American Indian Law Review

Volume 22 | Number 1

1-1-1997

A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact

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A GLIMMER OF HOPE: A PROPOSAL TO KEEP THE INDIAN CHILD WELFARE ACT OF 1978 INTACT

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I. Introduction

The Indian Child Welfare Act of 1978[1] (the Act) was enacted by Congress for the purpose of assisting parents, Indian custodians, and Indian tribes in protecting Indian children from removal and placement by state agencies and courts, into non-Indian homes. The Act establishes federal safeguards state courts must comply with in all custody proceedings involving Indian children. The Act also provides grants for Indian tribes for remedial programs designed to improve Indian family relations and alleviate problems faced by tribal families.

This article will examine the Indian Child Welfare Act in three parts. First, it will detail and explain the important aspects of the Act. Secondly, it will analyze what federal and state courts have done with the Act. Lastly, it will illustrate the political pressures which prevent the Act's full implementation. As with any congressional act, criticism and attacks have been aimed at the Act. The first wave of assaults attempted to question the constitutionality of the Act itself. When the Act was initially held to be constitutional by state courts, and ultimately the United States Supreme Court, those opposed to the Act tried to narrow the scope of the Act and the situations to which it applies. Those efforts have met with some success in the state courts and some bizarre exceptions to the Act have been established. As a result, the Act has not been allowed to correctly function and fully assist Indian tribes.

As one can probably tell, this area of the law operates in a highly emotional arena. After all, the lives of human beings hang on the interpretation of words. This author does not express an opinion on where an Indian child would be better off, but only wishes to illustrate the effects of the Indian Child Welfare Act and the legal battles for the right to decide where to place Indian children who are the subject of custody proceedings.

II. Historical Overview

In order to better understand the Indian Child Welfare Act, one must examine the situation prior to the Act and become familiar with the history of the American Indian in this country. A brief historical overview is necessary

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1. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1923 (1994)).

to understand the federal government's policies toward and treatment of the American Indian. Only then will one see how important passage of the Act was and how valuable it continues to be.

A. The Rise of the United States

Prior to and after the birth of this nation, the government sought to win the allegiance of the tribes. Laws were passed respecting the tribes and designed to keep the early settlers away from the tribes unless the federal government approved of the transactions.

The Nonintercourse Act of 1790[2] required federal licensing of persons wishing to trade with Indians and also prohibited the sale of Indian lands to non-Indians without approval by the federal government. Apparently the government realized that the states and their citizens might have tried to deal unfairly with the tribes and begin hostilities the government at that time wished to avoid.

Three years later, Congress passed a second and more detailed Nonintercourse Act[3] which also sought to regulate and restrict trading with the tribes, along with protecting Indian title to land. Indian lands were protected against non-Indians settling on their lands, but the second Intercourse Act also allowed state agents some powers of negotiation with the tribes with regard to compensation for the Indian lands. This was probably due, in part, to efforts by the state governments to secure a more substantial role in any Indian land transfers occurring within their boundaries.

This remained the United States' official policy toward the Indians for only a brief period. Unfortunately, the tribes continued to lose power as the states and settlers did not always follow the law. Coupled with the federal government's desire to colonize this continent, a shift in official policy was inevitable.

B. The Policy of Removal

When Andrew Jackson became President of the United States in 1829, the policy of removal began. The Indian Removal Act of 1830[4] was enacted to relocate most of the eastern tribes west of the Mississippi river. Tribes that remained were also forced to give up substantial amounts of land. Vast numbers of American Indians were marched westward onto lands considered unfit for human life.[5] Although Indians were accused of allowing fertile farmland to lie fallow, in justification of the Indian Removal Act, the simple fact was that settlers wanted Indian land.[6] It did not matter that Indians in

2. Act of July 22, 1790, ch. 33, 1 Stat. 137, 137-38.
3. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329, 329-32.
4. Act of May 28, 1830, ch. 148, 4 Stat. 411, 411-13.
5. GLORIA JAHODA, THE TRAIL OF TEARS 312 (1975).
6. *See* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME 129-33 (1996).

Georgia and Ohio had already been farming for many years and owned property.[7]

Even though Congress hoped the Indian Removal Act would relieve tensions between settlers and the tribes, this Act alone could not solve the problems or cure the ills inherent in the government's official Indian policy. The next step taken by the government in the quest to "help" the American Indian was to make the tribes a part of American Society.

C. Assimilation of the American Indian

Assimilation of the tribes into American society became the federal government's next goal.[8] By 1887, more than two hundred Indian schools had been built by the federal government.[9] These schools were designed to educate and civilize Indian youth.[10] The institutions rarely placed the children's comfort or Native American culture above their underlying target of indoctrination.[11] Indian parents were sometimes coerced into giving consent for their children to be sent to these schools.[12] Once the children were sent to school, the federal government then focused on the parents and older tribal members. The policy of assimilation of the parents consisted of two parts. First, all traditional forms of religious practice on the reservations were prohibited.[13] Secondly, Indians were encouraged to be farmers and to forget their old ways of life. Thus, the General Allotment Act[14] was passed in 1887. This Allotment Act granted land allotments to Indians to be used for farming.

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7. *Id.* at 130.

8. For those who believe assimilation of the American Indian should have been the official policy to begin with, it is interesting to note that colonists themselves resisted this idea in some instances. *See* LOEWEN, *supra* note 6, at 129 (stating that the Massachusetts legislature in 1789 passed a law prohibiting teaching Native Americans how to read and write "under penalty of death").

9. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE BASIC A.C.L.U. GUIDE TO INDIAN AND TRIBAL RIGHTS 4 (1992).

10. *Id.*

11. *See* PETER NABOKOV, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992, at 216 (1992) ("Their long hair was clipped to the skull, sometimes as part of a public ritual in which they renounced Indian origins. They were forbidden to speak native languages, often under threat of physical punishment. Daily routine followed a strict schedule of academic and vocational studies, mealtimes, intervals for prayer, housekeeping chores, and recesses. The costs of keeping up the buildings and grounds and food was defrayed by student labor. Learning by working was the creed").

12. *See* MARY CROW DOG, LAKOTA WOMAN 28 (1990) (quoting ANNUAL REPORT OF THE DEPARTMENT OF THE INTERIOR (1901) ("Gathered from the cabin, the wickiup, and the tepee, partly by cajolery and partly by threats; partly by bribery and partly by force, they are induced to leave their kindred to enter these schools and take upon themselves the outward appearance of civilized life.")).

13. *See* DAVID H. THOMAS, THE NATIVE AMERICANS: AN ILLUSTRATED HISTORY 360 (1993).

14. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994)).

It was designed to break up the communal society concept which was not understood nor approved of by American society. The Allotment Act also reduced the amount of land originally held by the tribes. Even after every Indian family was granted an allotment, significant amounts of land remained "unoccupied." These lands were then opened up for settlers. The Allotment Act resulted in disaster for those American Indians affected by it. Many allottees, poor to begin with, could not pay state real estate taxes when Congress removed property tax exemptions. As a consequence, lands were lost in foreclosure proceedings.[15] Allottees were also persuaded to sell their lands to non-Indians.[16] When the Allotment Act was passed in 1887, 140 million acres of land were owned collectively by Indian tribes.[17] When the allotment system was finally done away with in 1934, 50 million acres were left to the tribes.[18]

D. Reorganization of the Tribes

With the obvious failure of the Allotment Act, the Great Depression, and the election of Franklin D. Roosevelt as President of the United States in 1933, a new approach to the American Indian began. In 1934, Congress passed the Indian Reorganization Act (IRA).[19] The purpose of the IRA was to reorganize the tribes and allow them to remain separate and distinct from American society. The IRA provided new reservations for dispossessed tribes and for the establishment of tribal governments. Indian businesses were encouraged as was economic development. Polices and provisions of the IRA are still followed today.

E. Termination of the Tribes and Indian Self-Determination

In the 1950s, Congress once again decided to attempt assimilation of the tribes through termination. Termination of federal benefits and tribal governments was the new objective. Over one hundred tribal governments were terminated and ordered to distribute their land and property to their members.[20] In addition, Congress attempted to shift some responsibility for the tribes from the federal government to the states. Public Law 83-280[21] was enacted in 1953 to extend state jurisdiction over Indian tribes. Generally, Public Law 83-280 gave some states complete criminal and partial civil jurisdiction over the tribes. Although relevant in Indian Child Welfare Act litigation, a complete discussion of Public Law 83-280 is beyond the scope of

15. PEVAR, *supra* note 9, at 5.
16. *Id.*
17. *Id.*
18. *Id.* at 5-6.
19. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)).
20. PEVAR, *supra* note 9, at 7.
21. 18 U.S.C. § 1162 (1994); 28 U.S.C. § 1360 (1994).

this paper. One should keep in mind that if a state has assumed jurisdiction over tribal domestic matters under Public Law 83-280 the Indian Child Welfare Act does not alter that scheme.[22] A tribe may, however, regain jurisdiction, which will be discussed shortly.

Because of the federal termination policy, hundreds of Indian tribes were brought to the brink of economic collapse.[23] Proceeds received by the Indians from the sale of their lands were quickly spent. Although technically independent, the terminated tribes were not able to support themselves financially. What had begun as an effort to release the Indians from government control did not fully prepare the terminated tribes for independence. Many Indians had also moved to large cities in order to secure employment. Although some were successful, the majority of the Indians found themselves in the midst of the urban ghetto.[24] It then became apparent that assimilation through termination was a failure and Congress retreated from these efforts. The current policy of Congress was initiated in the late 1960s and stresses Indian self-determination and economic development among its goals.[25]

F. Tribal/State Relations and the Indian Child Welfare Act

Friction has often accompanied the relations between Indian tribes and the states. A number of treaties entered into by the United States and Indian tribes have had provisions specifically restraining actions by the states.[26] In addition, several United States Supreme Court decisions severely limited the powers of states over the tribes.[27] Even though assimilation of the tribes and the breakup of the reservations was no longer a national goal, certain states and state agencies undertook a course of action which was destroying the future of the tribes.

