Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children

Joan Heifetz Hollinger

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*

JOAN HEIFETZ HOLLINGER†

Table of Contents

A. Introduction and Scope .................................. 452
B. Circumstances Leading to Enactment of ICWA .......... 454
C. The ICWA: A Response to Historical Treatment of Indian Children ........................................ 456
D. What is a Custody Proceeding for ICWA Purposes? ..... 457
E. Who Are Indian Children within the Scope of ICWA? ... 458
F. ICWA Jurisdictional Provisions .......................... 459
   1. Exclusive Tribal Court Jurisdiction for Reservation Domiciliaries ................................... 460
   2. Tribal Court Jurisdiction Preferred, But is not Exclusive for Nondomiciliaries ................. 461
G. ICWA Notice and Intervention Provisions ............... 462
H. ICWA Standards for Termination of Parental Rights and Adoption ......................................... 464
I. Consent to Adoption, Revocation of Consent ............ 466
J. ICWA Placement Preferences ............................... 469
K. The Legal and Social Aftermath of Adoptions Governed by ICWA ........................................ 470
L. Implementation of ICWA .................................... 471
M. Judicial Resistance to the ICWA: Deciding the Act is not Applicable ..................................... 472
   1. Construing the Definition of “Indian Child” ........ 472
   2. ICWA Notice Requirement Excused if Court has no Reason to Know Child is Indian .............. 474
   3. The “Existing Indian Family” Gloss for Determining ICWA Applicability .......................... 477
N. Disputes about ICWA Jurisdictional Provisions ........ 481

* This Article was adapted from material included in J. Hollinger, Adoption of Native American Children, in ADOPTION LAW AND PRACTICE (J. Hollinger ed. Supp. 1989). Copyright © 1989 by Matthew Bender & Co., Inc. Reprinted with permission of Matthew Bender & Co., Inc.

† Professor of Law, University of Detroit School of Law. B.A., Swarthmore; M.A., University of California (Berkeley); J.D., SUNY Buffalo.
A. Introduction and Scope

Whenever a proposed adoption involves a child who is of Indian lineage, federal as well as state laws may govern the proceeding. The Indian Child Welfare Act of 1978 (ICWA) is the most likely federal statute to be applicable to any adoption of an Indian child. Although not itself an adoption code, the ICWA nonetheless contains jurisdictional, procedural and substantive provisions which pertain to adoptions. Pursuant to the Supremacy Clause of the United States Constitution, ICWA provisions will supplement or parallel any compatible state adoption laws, and will preempt any inconsistent or contradictory ones.

The primary goals of the ICWA are to protect the best interests of Indian children and to promote the security, survival and stability of Indian families and tribes. Whether these goals are ever compatible with the adoption of Indian children by non-Indians is a highly contested question, and lies at the heart of contemporary debate about the intentions and effectiveness of the Act.

---

1. The term "Indian" will be used to refer to native Americans, Alaskan natives and to any other identifiable ethnic group that has historically been characterized as an "Indian tribe" subject to congressional legislative authority. See generally U.S. Const. art. I, § 8, cl. 3.
3. U.S. Const. art. VI.
For non-Indians who wish to adopt an Indian child, the risks are often considerably greater than in adoptions of other children.\textsuperscript{5} The ICWA procedures for obtaining voluntary parental consent, as well as those for waiving consent, or for involuntarily terminating parental rights are, at least in theory, more protective of parental interests than are the analogous procedures for adoptions of non-Indian children. No child who comes within the scope of the ICWA can be adopted without the consent of the child’s parents, or of the child’s Indian custodian, if any.\textsuperscript{6} The entire proceeding may be handled by a tribal court applying customary laws which non-Indians may find perplexing. If the adoption proceeding is heard, instead, by a state court, the child’s tribe may have a right to intervene and to object to the prospective adoptors selected by the child’s parent or by a state adoption agency. A parent who originally consented to the adoption can withdraw consent until the decree of adoption is entered, and in that event, the child must be returned to the parent. For at least two years after an adoption decree is entered, a parent can nullify the adoption if the consent is shown to have been the product of fraud or duress. For an apparently indefinite time, Indian tribes or custodians can seek to vacate an adoption decree for other jurisdictional or procedural defects. If the decree is set aside, the child will be returned to the parent, unless the welfare of the child requires some other non-adoptive placement.\textsuperscript{7} Prospective adoptors who have had informal custody of an Indian child for months, or even years, may have their adoption petitions denied, or be told that apparently final adoptions are being vacated. In some of these circumstances, they may end up retaining custody of the child as “permanent guardians”; but in others, the child will be transferred to an Indian custodian who resides within a reservation.

For both non-Indian and Indian biological parents of children within the scope of the ICWA who desire to place their child with prospective adoptors who are non-Indian, the Act’s deference to tribal preferences and procedures may bar the exercise of parental choice. For the Indian children who may become involved in protracted controversies about their adoptive placement, the ICWA goal of promoting their best interests may be undermined by the ICWA’s other goal of ensuring tribal survival.

In addition to noting the historical circumstances which led to


5. For discussion of the risks and procedures involved in different types of adoptions, see \textit{Adoption Law and Practice} (J.H. Hollinger, ed.) (Matthew Bender 1988) [hereinafter \textit{Adoption Law and Practice}].


7. All of these ICWA provisions and their relationship to state laws will be discussed below.
the enactment of the ICWA and summarizing its provisions relevant to adoptions, this Article will demonstrate how the legal, cultural and political conflicts generated by the Act's dual goals have hindered its implementation during its first decade of existence.

B. Circumstances Leading to Enactment of ICWA

Passage of the Indian Child Welfare Act of 1978 (ICWA)\(^8\) occurred after an extensive congressional investigation of how Indian children fared in child custody proceedings. To rectify the woefully inadequate and insensitive treatment disclosed by its investigation, Congress declared in the ICWA a commitment to promote the best interests of Indian children and to protect the stability and integrity of Indian tribal communities. Minimal federal jurisdictional and substantive standards are established for any state or tribal court proceeding that involves the custody or placement of Indian children with someone other than their birth parents.\(^9\)

The removal by state and private child welfare agencies of disproportionately large numbers of Indian children from their tribal reservations, and their placement in non-Indian foster or adoptive homes, was documented in the Senate hearings of 1974 and 1977.\(^10\) As many as twenty-five to thirty-five percent of all Indian children were likely to spend several years or more in such placement, or in boarding homes run by the Bureau of Indian Affairs (BIA).\(^11\) In most states, two-thirds or more of the Indian child placements were in non-Indian homes; and in some states, the percentage was as high as ninety percent. The risk for Indian children of being involuntarily separated from their parents was in many states up to one thousand times greater than for non-Indian children.\(^12\)

The congressional investigation also revealed that when social agencies and state courts assessed charges of "neglect" or "abuse" by Indian parents, they were insensitive to traditional Indian values and patterns of childrearing. Instead of evaluating parental behavior in light of Indian cultural standards, including the preference for

---

9. The ICWA does not govern custody disputes in the context of a divorce. But it might pertain to a disputed stepparent adoption proceeding that arose subsequent to a divorce between the two parents of a child within the scope of the Act.
extended families as the locus of child care, child welfare workers and courts were said to be imposing on Indian families the norms of white, middle class society. The high rates of alcoholism and poverty within many Indian tribes were cited to justify separating Indian children from their tribal communities. Yet neither state nor federal programs offered Indian families the kinds of supportive services that might have enabled them to improve their children's lives.\textsuperscript{13}

State agencies frequently conditioned the minimal welfare services they had for Indian parents on the parents' "voluntary" commitment of their children to foster care. Moreover, children who were allegedly neglected or mistreated in their own families were not necessarily better off in foster care. Indians raised in non-Indian homes often develop serious social and psychological problems as adolescents and adults. They were not being sufficiently prepared to survive outside the reservation, nor were they acquiring the skills needed to lead productive lives on the reservation.\textsuperscript{14}

The hearings indicated that few tribal courts either sought, or were granted, the right to adjudicate Indian child custody or adoption proceedings. Despite its alleged commitment to the principle of tribal sovereignty, the federal government in the twentieth century had not prevented, and indeed had encouraged state courts to preempt tribal jurisdiction over matters pertaining to children, or to deny full faith and credit to tribal court decisions.\textsuperscript{15} By the 1970's, some state courts deferred to tribal courts in matters affecting children residing on a reservation,\textsuperscript{16} or in custody disputes involving children who, while domiciled on a reservation, were living elsewhere,\textsuperscript{17} but the relationship among tribal, state and federal courts remained unclear, especially with regard to adoptions.

As the number of healthy white children available for adoption...
has declined, many childless non-Indian couples have become interested in adopting Indian children. In addition, religious groups with a proselytizing mission have urged their members to become foster or adoptive parents of Indian children. Mormon couples, including many who already have children of their own, have been especially zealous in their efforts to "rescue" Indian children from what they claim are the depraved conditions on tribal reservations. As one Senator remarked, secular as well as religious agencies seem to operate on "the premise that most Indian children would really be better off growing up non-Indian." Financial motives may also encourage non-Indians to adopt Indian children, as these children often are entitled to certain non-taxable payments and annuities from tribal funds which would not be cut off by an adoption.

Throughout the senate hearings, tribal representatives, anthropologists and other experts in Indian culture decried the historical, personal, institutional, economic and social factors responsible for the loss of vitality in contemporary Indian societies. They pleaded for assistance in enabling the tribes to retain control of their most valuable natural resource, their children.

C. The ICWA: A Response to Historical Treatment of Indian Children

The ICWA is a response to these pleas. The Act's aim is to reverse the developments described above by drawing upon our official national policy of encouraging tribal self-determination. Congress declares in the Act that through the Constitution, as well as statutes, treaties and "the general course of dealing with Indian tribes," the United States has assumed responsibility "as trustee" to preserve and protect Indian tribes and their resources. This fiduciary responsibility includes a duty to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. A basic assumption of the Act is that Indian children are essential tribal resources, on whom tribal survival depends, and hence tribal governing bodies, not parents, should determine the circumstances in which Indian children will be raised. In this view, the dual goals of protecting the interests of Indian children and promoting tribal stability are fully compatible with each

21. See, e.g., U.S. CONST. art. I, § 8, cl. 3: "The Congress shall have Power... to Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
The ICWA attempts to fulfill federal trust responsibilities by clarifying and expanding the authority of tribal courts to adjudicate child custody proceedings, by establishing "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." Throughout the Act are provisions designed to ensure that Indian tribes will be heard, either as tribal courts deciding cases according to tribal laws and customs, or as parties in ICWA state court proceedings.

The ICWA applies when two conditions are met: first, there is a custody proceeding, as defined by the Act, and second, the proceeding concerns an Indian child, as also defined by the Act. Once both conditions are met, the Act's jurisdictional and notice requirements come into play, as do the placement preferences and the provisions on parental consent to an adoption and revocation of consent.

D. What is a Custody Proceeding for ICWA Purposes?

Under the Act, a "child custody proceeding" encompasses foster care placement, termination of parental rights, preadoptive placement, and adoption. Each of these proceedings contemplates the removal of an Indian child from parental supervision and control. Much of the Act concerns the removal and placement of children over the objection of a biological parent or parents. Nonetheless, the Act also addresses either expressly, or by implication, the voluntary placement of children by their parent(s) in foster care or with prospective adoptors, and the consent by a parent to the termination of parental rights or to an adoption. Excluded from the Act are custody proceedings in the context of divorce, juvenile delinquency hearings, and state interventions in an Indian family that do not contemplate removal of the child.

