favor of Abrogating the Use of the Best Interest of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. REV. 107, 108 (2003).

<sup>6</sup> *Id.* at 108.

<sup>7</sup> Civilization Fund Act, ch. 85, 3 Stat. 516, 516-17 (1819).

<sup>8</sup> See Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 827 (2001).

<sup>9</sup> See Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

<sup>10</sup> See Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (2006)).

<sup>11</sup> See *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 276-77 (1992) (Blackmun, J., concurring in part and dissenting in part).

cation Program of the 1950s.<sup>12</sup> This program relocated Native Americans from their tribal lands into urban centers<sup>13</sup> and many believed the program was just another way to strip Native Americans from their tribal lands.<sup>14</sup>

Beginning around 1869, white-run boarding schools for Indian children promoting assimilation were commonplace.<sup>15</sup> While Indian children attended these overcrowded and inadequate boarding schools, they were not permitted access to their parents or others from the tribe.<sup>16</sup> The children's former way of life, religions, language, and other semblances of the tribe were strictly forbidden.<sup>17</sup> As described by Vine Deloria, Jr. and Clifford M. Lytle, the goal of Indian boarding schools was to "inculcate Indian children with the virtues and values of Western civilization and to eliminate the traces of tribal 'barbarism' that their own heritage was thought to represent."<sup>18</sup> These assimilation policies and practices through the last century led to the need for a federal policy like the Indian Child Welfare Act.

## II. The Congressional Hearings leading to Implementation and ICWA's Declaration of Policy

Congress held a series of hearings between 1974 and 1978 leading to the passage of ICWA. The numerous personal stories, empirical studies and expert testimony given at those Congressional hearings illustrated the deleterious effect of removal on tribes and Indian children.<sup>19</sup> As Calvin Isaac, Tribal Chief of the

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<sup>12</sup> See *Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468 (Cl. Ct. 1985) (discussing land policies of the federal government with regards to tribal lands), *rev'd on other grounds*, *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986).

<sup>13</sup> *Sioux Tribe of Indians*, 7 Cl. Ct. at 479.

<sup>14</sup> See *Fond Du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849, 853-57 (8th Cir. 2011) (Murphy, J., dissenting).

<sup>15</sup> See Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17 (1996).

<sup>16</sup> See *id.* at 29.

<sup>17</sup> See *id.*

<sup>18</sup> See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, AMERICAN JUSTICE 241 (1983).

<sup>19</sup> See generally 1978 U.S.C.C.A.N. 7530 (1978).

Mississippi band of Choctaw Indians, put it, “Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.”<sup>20</sup> Misunderstandings of social structures practiced by Indian families led to many children being removed after social service workers thought Indian children were being neglected by their biological parents.<sup>21</sup> As in many other cultures, Indian children often “spent considerable amounts of time with care-givers other than their parents; cousins grew up like sisters and brothers in the houses of their aunts and uncles or grandparents, where whatever food and supplies they had were shared amongst the group.”<sup>22</sup> What ICWA advocates intended to do was establish a federal policy “that, whenever possible, an Indian child should remain in the Indian community,” and ensure that Indian child welfare determinations not be made on a “white, middle-class standard which, in many cases, forecloses placement with an Indian family.”<sup>23</sup>

Before ICWA, twenty-five to thirty-five percent of all Indian children were placed in out-of-home care.<sup>24</sup> In 1969, eighty-five percent of Indian children in foster care were placed in non-Indian homes.<sup>25</sup> The number of Indian children in the foster care system in South Dakota, a state with a high Native American population, was sixteen times greater than the rate for non-Indian children.<sup>26</sup> In Wisconsin the risk of separation from parents

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<sup>20</sup> *Indian Child Welfare Program: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. at 191-93 (1978).

<sup>21</sup> See 1978 U.S.C.C.A.N. at 7532; see also *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) (discussing the custom of extended family and tribe assuming responsibility for care of orphaned children).

<sup>22</sup> See Kunesh, *supra* note 15, at 23-24.

<sup>23</sup> DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW* 421 (2010) (quoting H.R. REP. NO. 95-1386, at 7545-47).

<sup>24</sup> 1978 U.S.C.C.A.N. at 7531.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

of Indian children was sixteen hundred percent greater than that risk for non-Indian children.<sup>27</sup>

Because the very existence of Indian tribes in America was at risk due to the alarmingly high number of children being placed with non-Indian families and the risk of loss of such an important aspect of American culture, Congress decided swift action was necessary. During the Congressional hearings on the passage of ICWA, Congress added that due to the unique political status of Indian tribes as sovereign nations, there was a responsibility assumed for the protection and preservation of the various Indian tribes.<sup>28</sup> Congress further rationalized ICWA's passage on the finding that Indian children were the most vital resource to the continuing existence of the Indian tribes.<sup>29</sup> The Congressional hearings of 1974 documented what one witness called "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today."<sup>30</sup> ICWA sought to acknowledge Indian communities' cultural and social standards.<sup>31</sup> Thus, ICWA's stated policy reads,

[T]o 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. . . .<sup>32</sup>

#### A. *What Is the Indian Child Welfare Act?*

The Indian Child Welfare Act is a federal law, which under the Supremacy Clause of the U.S. Constitution, trumps conflicting state law.<sup>33</sup> It governs the placement of children who are eligible for tribal membership.<sup>34</sup> The tribe's determination of

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<sup>27</sup> *Id.*

<sup>28</sup> 25 U.S.C. § 1901(2) (1978); *see also* *Angus v. Joseph*, 655 P.2d 208, 213 (Or. Ct. App. 1982).

<sup>29</sup> *See* 25 U.S.C. § 1901(3).

<sup>30</sup> *Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 3 (1974).

<sup>31</sup> 25 U.S.C. § 1901.

<sup>32</sup> 25 U.S.C. § 1902.