State and private agencies unfamiliar with the Indians' communal society disapproved of this way of life and were deciding Indian children were better off in a non-Indian, "nuclear" family.[28] Instead of helping Indian parents

22. *See* 25 U.S.C. § 1918(a) (1994).

23. PEVAR, *supra* note 9, at 7.

24. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 26 (2d ed. 1988).

25. Lynn K. Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237 (1992) ("The concept of Indian self-determination gained momentum in 1968 when President Johnson gave a special message to Congress stressing the fact that Indians should have a right to determine their own choice between life in the city or on the reservation without threat of tribal termination.").

26. *See* CANBY, *supra* note 24, at 298 (citing Tulee v. Washington, 315 U.S. 681 (1942)) ("Where a treaty to fish at 'all usual and accustomed places,' the state may not preclude those places, id., nor may it require a license fee of Indians to fish there.").

27. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (striking down state civil jurisdiction over Indian reservation, and upholding tribal court jurisdiction, when cause of action arises within reservation); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987) (striking down state regulation of tribal bingo enterprise).

28. CROW DOG, *supra* note 12, at 13 ("At the center of the old Sioux society was the

contend with the high levels of unemployment, poverty, and alcoholism in raising their children, state and private agencies decided to place the children in alternate homes.

State agencies and courts removed Indian children from their homes and families at alarming rates.[29] Tribes faced a greater threat to their survival than troops and guns in the removal of their progeny. Congress investigated the situation in the 1970s and came upon some disturbing findings. In the state of Minnesota, for example, Congress found that during the year 1971-1972, nearly one in four Indian infants under age one was placed for adoption, and approximately 90% of all Indian placements were in non-Indian homes.[30]

As a result, Congress passed the Indian Child Welfare Act. Congress declared, among other things, "that an alarmingly high percentage of Indian families are broken up by the removal . . . of their children . . . by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[31] Congress also set its sights on the state courts and asserted, "that the States exercising their recognized jurisdiction over Indian child custody proceedings . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[32] State courts generally did not attempt to adjudicate domestic disputes contained on the reservations, and voluntarily declined jurisdiction in many instances prior to passage of the Act.[33] One thing Congress also wanted to preserve was a tribal court's exclusive jurisdiction over custody proceedings involving reservation children who were temporarily located away from the reservation. Many states had seized upon the fact that the children were not located on the reservation at the time of the proceeding and held jurisdiction to be proper in the state courts. For example, the Montana Supreme Court in *In re Cantrell*[34] decided that because a child embarked on a train trip with his father for three days, away from their

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tiyospaye, the extended family group, the basic hunting band, which included grandparents, uncles, aunts, in-laws, and cousins . . . [t]he close-knit clan, set in its old ways, was a stumbling block in the path of the missionary and government agent, its traditions and customs a barrier to what the white man called 'progress' and 'civilization'.").

29. *See Hearings before the Subcommittee on Indian Affairs of the Senate Committee on the Interior and Insular Affairs*, 93d Cong. § 3, at 15 (1974) (stating that studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions).

30. *Id.* at 75.

31. 25 U.S.C. § 1901(4) (1994).

32. *Id.* § 1901(5).

33. *See* Wakefield v. Little Light, 347 A.2d 228, 238 (Md. 1975); *In re* Adoption of Buehl, 555 P.2d 1334, 1342 (Wash. 1976).

34. 495 P.2d 179 (Mont. 1972).

reservation, the state court had jurisdiction over any custody proceedings,[35] and allowed the State to place the child in foster care.[36]

One may ask, is it not in a child's best interest to live in a non-Indian environment if better conditions are present and the natural parents are not able to care for that child? That certainly seems a valid argument on its face, but the facts do not support it. Studies have shown high alcohol abuse and suicide rates for Indian youth placed in prolonged substitute care.[37] In addition, these Indian children suffer from identity problems as adults.[38] Indian children in non-Indian homes are not raised as Indians, but when they become adults they are treated as Indians and they never know who they really are.[39] Families who had children taken from them were also affected. Problems of alcoholism, unemployment, and emotional duress were exacerbated, which oftentimes led to the separation of the parents.[40]

III. Purposes and Provisions of the Indian Child Welfare Act

The purpose of the Act was to establish minimum federal standards for the removal of Indian children from their families and tribes. Furthermore, as will be discussed shortly, the Act also gave tribes the right to intervene in any proceedings involving Indian children. The Act also allows tribes, parents, and Indian custodians to petition for the transfer of child custody proceedings to tribal court from state courts in certain circumstances. Thus, not only would an Indian parent's rights be protected, but also those of the tribes in preserving their heritage. The Act not only mandates state courts to undertake specific acts, but also directs when state courts must respect tribal authority and transfer the cases to them.

A. Application of the Indian Child Welfare Act

The Act broadly defines child custody proceedings to which it applies. First, the act applies to any foster care placement action which attempts to remove an Indian child from its parent or temporary Indian custodian into a foster home or institution.[41] In essence, any action which deprives the parent or

35. *Id.* at 181.

36. *Id.* at 182.

37. Russell L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1290-91 (1980) (citing *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 156-57 (1977) (statement of National Tribal Chairmen's Association)).

38. *Id.*

39. *Id.* (citing *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. 49 (1974) (statement of Dr. Joseph Westermeyer)).

40. *Id.* (citing Joseph Westermeyer, *The Ravage of the Indian Families in Crisis*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 54 (Steven Unger ed., 1977)).

41. 25 U.S.C. § 1903(1)(i) (1994).

Indian custodian of the child, but where parental rights have not been disturbed, is included.

The Act encompasses any action resulting in termination of the parental rights of either parent.[42] It applies to preadoptive placements, which are permanent placements occurring after termination of parental rights, but before adoptive placement.[43] Also included are adoptive placements which are permanent placements of Indian children for adoption or any action which results in a final decree of adoption.[44] The Act does not apply to the placement of Indian children with a parent as a result of a divorce or juvenile delinquency proceedings.[45]

One of the initial determinations which must be made is whether or not a child is an "Indian child." Congress defined an Indian child as any unmarried person under age eighteen who is a member of an Indian tribe or eligible for membership.[46] In addition, the child must be the biological child of a member of an Indian tribe.[47] At first glance, the requirements to be considered an Indian child seem adequate. However, what of a child whose parents have not taken the time to enroll as members of the tribe? Does the fact that those parents may be eligible for membership have any bearing? State courts have not been consistent, but some appear to be complying with a literal reading of the law. In Washington, for example, a state appellate court found that since the Indian mother had not enrolled as a tribal member until after the child custody proceedings had started, her child was not legally an "Indian child" since the Act requires an Indian child to be born to an enrolled tribal member.[48]

This ruling frustrates the purposes of the Act because it disposes of tribal considerations with a technical aspect of the Act. It illustrates once again that state courts perceive the tribes as adversaries when in fact both should work towards Congress' goal of tribal self-determination. This strict Washington view was not followed by an Oregon appellate court which held that if a child is an Indian child at the time judicial proceedings begin, this is all the Act requires for applicability.[49] The appellate court was reversed, however, because the Oregon Supreme Court found insufficient evidence to support the determination the child was an "Indian child" in that case under the appellate

42. *Id.* § 1903(1)(ii).
43. *Id.* § 1903(1)(iii).
44. *Id.* § 1903(1)(iv).
45. *Id.* § 1903(1).
46. *Id.* § 1903(4).
47. *Id.*
48. *In re* Adoption of Crews, 803 P.2d 24 (Wash. Ct. App. 1991), *aff'd*, 825 P.2d 305 (Wash. 1992).
49. Quinn v. Walters, 845 P.2d 206, 211 (Or. Ct. App. 1993), *rev'd*, 881 P.2d 795 (Or. 1994).

court's standard.[50] The Act provides parental rights for Indian custodians, which are Indian persons who have temporary, legal custody of an Indian child.[51] One must also keep in mind that a tribe has to be federally recognized and be located in the United States to possess rights protected by the Act.[52]

B. Jurisdiction of State and Tribal Courts

The Act creates the jurisdictional scheme which Indian tribal courts and state courts must follow. Simply put, state courts do not have jurisdiction to hear any Indian child custody proceeding when that Indian child resides or is domiciled within the reservation of its respective tribe.[53] Also, if an Indian child is a ward of a tribal court, state courts have no jurisdiction no matter where the child resides.[54]

If an Indian child does not reside on, or is not domiciled on that child's tribal reservation, a state court must transfer any foster care placement or parental rights termination proceeding to the tribal court unless an exception applies.[55] Of course, a parent, Indian custodian, or tribe must petition the court for a transfer to tribal court.[56] A state court is not obligated to transfer the proceedings if either parent of the Indian child objects, a tribal court declines the transfer, or "good cause" exists not to transfer the proceedings.[57] The party opposing the transfer bears the burden of proving "good cause" to not transfer.[58]

An Indian child, Indian custodian of the child, or the child's tribe have a right to intervene at any point in a state court proceeding for the foster care placement of or termination of parental rights to the Indian child.[59] This provision does not create any exception for a proceeding which has already

