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COMMENTARY

Contemporary Hurdles in the Application of the Indian Child Welfare Act

SUSAN WASZAK

INTRODUCTION

In 1978 Congress passed an astonishing piece of legislation that gave Native American tribes a considerable amount of jurisdiction over matters of child custody and the adoption of their children. In 1976, the Association of American Indian Affairs gathered statistics relevant to the adoption of Indian children that Congress found "shocking [and that] cries out for sweeping reform at all levels of government."[1] The statistics revealed that Indian children were roughly 20 percent more likely than non-Indian children to be taken from their Native homes, and the vast majority of these children were placed with non-Indian families.[2] The Indian Child Welfare Act (ICWA) sought to remedy this situation by vesting jurisdiction with tribal courts when one of their children was in danger of leaving the tribal community through state or private efforts to terminate an Indian parent's parental rights. This commentary will outline the procedures set out in the ICWA, explore jurisdictional issues that arise when an Indian child custody case evoking the ICWA is brought to court, investigate successful attempts of the state courts in diminishing the strength of the act through judicially created exceptions—namely the "existing Indian family exception" and the "good cause" exception, and analyze the tribes' equally successful attempts to use tribal custom as a tool in formulating their own unique rule of law in governing the affairs of their children.

Susan Waszak has a Juris Doctor from Cleveland Marshall College of Law where she graduated *summa cum laude* in 2009. She received her BA in philosophy from the School of Interdisciplinary Studies at Miami University in 1996.

PURPOSE AND GUIDELINES

The purpose of the ICWA was to create uniform standards across the nation, as statistics and procedures varied state by state and county by county, and to "ensure Indian families will be accorded a full and fair hearing when child placement is at issue, establish a priority for Indian adoptive and foster families to care for Indian children . . . and generally promote the stability and security of Indian family life."[3] Because state, local, and federal officials abused their child-removal powers to "strike at the heart of Indian communities by literally stealing Indian children," the act sought to shift the balance of power to tribal communities so that they could regulate their own child welfare issues by keeping the children in the tribe and protecting the Indian children as Indians.[4] To accomplish this goal, the ICWA grants tribal courts jurisdiction over child custody proceedings that were formally heard by state courts.[5]

For the ICWA to apply, the child must be a member or eligible for membership of a federally recognized tribe and the biological child of a member of such a tribe. The relevant tribe in question shall determine membership, and that tribe's determination of the status of the child is not rebuttable.[6] The proceedings that will invoke the ICWA are temporary foster care placements; hearings to terminate parental rights; pre-adoptive placement, in which the parental rights have been terminated, but the child is entering into temporary foster care; and adoptive placement, whereby any Indian child is being permanently placed.[7] If the Indian child or the mother is domiciled in Indian country, the tribe has exclusive jurisdiction over the proceedings. The act uses the broader term *Indian country* to establish jurisdictional bounds and not the narrower boundary of reservation lands.[8]

If the child or parent lives outside Indian country and proceedings are brought in state court, the state court is required to notify the relevant tribe of the existence of the proceedings and allow them to intervene. The state court will then relinquish jurisdiction, and the case will be transferred to tribal court for further proceedings.[9] In the event of a waiver of the transfer by either biological parent, the case may remain in state court, but that court must still abide by the ICWA's placement preferences, unless they can show "good cause to the contrary."[10] The placement preferences are outlined in the act as follows: when possible, Indian children must be placed with "(1) a member of the Indian child's extended family; (2) other members of the Indian child's tribe; and (3) other Indian families."[11] If the tribe is notified but chooses not to intervene, the ICWA requirements will have been waived, and the case will proceed under applicable state law.

The issue of notice has been problematic in ICWA cases. State child service departments, fully aware of the notice requirement, oftentimes fail to give notice to the tribes, and the case proceeds under the state court system. Upon discovering the situation, a tribe must then petition to intervene. Courts have held that no matter how far the proceeding has progressed, all actions taken to date must be voided, and the case begins anew with tribal interests represented. In *Justin L. v. Superior Court of Los Angeles County*, a California

court castigated child services in an opinion remanding yet another custody case, writing, "we are growing weary of appeals in which the only error is the Department's failure to comply with ICWA . . . [the] requirements are not new. Yet the prevalence of inadequate notice remains disturbingly high," noting the case at bar was "a particularly egregious example of the practice of flouting ICWA."[12] As I will address in this commentary, child services fails to notify tribes of an ICWA case when it suits their purpose, and though chastised by a court of law for doing so, many departments will continue to delay notifying tribes for tactical reasons explored below.