In this Article, the term "child custody proceedings" will be used in the same manner it is used in the ICWA, and will be understood to include adoption proceedings.

24. See, e.g., In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) (at the core of ICWA is recognition that the tribe's interest in its children is distinct from but on a parity with the interest of the parents).
26. Id. § 1903(1).
27. Id. § 1903(4), (9).
28. Id. § 1913.
29. Id. § 1903(1).
E. Who are Indian Children within the Scope of ICWA?

The Act defines an "Indian child" as an unmarried person under eighteen who either is a member of an Indian tribe, or is eligible for membership in the tribe by virtue of being the biological child of a tribal member. If a child is eligible for membership in more than one tribe—as, for example, when his mother and father each belong to different tribes—the tribe with which the child has "the more significant contacts" will be entitled to whatever rights the Act recognizes for the child's tribe. Presumably, the other tribe, the one with the less significant contacts, will have no rights under the Act. In order for a child to be eligible for membership in any tribe, the legal status of the child's mother and father, as "parent" and as tribal members, has to be established.

A "parent" is any biological parent of an Indian child, whether or not that parent is himself or herself Indian, or any Indian adoptive parent of an Indian child, who was adopted under state law, or under tribal law or custom. Specifically excluded from the category of "parent" is any unwed father whose paternity has not been acknowledged or established. A child's mother is a "parent," as is the child's father if married to the mother at the time of the child's birth. As with most state adoption statutes, however, the father of a child born out of wedlock is not a "parent" pursuant to the ICWA unless he takes certain affirmative steps to establish his legal status. The ICWA does not indicate how or when an unwed father must establish or acknowledge his paternity. Presumably, he would have to abide by the statutory requirements of the state in which he resides, or by tribal rules if he is a reservation domiciliary. As applied to adoption proceedings, these requirements would have to pass constitutional muster, as would any statutory provisions pertaining to the fathers of out of wedlock children, regardless of whether those children are within or outside the scope of the ICWA.

In order for a child to be eligible for membership in an Indian tribe by virtue of his father's membership in that tribe, it may be necessary for the father to meet the ICWA definition of "parent." If this is so, the child of an unwed Indian father will not be considered eligible for membership in his father's tribe until that father's paternity is legally acknowledged or established. As indicated below, courts are having difficulty figuring out whether children of obvious

30. Id. § 1903(3).
31. Id. § 1903(5).
32. Id. § 1903(9).
33. For a general discussion of the status of unwed fathers in adoption proceedings, see Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption); Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Roberson, 45 Ohio St. L.J. 313 (1984).
34. See infra text accompanying § M(1).
Indian lineage are within the ICWA definition of "Indian children" when their mothers are non-Indian and their fathers are Indians and tribal members, but do not meet the ICWA criteria for "parent."

Because the blood relationship has historically been "the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe," the Act excludes some children who have been raised as Indians, while including some who have had no prior contact with Indian society. For example, children whose Indian parents are not themselves eligible for tribal membership, because they have only one-eighth or less Indian blood, are not covered by the Act, even though they may have been brought up on a reservation or in an Indian community. Children whose mother belongs to one tribe and whose father belongs to another may not be eligible for membership in either parent's tribe and would therefore be outside the scope of the Act. By contrast, children of Indian parents who have never resided in or near an Indian community are covered by the Act if the quantum of their Indian blood qualifies them for tribal membership.

The best source of information on the criteria for tribal membership is the tribe itself. The Bureau of Indian Affairs is the best secondary source. Enrollment is probative of tribal membership, but is not by itself determinative. Some tribes do not have written rolls. Others have rolls which list only those who were members as of a certain date. A particular tribe's current determination that a child is or is not entitled to membership is generally regarded as conclusive and as a more reliable indicator than enrollment.

F. ICWA Jurisdictional Provisions

Once a court determines that the two conditions of ICWA applicability are met—a custody proceeding involving an Indian child, as defined by the Act—the Act's jurisdictional provisions come into play. For children domiciled or residing on a reservation, the Act is structured to favor the exercise of jurisdiction by tribal courts rather

35. H.R. REP. No. 1386, 95th Cong., 2d Sess. 12, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7543. For recommendations that the Act be clarified in order to extend its coverage to certain Canadian and Hawaiian Native tribes, see 1987 Oversight, supra note 4.

36. See, e.g., Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (1979) [hereinafter BIA Guidelines]. The BIA Guidelines, published by the Bureau of Indian Affairs of the Department of Interior, are a useful source of information for questions about the implementation of the Act. For a discussion of the difficulties in determining which children of Alaska natives are covered by the Act and which are not, see Barsh, supra, note 13.

than state courts. Congress used the domicile of the child to distinguish between those who maintain close ties with the tribe and, therefore, should be subject to its exclusive control, and those who are sufficiently removed from the tribe to justify giving state courts jurisdiction over them in certain circumstances. 38

1. Exclusive Tribal Court Jurisdiction for Reservation Domiciliaries

Consistent with some prior case law, 39 the Act provides that tribal courts are to have exclusive jurisdiction over any child custody proceeding involving an Indian child who is domiciled, or resides within the reservation. 40 This means that even if one or both parents, or the child’s Indian custodian 41 object to a custody proceeding being heard in a tribal court, instead of in a state court, the tribe can nonetheless exercise its exclusive jurisdiction if the child is a domiciliary of the tribe’s reservation. Tribal courts also have exclusive jurisdiction when the child is already their ward, regardless of the child’s domicile or residence. The judicial proceedings of tribal courts pursuant to the Act are entitled to full faith and credit in federal and state courts “to the same extent . . . as [are] the proceedings of any other entity.” 42

Several exceptions to the exclusive jurisdiction provision may dilute its significance. First, other federal laws, most notably 28 U.S.C. § 1360, 43 may divest tribal courts of all jurisdiction over civil matters, including adoptions and other child custody proceedings. Tribes in at least six states with large Indian populations are subject to section 1360: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. Tribes affected by section 1360, or other similar federal laws, 44 may petition the Secretary of the Interior for permis-

39. See Barsh, supra note 13, at 1300-03.
41. An “Indian custodian” is any Indian person who has acquired custody of an Indian child pursuant to tribal or state law, or through custom. Any Indian who has acquired custody of an Indian child through an informal transfer of custody by the child’s parent may also qualify as an “Indian custodian” for the purpose of consenting to the child’s adoption, if the parent has not reclaimed custody, or if a custody dispute between the parent and the alleged custodian is resolved in favor of the custodian. 25 U.S.C. § 1903(6) (1982).
42. Id. § 1911(d). Does this mean as any other court? Or, literally, of any other “entity”? If the latter, the provision sounds more as if it makes tribal decrees subject to principles of comity rather than of genuine full faith and credit. See, e.g., Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985) (a tribal counsel decision to remove a child from his home and place him under tribal custody, because it was in the best interest of the child, must be given full faith and credit by the state under 25 U.S.C. 1911(d)) (1982).
sion to resume jurisdiction over ICWA custody proceedings.\textsuperscript{45} However, the procedure for resuming jurisdiction is complex; many tribes have never petitioned, others do so, but are turned down.\textsuperscript{46} Second, even though a parent or Indian custodian does not have a legal right to insist that tribal courts decline to hear a case, some tribal courts may nonetheless waive their right to jurisdiction. This is not an uncommon occurrence, especially in adoptions, because many tribes do not have their own adoption codes or tribal agencies which can supervise adoptive placements.\textsuperscript{47}

2. Tribal Court Jurisdiction Preferred, But is not Exclusive for Nondomiciliaries

For Indian children who are not domiciliaries of a reservation, the ICWA is also structured to prefer tribal court to state court jurisdiction. In child custody proceedings involving such nonreservation children, state courts may exercise original jurisdiction,\textsuperscript{48} but they must transfer the case to a tribal court upon the petition of either parent, the Indian custodian, or the tribe.\textsuperscript{49}

A request for transfer to a tribal court may be denied, however, if either parent objects, or for "good cause." This begins to sound as if the decision to transfer, or not to transfer, is subject to standard forum non conveniens concerns.\textsuperscript{50} If a request for transfer is denied, or if the tribal court declines to accept the transfer, the proceeding remains in the state court, albeit subject to other ICWA provisions.\textsuperscript{51}

As discussed below,\textsuperscript{52} the ICWA goal of shifting jurisdiction over cases involving the placement of Indian children to tribal courts is still far from being realized. First, the constraints of section 1360, and persistent controversy over the appropriate standards for determining "domicile" have operated to limit the scope of exclusive tribal jurisdiction envisioned by the Act. Second, as a


\textsuperscript{47} 1984 Oversight, supra note 4, at 24-34.

\textsuperscript{48} This is consistent with pre-ICWA principles that permitted state courts to exercise jurisdiction over Indian children living off a reservation in accord with the tenth amendment's reservation to the states of all powers not expressly granted to the federal government. Domestic relations has long been regarded as one of the areas over which the states can exercise their reserved powers.

\textsuperscript{49} 25 U.S.C. § 1911(b) (1982).

\textsuperscript{50} BIA Guidelines, supra note 36, at 67,590.

\textsuperscript{51} 25 U.S.C. § 1911(b), (c) (1982).

\textsuperscript{52} See infra text accompanying § N.
result of judicial inventiveness in finding “good cause” for denials, the number of transfers from state to tribal courts for cases involving nonreservation children has been much less than anticipated. Third, only a few states have entered into agreements with tribes, as authorized by the Act, to provide for the transfer of jurisdiction over custody matters to tribal courts, or to provide for concurrent state and tribal jurisdiction. Finally, some state courts avoid coming to terms with the Act’s jurisdictional preferences by deciding that certain kinds of cases are not within the Act’s “intended” scope.

G. ICWA Notice and Intervention Provisions

To ensure that tribal as well as parental interests are heard in ICWA cases which end up in state courts, the Act provides that the child’s tribe or Indian custodian shall have a right to intervene “at any point” in “any” proceeding for foster care placement or termination of parental rights. This language is broad enough to encompass both voluntary and involuntary proceedings. Moreover, a failure to allow the exercise of these intervention rights is one of the statutory grounds for an action to invalidate a foster placement or termination decree.

Despite these broad provisions on intervention, the Act explicitly mandates notice to a tribe, Indian custodian, or parent only in “any involuntary” state court proceeding, and then, only if “the court knows or has reason to know that an Indian child is involved.” If the party seeking involuntary foster placement or parental termination follows the procedures for giving notice spelled out in section 1912(a), and the tribe or custodian receiving notice fails to respond in a timely manner, the court can complete the case without further efforts to include the tribe or custodian. If proper notice is not given, however, the persons or tribe entitled to such notice can subsequently intervene in the proceeding, or petition to invalidate any final decree.