50. Quinn v. Walters, 881 P.2d 795, 800-01 (Or. 1994).
51. 25 U.S.C. § 1903(6) (1994).
52. *Id.* § 1903(8).
53. *Id.* § 1911(a).
54. *Id.*
55. *Id.* § 1911(b).
56. *Id.*
57. "Good cause" is not defined by the Act, but some guidance is available from the Bureau of Indian Affairs, Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979). The guidelines state: a) child's tribe does not have a tribal court as defined by the Act to which the case can be transferred; b)(i) proceeding was at an advanced stage when petition to transfer was received and petitioner did not file petition promptly after receiving notice; (ii) child is over age twelve and objects; (iii) evidence needed could not be presented to tribal court without undue hardship to parties or witnesses; (iv) parents of a child over five are not available and child has had little or no contact with the tribe or members of the child's tribe; c) socioeconomic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists; d) the burden of establishing good cause to the contrary shall be on the party opposing the transfer.
58. *Id.*
59. 25 U.S.C. § 1911(c) (1994).

begun or is substantially complete. It is a powerful provision necessary for the right of intervention to have any force. Full faith and credit must be accorded by the United States, all states and Indian tribes to the judicial actions of any tribal court hearing an Indian child custody proceeding.[60]

C. Notice

The Act also provides specific provisions regarding notice to an Indian child's tribe. If a state court knows or has reason to know an Indian child is involved, it must order a party in any state court child custody proceeding which is seeking involuntary foster care placement of or termination of parental rights to an Indian child, to notify the child's parent, Indian custodian, and the child's tribe by registered mail, return receipt requested.[61] The notifying party must inform the Indian parties of the pending proceedings and their right of intervention.[62] If the notifying party is not able to ascertain the names of or locations of the child's parent, Indian custodian, or tribe, notice must be given to the Secretary of the Interior.[63] The Secretary then has fifteen days to notify the Indian parties.[64] The state court must wait ten days after notice was received to resume any proceedings, but must grant a twenty day extension upon request of the child's tribe, parent or Indian custodian.[65]

D. Personal Rights under the Indian Child Welfare Act

One may wonder how an indigent parent or Indian custodian, subject to an involuntary proceeding, would assert their rights under the Act or even be aware of them without the financial ability to retain legal counsel. The Act also addresses this concern and provides for court appointed counsel after determining indigency.[66] In cases where a state does not ordinarily provide counsel in family law proceedings, the Secretary of the Interior is authorized to pay attorney's fees after notification by that court.[67]

Any party to an involuntary foster care placement or parental rights termination proceeding has the right to examine any document on which a court relies on in making a decision.[68] The party prosecuting an involuntary foster care placement or termination of parental rights proceeding must make efforts to prevent the breakup of the Indian family and certify that fact to the court.[69] The efforts which must be made have been held by some courts to be

60. *Id.* § 1911(d).
61. *Id.* § 1912(a).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* § 1912(b).
67. *Id.*
68. *Id.* § 1912(c).
69. *Id.* § 1912(d).

"reasonable" or "active" efforts to ensure an Indian family will remain united.[70] If these efforts prove futile, the termination of parental rights may proceed.[71]

E. Burdens of Proof

The Act also establishes evidentiary standards for involuntary foster care placements and termination of parental rights proceedings. Clear and convincing evidence must support any involuntary foster care placement of an Indian child.[72] Expert witnesses must provide testimony that continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child.[73] The same findings must be established, but by evidence beyond a reasonable doubt in the case of an involuntary proceeding to terminate parental rights.[74]

The Act does not specifically address whether testifying experts must be knowledgeable in Indian cultures. However, most courts have inferred from section 1912 of the Act that a qualified expert, in addition to being a domestic relations specialist, is one also educated in Indian cultures.[75]

The Act also provides protection for parents and Indian custodians in voluntary parental rights termination actions. If a parent or Indian custodian voluntarily consents to either a foster care placement or termination of parental rights, consent must be executed in writing before a judge of a court of competent jurisdiction.[76] This last requirement of proper jurisdiction is vital to the consent. No matter how much time passes after the consent was executed, if the court did not have jurisdiction at the time of consent, it never will obtain it and the consent should be invalid.[77] However, if a final decree of adoption is entered, the Act does not speak as to how long a person has to withdraw a valid consent. There is some question whether a state statute of limitations applies.[78] The judge must certify the consent was fully explained in detail and understood by the parent or Indian custodian.[79]

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70. K.N. v. State, 856 P.2d 468, 477 (Alaska 1993); C.E.H. v. L.M.W., 837 S.W.2d 947, 957 (Mo. Ct. App. 1992).

71. *C.E.H.*, 837 S.W.2d at 957.

72. 25 U.S.C. § 1912(e) (1994).

73. *Id.*

74. *Id.* § 1912(f).

75. *See In re* Welfare of T.J.J., 366 N.W.2d 651, 655-56 (Minn. Ct. App. 1985); *In re* K.A.B.E. & K.B.E., 325 N.W.2d 840, 843-44 (S.D. 1982). *But see* State *ex rel.* Juvenile Dept. of Lane County v. Tucker, 710 P.2d 793, 798-99 (Or. Ct. App. 1985).

76. 25 U.S.C. § 1913(a) (1994).

77. *See In re* Adoption of Halloway, 732 P.2d 962, 969 (Utah 1986).

78. *See In re* Adoption of T.N.F., 781 P.2d 973, 981 (Alaska 1989) (holding that state limitations period of one year applied to withdrawal of valid consent to adoption under Indian Child Welfare Act), *cert. denied sub nom.*, 494 U.S. 1030 (1990).

79. 25 U.S.C. § 1913(a) (1994).

The court must also insure the parent or Indian custodian understood the terms of the consent in English or that it was interpreted in a language which was understood.[80] Any consent given prior to the birth of an Indian child or given within 10 days of birth is not valid.[81]

If a parent or Indian custodian voluntarily places an Indian child in foster care under state law, the consent may be withdrawn at any time.[82] The moment consent is withdrawn, the Indian child must be returned to the parent or Indian custodian.[83] When a parent or Indian custodian chooses to voluntarily terminate parental rights to an Indian child or places the child for adoption, that consent may be withdrawn at any time prior to a final adoption decree being entered.[84] The child shall then be returned to the parent or Indian custodian.[85]

What happens to a parent or Indian custodian's right to withdraw consent to an adoption after a final decree of adoption is entered? The Act contains only a limited exception for consent obtained through fraud or duress.[86] If a court finds consent was obtained through fraud or duress, that court must vacate the adoption decree and return the child to the parent or Indian custodian.[87] The Act does limit attacks on final decrees under this section to those which have been in effect for less than two years.[88]

As pointed to earlier, the Act is silent with regard to statutes of limitation in the context of withdrawal of valid consents to adoption. It is reasonable to assume, until Congress has spoken, to defer to state law, as some courts have done.[89] Since state laws may vary in this area, it is probably not wise for Congress to allow this situation to continue. The Indian Child Welfare Act is critical for the protection of Indian families and tribes, and application should be consistent. Without consistent application, the Act becomes subject to state laws which may differ throughout the country. The results obtained in one state may not be the same in another state, and this would undermine uniform application of the Act, which Congress intended.

The Act is also silent regarding notice to the tribes in voluntary child custody proceedings. A tribe has an absolute right to intervene in any child custody proceeding involving an Indian child of that tribe. However, the tribes

80. *Id.*

81. *Id.*

82. *Id.* § 1913(b); *see also In re* Adoption of K.L.R.F., 515 A.2d 33, 38 (Pa. Super. Ct. 1986).

83. 25 U.S.C. § 1913(b) (1994).

84. *Id.* § 1913(c); *see also* Quinn v. Walters, 845 P.2d 206, 208 (Or. Ct. App. 1993), *rev'd*, 881 P.2d 795 (Or. 1994).

85. 25 U.S.C. § 1913(c) (1994).

86. *Id.* § 1913(d).

87. *Id.*

88. *Id.*

89. *In re* Adoption of T.N.F., 781 P.2d 973, 978 (Alaska 1989).

only have a right to notice in involuntary proceedings. As one can imagine, this has been a major setback to the tribes in certain situations. State courts, not eager to consider tribal interests, have not interpreted this gray area favorably to the tribes and have strictly applied the plain wording of the statute in denying the requirement of notice to the tribes in voluntary proceedings.[90] One may decide that if that is what the law says, then so be it. The truth is, however, state courts have not been so inflexible when a non-tribal party does not strictly comply with the notice requirements imposed by the Act in involuntary proceedings.[91] No matter how one feels about the Act, when the law is strictly applied to only a tribe, and flexibility is allowed to others, equal justice under law is not the result. If states are to strictly construe the law, that is fine, but it should be that way for everyone.

F. Attacks on State Court Judgments

If a state court does not correctly apply the Act, in a case to which the Act applies, that court's decisions may be attacked in a court of competent jurisdiction.[92] This right is given to the Indian child, parent or Indian custodian from which the child was taken, or the child's tribe.[93]

The party whose rights were violated may not want to continue the litigation in state court and may instead wish to resort to the federal courts. Neither Congress nor the United States Supreme Court have spoken on this issue, however, and a party will most likely have to continue in the state court system.[94] Upon exhaustion of available state court remedies, a party may then appeal to the United States Supreme Court. It seems rather harsh to grant federal rights and then delegate enforcement of those rights to the state courts which necessitated the granting of those rights in the first place. Nevertheless, the federal courts have not pursued an active role in enforcement of the Act in the states in which they sit. Only if a party can show that a state court's decisions with regard to the Act were "fundamentally flawed," will the federal courts hear the case.[95] This is because the federal courts do not look favorably upon collateral attacks on state court judgments. Finality in litigation is a desired goal and state appellate courts should be given the opportunity to decide the disputes.

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90. Catholic Social Services, Inc. v. C.A.A., 783 P.2d 1159, 1162-63 (Alaska 1989), *cert. denied sub nom.*, 495 U.S. 948 (1990).

91. *See In re* Krystle D., 37 Cal. Rptr. 2d 132, 141-42 (Cal. Ct. App. 1994) (holding that an Indian tribe had adequate notice of termination proceedings, even though Act requirement that notice be given by certified mail had not been complied with).