<sup>33</sup> *See* U.S. CONST. art. VI, cl. 2.

<sup>34</sup> *See* Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1978).

membership or membership eligibility is conclusive and final.<sup>35</sup> The proceedings governed by ICWA involve placement of Indian children where their parents are unable to demand their return, such as foster care and pre-adoptive placements and adoptive placements involving termination of parental rights.<sup>36</sup> ICWA does not apply in custody disputes between the child's parents in divorce proceedings, juvenile delinquency proceedings, or in adoptions not involving termination of parental rights, like step-parent or second parent adoptions. Those proceedings are left to the states and their courts.<sup>37</sup>

“Indian” is defined as 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.<sup>38</sup> “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.<sup>39</sup> “Parent” is defined as, “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.”<sup>40</sup>

ICWA expressly provides tribes exclusive jurisdiction over proceedings involving an Indian child residing or domiciled on the tribe's reservation or when the Indian child is a ward of the tribal court regardless of the status of living on the tribe's reservation.<sup>41</sup> When the child does not live on the reservation and is not a ward of the tribal courts, ICWA expounds that state courts shall transfer the proceeding to the tribe when requested unless

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<sup>35</sup> See *Adoption of Riffle*, 902 P.2d 542, 545 (Mont. 1995).

<sup>36</sup> See Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21 (2005).

<sup>37</sup> See 25 U.S.C. § 1903(1); see also *In re W.B.*, 281 P.3d 906, 917 (Cal. 2012).

<sup>38</sup> *Id.* § 1903(3).

<sup>39</sup> *Id.* § 1903(4).

<sup>40</sup> *Id.* § 1903(9). Note this definition as used in *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012).

<sup>41</sup> 25 U.S.C. § 1911.

there is a parental objection.<sup>42</sup> There are then two possible competing interests: “a parent’s interests in raising a child as he or she sees fit and the tribe’s interest in fostering its community by preserving Indian families.”<sup>43</sup> ICWA attempts to reconcile these by assuming that when the child resided on the reservation, the interests of the tribe are “distinct from but on a parity with the interests of the parents.”<sup>44</sup> When the child lives outside the reservation, ICWA provides that the parents’ interests *may* be primary.<sup>45</sup>

For adoptive placements, “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.”<sup>46</sup> Only when these options are exhausted, can the state or the tribe look outside the tribe to possible adoptive placements. Although placement within the same family and/or tribe is the goal, foster care or preadoptive placements are bit more lax when looking outside the tribe. These children “shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met.”<sup>47</sup>

ICWA also suggests the child be placed “within reasonable proximity to his or her home.”<sup>48</sup> The child, 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.<sup>49</sup> These preferences on placement apply to both the state and the tribal courts when making placement determinations.

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<sup>42</sup> *Id.*

<sup>43</sup> Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 27 (1997).

<sup>44</sup> *In re Larissa G.*, 51 Cal. Rptr. 2d 16, 19-20 (Cal. App. 4th 1996).

<sup>45</sup> *See id.* at 20.

<sup>46</sup> 25 U.S.C. § 1915.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

ICWA also gives the tribe, the parents, or an Indian custodian the right to intervene in a case involving foster care or termination of parental rights.<sup>50</sup> This intervention can be asserted at any time in the proceedings.<sup>51</sup> This right of intervention does not apply to pre-adoption or adoption proceedings unless they also include the termination of parental rights.<sup>52</sup>

ICWA applies to both involuntary and voluntary placements.<sup>53</sup> A voluntary placement occurs when the parents either consent to putting their child in foster care or consent to the termination of their parental rights.<sup>54</sup> ICWA allows for the tribe to have the final approval on the aforementioned custody proceedings because the impact on the tribe as a whole is the paramount concern.<sup>55</sup> In an involuntary proceeding, the state must notify both of the parents or Indian custodians and the child's tribe at least ten days prior to the proceeding.<sup>56</sup> Emergency proceedings such as protective custody hearings may follow state law, but proceedings after that are controlled by ICWA. The child may be provided an attorney and the parents are entitled to one if they are indigent and cannot afford one.<sup>57</sup> If the state doesn't have provisions for providing indigent parents an attorney, the Secretary of the Interior must pay the attorney expenses.<sup>58</sup> If the state cannot determine who the parent or the tribe is, then the state is required to notify the Secretary of the Interior.<sup>59</sup> Notification must at least be made by registered mail, return receipt requested, and the parties notified have the right to an additional twenty days to prepare prior to the proceeding.<sup>60</sup> Failure to provide such notice can cause a jurisdictional defect that may result in any such proceeding to be overturned.<sup>61</sup>

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<sup>50</sup> *See id.* § 1911(c).

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> 25 U.S.C. § 1913(d); *see also id.* § 1911(a).

<sup>54</sup> *Id.* § 1913(d).

<sup>55</sup> *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989).

<sup>56</sup> *See* 25 U.S.C. § 1912.

<sup>57</sup> *See id.* § 1912(b).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* § 1912(a).

<sup>61</sup> *See id.*

### III. The State Courts' Responses to ICWA

Again, there is no consensus among the states when it comes to interpreting individual portions of ICWA.<sup>62</sup> There are provisions within ICWA that are interpreted differently and there are a number of exceptions carved out of ICWA. These exceptions allow the state courts to make their own determinations when it comes to Indian children's placements using state court juvenile court statutes, allowing jurisdiction over the child and the matter to remain in state court, not tribal court.

