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THE RESURRENCE OF THE "TRIBAL INTEREST" IN INDIAN CHILD CUSTODY PROCEEDINGS

Roger M. Baron†

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I. THE "TRIBAL INTEREST" AS RECOGNIZED BY THE ICWA

The Indian Child Welfare Act of 1978 ("Act" or "ICWA") protects Indian children, Indian families, and Indian tribes. Protection of these interests is expressly declared in the Act which was enacted pursuant to Congress plenary power over Indian affairs found in the commerce clause.

Specific recognition of tribal sovereignty and recognition of the threat to the continued existence of the tribes themselves was a key factor motivating the enactment of the ICWA. Congressional studies indicated that up to thirty-five percent of all Indian children were being separated from their families. In ninety percent of the cases, ultimate placements were effected in non-Indian homes. Tribal heritage and the ability of the tribes to continue to exist as self-governing communities were major considerations in the passage of the Act.

A major cause of the problem was the involvement of non-Indian social workers who were unfamiliar with Indian culture and who were likely to misinterpret Indian behavior. Debilitation of Indian culture and Indian communities was exacerbated by state-created rules and policies which actually prohibited Indian child placement with Indian custodians.

Just as the social service agencies lacked familiarity with Indian culture, the state courts frequently lacked an understanding of tribal laws,
customs and mores\(^{12}\) and became "part of the problem."\(^{13}\) The Utah Supreme Court recognized in *In re Halloway*\(^{14}\) that the relationship between Indian tribes and Indian children "finds no parallel in other ethnic cultures"\(^{15}\) in the United States and that it is a "relationship . . . that non-Indian courts are slow to recognize."\(^{16}\) As a result, the "receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed."\(^{17}\) The *Halloway* decision vacated a Utah state court's adoption proceeding, finding exclusive jurisdiction to lie with the tribal courts of the Navajo Nation. *Halloway* was subsequently recognized by the United States Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield* as a "leading case on the ICWA."\(^{18}\)

Crucial, then, to the operation of the ICWA is the involvement of the Indian tribe. "[P]rotection of this tribal interest is at the core of the ICWA which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents."\(^{19}\) Recognition of the tribal interest in child custody proceedings was also noted by legal commentators in works published after the passage of the Act.\(^ {20}\)

II. THE RESURGENCE OF THE "TRIBAL INTEREST" IN THE ISSUES OF THE ICWA.

The title to this article describes the "resurgence of the tribal interest." Implicit in this title lies the reality that in the years subsequent to the passage of the ICWA many state courts resisted the involvement of the Indian tribes in Indian child custody proceedings.\(^{21}\)

Concern was expressed at the outset that state courts would be able to defeat the policy of the ICWA through technical application of the

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15. *Id.* at 969.
16. *Id.*
17. *Id.*
various provisions of the Act and through utilization of the ICWA's exceptions without a view toward the Act's goal of keeping Indian children in Indian communities. The general reluctance of the state courts to recognize the interest of the Indian tribes is supported weakly by the recurring notions that there simply is not enough "room" to include recognition of the rights of the tribe and that it is inappropriate to give to the tribe rights which may, in some cases, be superior to the interest of the parents. Not all state courts have been reluctant, however, to give recognition to tribal interests in the manner intended by the ICWA. In some cases the state courts have gone above and beyond the call of duty in molding state law to accommodate the tribal interest recognized by the federal policy imposed by the ICWA on the states. As more and more cases have arisen, questions of applicability of the ICWA and interpretations of numerous of the Act's provisions have been required. Until recently, however, state courts have been without the guidance of any direction by the United States Supreme Court.

In *Mississippi Band of Choctaw Indians v. Holyfield,* the Indian

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22. The Act is complex. It could be defeated by mere failure to read and understand its requirements . . . . There are exceptions in the Act that could be used to defeat its policy. Conscientious adherence to the policy of protecting Indian children, tribes, and families by keeping Indian children in their Indian communities will result in the use of the exceptions to do substantial justice rather than to defeat the Act.

Note, supra note 20, at 113.

23. Note, supra note 20 at 113; "In a sense the Indian Child Welfare Act is a time-bomb." Barsh, supra note 8, at 1335.


27. See In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987) (recognizing intermittent state court jurisdiction over wards of the tribal court found to be dependent and neglected in state territory in order to effectuate a transfer back to the tribal court over the parent's objection); In re J.M., 718 P.2d 150 (Alaska 1986) (recognizing exclusive tribal jurisdiction of Indian child who was a tribal ward notwithstanding credible arguments of waiver and estoppel based on a letter written by the tribe's chief purportedly conceding jurisdiction to the state court); In re Begay, 107 N.M. 810, 765 P.2d 1178 (1988) (reversing and remanding trial court's decision to keep jurisdiction of an adoption proceeding by permitting an interlocutory appeal and by granting the Indian tribe intervenor status on the appeal). See also In re M.R.D.B., 241 Mont. 455, 787 P.2d 1219 (1990) (Although decided after *Holyfield,* the court applied state law to classify the Indian child as a "ward" of the tribal court notwithstanding the tribe's failure to declare the child as a "ward.").

mother travelled some 200 miles from her home on the reservation for the express purpose of giving birth to her out-of-wedlock twin babies "outside the confines of the Choctaw Indian Reservation" so that they could be placed for private adoption. Two months after the adoption was finalized in state court, the tribe, learning about the adoption, moved to vacate the adoption decree, asserting it had exclusive jurisdiction by virtue of the ICWA. The Mississippi state courts denied relief to the tribe. Application of the exclusive jurisdiction provisions of the ICWA would only apply if the twins were considered to be "domiciled" on the reservation. The Mississippi courts resolved the "domicile" issue against the tribe.

The United States Supreme Court disagreed, holding that the intent of the Congress in passing the ICWA would be thwarted "by the simple expedient of giving birth and placing the child for adoption off the reservation." The Court restated the policies of the ICWA regarding the impact such non-Indian placements have on the Indian children and the Indian tribes themselves. The "domicile" question was resolved by the Court's recognition that Congress intended the application of a "uniform federal law of domicile," and in the Court's alignment with the rationale of the "scholarly and sensitive opinion" of the Utah Supreme Court in Halloway which strongly promoted a tribal forum for placements.

Thus, a decade after the passage of the ICWA, the United States Supreme Court reaffirmed the dominant role that the Indian tribe plays in resolving Indian child custody matters. The recognition of the tribal interest could not have arisen in a more poignant setting; in Holyfield, the tribal claim was opposed by all other interested parties and was held to be superior to even the wishes of the Indian mother.

The ultimate impact of Holyfield remains to be seen, but it is already clear that Holyfield has caused various courts to reconsider previous rulings which failed to recognize the "tribal interest." As indicated in the first part of this article, legal recognition of tribal interests does not have

29. Id. at 37.
30. Id. at 38.
31. Id. at 38-39.
32. Id. at 53.
33. "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves . . . ." Id. at 49.
34. Id. at 47.
35. Id. at 52.

### III. Recognizing the “Tribal Interest” in the Issues of the ICWA

Recognition of tribal interest may, in the abstract, be a proposition upon which there is universal endorsement. In application, however, recognition of a tribal interest boils down to a technical resolution of various aspects of the ICWA. With the development of a modest amount of case law since the enactment of the ICWA, it is now possible to ferret out and delineate those judicial resolutions which “promote” the interest of the Indian tribes and those which do not.

The remainder of this article will, on an issue by issue basis, present those judicial policies which affect the “tribal interest.” Although the “tribal interest” is the primary focus of this article, the resolution of issues dealing with Indian culture in general will also be addressed.

#### A. Determining the Applicability of the ICWA (Deciding “When to Decide”)

Applicability of the ICWA or, perhaps more appropriately, the non-applicability of the ICWA has been the subject of much litigation. Some of the arguments for non-application of the ICWA are found in issues which were foreseeable at the time the Act was passed such as who is an “Indian child”37 and what “Indian tribes” are included in the operation of the ICWA.38 Other arguments for avoidance of the ICWA have arisen solely as a result of judicially-imposed limitations which are not found in the ICWA—arguments such as the ICWA does not apply unless the child is being removed from an “existing” Indian family.39 These issues will be addressed in the segments to follow. Mere determination of the “applicability” of the ICWA, however, deserves a separate discussion.