92. 25 U.S.C. § 1914 (1994).

93. *Id.*

94. *See* Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493, 1501-02 (10th Cir. 1987); Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587, 591-92 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986).

95. *Kiowa Tribe*, 777 F.2d at 591.

Just as the substantive decisions of the state courts are usually protected by the lower federal courts, jurisdictional issues are also not subject to federal judicial review. *Comanche Indian Tribe of Oklahoma v. Hovis*[96] involved a custody proceeding which had originally been transferred by a state court to tribal court in accordance with the Act.[97] After the tribal court had accepted the case and proceedings were started, the mother petitioned the state court to vacate its transfer order because she had objected to the transfer at the time of the hearing.[98] The state court agreed with the mother and found that the state court shared jurisdiction with the tribal court because the child's domicile was not clearly on the reservation.[99] Since the mother had objected to the transfer, the court ruled it had acted improperly and vacated the transfer order.[100] The tribe unsuccessfully attempted to dissuade the state court from vacating its transfer order and petitioned the federal district court for a review of the jurisdictional dispute.[101] The district court agreed to resolve the interpretation of the Act which concerned jurisdiction.[102] After finding that the child resided on the reservation, it held jurisdiction to be exclusive in the tribal court and the mother's objection was of no consequence.[103] The Tenth Circuit Court of Appeals reversed the decision and reaffirmed the prohibition on collateral review of state court decisions by the federal courts. Additionally, federal courts will not usually review the substantive decisions of the tribal courts.[104]

G. Placement of Indian Children

After determining the existence of jurisdiction, the completion of foster care placement or adoption proceedings is the next step, and a state court must then decide where to place the Indian child. In any adoption placement, state courts must first, in the absence of "good cause" to the contrary, place the Indian child with a member of the child's extended family.[105] If that is not possible, a state court must then place the child with other members of the child's tribe.[106] Lastly, if the above two options are not available, a state court must then try to place the child with other Indian families.[107]

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96. 847 F. Supp. 871 (W.D. Okla. 1994), *rev'd*, 53 F.3d 298 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 306 (1995).

97. *Id.* at 873-75.

98. *Id.* at 874.

99. *Id.* at 874-75.

100. *Id.* at 875.

101. *Id.*

102. *Id.* at 887.

103. Comanche Indian Tribe of Oklahoma v. Hovis, 53 F.3d 298, 304-05 (10th Cir. 1995).

104. Sandman v. Dakota, 816 F. Supp. 448 (W.D. Mich. 1992), *aff'd*, 7 F.3d 234 (6th Cir. 1993).

105. 25 U.S.C. § 1915(a)(1) (1994).

106. *Id.* § 1915(a)(2).

107. *Id.* § 1915(a)(3).

The Act also establishes placement preferences in foster care or preadoptive placements of Indian children.[108] The Act creates a preference first for the Indian child's extended family.[109] The next preferences are for foster homes approved by the Indian child's tribe,[110] a foster home approved by an authorized non-Indian authority,[111] and finally an institution for children approved by a tribe or operated by an Indian organization with a program which will meet the needs of Indian children.[112]

Under the Act, a tribe may provide the court with a different order of preference for the court or agency if it is the least restrictive setting for the child.[113] It is worth noting that state courts are under a duty to keep records of all placements of Indian children and also show efforts were made to comply with the order of preference.[114]

If a final decree of adoption of an Indian child is vacated, where does the child go? The Act provides that a biological parent or prior Indian custodian may petition the court for return of the child.[115] The court, absent a finding that such a return is not in the best interests of the child, must grant the petition.[116] If an Indian child is removed from foster care for the purpose of placing the child in foster care once again, preferential placements in section 1915(a) of the Act must be complied with.[117]

H. Tribal Reassumption of Jurisdiction

If a tribe became subject to state jurisdiction under a federal law, such as Public Law 83-280 discussed earlier, it may be able to reassume jurisdiction. The tribe must petition the Secretary of Interior and provide a suitable plan to exercise jurisdiction.[118] The Act also provides specific criteria the Secretary may consider, but is not limited to that list, in reaching a decision.[119] The Secretary also has authority to grant tribes limited jurisdictional powers or exclusive jurisdiction over a certain geographic area.[120] If a tribe is able to reassume jurisdiction, pending cases in state courts are not affected.[121]

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108. *Id.* § 1915(b).
109. *Id.* § 1915(b)(i).
110. *Id.* § 1915(b)(ii).
111. *Id.* § 1915(b)(iii).
112. *Id.* § 1915(b)(iv).
113. *Id.* § 1915(c).
114. *Id.* § 1915(e).
115. *Id.* § 1916(a).
116. *Id.*
117. *Id.* § 1916(b).
118. *Id.* § 1918(a).
119. *Id.* § 1918(b)(1).
120. *Id.* § 1918(b)(2).
121. *Id.* § 1918(d).

1. Tribal and State Jurisdictional Compacts

States and tribes may also enter agreements as to jurisdiction over child custody proceedings.[122] These agreements may provide the transfer of cases to tribal court or allow concurrent jurisdiction. If agreement is possible, this would appear to be the most productive route for a tribe over which a state has jurisdiction under a prior federal law, or where the child's residence or domicile is in question. An agreement would serve to lessen the disputes which may arise in subsequent cases. If a tribe and the state are not able to reach an agreement, then tribes may wish to petition for reassumption of jurisdiction over domestic matters, which was discussed above.

2. Dissolution of Jurisdictional Agreements

If an agreement is reached and the tribe or state is later dissatisfied, either party may revoke it upon 180 days written notice to the other party.[123] Unless, a subsequent agreement is drafted, a cancellation of a jurisdictional agreement does not affect pending proceedings.[124]

I. Emergency Exceptions to the Indian Child Welfare Act

The Act also provides exceptions for the protection of the child. Ordinarily, a state court must not hear a child custody proceeding where a petitioner is seeking custody of an Indian child after initially having obtained custody improperly.[125] A court must return the child to the parent or Indian custodian, unless, doing so would present a substantial danger or threat to the child.[126] Substantial danger or threat must still be proved by either the clear and convincing standard, or beyond a reasonable doubt standard of evidence provided for in section 1912, subsections (e) and (f), depending on the nature of the proceeding.

The Act also allows a state to take an Indian child domiciled on a reservation into custody in an emergency situation, if the child is outside of the reservation at the time of the emergency.[127] An emergency situation is one in which a child would be in danger of physical damage or harm.[128]

Upon removal, a state must determine when a child is no longer in danger and subject to return to the parent or Indian custodian. If a child custody proceeding is necessary because the potential harm to the child has not

122. *Id.* § 1919(a).
123. *Id.* § 1919(b).
124. *Id.*
125. *Id.* § 1920.
126. *Id.*
127. *Id.* § 1922.
128. *Id.*

subsided, a state must either initiate it in the state courts or transfer to the tribal court, subject to the jurisdictional provisions of the Act.[129]

IV. Programs to Assist Indian Children and Families

Of course, once parents, Indian custodians, and tribes have stopped the removal of their children, the next task is to improve the conditions on the reservations that brought on the wrath of the state. The Act provides for federal grants to the tribes for Indian child and family service programs.[130] These programs include foster and adoptive homes, counseling for Indian families, and the employment of professionals to assist tribal courts in domestic matters.[131] The Act also provides federal grants for programs outside of the reservation designed to provide Indian foster and adoptive homes, and family assistance.[132]

Congress also determined that the breakup of Indian families may, in part, be caused by the absence of day schools near the reservations.[133] The Act provides for the Secretary of the Interior to consult with other federal agencies in relieving this problem.[134]

V. The Indian Child Welfare Act in the Hands of State Courts

A major concern one may foresee is, what will the state courts do with the Indian Child Welfare Act? Since states are in part responsible for the conditions leading to passage of the Act, how can Congress leave them the responsibility of implementing it? Aside from questions of federal and state relations, family law is simply a state matter.[135] With that in mind, we will now proceed to review state court decisions and the Indian Child Welfare Act.

A. Court Interpretation of the Indian Child Welfare Act

One of the leading state appellate decisions was rendered in Arizona, and clearly illustrates the principles which should be applied, and the analysis to be followed by state trial courts. The facts may be disturbing to some, but the case shows that not all cases are black and white, and the national goal, as declared by Congress, of preserving environments which reflect the unique values of Indian culture is what is at stake.[136] *In re Appeal in Pima County Juvenile*

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129. *Id.*
130. *Id.* § 1931.
131. *Id.*
132. *Id.* § 1932.
133. *Id.* § 1961(a).
134. *Id.* § 1961(b).
135. *See* Barber v. Barber, 62 U.S. (21 How.) 582, 599 (1859) (holding that states have exclusive jurisdiction over domestic relations cases).
136. *See* 25 U.S.C. § 1902 (1994).

Action No. S-903[137] also outlined and addressed the issues trial courts must contend with. The facts are provided to show what may happen in a case before a state court and to demonstrate the difficulties facing that court in reaching a decision.