THE SUPREME COURT INTERPRETATION OF THE ICWA

In 1989 the US Supreme Court declared the ICWA constitutional in *Mississippi Band of Choctaw Indians v. Holyfield*. A mother residing on the reservation traveled two hundred miles off-reservation to give birth to twins, and upon being released from the hospital she went to the county courthouse with the father, also an enrolled member of the tribe, to terminate parental rights and facilitate the adoption of the twins by Mr. and Mrs. Holyfield. The court recorded the termination and expedited the adoption, which was final a mere one month after the twins' birth. The Choctaw tribe, having received no notice at the time, moved a year later to vacate the proceedings, and the state courts refused to void the adoption decree. After the Mississippi Supreme Court affirmed the lower court decisions, the US Supreme Court voided the adoption and remanded the case to proceed in the Choctaw Tribal Court.[13]

The case rested on the narrow question of whether the twins were domiciled on the reservation, with the state arguing that because the twins were born hundreds of miles away in Harrison County they were not domiciled on the reservation. The Supreme Court, after pointing out that most Choctaw women give birth off-reservation as there are "limited obstetric facilities" located on the reservation, found that to read the act as excepting these women would be an absurd result, and so held on the narrow issue that the place in which the newborns were considered domiciled attaches to the mother who was domiciled on the reservation, giving the Choctaw Tribal Court exclusive jurisdiction.[14] Beyond this narrow question, the opinion goes out of its way to give a generous and full reading of the ICWA.[15] Emphasizing the legislative purpose behind the act, the court reaffirms that the purpose of the ICWA was the uniform application of guidelines implicated for the best interest of the child and Indian tribes, and the tribes best serve those interests. The court quotes at length an earlier Utah Supreme Court opinion explaining the necessity of tribal jurisdiction over custody issues:

> This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive

> forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children.[16]

Thus, the ICWA received a fairly glowing recommendation from the Supreme Court, which could find nothing wrong with it legally or politically, and the opinion instructed states to stop construing elements of the act in a way that frustrated the congressional intent.[17]

SUBSEQUENT STATE COURT HANDLING OF ICWA CASES

Alas, the states have not obliged. Prior to *Holyfield*, the supreme court of Kansas created what became known as the "existing Indian family exception" to the ICWA in *In re Baby Boy L.* Under this judge-created exception, if the court determined that an Indian child did not have sufficient contact with the Indian parent, this determination would take the case out of the ICWA and into regular state common law. This exception was followed and expanded in other states and was firmly established when *Holyfield* was decided.[18] After *Holyfield*, which did not explicitly address the exception, many lawyers and scholars nevertheless believed the "exception had been dealt its death knell" because of the strong and positive language the court had used.[19] States that had previously applied the exception continued to do so and, most surprisingly, the state of Washington, one that had held before *Holyfield* that the exception was contrary to the federal statute, was the first court to adopt the exception post-*Holyfield*.[20]

The Existing Family Exception

In *In re Crews*, Washington State reversed course and held "that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."[21] In *Crews*, a mother gave her child up for adoption, informing state social services that she had some Indian blood, though she was unsure of the amount. This disclosure should have immediately triggered the notification of the tribe. However, the tribe was not notified. The court opined the admittance of some "Indian blood . . . is insufficient to trigger the investigative duties placed on [child] services and the court," even though just three paragraphs before the court had cited the *Bureau of Indian Affairs Guidelines* requiring "any public or state-licensed agency involved in child protection services or family support [that] has discovered information which *suggests that the child is an Indian child*" to notify the applicable tribe.[22] Yet, inexplicably, the court found no duty for state services to comply with Bureau of Indian Affairs (BIA) guidelines or an act of Congress on a clearly unambiguous procedural rule. The mother in *Crews* was the daughter of a direct descendant of the Choctaw Nation, and, as such, her child was considered a member of the tribe.[23] All that is needed under the act is notification to

the tribe in a situation such as this: an Indian child, whose mother seeks to terminate her parental rights. It is not up to the court to decide whether the child is "Indian" enough for the act to apply. It should again be noted that the ICWA expressly leaves all matters of membership up to the tribes, and that their determinations upon the issue are binding.