#### A. States Offering More Protection

The states can choose to interpret portions of ICWA as providing more deference to tribes than the federal statute would seem to require. For example, in termination of parental rights proceedings, the federal ICWA standard has been interpreted by some courts to require a "dual burden of proof."<sup>63</sup> First, the court would use the *clear and convincing evidence* standard and determine the provisions for termination were met.<sup>64</sup> Then the court would turn to "the more stringent standard under ICWA to determine whether the petitioner has proved *beyond a reasonable doubt* that custody by the natural Indian parent would likely result in damage to the child."<sup>65</sup> In termination of parental rights hearings, other state courts have held that ICWA supplants the state standard and the only criteria applicable are those detailed in §1912(f), namely the higher "beyond a reasonable doubt" standard.<sup>66</sup> In foster care proceedings, the court may not issue a foster care placement unless "supported by clear and convincing evidence," a standard of proof higher under ICWA than in non-Indian child proceedings.<sup>67</sup> Courts also use different standards when reviewing a lower courts refusal to transfer a case to tribal court.<sup>68</sup> Some courts have determined that the appropriate stan-

<sup>62</sup> See also Gorman & Paquin, *supra* note 1, at 313.

<sup>63</sup> *In re Bluebird*, 411 S.E.2d 820, 823 (N.C. Ct. App. 1992) (emphasis added).

<sup>64</sup> See *id.* at 823.

<sup>65</sup> *Id.*

<sup>66</sup> See 25 U.S.C. § 1912(f); *People ex rel. C.A.J.*, 709 P.2d 604, 606 (Colo. App. 1985); *People ex rel. P.B.*, 371 N.W.2d 366, 371-72 (S.D. 1985).

<sup>67</sup> 25 U.S.C. § 1912(e).

<sup>68</sup> See *In re A.P.*, 961 P.2d 706, 713 (Kan. Ct. App. 1998).

ard to apply is abuse of discretion, while other states have held that the determination must be supported by clear and convincing evidence of “good cause.”<sup>69</sup>

#### B. “Active efforts” Requirements<sup>70</sup>

In a removal case, the party seeking the removal is required to make “active efforts” to provide the parent(s) or custodian with remedial and rehabilitative services designed to prevent the removal of the child from the Indian family.<sup>71</sup> The “active effort” requirement applies even if to all parties seeking removal, including a private party in a private adoption.<sup>72</sup> The Indian child may not be temporarily removed unless there is a likelihood of “serious emotional or physical damage” to the child if they remain in the home, as demonstrated to the court by expert testimony on whether 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.”<sup>73</sup> If testimony demonstrates no such harm would occur, removal of the Indian child is prohibited.<sup>74</sup> These experts must be qualified as such by the state.<sup>75</sup>

ICWA mandates the state make “active effort” in two ways: (1) provide services to the family to prevent removal of the child, and (2) attempt to reunify the child with his or her parent or Indian custodian after removal.<sup>76</sup> “Active efforts” are made with active and early participation and consultation with the child’s tribe in all case planning decisions. The states are not in consensus on what “active efforts” entail. California and Colorado treat

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<sup>69</sup> See also *People ex rel. J.L.P.*, 870 P.2d 1252, 1256-57 (Colo. App. 1994); *Matter of Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. App. 1993), *rev’d on other grounds*, 521 N.W.2d 357 (Minn. 1994), *cert. denied* 513 U.S. 1127 (1995).

<sup>70</sup> See generally Megan Scanlon, *From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Proceedings*, 43 ARIZ. ST. L.J. 629 (2011).

<sup>71</sup> See 25 U.S.C. § 1912(d).

<sup>72</sup> See Barbra Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 614 (2002).

<sup>73</sup> *In re A.P.*, 961 P.2d at 712; see also 25 U.S.C. § 1912(d).

<sup>74</sup> See *In re S.M.H.*, 103 P.3d 976, 984-95 (Kan. Ct. App. 2005).

<sup>75</sup> *BIA Guidelines*, 44 Fed. Reg. 67,584 (1979), available at [http://www.nicwa.org/administrative\\_regulations/icwa/ICWA\\_guidelines.pdf](http://www.nicwa.org/administrative_regulations/icwa/ICWA_guidelines.pdf).

<sup>76</sup> *Id.*

active efforts the same as “reasonable efforts,” the lower standard used in state court custody proceedings not involving ICWA.<sup>77</sup> Other states such as Utah and Oklahoma have held that the “active effort” language in ICWA requires more than just the “reasonable efforts.”<sup>78</sup> “Even [in these states] holding that active efforts require something more [than reasonable efforts, they] do not agree on what those efforts might entail.”<sup>79</sup>

#### IV. Exceptions to ICWA as Interpreted by the States

##### A. “Good Cause” Not to Transfer to Tribal Court and Keep the Case in State Court

For adoptive placements, “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.”<sup>80</sup> The order of placement preferences during removal proceedings are: “a member of the Indian child’s extended family; a foster home, licensed, approved or specified by the Indian child’s tribe, whether on or off the reservation; a Indian foster home licensed or approved by an authorized non-Indian licensing authority; or an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child’s needs.”<sup>81</sup>

In pre-adoptive, adoptive and foster care placements, these provisions must be followed unless there is “good cause to the contrary.” “Good cause” is not defined in ICWA.<sup>82</sup> The Bureau of Indian Affairs (BIA) has issued an advisory set of guidelines for state courts to use in determining “good cause.”<sup>83</sup> The determination of “good cause” not to transfer a case to tribal court

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<sup>77</sup> See *In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 612 (Cal. Ct. App. 2006); see also *People ex rel. K.D.*, 155 P.3d 634, 636-38 (Colo. App. 2007).

<sup>78</sup> See *State ex rel. C.D.*, 200 P.3d at 205; see also *In re J.S.*, 177 P.3d 590, 592-93 (Okla. Civ. App. 2008).

<sup>79</sup> See Scanlon, *supra* note 70, at 630.

<sup>80</sup> 25 U.S.C. § 1915.

<sup>81</sup> 25 U.S.C. § 1915(b).