The mother was a member of the Assiniboine Tribe in Montana and gave birth to her child when she was fifteen years old.[138] Apparently the mother planned to place the child for adoption, because the child was born in Nevada on February 27, 1980, and on March 18, the mother executed a voluntary relinquishment of her parental rights in a Nevada district court.[139] The relinquishment provided for the temporary placement of the child with the Nevada Catholic Welfare Bureau, Inc. (NCWB) to secure permanent adoptive parents.[140]

By the end of September 1980, the mother wanted her child back and filed a revocation of relinquishment the following October 2, with the Nevada district court.[141] At this time, the mother was back home in Montana.[142] The Nevada court clerk informed the NCWB of the revocation and that arrangements to return the child should be made immediately.[143] A final decree of adoption had not yet been entered.[144]

NCWB also worked with other agencies in finding adoptive homes for children in need of them.[145] In this case, NCWB had been informed by Catholic Services of Tucson that an adoptive family was available prior to the mother's revocation of relinquishment.[146] The child had already been picked up on May 24, and taken to Tucson, Arizona for adoption.[147] In Tucson, the child had been placed for adoption with a non-Indian couple, while a final decree was pending.[148] When the prospective parents were informed the natural mother wanted the child back, they refused to return the child.[149]

A petition to terminate the parental rights of the natural mother was filed in an Arizona state court on October 27, 1980, based on allegations that the mother had abandoned the child.[150] A temporary order was issued by the court directing the child remain with the adoptive parents.[151]

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137. 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied sub nom.*, 455 U.S. 1007 (1982).
138. *Id.* at 189.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 189-90.
151. *Id.*

On November 7, the natural mother asked her tribal chairman in Montana to intervene in the Arizona proceedings.[152] On January 20, 1981, the vice-chairman of the natural mother's tribe sent a letter to the presiding judge of the trial court in Arizona.[153] The letter advised the court of the tribe's desire to intervene and transfer the action to the tribal court.[154] A formal petition to transfer was filed on March 11, 1981.[155] The opposition to the transfer asserted that good cause not to transfer existed.[156] First, the child had never lived in Montana and the tribal court could not know the child's best interests.[157] Second, separation from the adoptive parents would harm the child.[158]

If one looks at the reasons advanced against transfer, it is apparent they are irrelevant in the determination of proper jurisdiction. The problem that has plagued implementation of the Act has been the belief that it is designed to take Indian children away from non-Indian adoptive parents. That is not the case. Assuming that the reasons advanced against transfer are true, they are secondary to the question of jurisdiction. The factors are important in placing the child for adoption, but not in deciding which court must hear the case. For example, if two divorcing parents obtain conflicting child custody orders from different jurisdictions, a federal court does not automatically have jurisdiction to decide which one is valid.[159] The fact that a litigant does not like the forum is not sufficient reason to divest the proper court of jurisdiction.

After a hearing on May 8, 1981, the Arizona court terminated the natural mother's parental rights and denied the transfer to tribal court.[160] Apparently, the trial court accepted the argument that good cause to deny transfer was present, because it did find the Act applied due to the fact that the child was born to a tribal member and was eligible for membership.[161] Nonetheless, the trial court held that since the natural mother relinquished her parental rights on March 18 of the previous year, and the child lived in Arizona thereafter, the child was domiciled in Arizona and the state court had concurrent jurisdiction based on section 1911(b).[162] The court also acknowledged the tribal intervention, but ruled that they had not otherwise participated in this matter

152. *Id.* at 190.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. Thompson v. Thompson, 484 U.S. 174, 186-87 (1988).
160. *In re* Appeal in Pima County, 635 P.2d at 190.
161. *Id.*
162. *Id.* at 191-92.

and dismissed their plea.[163] The court decided the child should remain with the adoptive parents.[164]

The first issue the appellate court looked at was whether the trial court properly asserted jurisdiction under the Act.[165] Section 1911(a) of the Act provided for exclusive jurisdiction in tribal forums for proceedings involving Indian children residing or domiciled on a reservation.[166] So, the court had to ascertain where the child resided or was domiciled.[167] The court looked at the relevant case law from other states and agreed with the determination that an illegitimate child takes the domicile of its natural mother until those parental rights are terminated.[168] Since in this case, the child's domicile had not been changed prior to the hearing on May 8, the child remained domiciled in Montana.[169] Therefore, the appellate court concluded jurisdiction was exclusive in the tribal court.

The appellate court then stated that even if the state court shared jurisdiction with the tribe, it should have declined to hear the case.[170] The relevant question would be to decide whether or not the natural mother would be a fit parent and that question would be better answered in Montana, where the mother lived.[171] Moreover, experts trained in Indian culture and relations would be easier to locate near the natural mother's reservation.[172]

To further support its position, the appellate court reasoned that the burden of proof necessary to terminate the mother's parental rights had not been met.[173] There was no finding beyond a reasonable doubt that continued custody by the parent would result in harm as required by section 1912(f) of the Act.[174] Furthermore, no efforts were made by the trial court to prevent the breakup of an Indian family as mandated by the Indian Child Welfare Act.[175] The Act also required that expert testimony, stating that continued custody by the Indian parent would result in serious harm to the child, be presented.[176] This too had not been done. Indeed, the appellate court found, "[t]he evil

163. *Id.* at 191.
164. *Id.* at 193.
165. *Id.* at 191.
166. *Id.*
167. *Id.*
168. *See* Application of Morse, 324 P.2d 773, 775 (Utah 1958); *In re* Estate of Moore, 415 P.2d 653, 656 (Wash. 1966).
169. *In re* Appeal in Pima County, 635 P.2d at 190.
170. *Id.* at 192.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 192-93.
175. *Id.* at 193.
176. 25 U.S.C. § 1912(f) (1994).

which Congress sought to remedy by the Act was exacerbated by the conduct here under the guise of 'the best interests of the child.'"[177]

After pondering *Pima County*, one may either think that the overall purpose of the Act is what matters, or, that the actions of the mother should not be condoned. After all, this mother originally wanted to give her child up and then changed her mind. It is entirely possible that a new set of parents and the child had formed a bond by that time. One may feel that this is not what the Act was intended to do, or that it was a measure to be used against state authorities, but not to allow indecisive natural parents to play havoc with other people's emotions. Those considerations certainly are entitled to be heard in the proper forum, but some state courts have utilized those factors in denying application of the Act.

With all due respect to those parties, however, such considerations are subordinate to the preservation of the tribe. How easy it would be to defeat the aims of the Act if parents could disregard it. One may decide that adoptive parents are treated unfairly by the Act, but what of the situation where a non-Indian mother decides to place a child for adoption against the wishes of the Indian father? Without the Act, the Indian father would be facing the same feelings and attitudes in the state courts which helped wake Congress up, and the tribe would be ignored. One may not feel comfortable with the facts of *Pima County*, but the result is correct. Had the appellate court affirmed the lower court, several new questions would have arisen.

For example, would the question of domicile be answered differently for Indian parents under the existing case law examined by the appellate court? Also, even though the Act allows a tribe to intervene at any point in child custody proceedings, would they have to participate from the start, as the trial court ruled? Under the Act, the preservation of Indian heritage and culture is of utmost importance. The interests of the natural parents, adoptive parents, and the states, are relevant, but not dispositive.

B. Constitutional Considerations in the State Courts

The Act treats one group of people differently than another. As such, attacks based on violations of equal protection and the due process clause of the Fourteenth Amendment to the United States Constitution were to be expected. One of the earliest decisions upholding the constitutionality of the Act was *In re Guardianship of D.L.L. & C.L.L.*[178] rendered by the Supreme Court of South Dakota.

This case involved Indian parents residing on the Lower Brule Sioux Indian Reservation in South Dakota.[179] The parents had voluntarily placed four of

177. *In re* Appeal in Pima County, 635 P.2d at 193.
178. 291 N.W.2d 278 (S.D. 1980).
179. *Id.* at 280.

their five children in foster care with Shalom, a group foster home.[180] The father had developed an ulcer in his right foot which necessitated amputation and a lengthy hospital stay, and felt that the children would be temporarily better off in foster care while he recovered.[181] After an informal arrangement had been undertaken concerning the two oldest children by the parents and Shalom, a formal order was issued by the Lower Brule Sioux Tribal Court which gave temporary custody of all four children to Shalom.[182] During the father's recovery in the hospital, the mother stayed in California.[183]

About seven months passed before the father returned home.[184] The two youngest children returned to the parents on the reservation without a court release order, but the two oldest remained in foster care.[185] A few months later, a formal release order for the two youngest children was issued by the tribal court, and provisions for weekend visits between the parents and the two oldest children were included in that order.[186]

Problems with alcohol were reported in the home, and the court modified the weekend visits by requiring a court order for each visit.[187] Shortly thereafter, one of the children in foster care became pregnant which allegedly resulted from a rape which occurred during a parental visitation period.[188] Based on this, Shalom refused to allow further visitation even though the tribal court ordered it to.[189] Shalom also did not obey a court order which directed that the children be removed from foster care and returned to the parents.[190] Instead, Shalom petitioned the state court for guardianship of the two children.[191]

Obviously, the Indian Child Welfare Act applied to this situation. The children were born to tribal members and were themselves members. In addition, everyone in the family resided on the reservation and the tribal court had initially heard the proceedings. There was no question that the tribal court had exclusive jurisdiction over the matter. In order to try to get around having the state court dismiss its claim, Shalom now attacked the constitutionality of the Act in three ways. First, it was contended that the Act unconstitutionally ceded jurisdiction over domestic relations cases to the United States.[192]

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

Second, Shalom argued that the Act violated the South Dakota Constitution by taking away state jurisdiction over Indians not on the reservation, which was provided by article 22.[193] Third, Shalom asserted the Act unconstitutionally closed the doors of the state courts to the children in foster care and amounted to "invidious racial discrimination."[194] The trial court dismissed Shalom's claims and an appeal was taken to the state supreme court.[195]

The court addressed each of Shalom's claims and after upholding the validity of the Act, held that jurisdiction was proper in the tribal court.[196] The supreme court began its analysis by examining Congress' authority to regulate Indian affairs under Article I, Section 8, of the United States Constitution.[197] The court reasoned that Congress had used this provision many times in the past with regard to Indian affairs, and plenary power was indeed vested in Congress.[198] The court then stated that unless Congress arbitrarily exercised its legislative authority, it would have to uphold the Act.[199] As for Shalom's claim that the Act violated the South Dakota Constitution, the court held this was not possible because Congress' power over Indian affairs did not derive from the state.[200] The court held that it was the state which had to be careful not to infringe upon the rights of Indians granted by Congress.[201] Since Congress' authority was supported by the United States Constitution, South Dakota had to respect federal laws allowing tribal governments the power to regulate the reservations.[202] Whether or not the state constitution provides for this is irrelevant to the inquiry, because Congress would have to permit the state to draft laws dealing with the reservations.[203] Without that authority from the federal government, the state has no place on the reservation.[204] Even if a tribal member leaves the reservation, the tribal courts may still be the best place to settle disputes which arose out of transactions on the reservation.[205] The court also held that when a situation "demands exercise of the tribe's responsibility of self-government," jurisdiction is proper on the reservation.[206]

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193. *Id.* at 281.
194. *Id.*
195. *Id.* at 280-82.
196. *Id.* at 282.
197. *Id.* at 289 (citing U.S. CONST. art 1., § 8, cl. 3 (dealing with commerce) ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes")).
198. *Id.* at 281.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 281; *see also* Fisher v. District Court, 424 U.S. 382 (1976).
206. *In re* Guardianship of D.L.L., 291 N.W.2d at 281.