Authority exists for the proposition that the applicability of the ICWA should be resolved at the outset of any child custody proceeding

38. Barsh, *supra* note 8, at 1308-10 & n.15.
39. Tellinghuisen, *supra* note 24, at 670-71; “[A]n important judicial limitation to the applicability of the Act appeared to be emerging... essentially, that the Act does not apply if a child is not being removed from an existing Indian family.” *Id.*
and that it would be error for a state court to first find the child or children to be within its jurisdiction and then seek to comply with the ICWA. In nonbinding guidelines issued by the Bureau of Indian Affairs, the BIA suggests that state courts should "routinely inquire of participants in child custody proceedings whether the child is Indian," and upon the assertion that "the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification."

Failure to resolve ICWA issues at the outset may have dramatic consequences, namely successful collateral challenges to otherwise permanent adoptive placements. In Holyfield, for example, the effect of non-compliance with the ICWA was to invalidate an adoptive placement that had been maintained for over three years. The United States Supreme Court acknowledged the anguish its holding had the potential to bring but reminded the legal community of the jurisdictional nature of the ICWA. Simply securing physical custody and maintaining it during "ensuing (and protracted) litigation" is not adequate reason to avoid the "mandate of the ICWA."

A viable post-judgment enforcement mechanism is provided in the ICWA for violations of the Act as well as a two year period for the withdrawal of consent in voluntary placements where the consent is induced by fraud or duress.

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40. See State ex rel. Juvenile Dep't. v. Cooke, 88 Or. App. 176, 744 P.2d 596 (1987); "The dispositive issue is whether the court was required to comply with the... ICWA... before finding that the children were within its jurisdiction. We hold that it was required to do so and that it did not." Id. at 597. Cf. In re N.A.H., 418 N.W.2d 310 (S.D. 1988) (inadequate but actual notices to tribes held to void subsequent termination proceeding).


42. Id. at 67,589.

43. Id. of 25 U.S.C. § 1912 (1988) which states in part, "where the court knows or has reason to know that an Indian child is involved..." (emphasis added).

44. Holyfield, 490 U.S. at 54.

45. Id. at 53. "Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain." Id.

46. Id. "We have been asked to decide the legal question of who should make the custody determination concerning these children — not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court." Id.

47. Id. at 53-54.


Although there is no federal statute of limitations on the Act's general authorization for a collateral attack, some violations of the ICWA may be protected through the borrowed application of state statutes of limitations. At least one case involving the application of Alaska's one year statute of limitations has been reported. Certain violations of the ICWA, however, may have no time limit, creating situations where the state court decree would be void ab initio.

From the tribal viewpoint: The “tribal interest” is promoted by the view that calls for the earliest possible resolution of questions concerning the applicability of the ICWA. Responsible and informed tribal action is fostered by an awareness of a “tribal interest” in a case at the earliest possible moment. In this regard, the “tribal interest” probably is aligned with the interests of the other parties and courts. Those whose interest may otherwise be opposed to the “tribal interest” should still desire a final decree which is immune from a collateral attack. The “tribal interest” has been compromised, however, by the holdings of some courts which have defeated the purpose of the ICWA by technically applying procedural rules so as to foreclose tribal input.

The “tribal interest” has been better accommodated by those state courts which have guided their state procedures so as to permit tribes an adequate opportunity to be heard and sufficient time within which to permit formal tribal enrollments which may be necessary as a predicate to the assertion of tribal jurisdiction.

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50. Trentadue & DeMontigny, supra note 49 at 536 n.311 and accompanying text.
52. Trentadue & DeMontigny, supra note 49, at 536 nn.312 & 314 and accompanying text.
53. Trentadue & DeMontigny, supra note 49, at 537. Much of the legal commentary on the ICWA has been geared to providing the bar with an adequate basis upon which to achieve adoption decrees which are not vulnerable to collateral challenges. “[I]gning this law will most likely render the final state court decision in an Indian child custody proceeding vulnerable to attack, and expose social workers and attorneys to potential civil liability.” Id. at 537; Cf. Tellinghuisen, supra note 24, at 692. “Strict adherence to the... Act is mandated — a mistake may bring tragedy upon the parties for a child may be yanked out of his home long after the occurrence of a procedural misstep.” Id.
54. In re Bird Head, 213 Neb. 741, 331 N.W.2d 785 (1983) (In a split opinion, the Nebraska Supreme Court held that the tribe “abandoned” a petition to transfer by “failing to appear” at a state court hearing. Three justices filed a concurring opinion indicating that the tribal court had no obligation under the ICWA to “appear” and that transfer under the ICWA is obligatory.); Cf. In re Blake C., 224 Cal. Rptr. 167, 181 (1986) (rejecting ICWA issues raised for the first time on appeal).
55. See In re Begay, 107 N.M. 810, 765 P.2d 1178 (1988) (tribe granted intervenor status on interlocutory appeal relying on § 1911(c)'s language that the tribe "shall have a right to intervene at any point in the proceeding." 765 P.2d at 1180. The court was also reluctant to imply a waiver of Indian rights.).
B. Child Custody Proceedings

There has been little controversy over the type of “child custody proceeding” covered by the ICWA. The Act defines “child custody proceeding” to include foster care placement, termination of parental rights, preadoptive placement and adoptive placement.\(^{57}\) Proceedings based on conduct by the child which would be criminal if committed by an adult are not covered by the ICWA.\(^{58}\) Likewise, the Act does not cover child custody disputes which arise in the context of divorce proceedings or other domestic relations proceedings such as separation proceedings.\(^{59}\) Although jurisdictional conflicts between state and tribal courts in domestic relations cases do exist,\(^{60}\) they are not analyzed in this article.\(^{61}\)

From the tribal viewpoint: Determining which “child custody proceedings” are encompassed by the ICWA is a fairly simple task, and the resolution of the attendant issues remains rather neutral in regard to consideration of the “tribal interest.”

C. Indian Child

The ICWA defines an “Indian child” to be one that is a “member of an Indian tribe” or one who “is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”\(^{62}\) Implicit in the use of a definition of this nature is the fact that some children with Indian blood are excluded. In lieu of utilizing a particular Indian blood quantum as the criteria for definition, as has been done on other occasions,\(^{63}\) Congress deferred the question to the Indian tribes themselves by making the definition of Indian synonymous with tribal membership.\(^{64}\) The resultant irony is that a child with only 1/64 degree Indian blood may, in some cases, invoke the ICWA\(^ {65}\) whereas a child

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58. Id.
59. Id. See also In re Defender, 435 N.W.2d 717, 721 (S.D. 1989); Malaterre v. Malaterre, 293 N.W.2d 139, 145 (N.D. 1980).
62. 25 U.S.C. § 1903(4) (1988). The definition also requires the child be unmarried and under the age of eighteen. Id.
63. Trentadue & DeMontigny, supra note 49, at 504-05.
64. Id.
with 29/64 Indian blood has been excluded under the ICWA because the child is not eligible for membership in an Indian tribe.\textsuperscript{66}  The visual appearance of a child may not give reason to suspect that the child is an Indian child.\textsuperscript{67}  On the other hand, there have been numerous child custody proceedings not covered by the ICWA involving children with Indian blood who were not eligible for tribal membership.\textsuperscript{68}  Despite these problems, the fact Congress chose to align the definition of "Indian child" with tribal membership should not be viewed as a technicality without purpose. Instead, it should be viewed as additional indicia of the significant role Congress intended the Indian tribes to play under the ICWA.

The involvement of an "Indian child" in any involuntary state court proceeding for foster care placement or termination of parental rights triggers a "notice requirement." Notice must be sent to the parent, Indian custodian, and the Indian child's tribe. In the event the particular tribe cannot be determined, notice is to be sent to the Secretary of the Interior.\textsuperscript{69}

A strict technical application of the ICWA avoids notice in situations where neither the child nor its parents are members of an Indian tribe.\textsuperscript{70}  Reliance on tribal rolls or official "enrollment" records of a tribe may substantiate tribal membership, but "enrollment is not always required in order to be member of a tribe,"\textsuperscript{71}  and not all tribes have written rolls.\textsuperscript{72}  As a result, there is an evolving notion that mere eligibility\textsuperscript{73}  for membership "is enough to trigger the notice provisions of the act and to


\textsuperscript{67}  "The record is clear that neither the judge nor the adopting parents had reason to believe that Baby Larry was an Indian child." In re Child of Indian Heritage, 219 N.J. Super. 28, 40, 529 A.2d 1009, 1015 (1987) aff'd 111 N.J. 155, 543 A.2d 925 (1988).