<sup>82</sup> 25 U.S.C. § 1911, 44 Fed. Reg. 67,591, available at [http://www.nicwa.org/administrative\\_regulations/icwa/ICWA\\_guidelines.pdf](http://www.nicwa.org/administrative_regulations/icwa/ICWA_guidelines.pdf).

<sup>83</sup> *Id.*

when such is requested is based on one or more of the following: (1) the proceeding was at an advanced stage when the transfer request was made and the party could have made it earlier; (2) the Indian child is over twelve years old and objects to the transfer; (3) it would cause undue hardship on the parties and/or witnesses to travel to a tribal court; (4) or the parents of an Indian child over the age of five<sup>84</sup> are not available and the child has had little or no contact with the tribe.<sup>85</sup> The burden of proving the existence of “good cause” rests on the party pushing there is “good cause” not to transfer the matter.<sup>86</sup>

These guidelines are not mandatory because they are “interpretative rather than legislative in nature,”<sup>87</sup> but many states have adopted them,<sup>88</sup> and given them varying degrees of weight.<sup>89</sup> Some courts view the foster placement/removal proceeding and the subsequent termination of parental rights proceeding as one proceeding for the purpose of ICWA, meaning that if the state has adopted the BIA guidelines and a tribe attempted to intervene during the termination proceeding, those courts could find that the proceedings were at an advanced stage and deny tribal intervention.<sup>90</sup> Other state courts have determined they are separate proceedings, thus allowing tribal intervention in the termination proceeding.<sup>91</sup>

A noticeable provision not included in the BIA guidelines is a discussion of the best interests and the child’s bond to the non-Indian foster family, if the child has been placed in such an environment. ICWA presumes that maintaining ties to one’s tribe is

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<sup>84</sup> *Id.* In the commentary to the BIA Guidelines, the rationale behind (4) is that children under five are expected to adjust to the change in cultural environment more readily than older children.

<sup>85</sup> 44 C.F.R. 67,584.

<sup>86</sup> *See id.*

<sup>87</sup> *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App. 1995).

<sup>88</sup> *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986); *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998); *Matter of M.E.M.*, 635 P.2d 1313 (Mont. 1981); *In re Adoption of S.W.*, 41 P.3d 1003 (Okla. Civ. App. 2001); *People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005).

<sup>89</sup> *See, e.g., In re Adoption of F.H.*, 851 P.2d 1361, 1364-1365 (Alaska 1993) (using only maternal preference as “good cause” to keep the adoptive placement with a non-Indian couple).

<sup>90</sup> *See, e.g., In re M.H.*, 956 N.E.2d 510 (Ill. App. 1d, 2011) (denying tribal intervention).

<sup>91</sup> *See, e.g., In re Zylena R.*, 825 N.W.2d 173 (Neb. 2012).

in the child's best interest.<sup>92</sup> Some states use the nature of the bond with a child's foster family and a detrimental effect of removing the child from their current placement as "good cause" to not follow the BIA Guidelines.<sup>93</sup> Other states though do not use a bond as a factor in determining "good cause"<sup>94</sup> unless there is an "extraordinary" emotional need.<sup>95</sup>

#### B. "Existing Indian Family" Doctrine

The "existing Indian family" is a judge-made exception to ICWA.<sup>96</sup> This exception seeks to forestall application of ICWA if the Indian child's parents have not maintained a significant social, cultural, or political relationship with their tribe and effectively blocks intervention by a tribe in certain child custody proceedings.<sup>97</sup> This exception was created in Kansas in the *Baby Boy L.* case of 1982, a mere four years after Congress passed ICWA.<sup>98</sup> In *Baby Boy L.* a non-Indian mother consented to the termination of her parental rights over the child the day the baby was born.<sup>99</sup> The child's father was incarcerated at the time and his tribe attempted to intervene in the ensuing adoption.<sup>100</sup> The court held that ICWA did not apply unless the child was part of an "existing Indian family unit" and the court denied the tribe's request for transfer.<sup>101</sup> The court also held that ICWA "was not to dictate that an illegitimate infant who has never been a mem-

<sup>92</sup> See, e.g., *People ex rel.* A.R., 2012 COA 195, para. 16 (Colo. App. 2012).

<sup>93</sup> See, e.g., *In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477, 459 (Idaho 1995) (finding the likelihood of serious psychological and emotional trauma if removed from adoptive parents a legitimate factor in good cause to deviate from placement preferences).

<sup>94</sup> See, e.g., *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Custody of S.E.G.*, 521 N.W.2d 357, 361-62 (Minn. 1994); *Holyfield*, 490 U.S. at 36; see also *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Cal. Ct. App. 2000); *B.R.T. v. Exec. Dir. of Soc. Serv. Bd.*, 391 N.W.2d 594, 601 n.10 (N.D. 1986).

<sup>95</sup> See *In re C.H.*, 997 P.2d 776, 783 (Mont. 2000).

<sup>96</sup> See Barbara Ann Atwood, *Flashpoint under the Indian Child Welfare Act: Towards a New Understanding of State Court Resistance*, 51 EMORY L. J. 587, 589-90 (2002).