Other state courts took up the *Crews* challenge of distorting the ICWA and have succeeded admirably. *In re Santos Y.* is a 2001 California State Court of Appeals decision that stretches the boundaries of imagining the disrespect that could be paid to Native Americans in the twenty-first century. The facts were hardly cheering—a member of the Minnesota Chippewa Tribe Grand Portage Band was living in Oregon and traveled to Los Angeles (where her mother lived) to give birth to a baby boy. Upon birth, the baby failed a toxicology analysis for cocaine, and social services undertook the care of the child. After three months the baby was transferred to a foster family in Los Angeles. The department complied with ICWA regulations by giving notice to the tribe. The mother was placed in a program that would have reunited her with her child but she had difficulty complying with the program. She finally did comply with the requirements, though her home in Oregon was deemed uninhabitable, and social services sought termination of her parental rights so as to allow the foster couple to adopt the child. The trial court terminated the mother's parental rights but, over the objections of social services, granted custody of the child to the properly intervening tribe as per the ICWA and instructed it to find a suitable home.[24]

The foster family appealed. On appeal, the appellate court attacked the ICWA from all sides. It applied the existing Indian family exception and found the child was not Indian enough for the act to apply, because the mother was not an active member of the tribe. Because the ICWA was created to maintain the tribal community, and because the mother did not have sufficient ties to the tribe, the court said there was no tribal community to maintain; the purpose for which the act existed was not found in the facts of this case.[25] The court additionally found the ICWA inconsistent with the California Constitution, which has been interpreted to give children fundamental rights, "including the fundamental right to 'have a placement that is stable [and] permanent.'"[26] The tribe had found a third cousin to the mother, a tribal member gainfully employed and living on the reservation, who was willing to adopt the child. According to the independent social service visits, this cousin would have given the child a perfectly stable and permanent home.[27] Yet the court decided the non-Indian family was better and refused to apply the federal statute.[28]

The California court deviated from two major principles of the ICWA. First, *Holyfield* and subsequent legislative history expressly provide that the act is a federal law to be applied uniformly throughout the country—states should not be applying their own laws. *Holyfield* expressed concern about "forum shopping," the phenomenon of potential litigators traveling to a particular state that has laws that would be favorable to them in order to file claims there. The Supreme Court did not want mothers traveling across state lines to have their children, envisioning a kind of "adoption broker business,"

and Congress explicitly spoke of the need for "uniform federal standards" in the application of the act.[29] By following its own rule of law, the California court destroyed the uniformity that the ICWA was supposed to create.

Secondly, the California court erred in announcing that "there is no Indian family here to preserve," for they missed the point of the communal familial setting important to tribes.[30] The "family" in this case is not just the Indian mother who may or may not have enough "significant social, cultural or political relationships with Indian life" but the extended family of such a child, the band, and the tribe.[31] Oddly, the case the court relies on for a due process definition of family is *Moore v. East Cleveland*, a case that acknowledged, among other things, that African American communities have extended family networks, and it is prejudicial and therefore unlawful for a municipality to impose a nuclear family setting upon ethnic communities that have a more expansive definition of family life. By failing to import the weight of a third cousin and the greater tribal community in the comparison with the nuclear non-Indian family, the court not only was imposing Anglo cultural standards upon the Indian group in a prejudicial manner but also was deciding this case based on reasons that are directly contrary to the legislative history of the act. The court declares, "we . . . do not find child custody or dependency proceedings to involve uniquely Native American concerns," leaving one to wonder if the court had actually read the legislative history.[32] In 1999 Congress explicitly rejected an amendment to the ICWA which would have authorized the existing Indian family exception, agreeing with the Department of the Interior statement that

> we want to express our grave concerns that the objectives of the ICWA continue to be frustrated by State court judicial exceptions to the ICWA. We are concerned that State court judges who have created the "existing Indian family exception" are delving into sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes.[33]

The committee reemphasized that tribes have a "parens patriae relationship with all Indian children who are members of a tribe or who are eligible for tribal membership" and "specifically recognizes the tribal interest" in off-reservation children.[34] It is harder to imagine a clearer expression of intent and meaning than that.

The *Santos* court went on to scoff at the Cherokee one-quarter blood requirement, finding that the requirement for membership "impermissibly intrudes" on the state's interest in caring for its own dependant children.[35] In express defiance of the ICWA, the court indicated that the state court will have the final say regarding how reasonable tribal membership requirements are. It is interesting to note, in a larger context, that many of the biological parents in these cases live far from the reservation, and were likely the children of Indians affected by federal relocation policies of the 1950s. It would be yet another cruel twist of fate that Native Americans enrolled in urban

placement programs have now been considered not "Indian" enough by the state courts for the purpose of falling under the ICWA.