Next, the focus turned to Shalom's claim that the Act denied access to the state courts based on "invidious racial discrimination."[207] The court quickly disposed of this argument by pointing to United States Supreme Court holdings which declared "Indian" to be a political classification and permissible, and not a racial one which was not under the United States Constitution.[208] Other courts have also held that the Act contains a rational basis for its special treatment of Indians, which is the protection of Indian families and to assure the very existence of the tribes.[209] The court then pointed out that the parties had submitted to the tribal court in the beginning and the children became wards of the tribal court to further sustain jurisdiction in the tribal court.[210]

Being the first state court to rule on these issues, the South Dakota Supreme Court did not have the benefit of prior cases. It approached the task at hand as a court would to determine the validity of the federal law. The court recognized that it was not empowered to make decisions with respect to the welfare of the Indian children when Congress granted exclusive jurisdiction to the tribe. It also respected the ability of tribal governments and courts to take care of their own affairs. The important elements were whether or not Congress overstepped its authority and if there was a rational basis for the Indian Child Welfare Act. The South Dakota court's analysis looked at each element and provided a strong framework for other courts to follow.

Other state courts have not heeded the South Dakota Supreme Court's ruling. A recent California appellate court decision held the Act unconstitutional.[211] The California court reasoned that unless the Act did not apply to situations where an existing Indian family would not be affected, Congress had exceeded its enumerated powers under the United States Constitution, and violated the 5th, 10th, and 14th amendments.[212] Thus, the court supported the judicially created "existing Indian family" exception to the Act.

In re Bridget R. involved the voluntary relinquishment of twins for adoption.[213] The father was a member of the Pomo Indian tribe and the mother was non-Indian.[214] The parents realized they would not be able to care for the children and made the difficult decision to place their children in an adoptive family.[215] The parents hired an attorney to help with the

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207. *Id.*

208. *Id.*; *see also Fisher*, 424 U.S. at 390-91.

209. *In re* Armell, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990), *cert. denied sub nom.*, 498 U.S. 940 (1990).

210. *In re* Guardianship of D.L.L., 291 N.W.2d at 282.

211. *In re* Bridget R., 49 Cal. Rptr. 2d 507, 536 (Cal. Ct. App. 1996), *cert. denied sub nom.*, 117 S. Ct. 693 (1997).

212. *Id.* at 516.

213. *Id.* at 515.

214. *Id.* at 516.

215. *Id.* at 517.

adoption.[216] The attorney advised the father not to disclose his Indian heritage so the adoption proceedings would not be delayed.[217] The father, worried about the welfare of his children, followed the attorney's advice.[218] After the birth of the twins, voluntary relinquishments of parental rights were executed, and they were placed with their adoptive family, who then took the children back with them to Ohio.[219]

Shortly thereafter, the twins' Indian grandmother, became aware of what had happened and contacted the father's adoption attorney and the Pomo tribe.[220] The Pomo tribe's chairperson wrote to the Los Angeles County Children's Court to inform the court of the fact the twins were potential tribal members and to request intervention in any proceedings.[221] The father then sought to rescind his relinquishment of parental rights and hoped to place the children with his sister.[222] The trial court rescinded the relinquishments and ordered the children be returned to the father.[223]

The appellate court reversed the trial court and held the Act unconstitutional, unless the "existing family exception" applied, otherwise it was impermissibly based on a child's Indian race.[224] The court stated that Congress' establishment of tribal rights which infringed on Indian children's rights was likewise unconstitutional.[225] The court also found that when an Indian child's social, cultural or political relationship to a tribe does not exist or is attenuated the only remaining basis for application of the Act is the child's race, which it felt was not permitted.[226] The court further held that as a result of this disparate treatment, the number and variety of adoptive homes that are available to an Indian child are more limited than those available to non-Indian children.[227]

The California court recognized that previous United States Supreme Court holdings have established that the term "Indian" is a political classification and not a racial one.[228] The California court, however, felt that the classification was based upon an Indian child's relationship to its tribe.[229] Since in the case before it, the children had basically no relationship with the tribe, the court

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 518.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 536.
225. *Id.* at 529.
226. *Id.*
227. *Id.*
228. *Id.* at 527.
229. *Id.*

held the Act's classification of an "Indian child" subject to the Act, could not stand.[230]

Clearly, federal case law has established that the political classification of "Indian" is not based on any relationship between members and the tribe.[231] In a pre-Act family law case, which was not addressed by the California court, *Fisher v. District Court*, the United States Supreme Court stated:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[232]

The California court also did not seem to think the tribal court would consider all possible alternatives in determining the best placement choice.[233] This criticism of the tribal court was not justified. There was no evidence presented to the California court establishing that the tribal court would not make a fully informed decision. Again, the Act is a jurisdictional statute. If Congress believed that tribal courts would be the best forum to decide where Indian children should be placed, state courts should not attempt to substitute their judgment for that of Congress.

When a court incorrectly determines that federal laws designed to assist tribes are based on race, then all of those laws could arguably be struck down by that court, as violative of the 14th amendment to the United States Constitution. This result was clearly not intended by Congress. When confronted with this issue with regard to Indian employment preferences with the Bureau of Indian Affairs, the United States Supreme Court declared:

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[234]

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230. *Id.* at 536.
231. Morton v. Mancari, 417 U.S. 535, 552 (1974).
232. Fisher v. District Court, 424 U.S. 382, 390-91 (1976).
233. *In re* Bridget R., 49 Cal. Rptr. 2d at 529.
234. *Mancari*, 417 U.S. at 552.

The pervasive "existing Indian family" exception, which was also part of the California court's holding, threatens the very existence of the Act and will be examined next.

C. Judicially Created Exceptions to the Indian Child Welfare Act

Normally, courts interpret legislative enactments by first ascertaining the plain meaning of the language used. Even if a court believes Congress may not have foreseen all of the consequences of a law, courts should still give effect to the words of the statute.[235] After a court examines the statute, and an ambiguity persists, only then should it peruse the legislative history to draw the meaning of the statute.[236]

Unfortunately, there are state courts that interpret statutes on the basis of what they believe Congress really meant and not what was enacted by it. *In re Adoption of Baby Boy L.*[237] gave birth to the judicially created "existing Indian family" exception to the Indian Child Welfare Act.

Baby Boy L. was born to an unmarried, non-Indian mother and an Indian father enrolled in the Kiowa Tribe of Oklahoma.[238] The day the child was born, the mother executed a consent to adoption and the prospective parents obtained temporary custody through a state court order.[239] At this time, the father was incarcerated, but received notice of the adoption proceedings.[240] The father was appointed counsel to appear at the adoption hearing and to answer a petition filed by the prospective parents which sought to terminate parental rights.[241] It was brought to the court's attention that the Indian Child Welfare Act might apply because of the father's tribal membership and all parties submitted briefs on the issue.[242]

As with any analysis, one should look at the facts. The father was an enrolled member of an Indian tribe.[243] The child was eligible for membership, but, did not reside on the reservation.[244] Therefore, the trial court should have determined that this was an involuntary proceeding, the Act applied, and the state court had concurrent jurisdiction along with the tribe.

The father's tribe was then given notice, and the tribe filed a plea in intervention and a motion to transfer to tribal court.[245] The tribe also enrolled

235. *See* Toibb v. Radloff, 501 U.S. 157, 162 (1991).
236. Blum v. Stenson, 465 U.S. 886, 896 (1984).
237. 643 P.2d 168 (Kan. 1982).
238. *Id.* at 172.
239. *Id.*
240. *Id.* at 172-73.
241. *Id.* at 173.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

Baby Boy L. in the tribe, over the mother's objection.[246] Obviously, the Kansas court was faced with difficult questions. The child had never lived on the reservation, the father was incarcerated, and a tribe from Oklahoma was demanding to be heard and to be granted jurisdiction over the matter.