<sup>97</sup> See generally *id.*

<sup>98</sup> *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 175.

ber of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.”<sup>102</sup>

After *Baby Boy L.*, the U.S. Supreme Court heard *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>103</sup> the only ICWA case in which the Supreme Court issued an opinion until this summer with *Adoptive Couple v. Baby Girl*.<sup>104</sup> Unlike the parents in *Baby Boy L.*, the mother in *Holyfield* lived on the reservation both before and after the off-reservation birth of the children.<sup>105</sup> The Mississippi state court made the determination that ICWA did not apply because the children had been born off the reservation and given to the state social service agency the day of their birth.<sup>106</sup> The U.S. Supreme Court found that the children were domiciled on the reservation because their biological mother was domiciled there, holding the lower court erred in not granting exclusive jurisdiction to the tribal court under ICWA.<sup>107</sup> The Supreme Court remanded the case to the tribal court for a custody determination three years after the child had been placed with non-Indian adoptive parents.<sup>108</sup> Noting the potential disruption in the children’s lives, the Supreme Court observed that any potential harm could have been avoided if the adoptive parents and state court had not wrongfully denied the tribe its rights under ICWA.<sup>109</sup> Although the Supreme Court did not consider the “existing Indian family” exception directly, some commentators view *Holyfield* as a rejection of the exception. In South Dakota for example, the state supreme court recognized that the “existing Indian family” doctrine was inconsistent with ICWA’s motivating impulse and the U.S. Supreme Court’s decision in *Holyfield*.<sup>110</sup>

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<sup>102</sup> *Id.* at 206.

<sup>103</sup> *Holyfield*, 490 U.S. 30 (1989).

<sup>104</sup> *Adoptive Couple*, 133 S. Ct. 2552 (U.S. 2013).

<sup>105</sup> *Holyfield*, 490 U.S. at 37.

<sup>106</sup> *In re B.B.*, 511 So. 2d 918 (Miss. 1987), *rev’d Holyfield*, 490 U.S. 30.

<sup>107</sup> *Holyfield*, 490 U.S. at 36.

<sup>108</sup> *Id.* at 53-54.

<sup>109</sup> *Id.*

<sup>110</sup> *See In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990).

The states are not in consensus on whether to follow the doctrine. As of 2012, Alabama,<sup>111</sup> Indiana,<sup>112</sup> Kentucky,<sup>113</sup> Louisiana,<sup>114</sup> Missouri,<sup>115</sup> Nevada,<sup>116</sup> Tennessee,<sup>117</sup> and certain districts in California<sup>118</sup> still recognize the “existing Indian family” exception and continue to apply it to cases in their state courts. Many more states have decided to abolish or reject the doctrine by either statute or case law. Most states, such as Arizona,<sup>119</sup> Colorado,<sup>120</sup> Illinois,<sup>121</sup> Idaho,<sup>122</sup> Michigan,<sup>123</sup> Montana,<sup>124</sup> New Jersey,<sup>125</sup> New York,<sup>126</sup> North Dakota,<sup>127</sup> Oregon,<sup>128</sup> South Carolina,<sup>129</sup> South Dakota,<sup>130</sup> Utah,<sup>131</sup> and other districts in California,<sup>132</sup> have rejected the doctrine by case law, and these court opinions offer a vast array of reasons for rejection. Interestingly some states that once embraced the “existing Indian family” ex-

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<sup>111</sup> See *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990) (narrowing application of the “existing Indian family” doctrine to cases where the child is born to unwed, non-Indian mother who is voluntarily relinquishing parental rights).

<sup>112</sup> See *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

<sup>113</sup> See *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

<sup>114</sup> See *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995).

<sup>115</sup> See *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

<sup>116</sup> See *Dawn M. v. Nev. State Div. Child & Family Servs.*, 221 P.3d 1255 (Nev. 2009).

<sup>117</sup> See *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

<sup>118</sup> See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-17 (Cal. Ct. App. 2001).

<sup>119</sup> See *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000).

<sup>120</sup> See *In re N.B.*, 199 P.3d 16 (Colo. App. 2007).

<sup>121</sup> See *Tubridy v. Iron Bear (In re Adoption of S.S.) (S.S. II)*, 657 N.E.2d 935 (Ill. 1995).

<sup>122</sup> See *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993).

<sup>123</sup> See *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

<sup>124</sup> See *In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996).

<sup>125</sup> See *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 931-32 (N.J. 1988).

<sup>126</sup> See *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005).

<sup>127</sup> See *In re A.B.*, 663 N.W.2d 625 (N.D. 2003).

<sup>128</sup> See *Quinn v. Walters*, 881 P.2d 795 (Or. 1994).

<sup>129</sup> See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 592 n.17 (S.C. 2012) *rev'd*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (U.S. 2013).

<sup>130</sup> See *In re Adoption of Baade*, 462 N.W.2d 485.

<sup>131</sup> See *State ex rel. D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997).

<sup>132</sup> See *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 323 (Cal. Ct. App. 2007).

ception have since rejected it, namely Kansas, the state that created the doctrine.<sup>133</sup>

The Oklahoma Code recognized the tribes' interest in Indian children, "regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated."<sup>134</sup> In 2004, Washington specified in its state statute that "[i]f the child is an Indian child as defined under the Indian child welfare act [sic], the provisions of the act shall apply."<sup>135</sup> In 2007, the Minnesota Legislature declared that a court "shall not determine the applicability of this chapter or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based on the level of contact a child has with the child's Indian tribe, reservation, society, or off-reservation community."<sup>136</sup> Finally, in 2009 Wisconsin became the fifth state to reject the "existing Indian family" doctrine by statute. Prior to this time, Wisconsin's courts had just refused to rule on the "existing Indian family" doctrine.<sup>137</sup>

One appeals court in California has taken an interesting approach to the "existing Indian family" exception.<sup>138</sup> The State's second district held in *In re Bridget R.* that,

under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe.<sup>139</sup>

The court first determined that applying ICWA to the children's adoption would deprive them of their due process rights because

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<sup>133</sup> *In re A.J.S.*, 204 P.3d 543; see also *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) (holding the "existing Indian family" exception to application of ICWA no longer viable, overruling prior state cases).

<sup>134</sup> OKLA. STAT. ANN. tit. 10, § 40.1 (West 2009).

<sup>135</sup> 2004 Wash. Legis. Serv. Ch. 64 (S.H.B. 3051) (West).

<sup>136</sup> MINN. STAT. § 260.771(2) (2008).