\textsuperscript{70}  In re Johanson, 156 Mich. App. 608, 402 N.W.2d 13 (1986), appeal denied, 428 Mich. 870 (1987), (upholding lack of notice where tribal membership was not officially sought after and accomplished until after the order of termination).

\textsuperscript{71}  In re Junious M., 144 Cal. App. 3d 786, 796, 193 Cal. Rptr. 40, 45 (1983) (quoting guidelines issued by the Bureau of Indian Affairs).

\textsuperscript{72}  Id. See also In re Angus, 60 Or. App. 546, 553, 655 P.2d 208, 212 (1982) in which the court stated, "Formal membership requirements differ from tribe to tribe, as do each tribe's method of keeping track of its own membership. There is thus no one method of proof of membership, but the testimony of a representative of tribal government would be probative evidence of membership." Id. at 552-53, 655 P.2d at 212.

\textsuperscript{73}  In re Junious M., 144 Cal. App. 3d at 797-98. 193 Cal. Rptr. at 45.
allow the tribe an opportunity to enroll" \footnote{74}{In re Smith, 46 Wash. App. 647, 652, 731 P.2d 1149, 1152 (1987) (discussing \textit{Junious M.}, but upholding the lack of notice in this case based on affidavits from the Bureau of Indian Affairs demonstrating that the children were not eligible for membership in any Indian tribe).} The approach was recently endorsed by the Vermont Supreme Court in view of the vulnerability the proceeding would otherwise have in a subsequent collateral challenge. \footnote{76}{In this decision, we are concerned with the tribe's right to notification of involuntary proceedings where the court has \textit{reasonable grounds to believe} a child subject to the proceeding is \textit{or may be} an Indian child. \textit{In re H.D.}, 11 Kan. App. 2d 531, 534, 729 P.2d 1234, 1237 (1986) (emphasis added) (reversing a parental termination by the trial court for failure to give tribal notice where mother did not become enrolled but had applied for membership in the Cherokee Nations after the case was heard by the magistrate).} Generally, it is recognized that each Indian tribe has the authority to determine its membership criteria and the authority to decide who meets those criteria. \footnote{77}{Junious \textit{M.}, 144 Cal. App. 3d at 793, 193 Cal. Rptr. at 44; \textit{In re Angius}, 60 Or. App. 546, 655 P.2d 208 (1982); \textit{In re J.L.M.}, 234 Neb. 381, 396, 451 N.W.2d 377, 387 (1990).} A tribe's declaration of a child's \textit{ineligibility} is conclusive, \footnote{78}{J.L.M., 234 Neb. at 396-97, 451 N.W.2d at 387; \textit{In re A.E.}, 749 P.2d 450, 452 (Colo. Ct. App. 1987) (relying, \textit{inter alia}, on guidelines issued by Bureau of Indian Affairs).} and a tribe's failure to respond to notice justifies a state court's avoidance of the ICWA where no other evidence of eligibility or membership is adduced. \footnote{79}{See \textit{In re Shawboose}, 175 Mich. App. 637, 438 N.W.2d 272 (1989) (Both the Grand River Ottawa and Chippewa tribes declined jurisdiction).} 

In the event more than one tribe has an interest, the tribe which has the "more significant contacts" is given priority under the ICWA. \footnote{80}{25 U.S.C. § 1903(5) (1982); Guidelines by the Bureau of Indian Affairs sets forth factors to consider in making this determination. 44 Fed. Reg. 67,586-87 (1979).} It is possible, however, that all interested tribes may decline involvement. \footnote{81}{See \textit{In re Shawboose}, 175 Mich. App. 637, 438 N.W.2d 272 (1989) (Both the Grand River Ottawa and Chippewa tribes declined jurisdiction).}

The Minnesota Court of Appeals recently decided \textit{In re B.W.}, \footnote{82}{In re B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990).} a significant case promoting the "tribal interest." The trial court's termination of parental rights was reversed for failing to comply with the evidentiary criteria of the ICWA. On remand, the court strongly suggested the possible transfer to the tribal court of the father's tribe. The father's tribe had requested transfer on the first day of trial but was not recognized as the "child's tribe" because of the child's more significant contact with his mother's tribe. Transfer to the mother's tribe was not possible.
because it lacked a tribal court. Apparently, the mother's tribe was fully cooperative to such a disposition, having assisted the father's tribe in getting its request before the trial court. In addressing the "lateness" of the request filed on the first day of trial by the father's tribe, the court emphasized that "it is essential to the purposes of the ICWA to allow appropriate tribal authorities to determine these matters according to tribal law, customs and mores best known to them."  

Even in those cases where there is no "tribal interest" in children which are the subject of the proceeding, the issue of whether or not there is an "Indian child" continues to be intensely litigated. Despite the lack of a "tribal interest," the ICWA, if applicable, requires a heightened standard of proof and more specific evidentiary requirements than found in traditional state law. The cases generally hold that the party seeking to invoke the protection of the ICWA carries the burden of establishing its applicability.  

From the tribal viewpoint: The "tribal interest" is promoted by the evolving notion that notice should be sent if it appears that the child or parents are eligible for tribal membership. Restricting notice to only cases where the state court is satisfied that the child or parent is in fact a member of a tribe invariably requires a state court determination of tribal membership and thereby infringes on the right of the tribe to make its own determination of membership. The fact that Congress chose to defer to tribal membership in the definition of "Indian child" fully supports the role of the tribal authorities in resolving this issue. A state court which chooses to send notice only when convinced that either the child or a parent is a member of the tribe subjects the proceeding to a greater likelihood of a successful collateral challenge. Cooperation in

83. Id at 445.
84. Id.
85. Id. at 446.
87. 25 U.S.C. § 1912(e)-(f) (1988) (proof "beyond a reasonable doubt" in the event of termination and testimony of "qualified expert witnesses").
90. In re Angus, 60 Or. App. 546, 655 P.2d 208 (1982) (successful collateral challenge where biological parents were 14 years old at the time of birth and unwed; mother initially consented to adoption and father did not "acknowledge" paternity until more than 6 months after birth of child and the execution of mother's consent).
dealing with the tribal interests in the manner exhibited in In re B. W. 91 undoubtedly promotes a resolution which is more lasting than one attained through efforts to require official enrollment documentation according to the state court's views and calendar. 92

D. Indian Tribe

Since the definition of an "Indian child" refers to membership in an "Indian tribe," 93 litigation has arisen in regard to which tribes the ICWA applies.

Efforts to apply the ICWA to Canadian and foreign tribes have generally been unsuccessful; 94 however, some foreign tribes have affiliations in both the United States and Canada. In In re Junious M., 95 the issue of the applicability of the ICWA did not present itself until the third day of trial. 96 The trial court did not apply the ICWA because of the testimony of the mother indicating that the Nooksack tribe was Canadian. 97 Subsequent investigation with the Department of the Interior revealed that the Nooksack tribe was a tribe in the United States but that it had been considered Canadian until 1973. 98 The trial court's failure to give notice to the Nooksack tribe constituted reversible error. 99

Determination as to the status of an Indian tribe may be aided by the Bureau of Indian Affairs and the Secretary of the Interior. 100 Before a tribe is accorded rights under the ICWA, it must first submit a "suitable plan" for dealing with child custody matters. 101 The plan must be approved by the Secretary of the Interior. 102 The failure of a tribe to satisfy these provisions has been held to be an adequate basis for the

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91. See supra notes 82-85, and accompanying text.
96. Id. at 791, 193 Cal. Rptr. at 42.
97. Id. at 791-92, 193 Cal. Rptr. at 42-43.
98. Id. 792, 193 Cal. Rptr. at 43.
99. Id. 797-98, 193 Cal. Rptr. at 47.
100. Id. at 793-94, 193 Cal. Rptr. at 43; see also In re Wanomi P, 216 Cal. App. 3d 156, 166-67, 264 Cal. Rptr. 623, 629-30; In re Stiarwalt, 190 Ill. App. 3d 547, 552-53, 546 N.E.2d 44, 48 (holding the Bureau's unrefuted determination to be conclusive).
102. Id. at (b).
denial of transfer in matters of concurrent jurisdiction. The requirement imposed on a tribe that it secure the approval of a suitable plan for dealing with child custody cases has even been held to apply in an otherwise exclusive tribal jurisdictional case where the child was domiciled and residing within the tribe’s borders. When confronted with an Indian child’s tribe which lacked an approved plan, at least one state court, however, has cooperated with tribal authorities so as to permit the substitution of another interested tribe which did possess an adequate tribal court structure.