While it is clear that a child’s tribe has an explicit right to notice and to intervene in any involuntary state court proceeding, it appears as if it has a right to intervene but no right to notice in voluntary proceedings. Perhaps a right to notice in voluntary as well as

54. Id. § 1911(c).
55. Id. § 1914.
56. Id. § 1912(a). For discussion of the problem of determining whether a court “has reason to know” a child is of Indian lineage, see infra text accompanying § M(2).
57. Id. The recipient of notice has at least ten days to decide whether or not to intervene, and the court may grant an extension for at least some additional, but not an unlimited, amount of time.
involuntary proceedings can be implied on the grounds that the explicit and general right to intervene means little unless the tribe knows about a pending proceeding. A tribe which does not receive notice, but which nonetheless learns about a proceeding, can presumably intervene "at any time." Because this possibility poses serious risks to the finality and outcome of voluntary proceedings, it may be advisable for the attorney representing the parent who wants to terminate parental rights voluntarily, or for the state court handling the proceeding to notify the child’s tribe even if such notice is not explicitly required.

The question whether notice is necessary in voluntary proceedings is further complicated by the ambiguities about which "voluntary" proceedings are included in the Act’s provisions on tribal intervention. Foster care and termination of parental rights proceedings are mentioned in section 1911(c), but adoptions are not. Because many proposed adoptions of Indian children combine a voluntary relinquishment by the birth mother with an involuntary termination of the birth father’s rights, the father’s tribe, if any, would presumably have a right to notice of the termination proceeding and a concomitant right to address the issue of whether the mother’s proposed adoptive placement was in accord with the ICWA and tribal preferences. In proceedings which combine a voluntary termination of parental rights with a proposed adoption, the tribe’s right to intervene is also fairly clear, even if its right to notice is not. But what happens when the termination and the adoption are handled by separate proceedings? If the tribe intervenes in and influences the outcome of the termination proceedings, then it has also succeeded in influencing the outcome of any subsequent adoption. But, if the Act is read literally, the tribe might not have party status in the separate adoption proceeding. In contrast, if any termination proceeding is construed as necessarily including the issue of the child’s placement if termination is ordered, then the tribe would have a right to participate in the placement phase of the termination process. And, of course, adoption is a typical placement option once a voluntary or involuntary termination has occurred.

As discussed more fully below, state courts have generally allowed the child’s tribe to intervene in adoption proceedings, whether or not they are consensual, or are over the objection of one or both parents. But judges and lawyers remain uncertain whether notice to tribes in voluntary adoptions is mandatory or merely discretionary.

Just what does the right to intervene entail? In theory, the right of a child’s tribe to take part in a parental termination proceeding is not equivalent to a right to consent to, or to withhold consent from,

59. See infra text accompanying § O.
a proposed adoption. Indeed, the ICWA does not directly address the question of whose consent is necessary for the adoption of an Indian child, presumably leaving that determination to the law of the state in which the adoption occurs. Nonetheless, as suggested above, in the context of an involuntary proceeding, the tribe’s preferences are likely to affect both the termination decision and the subsequent placement of the child. In a voluntary adoption proceeding, the tribe’s preference will in some instances strongly influence the parent’s choice of prospective adoptors, and in others, be diametrically opposed to the parent’s choice. As indicated below, a particular court’s degree of commitment to the ICWA goal of preserving tribal communities will no doubt affect its decision on how to weigh the parent’s preferences against the tribe’s.

H. ICWA Standards for Termination of Parental Rights and Adoption

The ICWA purports to protect parental rights both by narrowing the grounds for removing children from their parents, and by increasing the burden of proof that must be sustained by the party seeking to terminate parental rights. Because they are federal laws, the ICWA standards supplement complementary state standards for removal and termination, and preempt any contradictory or inconsistent ones.

In contrast to most state laws, which permit the temporary removal of children from their families and their placement in foster care on a preponderance of the evidence standard, the ICWA requires a heavier burden of proof for Indian children. The court must find “clear and convincing evidence” that “serious emotional or physical damage” to a child is likely to result if the child remains with its parents or Indian custodian. Similarly, the ICWA burden of proof for terminating parental rights is more exacting than the “clear and convincing evidence” standard required by state laws pursuant to the United States Supreme Court’s Santosky ruling. In ICWA proceedings, parental rights cannot be terminated without proof “beyond a reasonable doubt” that the continued custody of the child by the parent or Indian custodian “is likely to result in serious emotional or physical damage to the child.”

The ICWA evidentiary standards for removing Indian children from their existing custodial environment are significant not only

60. An analysis of the distinction between the right to consent to, or to veto an adoption, and the more limited right to notice of the adoption proceeding, is in Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption).
61. See discussion of consent to adoption of an Indian child infra § 1.
62. See infra text accompanying §§ J, R.
because they are, in theory, more exacting than analogous state standards applicable to the parents of non-Indian children. Unlike state termination laws, which are directed exclusively at biological or adoptive parents, the ICWA standards apply to Indian custodians as well as to parents. Because the definition of “custodian” is general enough to include an Indian who has informally acquired temporary custody of an Indian child from a parent, in addition to those who have “legal” custody under state or tribal law or custom, the ICWA’s protection of the interests of the parent or Indian person who has custody of an Indian child is apparently substantial.

Other safeguards exist for protecting Indian parents against the unwarranted loss of their children and Indian children against unwarranted removal from their parents. The Act provides for the appointment of counsel for indigent Indian parents and custodians, and asks state courts to take testimony from “qualified expert witnesses” in any involuntary removal or termination proceeding. BIA guidelines suggest that these witnesses should be familiar with Indian culture and childrearing practices and have some experience working or living with tribal communities. No preference is given, however, to tribal representatives, who despite their lack of professional degrees, may nonetheless be well qualified to testify about the values and behavior of Indian parents. Without explaining what a “higher standard” is, the Act also requires that in any state proceeding under the ICWA, the court shall apply any higher federal or state standard for the protection of parental rights than might be available from the ICWA itself. Perhaps this is simply a reminder that if, for example, state or federal courts were to expand the scope of constitutional protection for the interests of unwed fathers, courts in ICWA proceedings would be bound by such rulings.

Although the lack of even minimally adequate funding for services to Indian families continues to be a major stumbling block against achievement of the Act’s goals, the ICWA does speak of preventing unwarranted terminations with remedial services and rehabilitation programs “designed to prevent the breakup of the Indian family.”

66. In most states, the rights of a child’s guardian or temporary or informal custodian to prevent an adoption can be waived or forfeited if in the best interest of the child to do so, whereas the rights of a parent to prevent an adoption can be waived or forfeited only upon a clear and convincing showing that the parent is unfit; Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption).
68. Id. § 1912(b).
69. Id. § 1912(e), (f).
70. BIA Guidelines, supra note 36, at 67,593.
72. Id. § 1912(d).
Whether any of the protections of parental rights described here have actually tipped the scales against involuntary removals of Indian children is a question explored below.\textsuperscript{73}

I. Consent to Adoption, Revocation of Consent

No provision of the ICWA indicates precisely whose consent is or is not necessary for the adoption of an Indian child. That determination presumably depends on the adoption statute of the particular state in which the adoption proceeding is commenced. These state laws have to be interpreted, however, in light of the ICWA provisions that deal with other aspects of adoptions. These include the jurisdictional, notice and termination of parental rights requirements described above, as well as the placement, revocation and recordkeeping provisions to be discussed below.

If a tribal court has jurisdiction over an adoption, the tribe’s codes or customs will determine whose consent is necessary. Because the concept of adoption as incorporated into the laws of the states is largely unknown in most Indian cultures, tribes are much less likely to have adoption codes than to have customary rules for placing children on a more or less permanent basis with relatives or other tribal members, without necessarily severing all ties between children and their biological parents.\textsuperscript{74}

In virtually all states, the consent of both parents will be necessary, if they were married to each other at or around the time of the child’s birth. For children born out of wedlock, the consent of the mother will be necessary, but the consent of the father will not be required unless he meets the ICWA definition of “parent” and has acknowledged or established his paternity according to the particular state’s formal or informal procedures for doing so.\textsuperscript{75}

ICWA provisions as well as state adoption laws would both have to be examined in order to determine whose consent is necessary if the parents are deceased, or if the parents do not have custody of the child, or if the rights of the parents have been terminated involuntarily. Thus, in some instances, an Indian custodian, who acquires custody of the child after a voluntary or involuntary removal from the parents, may have the right to consent in lieu of the parents. In other situations, the tribe itself may become the child’s guardian and be empowered to consent to an adoption. In still other situations, an agency—state, tribal or private—may be authorized to consent to an adoption after a parent’s rights are voluntarily or involuntarily relinquished. In sum then, the ICWA

\textsuperscript{73} See infra text accompanying § S.

\textsuperscript{74} See discussion infra § R(2).

\textsuperscript{75} Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption).
complicates rather than simplifies the possible responses to the question of whose consent is needed.

As for the procedure for obtaining a valid consent to the adoption of a child within the scope of the ICWA, no provision of the Act expressly governs the manner in which a voluntary consent to an adoption may be executed. Nonetheless, the provision on voluntary termination of parental rights implicitly pertains to consents to adoption because a direct legal consequence of a termination of parental rights is, of course, that the child can then be adopted.

Procedures for the voluntary termination of parental rights are spelled out in some detail in 25 U.S.C. section 1913 and are intended to ensure that any consent is both voluntary and informed. No consent, relinquishment, or surrender given by a parent of a child within the scope of the ICWA, or by the child’s Indian custodian, is valid prior to, or within ten days of, the child’s birth. A consent to terminate parental rights must be in writing, and must be recorded before a “court of competent jurisdiction,” which has to certify that the consequences of the relinquishment were explained, either in English or in any language understood by the parent, and that the parent appeared to understand them. The Act is not clear, however, about which courts are “competent.” Is the term meant to encompass any state or tribal court which is eligible in general to handle adoptions of Indian children? Or, is it limited to the specific court which, given the child’s domicile and the status of the adult parties, can exercise jurisdiction over this particular termination or adoption proceeding?

Despite its detailed requirements for the execution of a consent to termination of parental rights, the Act is silent on whether the birth parent may terminate in favor of particular prospective adopters, or alternatively, may only relinquish rights to an agency which will then be empowered to place the child for adoption. In other words, does the ICWA permit or restrict direct non-agency adoptive placements by birth parents? As with the question of whose consent is necessary, the validity of direct placements probably turns on the relationship between the ICWA, which seems not to explicitly forbid or permit them, and the laws of the particular state in which the adoption proceeding is brought.

Voluntary adoptive placements under the Act retain a significant element of instability. The consent of a parent can be withdrawn “at any time” and “for any reason” prior to the entry of a

---

77. See the discussion of the diverse procedures used in different states for obtaining the consent of parents of non-Indian children, Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption).
final decree of termination, or of adoption, "as the case may be." This language has been interpreted to mean that if a voluntary termination occurs prior to the placement of the child for adoption, or after a placement, but prior to the final hearing on the proposed adoption, the consent can be revoked only until the termination is final. If the termination and the adoption decrees are both entered at the same hearing, the parent can revoke consent until that hearing occurs.

Although the Act does not specify how a withdrawal of consent is to be executed, it is quite explicit about the consequences of a withdrawal. The child "shall be returned to the parent." For a withdrawal of consent prior to the entry of a termination or adoption decree, no court has the authority to determine whether the child's best interests justify the child's return. Instead, the consequences of a revocation of a voluntary consent are, in theory, more clearcut and absolute than they often are with regard to adoptive placements of non-Indian children. The parent must be allowed to reclaim custody of the child.