<sup>137</sup> WIS. STAT. § 938.028(3)(a) (2009).

<sup>138</sup> See Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20*, In the Matter of A.J.S., and the Last Gasp of a Dying Doctrine, 36 WM. MITCHELL L. REV. 684, 708-12 (2010).

<sup>139</sup> *In re Bridget R.*, 49 Cal. Rptr.2d 507, 516 (Cal. App. 2d Dist. Ct. 1996).

they had a fundamental right to remain in the only family they had ever known and if applying ICWA would interfere with that right, then the government was required to establish a compelling interest.<sup>140</sup> The court further held that even though preserving Indian culture qualified as a compelling interest, that interest was not present where neither the children nor their parents had maintained significant social, political, or cultural ties with an Indian community.<sup>141</sup>

The court also addressed an equal protection challenge in that ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children who are similarly situated.<sup>142</sup> Because the court had already determined there was no compelling interest in their due process analysis, the court concluded that ICWA also violated the children's equal protection rights.<sup>143</sup> Under the Tenth Amendment, the court rationalized that by holding that jurisdiction over familial relations is traditionally a power reserved to the states.<sup>144</sup> Federal case law shows that Congress exceeds its authority when it legislates in matters generally reserved to the states and in the absence of a substantial nexus between the enumerated federal power and the matter regulated.<sup>145</sup> Here, the court found that to allow ICWA to override state law on the matter of family relations, it must be shown that the state law would do significant damage "to a clear and substantial federal interest."<sup>146</sup>

The California legislature attempted to address the split in the state's circuits by adopting a law "direct[ing] the courts to strive to promote the stability and security of Indian tribes and families and to comply with the Indian Child Welfare Act in all Indian child custody proceedings" and in effect, overrule *Bridget R.*<sup>147</sup> After that law was enacted, another district court in the state heard *In re Santos Y.*, a case involving the "existing Indian

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<sup>140</sup> *Id.* at 526.

<sup>141</sup> *Id.* at 526-27.

<sup>142</sup> *Id.* at 527.

<sup>143</sup> *Id.* at 528.

<sup>144</sup> *Id.*

<sup>145</sup> *Bridget R.*, 49 Cal. Rptr.2d at 529.

<sup>146</sup> *Id.* at 528.

<sup>147</sup> Daniel Albanil Adlong, *The Terminator Terminates Terminators: Governor Schwarzenegger's Signature, SB 678, and How California Attempts to*

family” doctrine and rejected the authority of the state to enact legislation regarding “the family relations of members of federally recognized Indian tribes.”<sup>148</sup> In effect, these decisions hold that without the “existing Indian family” exception, ICWA would be unconstitutional as applied when neither the children nor their parents had maintained significant social, political, or cultural ties with an Indian community. The California Supreme Court has yet to take up the “existing Indian family” exception.

## **V. Recent Attempts to Address the Problems with ICWA**

### *A. Indian Child Welfare Act Amendments of 2003*

On July 15, 2003 a bill was introduced by both Democratic and Republican congressmen in the House of Representatives sponsored by Don Young and co-sponsored by Neil Abercrombie, John Hayworth, and Dale Kildee titled the Indian Child Welfare Act Amendments of 2003 (H.R. 2750).<sup>149</sup> H.R. 2750 was referred to committee and died there. The bill attempted to amend ICWA to address many of the discrepancies of interpretation between the states discussed above, such as the “existing Indian family” doctrine.<sup>150</sup> H.R. 2750 sought to add to ICWA, “This Act shall apply to any Indian child involved in a child custody proceeding regardless of whether such child has ever been part of an Indian family or maintained a social or cultural relationship with an Indian tribe.”<sup>151</sup>

H.R. 2750 also sought to limit the number of instances in which state courts could refuse transfer to tribal courts.<sup>152</sup> The 2003 proposed amendments also sought to limit the parental objection option by limiting parental objections to those that are consistent with ICWA purposes.<sup>153</sup> Addressing the “active ef-

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*Abolish the Existing Indian Family Exception and Why Other States Should Follow*, 7 *APPALACHIAN J.L.* 109, 126 (2007).

<sup>148</sup> *In re Santos Y.*, 112 Cal. Rptr.2d 692, 728 (2001).

<sup>149</sup> Indian Child Welfare Act Amendments of 2003, H.R. 2750, 108th Cong. (2003).

<sup>150</sup> *See id.*

<sup>151</sup> *Id.* § 2(b).

<sup>152</sup> *See id.* § 5 (intervention in state court proceedings).

<sup>153</sup> *See* H.R. 2750, 108th Cong. § 4(b)(2)(D) (transfer of jurisdiction to tribal court).

forts” issues, H.R. 2750 sought to amend ICWA to “include the involvement and use of any available resources of the extended family, the Indian child’s tribe, Indian social service agencies, and Indian caregivers who have the expertise, as recognized by the Indian child’s tribe, to assist the Indian child’s family to function as a home for such child.”<sup>154</sup>

#### B. *Fostering Connections to Success and Increasing Adoptions Act of 2008*

The Fostering Connections to Success and Increasing Adoptions Act was introduced in the House of Representatives on September 15, 2008. as H.R. 6893, sponsored by Jim McDermott.<sup>155</sup> The bill passed unanimously in both the House and Senate and was signed into law by President George W. Bush in October of 2008.<sup>156</sup> The Act amended Title IV of the Social Security Act, and was specifically aimed at providing tribal foster care and adoption access.<sup>157</sup> Prior to this Act, if tribes wanted to run their own foster care or adoption programs, they could not directly access federal Title IV funds, and instead had to negotiate and come to an agreement with the state to access those funds through the state.<sup>158</sup> At the time the bill was introduced, only about half of the tribes that were federally recognized had these state agreements.<sup>159</sup> After the passage of the Fostering Connections to Success and Increasing Adoptions Act, those tribes can now apply for federal funds directly, enabling them to administer their own foster care and adoption programs.<sup>160</sup>

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<sup>154</sup> *Id.* § 7.