Since the state court had concurrent jurisdiction, it could have held the Act applicable and determined good cause not to transfer existed in the hardship to the parties in having to travel to Oklahoma to present their case. It was also apparent the mother would have objected to the transfer. These two factors would have precluded transfer under the Act. Rather than do that, the court seized upon Congress' reasons for passing the Act. It reasoned that since the Act was designed to prevent the breakup of Indian families, it did not apply here.[247] The child had never been in an "Indian family," and knew nothing of Indian culture.[248] Notwithstanding the clear provisions of the Act, the court decided it was the legislative history which controlled.[249] Having said that, the court then held the tribe's intervention and motion to transfer moot and proceeded with termination of the father's rights and granted the adoption.[250] The supreme court then heard the appeal and affirmed the trial court. What the supreme court also determined was that the Act was ambiguous in its purpose and held that "construction of an ambiguous statute should be avoided which would render the application of the statute impracticable, or inconvenient . . . ."[251] It also approved the trial court's holding that the Act's goal was to preserve Indian families and not to create them.[252]

The facts clearly support application of the Act. Concurrent jurisdiction existed and the tribe should have been allowed to intervene. As far as the transfer, the mother's objection would have prevented it, and the case would have remained in state court. The court would have then been allowed to proceed under the Act. The inquiry should have ended there. No one will dispute the fact that courts would like to avoid the heartwrenching task of removing children from homes. By not ending the inquiry at that point, however, the supreme court created dangerous precedent for state courts, hostile to the Act, to follow. The most troublesome aspect is that state courts may use their own values and prejudices to decide what a "family" should be. If a court does not believe a family is "Indian" enough, the Act may become meaningless. The "Indian family" exception and analysis of the Kansas Supreme Court was followed in South Dakota, Indiana, Washington, and

246. *Id.*
247. *Id.* at 175-76.
248. *Id.* at 172-73.
249. *Id.* at 175-76.
250. *Id.* at 188.
251. *Id.* at 177.
252. *Id.*

Oklahoma.[253] The judicial exception is clearly alive, as a Louisiana appellate court recently adopted the *Baby Boy L.* analysis and held that Congress only wanted to prevent the removal of Indian children from an existing Indian family and Indian environment.[254]

Justice Andersen of the Washington Supreme Court recognized that the frightening part of the judicially created exception is that it lacks any legislative support.[255] The Act should always apply as intended, regardless of the child's exposure to Indian ways.[256]

The other side of the argument is of course that the courts should apply the law as it is written. The Supreme Court of Idaho rejected the "existing Indian family" exception because it would make it too easy for a non-Indian mother to circumvent application of the Act.[257] Moreover, the "Indian family" exception would not take into consideration a tribe's interest in preserving its existence, which Congress provided for in the Act.[258] The Supreme Court of Alaska also refused to follow the exception due to its susceptibility to state court prejudices.[259] After the United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*,[260] which will be discussed in the next section, the Supreme Court of South Dakota questioned its *Claymore v. Serr*[261] decision and held the correct position to be application of the Act based on the facts of the case and not to focus on an existing family.[262] Although the United States Supreme Court did not specifically address the "existing Indian family" exception, the South Dakota Supreme Court inferred its disapproval indirectly. State courts which now face the issue are able to find support for either position in the various states. In the all too

253. Claymore v. Serr, 405 N.W.2d 650, 653-54 (S.D. 1987); *In re* Adoption of T.R.M., 525 N.E.2d 298, 302 (Ind. 1988), *cert. denied sub nom.*, 490 U.S. 1069 (1989); *In re* Adoption of Crews, 825 P.2d 305, 310 (Wash. 1992); *In re* S.C. & J.C., 833 P.2d 1249, 1255 (Okla. 1992).

254. Hampton v. J.A.L., 658 So.2d 331, 334-35 (La. Ct. App. 1995), *cert. denied*, 116 S. Ct. 1549 (1996).

255. *In re* Adoption of Crews, 825 P.2d at 312-14.

256. *Id.* at 312 (Andersen, J., dissenting) ("I disagree, however, with the majority's conclusion that the Indian Child Welfare Act of 1978 . . . applies only in those cases in which a state court determines that the cultural awareness, tribal affiliation, or lifestyle of the birth family meets some judicially fashioned level of 'Indian-ness'").

257. *In re* Baby Boy Doe, 849 P.2d 925, 931-32 (Idaho 1993), *cert. denied sub nom.*, 510 U.S. 860 (1993).

258. *Id.* at 931.

259. *In re* Adoption of T.N.F., 781 P.2d 973, 977 (Alaska 1989) ("[T]hese judicially-created exceptions to coverage of the ICWA are somewhat suspect in light of the Act's purpose of imposing federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.").

260. 490 U.S. 30 (1989).

261. *See supra* note 253.

262. *In re* Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990); *see also In re* Dependency & Neglect of N.S., 474 N.W.2d 96, 100 (S.D. 1991).

familiar fact pattern involving illegitimate Indian children, what are the courts to do? On the one hand, the case can be transferred to an unknown entity called the tribal court. On the other hand, usually two prospective parents are fighting for custody before the court and demanding the litigation be resolved, and the Indian Child Welfare Act looms overhead.

Appellate courts in New Jersey, California, and Illinois have declined to adopt the "Indian family" exception to the Act.[263] Instead, these courts have decided that a court must give effect to clear statutory provisions, and may not declare the law to be what they believe the legislature meant. The Illinois appellate court went further and declared that the courts which adopted the "Indian Family" exception had used the legislative history to create an ambiguity which did not exist.[264] The Illinois Supreme Court ultimately reversed the appellate court in order to determine if sufficient evidence existed to establish the child's domicile to be that of the Indian mother. The supreme court did not disagree with applicability of the Act if the child had not been abandoned by the Indian mother after sole custody had been awarded to the non-Indian father.

One can read the Act in vain to find a requirement that an Indian child be born into an existing Indian family for the Act to apply. As the Supreme Court of South Dakota aptly stated: "[n]o amount of probing into what Congress 'intended' can alter what Congress said, in plain English . . . ."[265] State courts must deal with the emotions and trauma of child custody proceedings and strive to do the best they can. The problem is that there is no place for judicial lawmaking when the legislature has spoken. In the cases supporting the "existing Indian family" exception to the Act, the facts justified concurrent jurisdiction and the likely retention of the proceedings in state court due to the objection of a parent or good cause. The courts should have applied the Act in spite of their disliking it, and continued the proceedings. Even if one sympathizes with the judges facing these cases, everyone should be able to agree that state courts should not go too far in fashioning remedies. First, there is no basis for the exception, and second, it undermines the integrity of the judiciary.

VI. The United States Supreme Court Speaks on the Act

In its only decision to date on the Act, *Mississippi Band of Choctaw Indians v. Holyfield*, the United States Supreme Court resolved two important issues.

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263. *In re* Adoption of Child of Indian Heritage, 529 A.2d 1009, 1016 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 543 A.2d 925 (N.J. 1988); *In re* Adoption of Lindsay C., 280 Cal. Rptr. 194, 201 (Cal. Ct. App. 1991), *rev'd*, 0711 minutes, (Cal. 1991), *available in* LEXIS, Shepards; *In re* Adoption of S.S., 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993), *rev'd on other grounds*, 657 N.E.2d 935 (1995), *cert. denied sub nom.*, 116 S. Ct. 1320 (1996).

264. *In re* S.S., 622 N.E.2d at 839.

265. *In re* Dependency & Neglect of N.S., 474 N.W.2d at 100.

First, it ruled that a parent may not circumvent the Act by voluntarily submitting to state court jurisdiction.[266] Second, the Court held that even if a child had never lived on a reservation, jurisdiction of a child custody proceeding may nevertheless be proper in the tribal courts.[267]

In *Holyfield*, J.B., the mother, gave birth to twin babies in Gulfport, Mississippi on December 29, 1985.[268] J.B. and W.J., the father, were enrolled members of the Mississippi Band of Choctaw Indians and resided on the Tribe's reservation in Neshoba County, Mississippi.[269] The parents had traveled over 200 miles from the reservation to give birth to their children in Gulfport.[270] Twelve days after the birth of the twins, J.B. executed a consent-to-adoption before a state chancery court.[271] Six days later, the Holyfields filed a petition for adoption in the same court.[272] On January 28, 1986, about one month after the twins were born, a final decree of adoption was issued.[273] Apparently the state court was aware of the Indian Child Welfare Act because the judge noted the Consent and Waiver of Parental Rights had been given in full compliance with section 1913(a).[274] No other references to the Act were made by the state court. About two months later, the parent's tribe became aware of the adoption and filed a motion to vacate the adoption decree because jurisdiction was exclusive in the tribal court.[275] In support of its motion, the tribe argued that the twins were domiciled on the reservation and had been born to tribal members, thereby establishing exclusive tribal jurisdiction under the Act.[276] The court rejected the tribe's arguments because it ruled the tribal court had never obtained jurisdiction over the children.[277] Since the parents had gone to considerable efforts to place the children for adoption away from the reservation, and the children had never been on the reservation, the court held the Act inapplicable.[278] The tribe then appealed to the Mississippi Supreme Court.[279] The supreme court affirmed the trial court and held the key issue in the case was "domicile."[280] The court then stated that the children had been abandoned and did not take the domicile of the parents as

266. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).
267. *Id.* at 52
268. *Id.* at 37.
269. *Id.*
270. *Id.*
271. *Id.* at 37-38.
272. *Id.* at 38.
273. *Id.*
274. *Id.* at 38 n.11
275. *Id.* at 38.
276. *Id.*
277. *Id.* at 38-39.
278. *Id.* at 39.
279. *Id.*
280. *Id.*

in ordinary state law principles of domicile.[281] Having been abandoned, the court went on to say the children were domiciled where they were born.[282] As such, the state court's exercise of jurisdiction was proper.[283] The tribe then appealed to the United States Supreme Court.

The Supreme Court first examined the Act and the reasons for its passage. Since this was the first time the Supreme Court had reviewed the Act, it had to ascertain whether its provisions were effectively designed to resolve the problems Congress perceived to exist. After reviewing Congress' findings and the legislative history, the Court agreed the Act was a proper response to the removal of Indian children and placement into non-Indian homes by the States.[284]

The Court then addressed the question of domicile. It began with the assumption that when Congress passes a law, it does not intend to make that law depend on state laws for its application.[285] It recognized that Congress enacts legislation for the entire country and desires its laws to have uniform application.[286] The Court also expressed concern that federal programs would be endangered if state laws were to control.[287] Since Congress found the states to be partly responsible for the situation which required passage of the Indian Child Welfare Act, the Court found it hard to believe a key issue such as jurisdiction would be left to the state courts to resolve.[288] Having decided that state definitions of domicile would not control, the Court had to then find a proper definition.