Child custody cases are terribly difficult, emotionally charged settings that necessitate arduous wading through the facts. The court in *Santos* did not want to pluck the child from his foster family because it would have been painful and damaging to take him from the only home he had known. At the time of the final opinion the child was three years old. But the child was to be placed in a permanent Indian home, not a foster home, and the couple in this case were foster parents who only later decided to adopt the child.[36] In *Holyfield*, Justice William J. Brennan made one mention of the sadness he felt when considering taking the three-year-old twins away from the only family they had known, to be made ward of the tribal court until the tribe could find a suitable home. He saved it for the last paragraph of the opinion.[37] But it did not deter his opinion. The act was constitutional and had not been complied with. Had social services in *Santos* dropped the case when the tribe had intervened in the termination hearings, the child would have been nine months old. At this time the mother's parental rights had not been terminated. The mother could have taken the child back upon compliance with social services in Oregon, and the foster parents would have had to give up the child. It was a temporary arrangement. The parental rights were terminated a full year before the *Santos* opinion, when the child was about twenty-two months old.[38] Would the court have had as much difficulty with the idea of taking the child from a temporary foster home at twenty-two months as it did taking the child, just shy of three years, from a home that now wanted to be permanent?

The answer is, probably not. Many cases exist in which state courts do not want to take the child from the non-Indian adoptive or pre-adoptive family because it is the only home he or she has known, and state agencies are well aware of this lack of enthusiasm and use it to their every advantage. The longer the case drags through the courts, the longer the child grows up in the non-Indian home, and the better chance state agencies have of keeping the child in that non-Indian home. In a child custody case in Oklahoma, for example, a Muscogee Creek Indian Nation of Oklahoma member has been fighting for six years through the state court system. Initially, the state courts did not apply the ICWA; he successfully appealed to Oklahoma Supreme Court, which reversed the trial court and remanded the case with instructions for the trial court to apply the act. The trial court superficially applied it, using the "good cause" exception, described below, to disregard the preferences plainly listed, and the father appealed again to the Oklahoma Supreme Court. That case is still pending. Meanwhile, the child is now a six-year-old boy living with a non-Indian family who, in 2002, moved to Missouri when they had only temporary custody of the child due to the mother's rights not having yet been terminated.[39] It is hard to see how the Oklahoma Supreme Court or any court, after this much time has passed, will be able to take the child away now, for public outcry would surely ensue, and elected state court judges are mindful of public outcry. What other remedy would you offer this father, who has no other choice but to go through the exhaustion of remedies to right a wrong that is now six years in the making?

The Good Cause Exception

The state court only need transfer the case to the tribal court if there is exclusive jurisdiction in order for the tribal court to decide it; or, if concurrent jurisdiction allows, it may hear the case in state court but must still apply the procedural steps laid out by the act. The good cause exception is taken directly from the language in the statute but misapplied either to determine that there is good cause as to why the ICWA does not apply or there is good cause as to why the preferences will not be adhered to.

Congress cryptically and unhelpfully added in section 1911(b) that the state court must transfer jurisdiction to the tribal court "in the absence of good cause to the contrary," and in section 1915(a) to deviate from the placement proceedings if there is good cause to do so.[40] For the most part, what will constitute good cause is left up to the trial courts to determine and is not appealable absent an abuse of discretion.[41] For example, the Oklahoma case involving the Muskogee Creek father was an example of a reversible and appealable error, because the trial court decided there was good cause to deny a transfer to tribal court without holding a good cause hearing and without any evidence.[42] The trial court may not simply decide on its own accord that there is good cause—the petitioning party must meet some standard of burden of proof of evidence supporting good cause in order to deviate from the procedures in the act.[43] A court must therefore jump through some procedural hoops before determining there is good cause in order to deviate from the transfer section or the placement preferences, but once completed, that state court determination generally may not be appealed.[44]

The BIA has published guidelines outlining when good cause may be found. These guidelines are not binding on courts but do reflect the federal government's intended scope of the good cause doctrine. The guidelines list three occasions when deviation from placement proceedings may occur. The first and third provisions have not been controversial, but the second provision has created enough trouble to make up for the other two.[45] That section reads that good cause may be found if there are "extraordinary physical and emotional needs of the child as established by testimony of a qualified expert witness."[46] According to the BIA guidelines, this provision is supposed to address those rare occasions when a child is in need of some type of "highly specialized" professional service not available to someone living on a reservation.[47] However, it has been relied upon in many cases, such as *In re Santos Y.*, to use the fact of the child's attachment to the foster parents as a sufficient "emotional need" that satisfies this available deviation from the rule. Other courts have found such superficial determinations insufficient. A trial court in Minnesota, relying on facts similar to *In re Santos Y.*, noted that the child had formed an emotional bond with the non-Indian mother, and this demonstrated an emotional need yielding good cause to deviate from the placement provisions. The Minnesota Supreme Court reversed, ruling that the supposed "emotional needs" determination was actually a masquerade and an inappropriate "best interest of the child" determination and was therefore not in compliance.[48]