From the tribal viewpoint: This issue remains fairly neutral. That the tribes which seek to partake of the benefits granted by the ICWA should abide by the ICWA is a reasonable requirement subject to little controversy. Understandably, tribes need to demonstrate the presence of a suitable tribal court structure. Again, the “tribal interest” is promoted by those state courts which cooperate in helping to find the appropriate tribal interest at stake. Even those litigants who may be opposed to the “tribal interest” should desire an early resolution of this issue for the sake of insulating the sought-after state court decree from a successful collateral challenge.

E. Existing Indian Family

Prior to the United States Supreme Court decision in Holyfield, a number of state courts created a “judicial limitation” to the ICWA which excluded the application of the Act in the event the Indian child was not being removed from an existing Indian family. The issue arose primarily in cases where an unmarried non-Indian mother gave birth to a

104. In re K.E., 744 P.2d 1173, 1174 (Alaska 1987) (rejecting also the positions urged by eight amici curiae, representing over one hundred separate tribes); see also Native Village of Venetie I.R.A. Council v. Alaska, 87 F. Supp 1380 (Alaska 1980) (upholding the reassumption provision); Barsh, supra note 8, at 1312.
105. See B.W., supra note 82-85 and accompanying text.
106. See supra notes 103-05 and accompanying text.
107. See supra notes 95-99 and accompanying text.
108. See also supra note 105 and accompanying text.
109. See supra note 48 and accompanying text.
110. In re Colnar, 52 Wash. App. 37, 41, 757 P.2d 534, 536-37 (1988) (interlocutory “remand” for notice to all appropriate Apache tribes and the Bureau of Indian Affairs to verify that the child was not eligible for enrollment in a tribe.)
112. Tellinghuisen, supra note 24, at 670-72.
113. In re Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982); In re S.A.M., 703 S.W.2d 603 (Mo.)
child fathered by an Indian and the child subsequently became the subject of an adoption or termination of parental rights proceeding. The argument posed in each of the cases was that an Indian family was not losing an Indian child because the child had basically lived its entire life in a non-Indian environment. This argument is premised on language in the "Congressional declaration of policy" of the ICWA that includes as part of the overall policy statement that minimum federal standards are established "for the removal of Indian children from their families."115

Other courts, having the opportunity to create the same limitation in similar cases, chose not to do so. Instead, they recognized that Congress intended for Indian tribes "to play a central role in custody proceedings involving Indian children."116 The "fact that a child may have been living in a non-Indian home is no reason, standing alone, to dispense with the provisions of the Act."117

In 1989, the United States Supreme Court handed down the Holyfield decision118 upholding the direct tribal interest created by the ICWA. In Holyfield, all litigants except the tribe actively opposed the exclusive jurisdiction granted to the tribe by the ICWA, even to the extent of having the Indian mother travel some 200 miles away from the reservation for the purpose of giving birth. That the parents had placed the twins in a non-Indian environment and that the children had never lived in an existing Indian family, however, did not serve to avoid the application of the ICWA.119


114. Baby Boy L., 231 Kan. at 201-202, 643 P.2d at 172 (adoption proceeding with the consent of the non-Indian mother instituted immediately after birth); S.A.M., 703 S.W.2d at 604 (parental neglect proceeding instituted 6 years after birth of child); Claymore, 405 N.W.2d at 651 52 (step-parent adoption proceeding instituted 7 years after birth of child); T.R.M., 525 N.E.2d at 301-02 (Indian mother living off reservation gave child to adoptive parents approximately 1 year after its birth. Adoption proceedings instituted one year later).


116. In re S.B.R., 43 Wash. App. 622, 626, 719 P.2d 154, 156 (1986); see also In re Junious M., 144 Cal. App. 3d 786, 193 Cal. Rptr. 40 where the court stated, "The language of the Act creates no such exception to its applicability, and we do not deem it appropriate to create one judicially.... Congress has found that it has a responsibility to protect and preserve the Indian tribes." Id. at 796. 193 Cal. Rptr. at 46.

117. In re Coconino County, 153 Ariz. 346, 352, 736 P.2d 829, 832 (1987); see also In re Child of Indian Heritage, 11 N.J. 155, 543 A.2d 925 (1988) where the court stated "we decline to follow the interpretation of the ICWA urged by respondents, which would preclude its application to voluntary private placement adoptions ... even where the child has never lived with an Indian family or in an Indian environment." Id. at 170-71, 543 A.2d at 932. The foregoing passage from Indian Heritage was cited with approval by the United States Supreme Court in Holyfield, 490 U.S. at 51.


119. Id. at 49.
The *Holyfield* decision has caused a reconsideration of this judicially-created "existing Indian family" requirement. The reliability of those cases supporting it has been questioned, even in those jurisdictions which initially adhered to it.

Less than one year before *Holyfield* the Indiana Supreme Court addressed the "existing Indian family" argument in *In re T.R.M.*, upholding an adoption granted to a non-Indian couple. The Indian mother who lived off the reservation voluntarily placed the child with the non-Indian couple shortly after its birth. Subsequently, both the Indian mother and Indian tribe opposed the adoptive placement, asserting exclusive tribal jurisdiction in the Oglala Sioux tribe in South Dakota by virtue of an "order of wardship." The Indian mother and Indian tribe were denied relief at the trial level. The state appellate court reversed, holding that exclusive jurisdiction was vested with the tribal court by virtue of the tribal wardship order which was entered one day before the adoption petition was filed. The Indiana Supreme Court, however, vacated the decision of the state appellate court and affirmed the adoption decree. It rested its decision on "separate and independent" holdings which included avoidance of the ICWA because the adoption proceeding did not constitute the "breakup of the Indian family." Other holdings included a collateral avoidance of the "wardship order," actual compliance with the ICWA, the tenth amendment to the United States Constitution, and a waiver of tribal rights for the failure of the tribe to appear at a state court hearing. The United States Supreme Court

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120. "After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family." Tellinghuisen, *supra* note 24, at 671.

121. "Congress sought to also protect the interests of Indian tribes . . . . Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and and Indian children themselves that Congress sought to protect." *In re T.N.F.*, 781 P.2d 973, 977 (Alaska 1989). In a case with similar facts, the "existing Indian family" holding of *Claymore* was rejected by the South Dakota Supreme Court. *In re Baade*, 462 N.W.2d 485, 489 (S.D. 1990).


123. *Id.* at 302.


125. 489 N.E. 2d at 159.


127. *Id.* at 303.

128. *Id.* at 306.

129. *Id.* at 307-08, 310-12.

130. *Id.* at 303-04, n. 1.

131. *Id.* at 306.

132. *Id.* at 302.
denied certiorari\textsuperscript{133} in the case approximately one month after it handed down the \textit{Holyfield} decision.\textsuperscript{134}

The decision of the Indiana Supreme Court in \textit{T.R.M.} is difficult to square with \textit{Holyfield}, as it relates to the “existing Indian family” issue, as well as other issues.\textsuperscript{135} The many “separate and independent” bases of its decision, in light of \textit{Holyfield}, militate against the reliability of any particular holding. For example, the United States Supreme Court might have determined that the “\textit{waiver of tribal rights}” holding was an adequate reason to decline the case — yet it should be noted that, as a matter of policy, “courts have historically been reluctant to imply a waiver of Indian rights.”\textsuperscript{136}

\textbf{From the tribal viewpoint:} The “tribal interest” clashes head on with this judicially-created limitation to the application of the ICWA. The authority of this limitation is little more than one phrase taken out of context from the Congressional policy portion of the ICWA.\textsuperscript{137} Immediately preceding the specially extracted language of the ICWA and included in the very same sentence is the Congressional declaration of the policy of this Nation “to promote the stability and security of Indian tribes.”\textsuperscript{138} All of this is enshrouded by extensive legislative history demonstrating that protection of “[the] tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest which is distinct from but on a parity with the interest of the parents.”\textsuperscript{139}

Continued reliance on this limitation is highly questionable in light of the Supreme Court’s decision in \textit{Holyfield} upholding the exclusive

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\textsuperscript{133} 490 U.S. 1069 (1989).
\textsuperscript{134} 490 U.S. 30 (1989).
\textsuperscript{135} For example, the Indiana Supreme Court resolved domicile questions on the basis of Indiana state law, \textit{T.R.M.}, 525 N.E.2d at 306, whereas the United States Supreme Court held in \textit{Holyfield} that Congress clearly intended for “a uniform federal law of domicile for the ICWA.” \textit{Holyfield}, 490 U.S. at 44-45.
\textsuperscript{136} \textit{In re Begay}, 765 P.2d 1178, 1180 (N.M. Ct. App. 1988). The court further stated, “[i]t is well established that a waiver of Indian rights should not be easily inferred. . . . [b]ecause one of the objectives of the ICWA is to ensure that tribes have an opportunity to exercise their rights under the Act.” \textit{Id.} \textit{See also In re J.M.}, 718 P.2d 150, 155 (Alaska 1986).