The Court noted that the parents chose to place their children for adoption away from the reservation and voluntarily submitted to the state court's jurisdiction.[289] However, if this in itself could defeat application of the Act, the tribe would not be able to assert its right to intervene.[290] The Court stated that the Act gives the tribe rights which are "distinct from but on a parity with the interest of the parents," and the parents may not unilaterally disregard the tribe's interest by traveling away from the reservation and filing a consent to adoption in a state court.[291]

By merging the two considerations outlined above, the Court was able to find the children's domicile to be that of the parents. The Court reasoned that because the parents could not defeat the Act's provisions, state abandonment

281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 42.
285. *Id.* at 43.
286. *Id.* (citing Jerome v. United States, 318 U.S. 101, 104 (1943)).
287. *Id.* at 44.
288. *Id.* at 44-45.
289. *Id.* at 49.
290. *Id.*
291. *Id.* at 42.

law could not control, since the tribe's interest would not be protected.[292] The parents could not legally "abandon" the child under the Act and divest them of the parents' domicile.[293] The children retained the domicile of the parents and jurisdiction was exclusive in the tribal court.[294] The state court's actions had therefore been contrary to the Act, and the Mississippi Supreme Court's decision affirming the lower court was reversed.[295]

The United States Supreme Court's holding also established that whether or not an Indian child has spent time on a reservation simply does not matter for purposes of the Act.[296] The goal of the Act is to assist Indian parents and tribes in preserving their heritage through their children, and Congress did not require that Indian children be familiar with a reservation or Indian culture.[297] An important finding the Court also addressed was that many Choctaw women gave birth outside of the reservation because of the lack of obstetric facilities present there.[298] The Mississippi chancery court had mentioned in its opinion that the mother had given birth to the twins in a non-reservation hospital in support of its holding.[299] By finding this situation common among Choctaw women, the Court did not find the state court's argument persuasive.[300] In other words, if a parent chooses to give birth in a non-reservation hospital, a state court may not justify its assertion of jurisdiction based solely on that fact.

In concluding, the Court recognized that three years had passed and the twins, no doubt, had developed family ties to the Holyfields.[301] The Court defended its holding as one which will help state courts avoid such pain caused by separation in future custody battles.[302] The primary issue the Court wanted to convey was that it was not deciding where to place the children, but that the state court should have left that decision to the tribal court.

The possible removal of the children from their home may cause uneasy feelings in some and that is understandable. What may be difficult for non-Indians to comprehend is that the trauma experienced by Indians due to the erosion of their culture caused by the removal of their children is just as great. Even though it was the tribe fighting for the right to decide where to place the children in *Holyfield*, it is no less entitled to protect its existence, or at least decide where to best place the children.

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292. *Id.* at 52-53.
293. *Id.*
294. *Id.*
295. *Id.* at 53-54.
296. *Id.* at 48-51.
297. *Id.*
298. *Id.* at 52 n.27.
299. *Id.* at 51-52.
300. *Id.* at 52.
301. *Id.* at 53.
302. *Id.* at 53-54.

One conflict among lower courts the Supreme Court did not resolve was the "Indian family" exception discussed earlier. This is most likely due to the Supreme Court's longstanding policy against resolving disputes not before the Court.[303] If one reads *Holyfield* expansively, it becomes clear that since it did not matter that the twins had not spent time on the reservation, the "Indian family" exception was implicitly overruled. Because the "Indian family" exception depends heavily upon the fact that an Indian child does not know its Indian heritage and culture, it may be logical to assume that *Holyfield* indirectly addressed it. If one strictly interprets *Holyfield*, as some state courts continue to do, the holding does not directly address the "Indian family" exception and so it survives.

VII. Recent Congressional Proposals

In 1996, two bills were introduced in Congress proposing major amendments to the Act. One bill, H.R. 3275, which is apparently adopting the "existing Indian family" exception would exempt from coverage of the Act child custody proceedings involving a child whose parents do not maintain significant social, cultural, or political affiliation with the tribe of which the parents are members.[304] The second bill, H.R. 3156, would exempt voluntary child custody proceedings from the Act.[305]

H.R. 3275, if passed, would seriously undermine the protective measures originally placed in the Act. It would allow state courts to impose non-Indian beliefs and values in determining whether or not a parent's ties to a tribe are "significant" to the satisfaction of the courts. This bill will certainly ensure that the next round of litigation will center around the meaning of the word "significant."

The dangers and prejudices taken into account by the Act have not subsided. This is apparent when states such as Kansas began ignoring the Act shortly after it became law, and other states have continued to do the same. To legitimize the position taken by the state of Kansas and other states that have not followed the law, ensures that justice will never be served in those jurisdictions.

H.R. 3156 would effectively do away with a Tribe's right of intervention in voluntary proceedings. This bill would allow a non-Indian parent to begin voluntary proceedings, subject the Indian parent to state court prejudices, and have the state court totally ignore the tribe. *Mississippi Band of Choctaw Indians v. Holyfield* would be overruled since the parents in that case purposefully traveled over 200 miles away from the reservation to give birth to their children and begin adoption proceedings.

303. Muskrat v. United States, 219 U.S. 346, 362-63 (1911).
304. H.R. 3275, 104th Cong. § 1 (1996).
305. H.R. 3156, 104th Cong. § 4 (1996).

It has been shown earlier that in voluntary child custody proceedings, a parent has the ability to object and prevent transfer to a tribal court. This amendment to the Act is simply not needed. The problems faced by tribes if this bill is passed are the same ones faced by them when the Act was originally passed. The bill seems to ignore that the purpose of the Act was to place Indian children with Indian parents to preserve the existence of the tribes and Indian heritage.

It is undisputed the Act was designed to prevent the breakup of Indian families. However, the Act viewed those families as an integral part of a larger communal society. Indian children were found to be essential in the preservation of Indian tribes. Congress found that Indian children raised in non-Indian homes had great difficulty coping in non-Indian society in their later years. If Indian relatives of the Indian child are willing and able to care for the child, they should be the first placement choice. Congress should view the Indian "family" not as a traditional, "nuclear" family, but should look at the bigger picture and see that the true essence of the Indian family is a tribal family. If an Indian child is not part of a traditional, "nuclear" family, that child is still part of a tribal family. This is evidenced by the fact many tribes intervene in voluntary proceedings. The taking away of this important right from the tribes, shows that the dangers Congress sought to insulate the tribes from in 1978, with regard to state court proceedings, have not been eliminated, but have resurfaced, threatening tribal rights in a very recent session of Congress. Any "improvements" implemented by these amendments would be realized mainly by non-Indian interests at the expense of Indian Tribes.

VIII. Conclusion

The Indian Child Welfare Act has been one of the most controversial laws enacted by Congress. It is, however, relatively young and its development process is far from over. While most state courts agree with the reasoning and policies of the Act, some of those courts strive for reasons to not apply it to custody battles before them.[306] Congress conducted extensive hearings prior to enacting the Indian Child Welfare Act and their judgment was an informed one. For those who disagree with the Act, some comfort may be had in the fact that Congress did not act arbitrarily. The Act may not be perfect, but it does provide a much needed legal basis for those trying to preserve the culture of our indigenous peoples. It is a very reasonable response to the routine placement of Indian children into non-Indian homes found to be the case in some states, and helps to stop Indian culture from disappearing forever. Our world is a difficult

306. *See In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 681 (Cal. Ct. App. 1996), *rev'd*, 0918 minutes (Cal. 1996), *available in* LEXIS, Shepards. The California Appellate Court outlined the appellate history of the case, beginning with the issuance of a peremptory writ of mandate reversing the trial court's refusal to apply the Act because it found the Tribe's criteria for membership, which was not based on a quantum of blood analysis, to be unreasonable).

one in which to live. Cultures inevitably clash, but one must keep in mind that cultural identity may be the most valuable asset a group of people possesses.

If more state courts would choose to become more aware of the Act and its goals, hostility towards it, would surely subside. Clearly, courts become defensive when they do not understand why Congress passed a law which disturbs the normal procedures involved in the resolution of domestic disputes. It is, however, unfair for state courts to deny application of the Act to situations where it clearly should apply, and then blame the Act when Indian children continue to be subjected to child custody proceedings. The resulting time wasted, expenses incurred, and emotional trauma inflicted, because of prolonged litigation to reverse erroneous state court decisions, are the products of those state courts that unjustifiably disregard the Act's provisions.

By being thoroughly informed on the Act and on Native American cultures, some of those who now disagree with the Act may be persuaded to support it. The controversy surrounding the Act is not yet close to being resolved. Congress should resolve the inconsistent application by some state courts and enforce the Act as originally enacted. The Act, as written, takes into consideration all interested parties' welfare, if its provisions are followed. Historically, tribes and states have had adversarial relationships. Unfortunately, because of this, some state courts have not allowed the Act to function. In addition, some of the arguments advanced by those state courts hostile to the Act are supported by at least some members of Congress, and tribes must await the resolution of those issues. In the meantime, many emotional legal battles will be fought as the Act develops and becomes a part of American jurisprudence. Many of the issues examined will likely be refined over time and new principles enunciated. The Act is continuing to mature and only time, the courts, and the United States Congress will tell what path it will travel. The road so far has been relatively smooth with a few rough spots, but the Act still provides a glimmer of hope for American Indians desiring to keep their culture alive and preserve their customs so that future generations may be aware of and proclaim their Native American heritage.