Even a final decree of adoption is not immune to challenge. In constrast to most states, which permit the validity of a necessary parental consent to be questioned on the grounds of fraud or duress until the decree is entered, or for a short time thereafter, the ICWA provides that for up to two years after the entry of an adoption decree, and for longer, if allowed by state law, a parent can challenge a consent as the product of fraud or duress and can petition to have the adoption set aside on those grounds. Moreover, any Indian child subject to a state court termination proceeding, any parent or Indian custodian from whom the child was removed, and the child's tribe may petition to invalidate a termination decree if any of the ICWA provisions on jurisdiction, notice, or substantive standards for termination are violated. The federal Act has no time limit for this kind of challenge, and it is not clear if a state's own time limits on appeals of a final decree would apply.

If an adoption decree is set aside because of an invalid consent, or for any other reason, and a biological parent or former Indian custodian seeks the return of the child, the state court is required to return the child unless it is shown that such return is not in the

79. Id. § 1913(c).
82. Adoption Law and Practice, supra note 5, at ch. 8 (Thompson & Hollinger, Contested Adoptions: Strategy of the Case).
83. See id. on challenges to invalid consents, where it is noted that in some states, the adoption can be attacked for a year after the final decree if fraudulently procured.
85. Id. § 1914.
child's best interests.\textsuperscript{86}

\textbf{J. ICWA Placement Preferences}

For "any adoptive placements" of Indian children pursuant to state law, the ICWA mandates placement preferences in favor of the child's extended family, other members of the child's tribe, or other Indian families.\textsuperscript{87} Only if no one is available from these categories can the child be placed in an unrelated or non-Indian family. Placement with a non-Indian family is not barred, but it certainly is discouraged.\textsuperscript{88}

As discussed more fully below,\textsuperscript{89} adoptive placements under the ICWA have not followed the Act's preferences nearly as often as the statutory language suggests they should. For one thing, there are statutory "good cause" and "parental preference" exceptions.\textsuperscript{90} These are frequently invoked to allow a parent's placement choice to prevail over tribal and statutory preferences in voluntary adoptions. The good cause proviso is also used by state agencies who have acquired the right to place a child for adoption after a voluntary or involuntary termination of parental rights. These agencies argue that no "suitable" Indian adoptors are available. Finally, although the Act requires that a record be kept by the state of any placement, and of the efforts to comply with the placement preferences, there are no statutory penalties for failure to abide by these preferences.

The Act's explicit requirement that ethnic or tribal identity be used as a basis for child custody decisions may pose constitutional problems. Since the passage of the ICWA, the United States Supreme Court has ruled that state courts violate the equal protection clause of the fourteenth amendment if they change a child's custody solely on the basis of racial considerations.\textsuperscript{91} The ICWA is federal legislation that requires state courts to use a child's ethnic or tribal identity when placing a child in foster care or for adoption. This poses several federalism problems: can Congress dictate the jurisdictional requirements and substantive standards of state court deliberations?\textsuperscript{92} Can Congress require state courts to do what, if

\textsuperscript{86} Id. § 1916.
\textsuperscript{87} Id. § 1915(a).
\textsuperscript{88} Cf. similar policies of preferring Black adoptive couples for Black children and mixed-racial children, discussed in Adoption Law and Practice, supra note 5, at ch. 3 (Bosky, Placing Children for Adoption).
\textsuperscript{89} See infra text accompanying § R.
\textsuperscript{90} 25 U.S.C. §§ 1915(a), (c) (1982).
\textsuperscript{92} The Federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738(a) (1982) is another example of congressional regulation of certain aspects of state court custody proceedings; its constitutionality has not been challenged.
they were acting on their own, might be suspect under the fourteenths amendment? Can Palmore93 be distinguished from the situations envisaged in the ICWA, where presumably ethnic or tribal identity is to be used not to reinforce racial stigmas, but affirmatively, to help redress the adverse consequences of separating Indian children from their culture, and to promote individual and tribal welfare? At least one court has held the Act constitutional under the Indian powers clause, the tenth amendment, and the due process and equal protection clauses of the fifth amendment.94 It is not clear whether other challenges to the ICWA's constitutionality will be raised in the near future, if at all.

K. The Legal and Social Aftermath of Adoptions Governed by ICWA

Under certain circumstances, the ICWA provides for the disclosure to Indian adoptees over the age of eighteen of both nonidentifying and identifying information about their biological parents and their Indian heritage. This is consistent with the recent changes in the laws of many states that require the compilation and sharing with the parties to an adoption of personal histories and background information, and which also permit the disclosure of the identity of the parties upon mutual consent.95 It is also consistent with the basic ICWA goal of preserving Indian culture and of maintaining ties between children of Indian descent and their tribes.

A general consequence of the adoption of non-Indian children is the termination of the adoptee's rights to inherit, or to receive any other economic benefits from or through members of the adoptee's original biological family, except for those benefits that have vested prior to the adoption.96 When an Indian child is adopted, however, any rights or benefits associated with the child's tribal membership, or with eligibility for tribal membership, are not terminated. In order to protect an Indian adoptee's access to these rights or benefits, the ICWA provides that the state that granted the adoption, and the Secretary of the Interior, who is supposed to maintain a central registry of all adoptions completed since 1978, must disclose any information relevant to an adoptee's eligibility for tribal membership to any Indian adoptee over eighteen, or to the adoptive parents or tribe.97

Any state court that issues an adoption decree involving an In-

93. 406 U.S. 429.
95. ADOPTION LAW AND PRACTICE, supra note 5, at ch. 13 (Hollinger, The Aftermath of Adoption: Legal and Social Consequences).
96. Id. at chs. 12-13.
97. 25 U.S.C. §§ 1917, 1951 (1982). Tribal spokesmen claim that many parents of Indian children who place their children privately for adoption by non-Indians try to evade the ICWA requirements. As a consequence, many adoptions of
Indian child is to provide the Secretary of the Interior with a copy of the decree, along with the name and tribal affiliation of the child, the names and addresses of the biological parents, if known, the names and addresses of the adoptive parents, and the identity of any agency that participated in the placement. An adult Indian adoptee may have access to this information, including the names of the biological parents, unless there is on file with the Secretary an affidavit from the parent or parents requesting anonymity.98

Although the Act does not explicitly grant adult Indian adoptees a right to learn the identities of their birth parents, it is nonetheless clear that these adoptees can learn a great deal about their heritage if they are interested in doing so. And in the absence of a “no consent” form, they may also learn who their original parents are. This potential for maintaining a modicum of “openness” after an adoption may make the prospect of allowing Indian children to be adopted by non-Indians more palatable to some tribes as well as to some birth parents.

L. Implementation of ICWA

In the ten years since the enactment of the ICWA, its implementation has been uneven. Although all states are bound by its provisions, only a handful have incorporated specific references to the Act in their state adoption or child dependency codes.99 Most state social services agencies have yet to enter cooperative agreements with tribal governments about how to handle proceedings governed by the Act.100 The grant of exclusive jurisdiction to tribal courts over matters involving Indian children domiciled on reservations has been of limited effect in the section 1360 states because so few tribal governing bodies have petitioned, or have had their petitions granted, to resume jurisdiction from state courts pursuant to 25 U.S.C. § 1918.101 In California, for example, which has the largest Indian population of any state,102 and Alaska, whose Native Village members come within the Act’s scope, most tribal governments have not yet been permitted to establish or reestablish their own

---

100. 1987 Oversight, supra note 4; 1984 Oversight, supra note 4, at 24-34.
101. Id.
102. California had over 200,000 Indians from a number of different tribes, according to the 1980 Census; Oklahoma was next at approximately 170,000; then Arizona with approximately 152,000; then New Mexico with approximately 105,000.
courts.103

Many state courts of original jurisdiction, which are accustomed
to handling adoptions, as well as a number of state appellate courts,
have concluded that the ICWA is not applicable to certain kinds of
adoptions. Even when they agree that the Act is applicable, many
courts have construed its jurisdictional, procedural and substantive
provisions so narrowly as to raise doubts about its effectiveness in
reducing the rate of placement of Indian children in non-Indian
homes.

What combination of factors accounts for the uneven imple-
mentation of the ICWA? No doubt all of the following play some
role: the relatively small number of lawyers and judges who are
knowledgeable about the ICWA or sympathetic to its goals, the iner-
tia of state social services bureaucracies and their insensitivity to
traditional Indian cultures, the weakness of particular tribal govern-
ments, uncertainty about the degree to which the Act supersedes
state laws, and the lack of funds to attack the underlying social and
economic problems that do indeed pervade many Indian commu-
nities and arouse outsiders to “rescue” Indian children. Despite these
factors, evidence of a more genuine commitment to the ICWA goals,
and a willingness to construe its provisions more liberally in favor of
tribal prerogatives, is showing up in state courts and among child
welfare professionals. At the same time, however, many parents of
Indian children attempt to evade the ICWA goal of tribal control
over Indian children by intentionally placing their children with
non-Indian adoptors.

M. Judicial Resistance to the ICWA: Deciding the Act is not Applicable

By narrowly construing ambiguous provisions in the Act, espe-
cially those pertaining to notice and to the definitions of “Indian
child” and “parent,” a number of courts have concluded that the
Act does not apply at all to certain situations.

1. Construing the Definition of “Indian Child”

The question whether a child meets the Act’s definition of In-
dian child104 often arises when a child is born out of wedlock to a
non-Indian mother and an Indian father, and the mother wants to
relinquish the child, either in a direct placement with prospective
adoptors, or to an adoption agency. Unless the Indian father ac-
knowledges or establishes his paternity, he is not considered a “par-

103. In re K.E., 744 P.2d 1173 (Alaska 1987); Native Village of Nenana v. State,

104. See discussion supra § E. An “Indian child” is defined as an unmarried per-
son under eighteen who is either a member of an Indian tribe, or the biological
child of a member of an Indian tribe and eligible for membership in the tribe.
ent" of the child. If the father does not know about the child's birth, and the mother declines to identify him, the child may not be characterized as the child of an Indian parent. This child has, in the Act's terminology, only one parent, the non-Indian mother. Although the child is of Indian heritage and would probably be eligible for tribal membership if the putative father's paternity were established, courts often treat the child as outside the scope of the Act if, at the time the proposed adoption is commenced, the child's Indian status is unclear. They then allow the adoption to proceed without regard to the ICWA's placement preferences or requirements for tribal notice.

Arizona courts have ruled, for example, that until such time as the putative Indian father of a child born to a non-Indian mother acknowledges or establishes paternity, the ICWA is not applicable to a proposed adoption of the child. In one case, the mother wanted to place the child with non-Indian adoptive parents and did not want any contact with the biological father. Although she admitted that the father was probably an Indian and a tribal member, the court said that until he came forward and took affirmative steps to establish his paternity, the child's eligibility for tribal membership remained unclear and the adoption could be granted without reference to the ICWA, and without allowing the alleged father's tribe to intervene.

The New Jersey Supreme Court has similarly ruled that before a child whose putative father is Indian can be deemed an "Indian child" within the scope of the ICWA, the father must acknowledge or establish his paternity according to state or tribal law standards for determining paternity. Unless his status as a lawful parent is clear prior to the entry of a judgment of adoption and termination of parental rights, the Indian father and his tribe have no standing under the ICWA to intervene. The court found that Congress intended to defer to state or tribal procedures for acknowledging or establishing paternity, so long as they are consistent with constitutional principles requiring that unwed fathers be given a realistic opportunity to enter into a legal relationship with their child. In this particular case, the court upheld the trial court's conclusion that the ICWA was inapplicable, not on the grounds that it was a private placement by a non-Indian mother, but on the grounds that the putative Indian father had failed to abide by New Jersey's procedures for establishing that he was in fact the child's legal parent.