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

\textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Holyfield}, 490 U.S. at 52 (quoting \textit{In re Halloway}, 732 P.2d 962, 969 (Utah 1986)).
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right of the Indian tribe to adjudicate the custody proceeding for children who lived their entire lives in a non-Indian adoptive placement — a tribal right which was found in Holyfield to be superior to the rights of the Indian parents who opposed the tribe. The case law and legal commentary subsequent to the Holyfield decision support the demise of the "existing Indian family" limitation on the ICWA.

F. Parent or Indian Custodian

Under the ICWA, the rights of notice and intervention extend not only to the Indian tribe but also to the "parent or the Indian custodian" of an Indian child involved in an involuntary state court proceeding. The right to seek a transfer to a tribal forum is extended also to the "parent or the Indian custodian" as well as the Indian tribe. The rights of intervention and transfer are not limited to involuntary proceedings, and the ICWA grants many other rights which are generally more substantial than state-recognized rights to the "parent or Indian custodian." Accordingly, issues have arisen concerning the applications of these terms, both of which are defined in the Act. A "parent" need not be an Indian to be afforded protection under the ICWA. Non-Indian biological parents are included in the definition and have been afforded both the right to counsel granted under the ICWA

140. See supra, notes 28-36 and accompanying text.
143. Id. at § 1911(c) (1988) (the right of intervention is not limited to involuntary proceedings).
144. "[P]arent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions made under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." Id. at § 1903(9); "'Indian custodian' means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." Id. at § 1903(6).
145. Id. at § 1911(b).
146. Id. at (b), (c).
147. Eg. heightened standards of proof for termination, 25 U.S.C. § 1912(e),(f) (1988); specialized standards for consent in voluntary cases. Id. at § 1913(a); authority for collateral attacks. Id. at § 1914.
148. Cf. "I do not agree with the court, however, that the non-Indian in this case, LJ, may avail herself of the protections of the Act to further purposes which have nothing to do with furtherance of Indian welfare . . . ." In re T.N.F., 781 P.2d 973, 982 (Alaska 1989) (Compton, J. concurring), cert. denied, Jasso v. Finney, 100 S. Ct. 1480 (1990).
149. In re G.L.O.C., 205 Mont. 352, 357, 668 P.2d 235, 237 (1983) (reversing a transfer to tribal court made without affording the non-Indian the ICWA right to counsel granted by 25 U.S.C. § 1911(b)).
standing to raise ICWA defects on appeal. A non-Indian adoptive parent is excluded, however, from the definition of "parent" under the Act, but protection is afforded to an Indian person who has adopted an Indian child, even as to adoptions undertaken pursuant to tribal law or custom.

The definition of "parent" recently was addressed by the Alaska Supreme Court in a rather unique case, In re T.N.F. The natural mother was a non-Indian who served as a surrogate mother for her sister, who was sterile, and brother-in-law. The father who was Indian provided sperm for the artificial insemination. Following the birth, the child was delivered to the sterile adoptive mother. Adoption proceedings ensued. The biological mother's consent apparently failed to comply with the ICWA because it was not executed before a judge. Just over a year after the adoption was finalized, the non-Indian biological mother moved to vacate the adoption decree on the basis of non-compliance with the ICWA. The Alaska Supreme Court held that the non-Indian biological mother was included by the "plain language" of the ICWA, but that her claim was barred by Alaska's one year statute of limitations.

Although the biological, non-Indian parent may be included, it is possible for an Indian father to be excluded rights under the ICWA if the child is illegitimate. The last sentence of the Act's definition of "parent" provides that the definition "does not include the unwed father where paternity has not been acknowledged or established." Unwed Indian fathers have been denied rights under this provision for failure to come forward and acknowledge their paternity through either tribal or state court procedures. The burden of acknowledgement may be substantial especially if an adoption proceeding swiftly is undertaken. Some


154. The father's Indian heritage was 1/32 Chickasaw. Id. at 974.

155. Id.

156. Id.

157. Id. at 978-82.


159. "Wright never filed an affidavit of paternity with the tribe or in any way attempted to exercise any right he might have had to establish his parental rights before the Rosebud Sioux Tribal Court." In re Child of Indian Heritage, 111 N.J. at 155, 178, 543 A.2d 925, 936 (1988) (denying Indian father the right to bring 25 U.S.C. § 1914 collateral challenge). "The [biological father] made
courts have taken the view that the mere assertion of paternity in the adoption proceeding itself is not adequate compliance with the ICWA.\textsuperscript{160} Acknowledgement may be accomplished through enrollment of the child in the tribe.\textsuperscript{161} The failure of an Indian father to satisfy this provision does not affect the tribal right of intervention, but may affect the tribe's right to notice in such situations where the proceeding otherwise eludes the ICWA.\textsuperscript{162}

The phrase "Indian custodian" has been construed narrowly by some courts so as to preclude the extension of rights under the ICWA to Indian relatives who may have served as custodians of the child.\textsuperscript{163} These holdings are difficult to square with the purpose of the ICWA which includes recognition of the role of the extended family in Indian society,\textsuperscript{164} a role largely misunderstood by non-Indian social workers.\textsuperscript{165} Granted these courts were confronted with unpleasant factual situations,\textsuperscript{166} yet the ICWA does not mandate custodial placements with such relatives — only the extension of certain basic rights such as notice\textsuperscript{167} and the establishment of "minimum [f]ederal standards for the removal

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  \item no attempt to acknowledge or establish his paternity until he filed his petition to vacate . . . . Congress has by this language evidenced its intent not to extend the ICWA to the child born out of wedlock . . . . whose father has never had custody and has not acknowledged or established paternity . . . through the procedures available through the tribal courts . . . or through procedures established by state law. \textit{In re Baby Boy D.}, 742 P.2d at 1059, 1064 (Okla. 1985), \textit{cert. denied}, Harjo v. Duello, 484 U.S. 1072 (1988) (also construing parallel state law version of the ICWA).
  \item 160. "The father in this case attempted to acknowledge paternity, and the adverse parties have never contended seriously that the putative father was not the biological father." \textit{Baby Boy D.}, 742 P.2d at 1073 (Kauger, J. concurring in part and dissenting in part); \textit{But see In re S.A.M.}, 703 S.W.2d 603, 609 (Mo. App. 1986) (discussing the facts of \textit{In re Baby Boy L.}, 231 Kan. 199, 643 P.2d 168 (1982) in which the court stated, "The answer requested that he be given permanent custody of the child. Thus the father in \textit{Baby Boy L} took . . . steps . . . for his claim that [he] had acknowledged or established paternity, within the meaning of § 1903(9).") \textit{Id.} at 609.
  \item 161. \textit{Eg. In re Coconino, 153 Ariz. 346, 736 P.2d at 833 (trial court's order was vacated for not complying with ICWA where the Indian father's paternity was acknowledged by his enrollment of the child in the Najaho tribe).}
  \item 162. \textit{Navajo Child of Indian Heritage}, 111 N.J. at 170, 543 A.2d at 930 (tribe declined opportunity to intervene). "The father and the tribe were entitled to notice and to an opportunity to be heard." \textit{Baby Boy D.}, 742 P.2d at 1074 (Kauger, J. concurring in part and dissenting in part).
  \item 163. \textit{In re J.J.}, 454 N.W.2d 317, 327 (S.D. 1990) (holding that Indian grandmother was not an "Indian custodian" because she was given custody by the Department of Social Services and not the child's parent); \textit{In re Bird Head}, 213 Neb. 741, 746, 331 N.W.2d 785, 789 (1983) (Indian aunt who had actual possession for less than one week found not to be an "Indian custodian.").
  \item 164. 25 U.S.C. § 1903(2) (1988); \textit{Id.} at § 1915(a) (adoptive placement preference for extended family).
  \item 165. \textit{See Holyfield}, 490 U.S. at 35.
  \item 166. \textit{J.J.}, 454 N.W.2d at 322-25; \textit{Bird Head}, 213 Neb. at 746, 331 N.W.2d at 788-89.
  \item 167. \textit{J.J.}, 454 N.W.2d at 327 (Indian grandmother held not entitled to "notice").
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of Indian children” and subsequent placement.168 Other courts, recognizing the policy of the ICWA, have gone above the technical requirements of the Act in extending notice, the opportunity to be heard,169 and intervention to Indian relatives who would not otherwise be afforded such rights under the Act.170