Similar situations arise when the issue is good cause for a transfer of jurisdiction. Initially, these situations were envisioned as instances when the intervening tribe did not have tribal courts to hear the case. It was meant to be a procedural issue, rather than a substantive question. Yet many state courts will come up with something they believe passes for good cause in order to avoid transferring the case to an able and willing tribal court. Courts do this for a number of reasons, foremost because they do not fully understand the way the ICWA works. As ICWA litigator and tribal court Judge B. J. Jones notes, "it is important to note that a 'transfer' under the ICWA refers to a transfer of *jurisdiction* and not necessarily to a physical transfer of a child back to a reservation."[49] Jones adds that many uninformed state courts and agencies hold this "confusion," and the result is a "misunderstanding . . . which in turn may color a judge's decision in determining a transfer issue."[50] Such fear creates judicial magicianship wherein one inserts a rabbit (as a member of an Indian tribe, ICWA applies), waves a wand, and pulls out a plum (a member, yes, but she's not an *enrolled* member; therefore, the ICWA does not apply).[51] This fear is based on ignorance of the unknown and a deep-seated racism that Indians could not possibly have courts that uphold the rule of law of a civilized community and must, it follows, be biased toward tribal interests.

TRIBAL COURT TREATMENT OF ICWA CASES

Native Americans do have courts that uphold the rule of law of a civilized community and that are not biased toward tribal interests. The preferences in the ICWA, for example, are just that—preferences—and if they are unable to be met, the court will do what is reasonable and in the child's best interest. On remand in the *Holyfield* case, for example, the Choctaw Tribal Court, after going through the statutory preferences, decided the child should stay where it was, in the non-Indian home. Before arranging the adoption with the Holyfields, the mother had attempted to find a family member to take the twins, but she could not find a person willing to take both children, and she did not want the twins separated. The court agreed that the twins should stay together, and they were likewise unable to find a tribal member willing to take both children. Because the tribe would have to place the twins in a foster home until a permanent home could be established, the judge determined the twins were best left in the loving permanent home they had. They requested that the non-Indian family bring the twins to certain festivals on the reservation every year to learn about their heritage, something the family willingly agreed to do.[52] The findings of the Choctaw Tribal Court could hardly be seen as anything other than a reasonable exercise of judicial authority that state courts have no reason to fear and could stand to learn a thing or two from.

As with federal and state courts, tribal courts follow "choice of law" principles that are either laid out in the court procedural rules or, in some cases, the tribal code. Choice of law principles are standard requirements for determining which law should be applied. For example, a case litigated in a particular state may, depending on the parties or the location of the activity

at issue, involve that state applying federal law or the law of another state.[53] Tribal courts generally apply federal law first, and many list tribal law second and state law last. Tribal law and state law may merge when, for example, there is no established tribal law on point. The tribal court may borrow directly from the state or, more commonly, take some state law principles, look at what other tribes do in like situations, and mold a rule of law based upon what makes sense in their own particular tribe, thus developing a tribal common law from a variety of sources including applicable state law.[54] Some larger tribes have developed a more Westernized court for issues involving federal law and non-Indians, simultaneously establishing traditional courts for tribal litigation.[55] This ensures that traditional tribal custom will be maintained and developed while also addressing increasing litigation among and about federal and state issues that often involve non-Indians.