Tribal representatives complain that state trial courts routinely

follow the approach of the Arizona and New Jersey appellate courts and rule that the ICWA does not apply to proceedings involving children of apparent Indian lineage when the mother is unwed and non-Indian, and the putative father, who is Indian, has not acted to acknowledge or establish his paternity according to the relevant state or tribal procedures. In these situations, neither the putative father nor his tribe are permitted to intervene in the adoption.

2. ICWA Notice Requirement Excused if Court has no Reason to Know Child is Indian

Although failure to provide notice is grounds for reversal of an ICWA proceeding, there is a limitation on when notice is required. The notice provisions are not triggered unless "the court knows or has reason to know that an Indian child is involved." In order to invalidate a child placement for failure to follow ICWA criteria, or for lack of notice to an Indian parent or to a tribe, it is not sufficient for a parent or tribe to prove that the child is in fact an Indian. They must prove that the state court knew or had reason to know that the child is an Indian. If, for example, a non-Indian birth mother does not identify a child's putative Indian father, and does not divulge that the child is of Indian descent, the child's status may not be discovered. Similarly, an Indian mother may deny or misrepresent her own and the child's ethnicity. This is more likely to happen in states where adoptions of Indian children occur infrequently than in the western and northwestern states where they are much more common. An adoption decree entered on the basis of the court's good faith ignorance of the child's ethnic status cannot be set aside for failure to provide notice to the tribe with which the child may be affiliated.

In a recent New Jersey private adoption case, a birth mother claimed her child was Caucasian and withheld from the adoptors as well as from the court the fact that she herself was part Indian and that the child's putative father was a member of the Rosebud Sioux Tribe of South Dakota. The New Jersey superior court upheld the trial court's refusal to set aside the adoption after it learned of the child's Indian heritage. It was not reversible error, the court said, to dispense with notice to the Rosebud Sioux Tribe, and to approve the proposed adoption without regard to the ICWA placement preferences, because the trial court had no reason to know that the child was an Indian.

Attorneys should be wary of extending the reasoning of the trial

109. In re Adoption of Child of Indian Heritage, 219 N.J. Super. 28, 529 A.2d 1009 (1987) (the record is clear that neither the judge nor the adopting parents had reason to believe that Baby Larry was an Indian child; hence, there was no error in initially not applying the ICWA in the termination and adoption proceedings). The
court in the New Jersey case to other situations. As noted above, a child’s tribe has a right to intervene “at any time” in an adoptive placement. Once the tribe hears of the proceeding, it should be allowed to participate to show that the child fits the definition of “Indian child” and to insist that the Act’s criteria apply. The trial court’s good faith lack of awareness of the child’s Indian status can excuse its failure to give formal notice to the tribe at an earlier stage of the proceeding, but it should not excuse a refusal to permit the tribe to argue for the applicability of the ICWA once the tribe learns about the proposed adoption through other means.

Moreover, if a tribe wishes to challenge a state court’s jurisdiction on the grounds that a child is domiciled on its reservation and should be subject to its exclusive jurisdiction, the state court’s “innocence” should similarly not allow it to escape deferring to the tribal court once the “truth” is known. In other words, a state court’s good faith lack of knowledge about a child’s Indian status should excuse an initial failure to notify the child’s tribe, but should not excuse other jurisdictional and procedural errors once accurate information is placed before the court.

Neither the Act nor BIA guidelines suggest any penalty for a parent’s intentional misrepresentation of a child’s Indian heritage. But as an officer of the court, the parent’s lawyer may have a duty to disclose, if he or she has reason to believe the child is an Indian.

If this duty exists, failure to bring the child’s status to the court’s attention could be grounds for disciplinary action against the attorney, or might even expose the attorney to civil liability to a tribe whose participation in an adoption was precluded because of the attorney’s deliberate nondisclosure of the child’s lineage.

What if the birth mother, who is non-Indian, does not know that the father is an enrolled member of an Indian tribe? In such circumstances, she is under no duty to find out “the truth.” If child welfare workers or adoption agencies are involved in the case, however, they may have some duty to attempt to learn who the father is and whether he has a tribal affiliation. This is analogous to the duty an adoption agency would have under the laws of most states to

---

111. In the New Jersey case, the Rosebud Sioux tribe did not attempt to intervene, and the putative Indian father did not act to acknowledge his paternity until after the adoption decree was entered. If, however, the tribe had attempted to participate during the pendency of the adoption in order to assist the father in establishing his paternity and in order to demonstrate the child’s eligibility for tribal membership, the court should have permitted such intervention.

112. Pursuant to the BIA Guidelines, supra note 36, at 67,586, a judge is deemed to have reason to inquire into a child’s ethnic status if, among other things, a lawyer, who is an officer of the court, has knowledge that the child may be an Indian.
attempt to identify and locate a putative father, if the mother exercises her right not to identify him, or honestly does not know of his whereabouts.\footnote{113. Adoption Law and Practice, supra note 5, at ch. 2 (Hollinger, Consent to Adoption).}

Attorneys should not encourage or condone their clients' misrepresentations about a child's heritage. Ethically, it is preferable to face up to the consequences of letting the court know the child may be an Indian, including the likelihood that the tribe will be notified of the proposed placement, than to remain silent and then have the court, or the social workers, discover independently that the child is Indian. It is also preferable from a practical and humane perspective, because it reduces the risks that the adoption will be subject to collateral attack by the other parent or the tribe after the decree is entered. In addition, if uncertainties about children's lineage are not resolved, they may lose their chance to ever become tribal members, if they wish to do so, and to claim whatever economic or other benefits follow from tribal enrollment.

Quite different from the situations in which a non-Indian birth mother wants to circumvent the Act's placement preferences and notice requirements are the situations in which an Indian parent wants the child to be within the Act in order for the parent to take advantage of the Act's stringent standards for terminating parental rights. This was an issue, for example, in a Michigan case where a mother tried to establish her own and her child's eligibility in first one, then another Indian tribe, in order to get the presumed benefit of the beyond a reasonable doubt standard for terminating her rights.\footnote{114. In re Johanson, 156 Mich. App. 608, 402 N.W.2d 13 (1986) (after being turned down by the Chippewas, the mother was admitted to the Cherokee Nation of Oklahoma, but not until after the entry of the decree terminating her parental rights).} The Michigan Court of Appeals upheld the trial court ruling that at the time of the termination hearing the mother had not shown the necessary tribal affinity to allow her son to fit within the category of "a biological child of a member of an Indian tribe." Hence, the ICWA standards were found inapplicable to the case, and neither the Chippewas nor the Cherokees were ever notified of the involuntary termination proceeding. Although the trial judge acknowledged that the child was probably of Indian lineage, and referred to the ICWA placement preferences in his dispositional order, he refused to allow the mother more time to establish her tribal ties.

In contrast to the approach of the New Jersey and Michigan courts, other trial courts are coming to realize that unless they notify a child's alleged tribe of a pending proceeding, the question of the Act's relevance to the child may not be adequately resolved. A trial
court's order terminating parental rights is becoming easier to va-
cate because of failure to notify either the mother's or the father's
tribe in order to give them an opportunity to prove that the child is
within the ICWA. Citing the BIA guidelines' suggestion that "all
ambiguities be resolved in favor of the result most consistent" with
ICWA goals, a Kansas appellate court reversed a lower court's
order terminating the parental rights of a mother who did not estab-
lish her membership in the Cherokee Nation until six weeks after
the termination order. The trial court and the state social workers
were aware that the child had Indian blood, said the appeals court,
and should have acted sooner to notify the Cherokees.

Tribal representatives who laud the result in this Kansas case
argue that in all cases involving the placement of a child, the court
or the child welfare agency or the attorneys have an obligation to
inquire about the child's lineage. If there is any possibility that a
child might have Indian blood, they want the proceedings to be
delayed until the child's status can be determined. In other words,
they want to restrict the circumstances in which "no reason to
know" can justify a refusal to apply the ICWA.

3. The "Existing Indian Family" Gloss for Determining
ICWA Applicability

Another rationale has been used for deciding that certain adop-
tion proceedings are not within the scope of the ICWA. It is an ar-
gument that is less explicitly tied to the statutory language than
either of the two approaches just discussed: the claim that the child
of a putative Indian father is not covered unless the father meets the
Act's definition of "parent," or the claim that the Act does not apply
when a court does not know or have reason to know the child's In-
dian status. This third argument is based on a particular and narrow
judicial construction of what is intended by the ICWA goal of
preventing the destruction of Indian families and tribal communi-
ties. In essence, this position is that if a child, albeit an Indian, is
not part of a "genuine" or "existing" Indian family, then the Act
should not apply. What can be called the "existing Indian family"
gloss on the requirements for ICWA applicability has shown up pri-
marily in situations like those sketched above: a child born out of
wedlock to a non-Indian mother and Indian father, and who has
lived since infancy with the mother in a non-Indian community, and
has had little if anything to do with the father or with the father's
tribal relatives.

To date, the Supreme Court of Kansas is the major proponent

115. BIA Guidelines, supra note 36, at 67,585-86.
117. 1987 Oversight, supra note 4.
of this judicial gloss on the question of who is and who is not covered by the ICWA. In the influential Baby Boy L. case, a non-Indian mother placed her out-of-wedlock child with a non-Indian couple who hoped to adopt him. The unwed father, a five-eighths Kiowa Indian tribe member took part in the adoption proceeding while in a Kansas reformatory. The trial court found that although the father had acknowledged his paternity, he was unfit. The court terminated his parental rights, and then, on the basis of the mother's consent and a favorable report on the adoptive home, approved the adoption as in the child's best interest. The Kiowa tribe intervened to appeal on the grounds that the father's rights should not have been terminated, that the ICWA was violated, and that even if the father was not granted custody, the tribal community should be granted custody pursuant to the ICWA placement preferences.

In ruling that the ICWA does not govern the case, the Kansas court described it as one where the state is not trying to break up an existing Indian family. Prior to the child's placement, he had lived exclusively with his non-Indian mother and had no exposure to Indian culture. The mother threatened to withdraw her consent to the adoption and reclaim the child if there was any chance that the child would end up in the custody of the father or of the Kiowa tribe. The court said that the ICWA was not intended to consign a child to an Indian environment over the express objections of its mother.

The Kansas opinion is, to say the least, hostile to the Kiowa tribe's interest in acquiring custody of the child. Technically, the ICWA should apply to any adoption proceeding concerning this boy because his father, who is a member of the Kiowa tribe, acknowledged his paternity, and is thus a "parent" under the Act. Moreover, the boy was eligible for membership in the tribe because of his father's tribal status. If the ICWA had been found applicable, it would still be possible to terminate the father's rights, but the father's tribe would have a clear statutory right to participate in the proceedings, and the grounds for termination would have to meet the "beyond a reasonable doubt" evidentiary standard.

If the father's rights were terminated pursuant to the ICWA standards, a sharp conflict would then arise between the placement preferences of the Act and the preferences of the non-Indian mother. The mother's preferences could prevail, as against the tribal and ICWA placement preferences, if the court found that her wishes constituted "good cause" for rejecting the tribe's preferences. Good cause might be based on the fact that the child had no previous exposure to Indian culture and presumably would have a

difficult time if suddenly thrust into tribal life. In other words, the court could have found that the ICWA did apply, but nonetheless could conclude, pursuant to the ICWA, that the mother’s proposed placement with a non-Indian couple would better serve the child’s needs than a placement with the Kiowa tribe. Alternatively, the court could permit the mother to withdraw her consent and reclaim her custody of the child.