From the tribal viewpoint: The “tribal interest” is affected adversely in those cases where a child custody proceeding is undertaken without notice to the tribe. This may occur in a scenario where the existence of an Indian child and the resulting applicability of the ICWA is not recognized by virtue of an Indian father’s failure to acknowledge his paternity.171 State courts should not hesitate to give notice in such cases to both the Indian father and Indian tribe. The giving of notice will serve to protect the ensuing litigation from a collateral challenge172 and also afford the father, in conjunction with the tribe, the opportunity to satisfy tribal laws or customs concerning acknowledgement of paternity.

The “tribal interest” is separate and distinct from the interest of the “parent.” The concept of the “Indian custodian”, however, draws into focus the role of the extended family in Indian culture. The tribe usually encompasses the extended family; accordingly, the “tribal interest” is promoted by those courts which have liberally read the ICWA to permit the involvement of Indian custodians and extended family members. This is especially true in cases where the tribe may wish not to become involved for financial or other reasons.173

The extension of rights under the ICWA to non-Indians is of relatively little consequence to the “tribal interest” in most cases.

168. 25 U.S.C. § 1902 (1988); But see Bird Head, 331 N.W.2d at 789 (Indian aunt denied the procedural and substantive rights of the ICWA).
169. Duncan v. Wiley, 657 P.2d 1212 (Okla. Ct. App. 1982) (case involving three parentless Indian children; Indian aunt was appointed “first” legal guardian, followed by the subsequent appointment of non-Indians as legal guardians; subsequent appointment of non-Indian guardians without notice to Indian grandparents held to be invalid).
170. In re M.E.M., Jr., 223 Mont. 234, 725 P.2d 212 (1986) (Indian aunt granted intervention in foster parent’s adoption proceeding by virtue of the statutorily created “interest” in her as an “extended family member” by the ICWA; decision supported by Montana state constitutional provision encouraging the preservation and protection of the Indian culture of Montana).
171. See supra notes 160 and 162 and accompanying text.
172. See supra note 48 and accompanying text.
173. See supra notes 169-70 and accompanying text.
G. **Exclusive Jurisdiction**

An Indian tribe has exclusive jurisdiction in child custody proceedings where the Indian child “resides or is domiciled within the reservation” and “where an Indian child is a ward of a tribal court . . .”\(^{174}\)

The recent *Holyfield*\(^{175}\) decision resolved the major domicile question. Domicile of Indian children under the ICWA is now a matter of “uniform federal law”\(^{176}\) and is that of their parents.\(^{177}\) In the case of an Indian mother domiciled on a reservation, her children will be considered domiciled on the reservation even if they are born off the reservation.\(^{178}\) A child born to an Indian mother who is not domiciled on a reservation avoids the exclusive jurisdiction of the mother’s tribe.\(^{179}\) Similarly, an Indian child born to a non-Indian mother would invoke the exclusive jurisdiction of the father’s tribe if the parents are domiciled on the reservation.\(^{180}\) An Indian child born to a non-Indian mother would avoid the exclusive jurisdiction of the father’s tribe if the parents are domiciled off the reservation\(^{181}\) or if the child is illegitimate and the mother is domiciled off the reservation.\(^{182}\)

There has been some litigation over the exclusive basis for jurisdiction extended to the tribe for an Indian child who is a “ward of a tribal court.” Some authority exists for the proposition that wardship orders must be entered while the child is actually residing or is domiciled on the reservation.\(^{183}\) The language of the ICWA supports this interpretation.\(^{184}\) However, once a tribal court enters wardship orders, exclusive jurisdiction attaches and remains with the tribal court indefinitely. State

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175. See supra notes 28-36 and accompanying text.
176. *Holyfield*, 490 U.S. at 47.
177. *Id.* at 48-53. In the case of an illegitimate child, the mother’s domicile usually controls. *Id.* at 48. See also *In re Pima County*, 130 Ariz. 202, 635 P.2d 187 (1981) (illegitimate child born to Indian mother on reservation took on mother’s domicile triggering exclusive jurisdiction of tribal court).
178. *Holyfield*, 490 U.S. at 49. “[I]t is entirely logical that ‘on occasion a child’s domicile of origin will be in a place where the child has never been.’” *Id.* at 48.
180. “Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.” *Holyfield*, 490 U.S. at 48.
181. *Id.*
182. The domicile of an illegitimate child has traditionally been the domicile of its mother. *Id.* See also *In re Pima County*, 130 Ariz. 202, 635 P.2d 187 (Ariz. Ct. App. 1981) (illegitimate child born to Indian mother on reservation took on mother’s domicile triggering exclusive jurisdiction of tribal court).
184. “Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive
courts in various jurisdictions have upheld the exclusive nature of tribal jurisdiction on this basis even in situations where credible arguments existed for the cessation of the wardship status.\textsuperscript{185}

\textit{From the tribal viewpoint:} As a result of the United States Supreme Court decision in \textit{Holyfield}, little controversy remains in resolving the issues which surround the tribal court's instances of exclusive jurisdiction on the basis of "domicile." Clearly, the "tribal interest" may be superior to the interest of the parents, especially if those parents are domiciled on reservations.\textsuperscript{186} This conclusion is entirely consistent with the purpose of the ICWA.

State courts appear to have established due regard for exclusive tribal jurisdiction in matters where the Indian child is a "ward" of a tribal court.\textsuperscript{187}

\textbf{H. Voluntary Proceedings}

Voluntary proceedings in regard to Indian children domiciled on the reservation must, by virtue of the ICWA and \textit{Holyfield}, be brought in the tribal court. The situation is different, however, in the case of a voluntary proceeding involving an Indian child not under the tribe's exclusive jurisdiction.\textsuperscript{188} The ICWA makes no provision for "notice" to an Indian child's tribe of a proceeding for the voluntary termination of parental rights.\textsuperscript{189} There is also some dispute\textsuperscript{190} over whether the tribe has right to intervene in a voluntary proceeding in state court.\textsuperscript{191} Nonetheless, the
ICWA grants additional protections in voluntary proceedings such as the requirement that consent be executed before a judge of a court of competent jurisdiction who then has the obligation of certifying that the parent "fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood." 192 The ICWA further provides that consent "may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption." 193 It is common for state court adoption proceedings to consist of two steps: the first step, a termination of parental rights; the second step a final adoptive placement. Because of this two-step process, the issue has arisen as to whether or not a parent's right to withdraw consent "for any reason" expires after the first step when the parental rights are terminated or whether the right exists until the final adoption decree. In resolving this issue, there has been a fairly-even split of authority. The Supreme Courts of North Dakota and Alaska have held that the parent's ability to withdraw consent expires with the finality of the initial order terminating parental rights. 194 Courts in Arizona and Pennsylvania 195 have, on the other hand, held that parents under the ICWA enjoy a "higher standard of protection" 196 and have permitted the withdrawal of consent prior to the finalization of the actual adoption. According to these courts, "[w]hen an Indian child... is involved, adoptive... parents must be held to assume the risk that a parent... might change her mind before the adoption is finalized." 197 In the event the parent's consent was "obtained through fraud or duress," the parent is given a two-year period from the effective date of the adoption within which to bring a collateral challenge. 198