<sup>155</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008); *See generally* National Resource Center for Permanency and Family Connections (herein “FosteringConnections.org”), [http://www.fosteringconnections.org/about\\_the\\_law?id=0003](http://www.fosteringconnections.org/about_the_law?id=0003) (last visited July 29, 2013).

<sup>156</sup> *See* FosteringConnections.org, *supra* note 155.

<sup>157</sup> *See* Pub. L. No. 110-351, 122 Stat. 3949.

<sup>158</sup> *See* FosteringConnections.org, *supra* note 155.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

### C. Tribal Customary Adoption in California

California Assembly Bill 1325 (AB 1325) was signed by Governor Schwarzenegger in October of 2009.<sup>161</sup> AB 1325 requires social workers and judicial officers in California to consider tribal customary adoption as an alternative to termination of parental rights if the Indian family is unable to reunify.<sup>162</sup> This is another permanency option for the courts to consider. Tribal customary adoption allows an Indian child eligible under ICWA who is a ward/dependent of the state to be adopted by the “customs, laws and traditions of the child’s tribe” without actually terminating their birth parents’ rights.<sup>163</sup> Consent of the birth parents is not necessary for a tribal customary adoption.<sup>164</sup> In effect, these children can have two sets of legal parents, a first under California law.

Federally, there is a strong preference, evidenced by the Adoptions and Safe Families Act, for termination of parental rights and adoption when a family cannot be reunified after being in dependency court.<sup>165</sup> Since the time of forced assimilation, usually accompanied by non-Indian adoption of Indian children with policies such as the Indian Adoption Project, tribes had been actively against such termination of parental rights followed by adoption.<sup>166</sup> Tribes had traditionally used guardianships as a way to achieve permanency without terminating the birth parents’ parental rights over a child.<sup>167</sup> AB 1325 allows Indian children permanency with closer adherence to tribal customs and traditions.

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<sup>161</sup> See CAL. WELF. & INST. CODE § 366.24 (West 2013). See also *Recent Court Decisions and Legislative Impact on Juveniles*, 14 U.C. DAVIS J. JUV. L. POL’Y 403, 416 (2010).

<sup>162</sup> See *Tribal Customary Adoption*, CALIFORNIA COURTS, (Jan. 21, 2013), <http://www.courts.ca.gov/12569.htm>.

<sup>163</sup> FAQ Tribal Customary Adoption, CALIFORNIA COURTS, (Jan. 21, 2013), <http://www.courts.ca.gov/documents/Tribal-AdoptionFAQ.pdf>.

<sup>164</sup> See CAL. WELF. & INST. CODE § 366.24(c)(11) (West 2013).

<sup>165</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>166</sup> See *Customary Adoption*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, <http://www.nicwa.org/adoption/> (Jan. 21, 2013).

<sup>167</sup> See Barbra Ann Atwood, *Wells Conference on Adoption Law: Achieving Permanency for American Indian and Alaska Native Children: Lessons From Tribal Traditions*, 37 CAP. U.L. REV. 239, 268 (2008).

## VI. Baby Veronica and the Future of ICWA

### A. Background

In *Adoptive Couple v. Baby Girl*<sup>168</sup> Veronica was born to an unwed mother in Oklahoma on September 15, 2009.<sup>169</sup> The biological mother and father were in a relationship when the child was conceived and had plans to marry but the father refused to provide the mother with any financial support until they married.<sup>170</sup> The mother and father's engagement deteriorated and the couple broke up prior to the child's birth.<sup>171</sup> Three months before Veronica was born, the mother sent the father a text message asking if he would either pay child support or relinquish his rights to the child upon her birth. The father replied that he would relinquish his parental rights.<sup>172</sup> The mother then made the decision to put the child up for adoption when born and chose the Adoptive Couple, through an adoption agency.<sup>173</sup> The Adoptive Couple lived in South Carolina.<sup>174</sup> In August 2009, the adoptive mother visited the birth mother in Oklahoma, provided her with financial assistance at the end of her pregnancy and continued to provide financial assistance after the child's birth.<sup>175</sup> The Adoptive Couple hired an attorney to represent the mother, and that attorney wrote to the Cherokee Nation to inquire as to the father's status as an enrolled member.<sup>176</sup> That attorney spelled the father's name incorrectly and provided an incorrect birth date.<sup>177</sup> In turn, the Cherokee Nation was unable to verify the father's membership.<sup>178</sup> Further, on the Interstate Compact on Placement of Children (ICPC) paperwork the mother identified the child as "Hispanic" instead of "Native American" which, if circled, would have sent the paperwork to the correct place.<sup>179</sup>

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<sup>168</sup> 133 S. Ct. 2552 (U.S. 2013).

<sup>169</sup> *Id.* at 2558.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012).