Instead of proceeding pursuant to the ICWA, however, the Kansas court ruled that the ICWA can be invoked only to protect a child against an unreasonable or unnecessary severance from its Indian culture. The Act does not apply, said the court, when the result would be to “force” a non-Indian parent to turn over her child to an Indian community with which neither she nor the child has had any prior contact.

The Kiowa tribe attempted, without success, to appeal the decision of the Kansas Supreme Court in Baby Boy L. to the federal courts. The Tenth Circuit Court of Appeals upheld the district court’s ruling that a state court’s determination that the ICWA did not apply to a particular adoption proceeding is binding on the federal courts unless it is “so fundamentally flawed as to be denied recognition under 28 U.S.C. section 1738 [the full faith and credit statute].” That statute requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state in which the judgments were rendered.

In addition to allowing the rationale of Baby Boy L. to prevail, at least in Kansas, this federal appeals court decision also suggests that the federal courts will be loathe to entertain tribal challenges to state court rulings on the applicability of the ICWA. This is the clear implication of several other federal appeals court rulings, at least in the Tenth Circuit.

---

122. Navajo Nation v. District Ct. for Utah Co., 831 F.2d 929 (10th Cir. 1987) (Utah Supreme Court ruling that under ICWA, tribal courts had exclusive jurisdiction over adoption of Indian child domiciled on Navajo reservation moots jurisdictional issue for federal courts); Kickapoo Tribe of Okla. v. Rader, 822 F.2d 1493 (10th Cir. 1987) (reverses state court termination of putative Indian father’s rights because of unconstitutional denial of due process, but defers to state court decision that ICWA is not applicable to adoptive placement of child of non-Indian mother and putative Indian father). For a discussion of whether Indian parents or tribes who are aggrieved by a state court ruling on ICWA jurisdiction can seek recourse in federal court, see ADOPTION LAW AND PRACTICE, supra note 5, at ch. 4 (Schur, Adoption Procedure).
In sharp contrast to the Kansas approach is a recent ruling of the Washington Court of Appeals.\textsuperscript{123} A lower court had granted custody of a child born out of wedlock to the parents of the child's non-Indian mother. The child had lived with the grandparents for more than five years when the putative Indian father, who had never supported the child, showed up and demanded that the custody order be set aside because neither he nor his tribe had received notice. The Washington appeals court deferred to the father and ruled that the fact that the child was by definition an Indian under the ICWA meant that the custody hearing was invalid because neither the putative father nor the tribe had been notified. Explicitly rejecting the interpretation of the Kansas court, the Washington court said the fact that the child had never lived in an Indian family or on an Indian reservation was not one of the exceptions in the ICWA for denying a tribe a right to intervene.

While the Kansas opinion tilts far in the direction of denying a tribe any role in an adoption proceeding involving a child who has never had contact with Indian society, the Washington opinion goes quite far in the opposite direction of allowing a child who has lived all his life without any contact with his Indian father or his tribe to be turned over to the tribe. It also illustrates the consequences of the apparently unlimited time in which a parent or a tribe can collaterally attack a placement order for violations of the ICWA.\textsuperscript{124} In the absence of any provision in the ICWA setting a time limit on the kinds of collateral attacks permitted by the Act, it is not clear whether a state statute of limitations would apply.

The South Dakota Supreme Court has agreed with its Kansas counterpart that the ICWA is not applicable if there is no "existing Indian family" threatened with the loss of an Indian child.\textsuperscript{125} Although acknowledging that there was no express statutory exception for Indian children who have not been raised in an Indian family or tribal community, the South Dakota court said that it was not the intention of the ICWA to include within its scope children who have not already been exposed to their Indian heritage. The South Dakota court concluded that an "implied" requirement of the ICWA is that an Indian child has to be part of an existing Indian family before the Act can apply. A similar result was reached by a Missouri appeals court.\textsuperscript{126}

If in coming years the Baby Boy L. approach is not repudiated, the "existing Indian family" gloss on the express statutory requirements for ICWA applicability could significantly decrease the number of adoption proceedings that are found to be within the

\textsuperscript{125} Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987).
\textsuperscript{126} Miller v. Miller, 703 S.W.2d 609 (Mo. Ct. App. 1986).
Act's scope. Particularly vulnerable to being excluded from the Act are voluntary adoptive placements of Indian children by non-Indian parents who have resided with their children outside a reservation. The prospect that such private placements will be made, without reference to ICWA notice requirements or placement preferences, angers many Indian tribes and their legal advisors. They have beseeched Congress to amend the ICWA to preclude the use of the "existing Indian family" gloss on the scope of the ICWA. Eloquent support for their position comes from the New Jersey Supreme Court in a recent and well-reasoned critique of the Baby Boy L. approach as being inconsistent with the language of the Act as well as with the Congressional intent that the Act reach and protect all Indian children.

N. Disputes about ICWA Jurisdictional Provisions

Even when they concede that the ICWA is applicable, some courts have not accepted the basic policy of the ICWA, that disputes about the placement of Indian children should whenever possible be resolved by tribal courts rather than state courts. Controversy about the criteria for determining "domicile" is the chief manifestation of this resistance. Especially troublesome for state courts is whether they have to defer to federal principles of domicile, or may continue to use traditional state law principles. The stakes are high: if at the commencement of an ICWA proceeding, an Indian child is found to be a reservation domiciliary, the tribal court will have exclusive jurisdiction. If the child is found to be domiciled off the reservation, a state court can exercise jurisdiction, subject to the somewhat discretionary transfer provisions.

1. Impact of Domicile Rules on Exclusive Jurisdiction of Tribal Courts

All courts agree that at birth a child takes the domicile of the parents, if they are married, or of the mother, if she is unwed and the father has not acknowledged paternity. Domicile is generally defined as the place where a person is, or has been, physically present, and which is intended to be the person's permanent home. Despite this common starting point, there is no uniformity among the states for deciding how or when a person's domicile can change, or when a child's domicile can become different from that of the

127. See, e.g., 1984 Oversight, supra note 4 (statements from Navajo Nation, Cherokee Nation, American Indian Law Center); 1987 Oversight, supra note 4.
129. See discussion supra § F.
parents. If, for example, a mother's consent to her child's adoption, or her transfer of custody to prospective adoptors, is found to meet a state's standards for "abandonment," then the child's domicile will be considered in some states to have changed from the mother's to that of the adoptors, who will thereafter stand in loco parentis to the child. In these circumstances, if the adoptors are non-Indians, the tribal court will lose its exclusive jurisdiction. Similarly, if living temporarily off a reservation is considered the equivalent of a change of domicile for ICWA jurisdictional purposes, a mother can easily change her own as well as her child's domicile with a resultant loss of tribal jurisdiction. In some states, the mother's and child's domicile may be treated as identical until a final decree of termination or adoption is entered, even if they live apart from each other. If this is so, then the mother's "abandonment" of the child will not affect tribal jurisdiction, but her change of domicile will.

When a particular state's rules make it easy for non-Indian adoptors to claim that an Indian child who has been placed with them acquires their domicile, those rules may arguably be preempted by a federal approach to domicile that is more consistent with the ICWA policy of favoring tribal court adjudication. This federal claim would posit that a child's domicile remains that of its married birth parents, or of its unwed mother, and does not change until the entry of a formal decree of termination or adoption.

When Indian parents want to place their child for adoption by non-Indians, they typically argue for an interpretation of the rules of domicile that permits state court jurisdiction. By contrast, a tribe or Indian parents who object to an adoption, or who are defending against an involuntary termination action, will typically argue for an interpretation of domicile that permits tribal court jurisdiction. Recent state court rulings, with one interesting exception, have increasingly scrutinized state domicile standards in light of the ICWA policy of favoring tribal courts and have concluded that state principles have to yield to the policy of the federal law.

Arizona appellate courts are consistent in ruling that if a child's mother is domiciled on the reservation at the time she gives birth, the child will be treated as having the same domicile as the mother even if the birth occurs off the reservation. In one case, an Indian mother appealed a trial court order terminating her parental rights and approving the child's placement by an agency with adoptive parents. The Arizona Court of Appeals ruled that the ICWA allowed her to revoke her earlier voluntary relinquishment of the child and to reclaim custody of her child. More importantly, the

---

appeals court concluded that the trial court should have deferred to
the exclusive jurisdiction of the tribal court on the mother's reserva-
tion in Montana. Even though the fifteen year old mother had relin-
quished her child to a Catholic agency in Nevada, which had then
placed the child with prospective adoptive parents in Arizona, the
mother and her child remained domiciliaries of her Montana
reservation.

In addition, the court said it could not consider the prospective
adoptors' claims that the evidence in Arizona about the child consti-
tuted "good cause" for refusing to transfer the case to the Montana
tribal court. Such considerations are relevant only to disputes
where state and tribal courts have concurrent jurisdiction, and not
to this one, which is subject to exclusive tribal court adjudication.
The adoptors' other claim, that the transfer of custody back to the
birth mother would emotionally harm the child, is not appropriate,
said the court, because the ICWA mandates the return of the child
to the birth parent who withdraws her consent at any time prior to a
final adoption decree.

The Arizona courts' analysis of the relationship between jurisdic-
tion and domicile in ICWA proceedings is echoed in decisions of
the New Mexico courts. These courts have ruled that tribal
courts cannot be deprived of their exclusive jurisdiction over adop-
tions of Indian children simply because a birth mother who is a res-
ervation domiciliary gives birth off the reservation or executes a
consent to adoption in a state court. The prospective adoptors
cannot stand in loco parentis for the purpose of giving the child their
domicile until an adoption decree is final. In the interim, the child's
domicile remains that of the birth mother, even though she has
placed the child off the reservation. To find otherwise would under-
mine the principle of tribal sovereignty that lies at the heart of the
ICWA. In upholding the claims by tribal courts to exclusive jurisdic-
tion, the Arizona and New Mexico appellate rulings chide state
trial courts for being slow to recognize their obligation to construe
state domicile rules in ways that are consistent with the ICWA's
commitment to expanding tribal court jurisdiction.

2. Significance of Utah's Halloway Ruling

To date, the ruling of the Utah Supreme Court in Halloway is
the most important vindication of the principle that state standards
for determining domicile have to yield to federal ones whenever the
state standards would undermine the ICWA's basic intentions. The

---

court found that the Act’s preferences for tribal court adjudication of Indian child custody proceedings would be defeated if it were possible to change a child’s domicile from a reservation to a different locale simply by a short term move, or by transferring custody informally to non-Indian prospective adoptors. To be consistent with the ICWA’s goals, the court held that Utah’s laws of domicile and abandonment cannot operate to deprive the Navajo Nation of its exclusive jurisdiction over the proposed adoption of an Indian child by a non-Indian Mormon couple.

In many respects, Halloway is an emblem of the potentially tragic consequences of disputes about the placement of Indian children: the reinforcement of bitter and hostile feelings between certain Indian and non-Indian communities, the exploitation of ICWA’s ambiguities by all parties in order to delay the resolution of a dispute, and the contradictions between vindicating tribal authority and promoting the welfare of Indian children.