From the tribal viewpoint: Since the ICWA does not explicity require notice for voluntary terminations, it seems doubtful that tribes have

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196. Pima County, 130 Ariz. at 207, 635 P.2d at 192.
197. Id.; K.L.R.F., 356 Pa. Super. at 565, 515 A.2d at 38 (quoting Pima County, 130 Ariz. at 207, 635 P.2d at 192); the K.L.R.F. court also noted that a "purely consensual placement" does not fit the traditional two-step process and that it "is, by necessary implication, merely temporary for the purpose of § 1913(b) until such time as a final decree fixing parental rights and awarding permanent custody is entered." 356 Pa. Super. at 563, 515 A.2d at 37.
a “right to notice.” The right of tribal intervention in voluntary proceedings, however, appears to be clearly granted by the ICWA. Because foster care and adoptive placement preferences, including first priority to members of the Indian child’s extended family, are specified by the ICWA, there is good reason for this interpretation. The ICWA also allows a tribe to designate a different order of preference. Participation by the tribe in voluntary termination proceedings would insure compliance with the preferential placement directives intended by Congress in the enactment of the ICWA. To further this end, state courts should not hesitate to notify the appropriate tribe at the beginning of a voluntary termination proceeding, even if not specifically required to do so under the Act. Cooperation between state and tribal authorities in dealing with the preferential placement directives of the ICWA will yield a more stable environment for the adoptive placement. It is entirely possible that the tribe may, by stipulation or by resolution, accede to the desires of other interested parties in the event those desires are not consistent with the preferences of the ICWA.

I. Concurrent Jurisdiction of State and Tribal Courts

1. Transfer to Tribal Court

The ICWA provides that, in proceedings where concurrent jurisdiction exists, either parent or the Indian child’s tribe may request a transfer to the “jurisdiction of the tribe.” The mandate of the ICWA is that the state court, “in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent . . . subject to declination by the tribal court.” Stated differently, upon request, the ICWA requires transfer subject only to (a) good cause or (b) the veto power of either parent or the tribe.

The transfer provision of the ICWA was designed to give Indian tribes “presumptive jurisdiction over nondomiciliaries,” however, in

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199. Id. at § 1911(c).
200. Id. at § 1915(a), (b).
201. Id. at § 1915(c).
202. See In re J.R.S., 690 P.2d 10 (Alaska 1984), where all participants of an adoption hearing agreed to set aside the placement preferences of the ICWA in order to allow the adoption. The court, however, reversed and remanded the case because the placement preference systems most obvious defender—the child’s tribe—was not represented at the adoption hearing. Id. at 14-15, 18.
203. See supra notes 200-01 and accompanying text.
204. 25 U.S.C. § 1911(a) (1988). The right to “petition” for a transfer also extends to Indian custodians. Id. at § 1911(c).
205. Id. at § 1911(b) (emphasis added).
206. Holyfield. 490 U.S. at 49. “Absent an objection or proof why the transfer should not occur,
the past, the majority of state courts dealing with a request for transfer have denied the transfer by focusing on the exceptions and technical requirements of the Act.207 Following Holyfield, however, a recent trend by a small number of state courts has developed which upholds the presumptive nature of the ICWA's transfer provision.208

(a) Good Cause

An exhaustive discussion of the grounds utilized by state courts for "good cause" to deny a transfer is not warranted in this article. It should be noted that the Bureau of Indian Affairs has issued nonbinding guidelines for use in determining whether good cause exists. Included in those guidelines is the recognition that "[s]ocio-economic 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."209 It is precisely these types of considerations, however, which understandably and inescapably weigh heavily on the state courts in ruling on requests to transfer.210 Unpleasant factual scenarios are common in termination cases, and courts are hesitant to cede jurisdiction to a tribal forum which is perceived to be more tolerant of the abuse or neglect that may have been the reason for the proceeding.211

the transfer is obligatory unless the tribal court declines the transfer." In re Bird Head, 331 N.W.2d 785, 791 (Neb. 1983) (Krivosha, J. concurring) (emphasis added).


208. See In re Armell, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990) (upholding trial court's transfer to the Potawatomi tribal court); In re B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990) (strongly suggesting transfer upon remand to the tribal court of the Omaha tribe of Nebraska, observing that "transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by ICWA whenever possible."). Id. at 446.


210. Justice Sheehy, dissenting in In re M.E.M. noted that [T]he District Court in this case refused to transfer the proceedings to the Tribal Court upon the perceived impairment that the child's custody would be given to persons on the reservation with whom the District Court, and the Department of Public Welfare, were not satisfied . . . . It cannot, in my view, be "good cause" to refuse transfer . . . on the perception that the tribal court may not act with respect to the child in the way we would wish it to act. The purpose of the Indian Child Welfare Act is to remove as far as possible the white man's perceptions in these matters where Indian values may conflict.


211. E.g., Ex rel J.J., 454 N.W.2d 317 (S.D. 1990), where the trial court's denial of request to transfer was upheld and, in so doing, the court stated,

We are aware of the Act's intent of preserving Indian culture, values, home life and child rearing . . . . These are laudable objectives that should be carried out. But home life at V.J.'s, consisting as it did of child molesting, beatings with shoes, sadistic burnings, and alcohol abuse is certainly not the traditional Lakota culture that the Act seeks to preserve.
However, the ICWA recognizes the fact that state courts may have the same unfamiliarity with the Indian culture seen in non-Indian social workers. The purpose of the ICWA is not to promote child abuse or neglect, but to provide an Indian forum for the solution. Ultimately, the element of trust in the tribal court system becomes the issue. The trust necessary to make the system work is the type of trust already extended by the United States Supreme Court, the Utah Supreme Court, and the appellate courts of Minnesota and Illinois.

It has been generally recognized that the request for a transfer may be made “orally” and that the party opposing transfer carries the burden of establishing good cause. The guidelines by the Bureau of Indian Affairs suggest that the following circumstances may establish “good cause” for denying a transfer: (1) lack of a tribal court; (2) untimeliness in seeking a request where the proceeding is at an advanced stage; (3) an Indian child over twelve years of age objects; (4) undue hardship on the parties and witnesses in presenting evidence in the tribal court, and; (5) where the child is over five years of age, has had little or no contact with the tribe and the child’s parents are unavailable.

Some courts have permitted the “best interests of the child” to be considered in ruling on a request for transfer, however, this criteria is not suggested by the Bureau of Indian Affairs and is out of harmony with the jurisdictional nature of the ICWA.

... Actually, the trial court found that 'V.J. has resorted to the Standing Rock Sioux Tribe to find a way to get these children...'

Id. 325, 328.

212. See supra notes 10-13 and accompanying text.

213. "... we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts.” Holyfield, 490 U.S. at 54 (quoting Halloway, 732 P.2d at 972).

214. “... we must defer to the experience, wisdom and compassion of the Navajo Nations tribal courts to fashion an appropriate remedy.” Halloway, 732 P.2d at 972.

215. See cases cited supra note 208.


218. See supra note 209.


220. See supra note 209.

221. See supra notes 210-15 and accompanying text.
(b) Veto Power

Either parent or the tribe may veto a request to transfer.222 The veto power of a parent extends to both non-Indian parents223 and Indian parents.224 The ICWA does not extend the veto power to an "Indian custodian" even though an Indian custodian is authorized to request the transfer.225 Guardians representing the Indian child's interest under state law or procedure are not extended the veto power over a request to transfer.226

2. State Court Proceedings

Not surprisingly, a number of state court proceedings have successfully adhered to the "minimum standards"227 imposed by the ICWA.228 These standards are not inconsequential. In a termination proceeding, the ICWA requires proof "beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."229 At least one state court has found that evidentiary proof satisfying the lesser standard of "clear and convincing evidence" will not satisfy the ICWA.230 The party seeking termination must additionally satisfy the independent state grounds for

222. See supra note 205 and accompanying text; for a case involving the tribe's right to decline a transfer, see Wayne R.N., 107 N.M. 341, 757 P.2d 1333 (N.M. Ct. App. 1981), where transfer was denied on the basis, inter alia, of the fact "[t]he Tribe's attorney stated the Tribes were opposed to the transfer." Id. at 344, 757 P.2d at 1336.