When deciding cases, tribal courts, like state courts, draw on custom as an aid to deciphering the correct ruling. The District Court of the Navajo Nation released an opinion in *In re Adoption of S.C.M.* that illustrates choice of law principles and custom. In this case, a Navajo man living in Utah filed an application for adoption of his niece after her mother, the Navajo man's deceased wife's sister, placed the care of the child with the Navajo man shortly after the child's birth. The child was Canadian Indian, her mother and aunt being of the Kwakiutl tribe. The case was about jurisdiction—whether the Navajo court had jurisdiction over the adoption application regarding the Canadian child. In determining first whether the court had personal jurisdiction over the Navajo man living in Utah, the tribal court resorted to a prior Navajo Nation case that defined the law of domicile and was later codified in the Navajo Tribal Code. The Navajo law regards domicile to be the place "where they maintain their traditional and legal ties, regardless of where they actually live," and the court found Navajo domicile law to trump the domicile law of New Mexico, which defines *domicile* as where a person actually lives.[56]

Tribal courts will also use extended family custom to define *domicile*. In *In re K.A.W.*, the Children's Court for the Comanche Indian Tribe was forced to decide whether it had exclusive jurisdiction under the ICWA or if a concurrent state court proceeding could go forward. Though under Oklahoma state law the child would be domiciled where the mother lived, in this case off-reservation, thereby giving the Oklahoma state courts concurrent jurisdiction, the tribal court found that the child had been living with a paternal aunt on the reservation. The state court had found the paternal aunt's domicile "irrelevant."[57] The Comanche court held otherwise, citing the federal definition of *domicile* (where the person makes his or her home) and weaving it with Comanche custom, noting "non-Indian society often has misunderstood the Indian custom of extended family members performing parental roles" and found the child domiciled on the reservation, through the paternal aunt's domicile.[58]

The custom of the extended family often plays a pivotal role in tribal cases in many settings. In the Navajo case, the court, having found personal jurisdiction over the Navajo uncle, now had to proceed further in order to determine whether it could award the adoption decree. Although it did not award the adoption decree at this time (it did not have jurisdiction over the child and

ordered the Navajo man to go through proper channels in Canada in order to obtain jurisdictional consent), the court noted that, if successful, under Navajo custom the man would have a legitimate interest in adopting the child:

> Here, a Navajo man placed his saddle before the Hogan of a Kwakiutl woman and has pledged to serve her clan and protect his niece. (The court is unaware of the proper metaphor for the Kwakiutl version of a Hogan and apologizes for ignorance of that fact.) Therefore the policy would appear to be in his favor.[59]

In determining that the court did not have personal jurisdiction over the child, the judge cited state court rulings on jurisdiction, as well as the Navajo tribal code, and expressed a policy concern in interfering with Canadian courts and social services and the Kwakiutl tribe.

Placing children with extended family members is one of the most striking contrasts between tribal custom and non-Indian ways. The US Supreme Court has found parental rights to be fundamental under the due process clause of the Fifth and Fourteenth Amendments, but this fundamental right does not extend to grandparents. Thus, grandparents who wish to see their grandchildren will not be permitted to do so if the children's parents object.[60] Tribal courts recognize the importance of grandparent relationships and have awarded visitation rights to grandparents over the objection of the parent. In *In re C.D.S. and C.M.H.*, the Court of Indian Offenses for the Delaware Tribe of Western Oklahoma awarded grandparent visitation rights because "grandparents oftentimes provide the necessary guidance in traditional tribal customs, history, and culture, and function as the central part of the family, [and] the court would find it difficult to completely ignore the need to maintain and foster such important relationships."[61] The court then ordered the parents and grandparents to agree to a visitation schedule that the court could approve.[62]

The ICWA goes even further, by expressly placing collective tribal rights over parental rights. Recall in *Holyfield* the biological mother sought out a non-Indian family for adoption of her twins, but under the act the tribe's interest in the children was deemed stronger than the biological mother's rights. Similarly, when the Montana Supreme Court applied the ICWA it reversed a lower court decision that gave preference to a mother's request to remain anonymous. The tribe wanted to learn the identity of the mother for purposes of trying to comply with the placement preferences by finding a family member, and the Montana court correctly applied the act in finding that the tribal interests in family placement outweighed the mother's anonymity interests.[63] By granting tribal interests great weight under the ICWA, Congress recognized the importance of extended families in tribal custom and gave tribes the power, under a federal statute, to exercise that custom freely when determining their own affairs.