<sup>176</sup> *See id.* at 554.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

Once the Adoptive Couple took Veronica to South Carolina in September of 2009, they filed an adoption action but did not serve or notify the father until January of 2010, just days before he was going to be deployed to Iraq.<sup>180</sup>

In that same month, the Cherokee Nation identified the father as an enrolled member and finally in April of 2010 the Tribe filed a Notice of Intervention in the South Carolina adoption action.<sup>181</sup> The South Carolina family court found,

(1) the ICWA applied and it was not unconstitutional; (2) the “Existing Indian Family” doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) Appellants failed to prove by clear and convincing evidence that Father’s parental rights should be terminated or that granting custody of Baby Girl to Father would likely result in serious emotional or physical damage to Baby Girl;

thus denying the Adoptive Couple’s adoption petition.<sup>182</sup>

The South Carolina Supreme Court found that the father was considered a “parent” under ICWA even though ICWA “does not include the unwed father where paternity has not been acknowledged or established” because the father both acknowledged his paternity by pursuing these court proceedings and established his paternity through DNA testing.<sup>183</sup> The court also found that, though the father’s consent would not be needed under South Carolina state law, as a parent under ICWA’s § 1913(c) “consent shall not be valid unless executed in writing and recorded before a judge” and the parent is able to withdraw that consent at any time prior to the final adoption or termination decree.<sup>184</sup> Here, the father only signed an “Acceptance of Service,” which contained a provision stating he was not contesting the adoption, but not the more strict procedural requirements of § 1913(c).<sup>185</sup> Furthermore, the court determined that even if consent had been given, his actions to obtain custody of Veronica since that time would render that consent withdrawn.<sup>186</sup>

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<sup>180</sup> *Id.* at 555.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*, 731 S.E.2d at 560; *See also* 25 U.S.C. § 1903 (2013).

<sup>184</sup> 25 U.S.C. § 1913(c) (2013); *See also Baby Girl*, 731 S.E.2d at 561.

<sup>185</sup> *See Baby Girl*, 731 S.E.2d at 561.

<sup>186</sup> *Id.*

In conclusion the South Carolina Supreme Court held, “we simply see this case as one in which the dictates of federal Indian law supersede state law where the adoption and custody of an Indian child is at issue.”<sup>187</sup> Petitioners urged the Supreme Court to grant the writ of certiorari due to the split in the states’ appellate courts as well as several state supreme courts as to implementation of provisions of ICWA. On January 4 of 2013, the U.S. Supreme Court granted the Adoptive Couple’s writ of certiorari.<sup>188</sup>

### B. *The U.S. Supreme Court Ruling and Its Implications*

The U.S. Supreme Court, by majority consisting of Chief Justice Roberts and Justices Alito (delivered the opinion of the Court), Kennedy, Thomas, and Breyer, reversed the South Carolina Supreme Court’s ruling. The Court first determined that they “need not — and therefore do not — decide whether Biological Father is a ‘parent,’ ” under ICWA.<sup>189</sup> The Court instead assumes the father to be a “parent” for the sake of argument.<sup>190</sup>

The Court looked to § 1912(f), § 1912(d), and § 1915(a) to determine if ICWA would apply to this situation.<sup>191</sup> Section 1912(f) provides that “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . 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.”<sup>192</sup> The Court, quoting Webster Dictionary’s definition of “continued,” concluded ICWA did not apply to this situation because the father, who never had physical or legal custody of the child, could not show *continued* custody per the statute.<sup>193</sup> Here, the Court essentially agrees with the “existing Indian family” doctrine held by some states.<sup>194</sup> The Court found that § 1912(f)

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<sup>187</sup> *Id.* at 567.

<sup>188</sup> See Petition for Writ of Certiorari at 9, 2012 U.S. S. Ct. Briefs LEXIS 4107; *Baby Girl*, 2013 U.S. LEXIS 11.

<sup>189</sup> Adoptive Couple, 133 S. Ct. at 2552.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2557-58.

<sup>192</sup> *Id.* at 2560.

<sup>193</sup> *Id.* at 2560-62.

<sup>194</sup> See *supra* Part IV.B.

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limits ICWA to those circumstances where the child was part of an existing Indian family unit.

The Court also looked to § 1912(d); “[a]ny party” seeking to terminate 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.”<sup>195</sup> The Court determined that § 1912(d) applies only when there is an existing Indian family to break up. Here, the Court found that § 1912(d) does not apply because the Indian father “abandoned” Baby Girl prior to her birth and never had custody of her.<sup>196</sup>

The Court further found that § 1915(a) and its placement preference for other Indian families, did not apply in cases where no preferred party has formally sought to adopt the child.<sup>197</sup> The Court determined that there “simply is no ‘preference’ to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.”<sup>198</sup> Here, the Adoptive Couple was the only party to seek adoption of Baby Girl as the father was not seeking adoption of the child, but instead argued his rights had been wrongfully terminated and thus, § 1915(a) did not apply.<sup>199</sup> The U.S. Supreme Court reversed the judgment of the South Carolina Supreme Court and remanded the case for further proceedings not inconsistent with their opinion.<sup>200</sup> The South Carolina court subsequently approved the adoption<sup>201</sup> and after numerous delays Veronica was finally reunited with the adoptive parents.<sup>202</sup>

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<sup>195</sup> *Baby Girl*, 133 S. Ct. at 2562.

<sup>196</sup> *Id.* at 2563.

<sup>197</sup> *Id.* at 2564.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 2564.

<sup>201</sup> Warren Richey, *Supreme Court: “Baby Veronica” to return to adoptive parents*, Christian Science Monitor, August 2, 2013 *retrieved from* <http://www.csmonitor.com/USA/Justice/2013/0802/Supreme-Court-Baby-Veronica-to-return-to-adoptive-parents-video> (last accessed on October 16, 2013).

<sup>202</sup> Max Ehrenfreund, *Baby Veronica returned to adoptive parents*, Washington Post, September 24, 2013 *retrieved from* [http://articles.washingtonpost.com/2013-09-24/national/42342067\\_1\\_melanie-capobianco-dusten-brown-james-fletcher-thompson](http://articles.washingtonpost.com/2013-09-24/national/42342067_1_melanie-capobianco-dusten-brown-james-fletcher-thompson) (last accessed on October 16, 2013).

## **VII. Conclusion**

The Indian Child Welfare Act remains an important piece of legislation designed to protect Indian children and their families. While the Supreme Court has provided some guidance on at least one significant aspect of the law, it is anticipated that states will continue to struggle to meet the goals of the Act.

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