223. In re G.L.O.C., 205 Mont. 351, 352, 668 P.2d 235, 236 (1983) (non-Indian father's denial of right to counsel constituted grounds to vacate transfer order where father, acting without counsel, did not "expressly declare he would contest transfer").

224. In re S.Z., 325 N.W.2d 53 (S.D. 1982) (upholding initial objection to transfer made by both Indian mother and non-Indian father where subsequent transfer was apparently consented to by appointed counsel).


termination of parental rights. The ICWA does not, in and of itself, pro-
vide the substantive law regarding the termination. It simply superim-
poses federal standards on the substantive law of the state.\footnote{231}

The requirement that there be testimony of qualified expert wit-
tnesses has been the subject of a fair amount of litigation. The Bureau of
Indian Affairs guidelines urge the use of expert witnesses who possess
special knowledge of the social and cultural aspects of Indian life.\footnote{232}
State courts, however, have entered varying interpretations of this provi-
sion ranging from mere "expertise beyond the normal social worker"\footnote{233}
to the level of "particular and significant knowledge of and sensitivity to
Indian culture."\footnote{234} An exception for experts lacking specialized knowl-
dge of Indian culture has been recognized by some courts for situations
where "cultural bias" is not an issue.\footnote{235} At least one court has held that
despite the Act's usage of the plural form of the word, "witnesses," this
 provision may be satisfied by one qualified expert.\footnote{236}

The ICWA further requires that the party seeking foster care place-
ment of an Indian child or termination of parental rights to an Indian
child demonstrate that \textit{active remedial} efforts were made to prevent the
breakup of the Indian family.\footnote{237 An adoptive placement is, under the
ICWA, to be according to the order of preferences\footnote{238} set forth in the Act
which, absent tribal resolution to the contrary, gives first priority to \textit{ex-
tended} family members.\footnote{239} Several state court proceedings have been
reversed for failure to adhere to these additional criteria of the ICWA.\footnote{240}

\footnote{231. This point is driven home by the dissenting opinion of Justice Henderson in \textit{In re Baade}, 462 N.W.2d at 493, where he questioned compliance with South Dakota law on abandonment as it applies to the Indian father where the child was at birth immediately removed some 400 miles away for adoption by the mother's sister and brother-in law, noting that South Dakota courts have traditionally required that abandonment be shown to be a "giving up or total desertion of the minor child . . . an absolute relinquishment." Id. at 491.}
\footnote{232. 44 Fed.Reg. 67584, 67593 (1979).}
\footnote{234. \textit{In re B.W.}, 454 N.W.2d 437, 444 (Minn. App. 1990) (citing other cases and questioning the qualifications of a tendered expert of Indian heritage from the child's tribe who was not knowledgeable in tribal customs); \textit{see also} \textit{State ex rel Juvenile Dep't. v. Charles}, 70 Or. App. 10, 688 P.2d 1354 (1984) \textit{petition dismissed} 701 P.2d 1052 (1985).}
\footnote{237. 25 U.S.C. \textsection{} 1912(d)(1988).}
\footnote{238. \textit{Id.} at \textsection{} 1915(a). \textit{See also supra} notes 200-01 and accompanying text.}
\footnote{239. \textit{Id.}}
\footnote{240. \textit{E.g.}, \textit{State v. Charles}, 70 Or. App. 10, 688 P.2d 1354 (1984) (reversed for failure to show remedial efforts to prevent breakup of Indian family); \textit{In re Bird Head}, 213 Neb. 741, 331 N.W.2d}
Regrettably, the order of preference directive contained in the ICWA has, on occasion, been construed against the goal of protecting the "tribal interest" recognized by the United States Supreme Court to be at the core of the ICWA.241

From the tribal viewpoint: Perhaps the area of greatest vulnerability to the "tribal interest" lies in the ability of state courts to avoid transfer of those cases which "presumptively" belong in tribal courts. As written, the ICWA by use of mandatory language, "shall transfer," directs that a request to transfer be honored upon presentment. Understandably, there is an exception which warrants denial of the request for "good cause," but this exception has almost grown as large as the initial grant of concurrent jurisdiction.242 The "tribal interest" is promoted by a closer adherence to the guidelines established by the Bureau of Indian Affairs on the "good cause" issue243 and the elimination of the consideration of the child's "best interests" in resolving transfer requests.244 The "best interest of the child" criteria has been traditionally eliminated from consideration in dealing with jurisdictional issues in child custody matters.245

The actual application of the ICWA in the state courts has generated a significant amount of case law which has generally promoted the Act's purpose.246 Unfortunately, it is not possible to say that the Act has been interpreted and applied uniformly by all state courts in a manner consistent with that purpose.247

IV. Conclusion

Protection of the "tribal interest" in Indian children was a primary


241. E.g., In re Baade, 462 N.W.2d 485, 490 n.3 (S.D. 1990) (finding that Indian child's adoptive placement with non-Indian aunt and non-Indian uncle complied with ICWA directive that extended family be given preference).

242. See supra notes 206-07.


244. See supra notes 219-21.

245. The "best interests of the child" is eliminated from consideration in resolving issues under the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA). For a discussion of the relevant criteria in resolving jurisdictional issues, see Thompson v. Thompson, 484 U.S. 174, 175 n.1 and accompanying text (1988).

246. See supra notes 229-40.

247. E.g., supra notes 70, 231, 241.
courts have overlooked and denied this “tribal interest.” The recent
United States Supreme Court decision in *Holyfield*, however, has helped
the legal community refocus its attention toward the purpose of the
ICWA.

There still remains a degree of hostility toward tribal involvement.
Some of this hostility is linked to the unfortunate situations surrounding
each case. Yet there are also unfortunate situations surrounding non-
Indian custody adjudications in state courts, and these courts have not
generally been criticized because of the unfortunate facts adjudicated in
those unpleasant proceedings. On the other hand, tribal courts are some-
times equated with the facts of the cases which may be subject to transfer
to those courts. As a result, state courts have found reasons to avoid
transfer focusing on the exceptions contained in the ICWA instead of
looking at the overall purpose of the ICWA. Granted, it may take some
time and experience before the tribal courts and tribal authorities become
proficient in dealing with Indian child custody proceedings. The non-
Indian community will need to display patience and understanding in
coping with the ICWA and its purpose.

To a certain degree, the plight of the tribal courts is like the unem-
ployed newcomer — no one will hire him because he lacks experience,
but he can gain no experience because no one will hire him. State courts
are hesitant to transfer cases to the tribal courts because they are per-
ceived as lacking the necessary experience to deal with those cases; the
tribal courts lay idle, without experience, because state courts avoid
transferring cases to them. In addressing this dilemma, the following
remarks are helpful:

tribal courts are the very visible standardbearers for charting much of
the future of tribal self-determination . . . . [T]hey need greater under-
standing, growing support, and continued recognition . . . .248

It is a mistake to view the “tribal interest” in the same manner as
one would view the interest of a party-litigant, even though the tribe
may be relegated to that role in many instances. Instead, the “tribal in-
terest” is a jurisdictional one. As pointed out by the Supreme Court in
*Holyfield*, the question is “who should make the custody determination
concerning these children — not what the outcome of that determination

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The resolution of jurisdictional questions in child custody cases has not traditionally involved the assessment of the "best interest" of the child, and it should not play a role in the resolution of requests to transfer made pursuant to the ICWA. Notwithstanding this conclusion: Is it not in the best interest of all concerned, including the child's, that jurisdictional matters be swiftly and authoritatively resolved, without clinging to over-stretched exceptions such as "good cause" or narrow interpretations of the ICWA that may ultimately fail? The message of Holyfield can be no clearer on this point, with the legal community witnessing the successful collateral challenge on a three-year-old adoptive placement.

Much of the legal commentary on the ICWA has focused on helping the practitioner avoid the "legal pitfalls" of the ICWA. While this approach may have some merit, the best way of avoiding the hazards of the ICWA is through the acknowledgement of the "tribal interest." No doubt in many cases the "tribal interest" may be aligned with all other legitimate interests. There will, of course, be times when the "tribal interest" will stand alone. The ultimate bond, which has yet to be fully attained but which is closer now than ever before, is trust in the tribal courts. This trust already has been acknowledged and extended by the Utah Supreme Court and the United States Supreme Court. As America litigates, the list will grow longer.

249. Holyfield, 490 U.S. at 53.