BRIDGING THE GAP BETWEEN TRIBAL AND STATE COURTS

The ICWA was and remains a forceful piece of legislation enacted to solve the problem of state agencies reaching into tribal areas and displacing Native American children through state channels created by and for the non-Indian majority. Though not without its detractors, the ICWA attempts and succeeds in placing the power to adjudicate cases in the hands of tribal courts. In retrospect, writing and passing the act was relatively easy compared to getting state agencies and courts to comply with it. Many state courts do comply with the ICWA, explicitly rejecting the judicially created exceptions, and many of these states have large Native American populations.[64] The few holdouts are strong, however, and because child custody issues are considered to be purely within state domain, federal courts may apply the abstention doctrine and refuse to hear appeals of the state court proceedings.[65] The US Supreme Court has denied reviewing a case on the issue; the 105th Congress spoke forcefully about the need for state courts to stop applying judicial exceptions to the act but failed to pass the amendment. Where else can one turn for relief? What can happen is a change in state legislation. For example, in response to its state court using the existing Indian family exception, the California legislature passed a bill that purported to overturn the state court adoption of the exception. This was before a California state court decided *In re Santos Y.*, and in response to that case the California legislation then passed another bill, broader and more explicit, to cover the specific areas *Santos Y.* waded into in order to use the exceptions.[66] Time will tell if rogue California courts will now behave as they have been instructed, twice, by the state legislature. Until then, one is left to appeal to the mercy of state courts, hoping that outrage in the Indian and non-Indian communities, congressional reports, and complying state courts will shame noncooperating states into abolishing the exceptions. Tribes and states may take the initiative and negotiate compacts among themselves, ironing out some finer points of ICWA application.[67] Meanwhile, the more litigation occurs in increasingly sophisticated tribal courts and, importantly, the general publication of these tribal court opinions, the more the public will become aware of the competency of tribal courts and start working with tribes as they attempt to wade through difficult decisions regarding their children. That the federal government has authorized and encouraged them to do so is twenty years passing—now it is time for the rest of the nation to catch up.

Acknowledgment

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NOTES

1. Senate Select Committee on Indian Affairs, *Indian Child Welfare Act of 1977: Hearing before the United States Select Committee on Indian Affairs*, 95th Cong., 1st sess. (Washington, DC: US Government Printing Office, 1977), 538. (Hereinafter *Indian Child Welfare Act* will be referred to as ICWA.)

2. Ibid. The numbers vary from 64% (Maine) to 97% (New York) of children living with non-Indian families. See also David Fanshel, *Far from the Reservation: The Transracial Adoption of American Indian Children* (Lanham, MD: The Scarecrow Press, 1972), 33–48. (This details the Indian Adoption Project, the brainchild of the Child Welfare League of American, from 1958–1967, for the purpose of encouraging and facilitating outside adoption of Indian children.)

3. Senate Select Committee on Indian Affairs, *Hearing before the United States Select Committee*, 539.

4. Ibid., 2.

5. B. J. Jones, Mark Tilden, and Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook*, 2nd ed. (Chicago: American Bar Association, 2008), 5.

6. *U.S. Code* 25 (2006), § 1903(4).

7. *U.S. Code* 25 (2006), § 1903(1). Generally, if the parent is free to retrieve the child at any time, the ICWA will not apply.

8. Jones et al., *Indian Child Welfare Act Handbook*, 56–58.

9. Ibid., 53.

10. *U.S. Code* 25 (2006), § 1915(a).

11. Ibid.

12. *Justin L. v. Superior Court of Los Angeles County*, 165 Cal. App. 4th 1406, 1410 (Cal. App. Dep't Super. Ct. 2008).

13. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37–40 (1989).

14. Ibid., 52n27.

15. Ibid., 51–53.

16. Ibid., quoting *In re Adoption of Halloway*, 732 P.2d 962, 967 (Utah 1986).

17. Jones et al., *Indian Child Welfare Act Handbook*, 57.

18. Christine D. Bakeis, "Violating Personal Rights for the Sake of the Tribe," *Notre Dame Journal of Law, Ethics, and Public Policy* 543, no. 10 (1996): 570–73.

19. Jones et al., *Indian Child Welfare Act Handbook*, 31.

20. Bakeis, "Violating Personal Rights."

21. *In re Crews*, 825 P.2d 305, 310 (Wash. 1992).

22. Ibid., 312; emphasis added.

23. Ibid.

24. *In re Santos Y.*, 112 Cal. Rept. 2d 692, 699–700, 707–712 (Cal. Dist. Ct. App. 2001).

25. Ibid., 726.

26. Ibid., 725. The court is using the ICWA as codified in the California constitution because California is a PL-280 state and has a grant of civil jurisdiction that seems to apply to the ICWA. Therefore, California believes it is permissible to impose the modified California version of the ICWA rather then the federal version. The extent PL-280 jurisdiction extends is unclear. Some PL-280 states, such as Wisconsin, do not apply its jurisdictional grant at all to ICWA matters, reading the PL-280 grant narrowly.