Born in 1977 to Cecelia Saunders, a full-blooded Navajo and domiciliary of a New Mexico Navajo reservation, Jeremiah Halloway lived on the reservation and was cared for, first by his mother, and later by his maternal grandmother. In 1980, his maternal aunt Polly, a Mormon convert, removed him from the reservation, apparently with his mother’s consent, and took him to Utah where she left him with Dan and Pat Carter, a childless Mormon couple. The aunt did not want Jeremiah placed by a Navajo agency in another Indian home because she feared they would have drinking problems similar to those plaguing his own family. Several months later, Cecelia executed a consent to her son’s adoption by the Carters in a county court in Utah. Although the court ordered the Carters’ attorney to notify the Navajo Nation of the pending adoption, he did not do so until five months later.

During the next two years, Jeremiah remained with the Carters, but no final adoption decree was entered. Much of this time was spent in informal negotiations between the Navajos and the Carters for the return of Jeremiah to the reservation. When these efforts failed, the Navajos formally intervened in the state proceeding in 1982 and demanded that the trial court dismiss the proceedings and recognize the exclusive jurisdiction of the Navajo courts. In denying the tribe’s request, the trial court ruled that the deliberate change in Jeremiah’s residence by his mother from the reservation to Utah, where the Carters lived, meant that his domicile at the time of the commencement of the adoption was in Utah, thus precluding the Navajos from seeking exclusive jurisdiction under ICWA section 1911(a). It also found “good cause” to deny a transfer request pursuant to section 1911(b) “in view of the long period of time” the boy had lived with the Carters, who had come to stand in loco parentis.
Between 1982 and 1985, the Navajos tried without success to convince the Utah court to reconsider its jurisdictional ruling, and Cecelia withdrew her previously executed consent to Jeremiah's adoption. Instead of returning the boy to his mother upon her revocation of her consent prior to the entry of an adoption decree, as section 1913(c) mandates, the trial court allowed the Carters to petition to terminate Cecelia's parental rights on the grounds of her alleged abandonment of her son. The court also rebuffed as "untimely" the efforts by the Navajos to secure "full faith and credit" for a tribal court finding that it had exclusive jurisdiction over Jeremiah. In January 1985, nearly five years after Jeremiah had begun living with the Carters, the Utah court granted their adoption petition, having found that the ICWA "beyond a reasonable doubt" standard for terminating Cecelia's parental rights was met, as well as Utah's statutory requirement that she "knowingly and voluntarily abandoned" her child.

On appeal by the Navajo Nation, the Utah Supreme Court declined to address any of the substantive grounds of the trial court's adoption order. Instead, it confined itself to "the pivotal issue" of jurisdiction and ruled that the Utah courts had never acquired lawful jurisdiction over the Carter's adoption petition. The primacy of tribal sovereignty in resolving custody disputes "cannot be minimized," the court said. Although the BIA guidelines had originally assumed that state law definitions of domicile would not undermine the purposes of the ICWA, state courts are obligated to recognize the supremacy of these purposes in instances where state laws turn out to conflict with them. A broad test of federal preemption applies whenever the states attempt to regulate Indian affairs.

The Utah Supreme Court agreed that the trial court had ample evidence under Utah law to conclude that Cecelia had abandoned Jeremiah even prior to her 1980 consent to his adoption, thereby enabling his domicile to shift away from the reservation to that of the Carters. But, because this analysis would serve to justify the Utah court's assumption of jurisdiction, it cannot stand. Both the trial court's ruling on jurisdiction, and the efforts of Jeremiah's aunt and the Carters to assure it, have to yield to the higher federal principle in favor of exclusive tribal jurisdiction over children like Jeremiah.

Acknowledging that many non-Indians find it difficult to understand how a tribal community can have an interest in its children "distinct from but on a parity with the interest of the parents," the

136. BIA Guidelines, supra note 36, at 67,585.
137. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) ("state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law [including] the goal of promoting tribal self-government").
Utah Supreme Court said that state courts and prospective non-Indian adoptors must nonetheless come to recognize that protection of this tribal interest is at the core of the ICWA.

In consigning Jeremiah's fate to the determination of the Navajo Nation, the Utah court said it was "acutely aware" that Jeremiah's removal from the Carters, with whom he had lived for more than six years, will disrupt strong emotional bonds and cause "a great deal of pain and anguish." While stability is a "paramount value" in child placement, it cannot excuse the basic jurisdictional defect in this case. The "experience, wisdom, and compassion" of the Navajo courts must be counted on "to fashion an appropriate remedy" that will take into account not only the strength of the bond between Jeremiah and the Carters, but also the tribe's delay in responding to the notice it received of the original state court proceeding. In this regard, the court noted "an innovative approach" called "open adoption" that would allow children to remain in the custody and care of adoptive parents while maintaining some contact with their biological relatives and Indian heritage. The Navajo court's resolution of the conflict between the Carters and Jeremiah's relatives is discussed below.

3. Holloway Ruling Questioned

In a concurring opinion in Halloway, one justice of the Utah Supreme Court said he would reach the same result as the majority, but without its complicated, and in his view, questionable analysis of the effect of Utah's laws of domicile and abandonment on the jurisdictional provisions of the ICWA. The result could rest, instead, on a finding that prior to the entry of a final decree of either abandonment by Cecelia, or adoption by the Carters, Cecelia had exercised her express ICWA right to revoke her consent and demand the return of Jeremiah to her custody. Accordingly, the trial court should have dismissed the state court proceeding and ordered the Carters to surrender Jeremiah to his mother.

One justice dissented, arguing that by conceding that Cecelia's behavior meets Utah's tests for abandonment, while not allowing that finding to preclude exclusive tribal jurisdiction, the majority had imposed its own inflexible notion of what constitutes federal principles of domicile. The dissenting justice believed the approach of the ICWA and the BIA guidelines is less rigid. Noting that Indi-

139. Id. at 972 n.11 (citing S. ARMS, To LOVE AND LET Go (1973)). See discussion of open adoptions in ADOPITION LAW AND PRACTICE, supra note 5, at ch. 13 (Hollinger, Aftermath of Adoption: Legal and Social Consequences).
140. See infra text accompanying § R(2).
ans may be especially mobile because of the difficulties of making a living “within the confines of their reservations,” he remained unpersuaded that “special rules need to be applied to Indian people respecting their domiciles.”142

Indeed, a problem lawyers will have in grappling with the majority ruling in *Halloway* is that no guidelines are set forth for determining how the parent of an Indian child can succeed in changing her own and the child’s domicile legitimately so as to deprive a tribal court of exclusive jurisdiction. If a state’s abandonment law cannot be invoked for this purpose, what rules can be followed? If a child’s parent or other relatives are concerned about the quality of the child’s upbringing on a reservation, how can they place the child in a different setting or with non-Indian adoptors who reside elsewhere without being accused of intentionally frustrating the purposes of the ICWA?

Consider, for example, what has happened in a variant of the *Halloway* tale, one in which the Indian birth mother, unlike Jeremiah’s mother, remained adamant in her desire to thwart tribal jurisdiction and to circumvent the ICWA placement preferences. In a 1988 case that, like the *Halloway* situation, received a lot of media attention, an unwed Navajo woman gave birth to a child in California, where she lived during her pregnancy with a non-Indian couple whom she hoped would adopt her child. Despite the mother’s vehement objections to the intervention of the Navajo tribe in her decision to place the child, the tribe learned about the pending California adoption proceeding.143 It convinced the local court that even though the mother was determined to pursue her education in California, she was still domiciled on a Navajo reservation in Arizona, and her child’s domicile was the same as hers. The court found that no state court could exercise jurisdiction over the proposed adoption. The mother and the child were ordered to return to the reservation where the issue of the child’s custody would be resolved before a Navajo court.144 This court subsequently approved a settlement agreement similar to the one reached in *Halloway*.145 The infant will be raised by the California couple, who will become her permanent guardians, but her birth mother and her tribal relatives will have some visitation rights. The child is also to remain a member of the Navajo Nation.146

---

142. *Id.* at 973 (Howe, J., dissenting).
143. The unwed father did not appear to either support or oppose the tribe’s position.
145. See discussion infra § R(2).
Quite different from the Utah Supreme Court's approach in *Halloway* is the Mississippi Supreme Court's recent ruling in a case involving twins whose Indian parents were both domiciliaries of the Choctaw reservation.\(^{147}\) With the father's cooperation, the mother arranged to give birth off the reservation. Soon thereafter, the parents placed the twins with a non-Indian couple who commenced an adoption proceeding in a Mississippi court. When the Choctaw tribe intervened to seek dismissal of the case on the grounds that the tribal court had exclusive jurisdiction, the Mississippi court rejected the argument that the twins resided on or were domiciled within the territory set aside for the reservation. It praised for its "creativity" the tribe's claim that the children's "living within the womb of their mother" constituted residency on the reservation, but found the claim "unsupported by any law within this state," and too "complicated" to address "due to the far-reaching legal ramifications that would occur were we to follow such a tangential course."\(^{148}\)

Without acknowledging the *Halloway* decision, the Mississippi court sidestepped the issue whether the twins' domicile was the same as their parents, regardless of where they happened to be born. Instead, the court implicitly rejected the Halloway interpretation of domicile by implying that even if the twins were reservation domiciliaries at birth, their parents' voluntary surrender of custody to the prospective adoptors was the occasion for a change of domicile to that of the adoptors.\(^{149}\) Once that occurred, a state court could assume jurisdiction. The appellate court went on to say that the lower court "strictly adhered to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, and service of process," and this in effect cured whatever jurisdictional defects may have existed when the court agreed to hear the adoption petition. What the appellate court did not note, however, was that in approving this adoption by the non-Indians selected by the twins' parents, the lower court ignored the contrary placement preferences of the ICWA and of the Choctaw tribe.

In response to an appeal from the Choctaws, the United States Supreme Court has agreed to review the Mississippi court's *Holyfield* decision, and to determine, among other issues, whether domicile

---

1, p. 25; Griffin, Girl's Guardian Parents Forge Rare Kinship with Navajo Mother, L.A. Times, May 15, 1988, Part 1, p. 3.

147. Mississippi Band of Choctaw Indians v. Holyfield, 511 So.2d 918 (Miss. 1987).

148. *Id.* at 921.

149. In *Halloway*, the Indian mother's voluntary surrender of custody to the non-Indian adoptors was found not to constitute a change of domicile.
under the ICWA is to be defined by state or federal law.\textsuperscript{150} The Choctaws have in effect asked the Supreme Court to find that the Utah \textit{Halloway} analysis of the exclusive jurisdiction provisions of the ICWA is correct, and that the Mississippi analysis is wrong. The case was argued before the Supreme Court in January 1989. Until the Supreme Court resolves the issues raised in \textit{Holyfield}, state trial and appellate courts will remain confused about the extent to which state principles governing domicile should defer to the ICWA goal of expanding the scope of tribal court adjudication of Indian child custody proceedings.