27. Ibid., 707.

28. Ibid., 726.

29. *Holyfield*, 46n20; Senate Committee on Indian Affairs Report, *Amending the Indian Child Welfare Act of 1978, and for Other Purposes*, 105th Cong., 1st sess., 1997, S. Rep. 105–156, 9.

30. Ibid.

31. *In re Santos Y.*, 720.

32. Ibid., 730.

33. US Assistant Secretary for Indian Affairs Ada Deer, US Department of the Interior, prepared statement for the *Joint Hearing of the House Resources Committee and the Senate Committee on Indian Affairs, on H.R. 1082 and S.569, Bills to Amend the Indian Child Welfare Act of 1978*, 105th Cong., 1st sess., 18 June 1997, 77.

34. Senate Committee on Indian Affairs Report, *Amending the Indian Child Welfare Act of 1978*, 26.

35. *In re Santos Y.*, 731.

36. Ibid., 700–12.

37. *Holyfield*, 53–54.

38. *In re Santos Y.*, 703.

39. *Yancey v. Bonner*, 2008 WL 479760 (W.D. Okla. 2008), 1.

40. *U.S. Code* 25 (2006), §§ 1911, 1915.

41. Jones et al., *Indian Child Welfare Act Handbook*, 139.

42. *In re Baby Boy L.*, 103 P.3d 1099, 1107–8 (Okla. 2004). This is the original state court proceeding from which *Yancey v. Bonner* arose.

43. Jones et al., *Indian Child Welfare Act Handbook*, 139.

44. Ibid., 154. Traditionally, federal courts will not hear an appeal on a case solely in the realm of state law, like child custody cases, but the Ninth Circuit Court ruled in 2005 that a federal court may hear an appeal from an ICWA case, finding the federal law provided a collateral cause of action under §1914.

45. Ibid., 139.

46. *U.S. Code* 18 (2006), §1911.

47. Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings" 67584, *Federal Register* 44, no. 228 (26 November 1979): F.3 Commentary.

48. *In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

49. Jones et al., *Indian Child Welfare Act Handbook*, 59.

50. Ibid., 60.

51. *In re Adoption of C.D.*, 751 N.W.2d 336 (N. Dak. 2008).

52. Solangel Maldonado, "Race, Culture, and Adoption: Lessons from *Mississippi Band of Choctaw Indians v. Holyfield*," *Columbia Journal of Gender and Law* 1, no. 17 (2008): 17–18.

53. William C. Canby Jr., *American Indian Law in a Nutshell*, 4th ed. (Eagan, MI: Thomson-West, 2004), 229.

54. Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts," *American Indian Law Review* 285, no. 22 (1998): 299–300. Tribal courts look to state law for practical reasons as well as purposes of comity.

55. Ibid., 351–52. The Navajo have the Navajo Peacemaker Court, and some tribes direct issues to a Council of Elders.

56. *In re Adoption of S.C.M.*, 4 Nav. R. 167 para. 28–32 (Navajo 6/20/1983).

57. *In re K.A.W.*, 2 Okla. Trib. 338 (Comanche Child Ct. 1992).

58. Ibid., 352.

59. *In re Adoption of S.C.M.*, para. 54.

60. *Troxel v. Granville*, 530 U.S. 57 (U.S. 2000); though individual states may give grandparents rights under state law.

61. *In re C.D.S. and C.M.H.*, 1 Okla. Trib. 200, 208 (Delaware CIO 1988).

62. Ibid.

63. *In re Baby Girl Doe*, 865 P.2d 1090 (Mt. 1993).

64. Jones et al., *Indian Child Welfare Act Handbook*, 32 (citing Alaska, Illinois, Colorado, Iowa, Minnesota, Montana, New Jersey, Idaho, North Dakota, Utah, Arkansas, New York, and some California appellate courts).

65. Ibid., 154. See also *Morrow v. Winslow*, 94 F.3d1386 (10th Cir. 1996), 1397–98, denying jurisdiction under the *Younger* doctrine because the state court proceeding was not yet final. A federal court will abstain from hearing a case, under the *Younger* doctrine, when there is a ongoing state court proceeding. The court will do so in an interest to avoid federal clashes with important state interests.

66. Daniel Albanil Adlong, "The Terminator Terminates Terminators: Governor Schwarzenegger's Signature, SB 678, and How California Attempts to Abolish the Existing Indian Family Exception and Why Other States Should Follow," *Appalachian Journal of Law* 109, no. 7 (2007): 126–30.

67. Jones et al., *Indian Child Welfare Act Handbook*, 60.