4. \textit{Assessing Requests to Transfer from State of Tribal Courts}

In contrast to proceedings involving Indian children who are reservation domiciliaries, proceedings involving nondomiciliary Indian children can be initiated in state courts. In accord with the ICWA preference for tribal courts, the child's tribe, or parents, or Indian custodian may petition to transfer the case to a tribal court.\textsuperscript{151}

In practice, it is turning out to be a lot easier to have a request for transfer denied than to have it approved. Although the party who opposes a transfer petition has the burden of proving the existence of "good cause" to warrant a denial, this is frequently not difficult to do. The objection of a parent is sufficient, by itself, to justify a denial. Indian or non-Indian parents who want to place their child for adoption with non-Indians typically ask a state court to deny a transfer request. They assume, perhaps correctly, that even though the state court has to follow ICWA standards, it will be more sympathetic to the parent's placement choice than if the adoption were transferred to a tribal court.

Even when the parents themselves initiate a transfer petition, or do not object to one filed by the child's tribe, state courts retain considerable discretion to deny the petition if a state agency or prospective adoptors challenge it. Transfers may be denied, for example, if the evidence could not adequately be presented in the tribal court without imposing "undue hardships" on the parties and other witnesses.\textsuperscript{152} As the comments to the BIA guidelines predict, this forum non conveniens basis for rejecting a request for transfer has had the effect of limiting transfers to cases involving Indian children who live near a reservation.\textsuperscript{153}

Transfer requests may also be denied when they are "un-

\textsuperscript{151} See discussion supra § F(2).
\textsuperscript{152} BIA Guidelines, supra note 36, at 67,591.
\textsuperscript{153} Id. See also complaints of tribal spokesmen in 1987 \textit{Oversight}, supra note 4, 1984 \textit{Oversight}, supra note 4.
timely.” A California appeals court found, for example, that although the Santo Domingo Pueblo of New Mexico had been notified of a state court dependency action involving an Indian child, it had waited more than sixteen months before petitioning for a transfer to its own courts. By this time, the child had established a strong bond with the prospective non-Indian adoptive parents, and the evidence relevant to the parents’ alleged unfitness had accumulated in California. The trial court’s finding of “good cause” to deny the tribe’s transfer request was clearly justified.\(^{154}\)

Among the grounds that a state court presumably cannot consider in reviewing a request for transfer are doubts about the tribal government’s approach to parent-child relationships, or about the adequacy of tribal resources to assist Indian families.\(^{155}\) The Alaska Supreme Court has ruled, for example, that a tribe’s request for foster care assistance from a state agency for a child who was a ward of the tribe did not constitute a “waiver” of tribal jurisdiction to a state court.\(^{156}\) Tribal spokesmen claimed, however, that many state courts retain jurisdiction over Indian child custody proceedings for these kinds of reasons, even though they do not express them openly.\(^{157}\)

When transfer requests are granted, state courts are typically unwilling to resume jurisdiction from a tribal court at some later time. Occasionally a parent or another relative, who had earlier agreed to a transfer from a state to a tribal court, will decide that their interests would in the long run be better protected in state court. This kind of forum shopping has not elicited much sympathy from state courts.\(^{158}\)

Many tribal representatives complain that they get no assistance from the BIA or any other federal agency in preparing transfer requests. The Navajo Nation, for example, has some kind of governing body in nineteen different states, and must therefore contend with nineteen different sets of local rules for assessing transfer requests. In addition, lawyers for the Navajos, as well as for other tribes, who are admitted to practice in one state may not be admitted in other states. These complexities hurt tribes in that they


\(^{156}\) *In re J.M.*, 718 P.2d 150 (Alaska 1986) (lower court erred when it concluded Native Village of Kaltag had waived its jurisdiction by applying to state for foster care payments for Indian child).

\(^{157}\) 1984 Oversight, *supra* note 4 (statements from tribal representatives).

may unwittingly delay intervention in state proceedings and thereby arouse the anger of state courts, which then dismiss tribal petitions as "untimely." It is not at all clear, however, that the federal government has any duty to train lawyers to assist tribes in pursuit of their interests under the ICWA.

O. Dealing with Problems of Notice and Intervention

If a state court denies a request for transfer to a tribal court, it presumably remains bound to follow ICWA provisions and is subject to reversal for failure to do so. The tribal notice and intervention provisions are among those most essential for ensuring state court adherence to the Act's policies.

As indicated above, trial courts are not consistent in their efforts to notify tribes when the issue before the court is the child's alleged status as an "Indian child." They are also lax in their efforts to notify tribes when the issue is not the Act's general relevance, but the specific application of its substantive standards.

Tribal representatives claim that in more than two thirds of voluntary placements of Indian children for adoption, tribes are not notified. They learn about the placement, if at all, indirectly, often after the child has lived with prospective adoptors for a long time, or after the adoption decree has been granted. The tribes in these situations may eventually succeed in having an adoption denied or set aside, but the process is time-consuming and costly, and the emotional toll on all parties, especially the Indian child, is heavy.

Lawyers representing tribes want the Act amended to clarify that tribes have a right to intervene in voluntary as well as involuntary proceedings, including all adoptions. They also want the Act to require explicitly that the tribe be notified not just of involuntary foster care or termination proceedings, as the Act now reads, but of any and all proceedings in which an Indian child may be involved.

Despite these complaints, evidence is mounting that at least in involuntary termination proceedings, state trial courts that fail to follow the requisite notice procedures will be reversed on appeal. Courts that have not followed the Act's procedures for notice to a

160. See discussion supra § G.
161. See discussion supra § M(2).
162. 1987 Oversight, supra note 4, at 106.
164. See, e.g., In re N.A.H., 418 N.W.2d 310 (S.D. 1988) (notice to mother's Oglala Sioux tribe and to father's Crow tribe was flawed because it did not tell them of their right to intervene, hence child's tribal affinity could not be clarified); State ex rel. Justice Dept. v. Cooke, 88 Or. App. 176, 744 P.2d 596 (1987) (mother's Lummi tribe should have been notified of state action to remove children from home).
parent of an Indian child are being similarly reprimanded. 165

Even when a state court is scrupulous in notifying tribes of their right to intervene, it is not unusual for them to decline to intervene in a state initiated proceeding to terminate the rights of an Indian parent. 166 A decision not to exercise its statutory rights to participate in a state proceeding may spare a tribe the embarrassment of having to defend an Indian parent who, by anyone’s standards, is unfit to raise a child. But it also waives the tribe’s right to insist on the ICWA placement preferences, or to challenge other possible statutory violations.

A decision not to intervene is distinguishable from a delay in intervening because of a failure to receive the requisite notice of the proceeding. In the latter case, the tribe would of course preserve its rights to challenge irregularities in the event it learns about the proceeding independently. By contrast, if the tribe voluntarily chooses not to intervene, it effectively waives its right to challenge other aspects of the proceeding.

P. How the ICWA Standards for Terminating Parental Rights Have Fared in State Courts

Most state trial courts have tried to adhere to the ICWA’s apparently stringent evidentiary and other requirements for an involuntary termination of parental rights. Nonetheless, these courts retain broad discretion to determine precisely what quantum of evidence is needed to prove the requisite grounds “beyond a reasonable doubt,” as well as to decide who qualifies as an expert witness, or whether sufficient efforts were made to provide rehabilitative services to the parent. Because a trial court’s findings that the evidence of parental misconduct justified termination will not be reversed unless clearly erroneous, 167 a court that is careful to say in its ruling that it applied the ICWA standards is able to retain considerable leeway in assessing the probative value of the evidence.

The BIA guidelines warn state courts not to pay attention to generic poverty, alcohol abuse, or nonconforming social behavior in deciding whether to remove a child permanently from parental cus-

---

165. See, e.g., In re L.A.M., 727 P.2d 1057 (Alaska 1986) (ICWA does not permit notice by publication to parent whose rights are being terminated).
166. See, e.g., Long v. State Dep’t of Human Resources, 527 So. 2d 133 (Ala. Civ. App. 1988); People ex rel P.B., 371 N.W.2d 366 (S.D. 1985) (Oglala Sioux tribe chose not to participate in this proceeding to terminate the rights of a Sioux mother whose chronic use of alcohol and inhalants, coupled with her severe personality disorder, made the likelihood of serious emotional harm to her child “inevitable”). Many similar cases exist, but are not challenged on appeal or are not reported, 1987 Oversight, supra note 4, and phone interviews of DSS workers in several states by author.
Instead, the focus is supposed to be on parental behavior that is likely to cause, or create a risk of serious damage to the child. A number of courts conclude, however, that they cannot avoid taking into account such factors as a parent's alcohol abuse or unstable home life in determining whether a child is at risk of physical abuse or longterm neglect.

As the United States Supreme Court noted in Santosky, the trial court in a termination proceeding must often evaluate medical and psychiatric testimony to decide issues such as lack of parental motivation, hostility between parent and child, and inability to control abusive or destructive behavior. These issues are not easily provable to "a level of absolute certainty." If the ICWA strict evidentiary standard is to be effective, it is not so much because the evidence of alleged parental failures can in fact be proven beyond a reasonable doubt, but because it will serve as a warning to state agencies to make good on their statutory duty to attempt to salvage the relationship between a parent and an Indian child, and not move too quickly to initiate termination actions.

Some courts try to clarify the relationship between the ICWA standards and their own state requirements for terminating parental rights. The Alaska Supreme Court has ruled, for example, that the ICWA standards supplement, but do not displace those already included in the state's laws. The trial court must find "beyond a reasonable doubt" that continued custody of the child by the parent is likely to result in serious damage to the child. But the ICWA standard does not have to be applied to any additional findings required by the state in order to terminate parental rights. For those additional findings, the "clear and convincing evidence" standard required by Santosky is sufficient. The court noted that by insisting on findings of parental unfitness beyond those mandated by the ICWA, Alaska's statute provides a level of protection greater than that of the ICWA. Therefore, it is not preempted, but only supplemented, by the federal statute.

A state court's failure to apply the ICWA standards is clearly grounds for reversal. When, for example, the Sault Ste. Marie Tribe

168. BIA Guidelines, supra note 36, at 67,593.
171. Id. at 769.
173. 455 U.S. 745.
of Chippewa Indians appealed as of right from the termination of
the rights of the parents of a Chippewa child, the Michigan Court of
Appeals agreed that the termination had to be reversed and the is-
 sue remanded because the trial court had failed to apply the ICWA
evidentiary standards.\textsuperscript{174}

Similarly, a state trial court’s failure to seek the testimony of an
expert who has the appropriate qualifications for evaluating Indian
child-rearing practices may be grounds for reversing an involuntary
termination.\textsuperscript{175} A level of expertise beyond that of a typical social
worker was contemplated by the ICWA. But how much familiarity
with Indian culture and customs is needed to qualify as an expert
witness? How exactly are judges to use materials or information
about Indian heritage and culture in making placement decisions?
Most courts that have considered the issue conclude that the compe-
tence of a witness to give an expert opinion is within the discretion
of the trial court. Its approval of a particular witness will not be
overturned unless there is no evidence that the witness was
qualified.\textsuperscript{176}

Q. ICWA Provisions Relevant to Voluntary Consent and Its Revocation

The uncertainty alluded to above,\textsuperscript{177} about whether the ICWA
applies to direct private adoptive placements by birth parents, is ad-
dressed in a recent Pennsylvania case.\textsuperscript{178} The court noted that the
only explicit references in the Act to voluntary placements are with
reference to parental consent to temporary foster care, or to a ter-
mination of parental rights. In both of these situations, an author-
ized agency or tribal organization generally assumes responsibility
for the care and custody of the child until the foster care ends or an
adoptive placement becomes permanent.

What about the direct placement by a parent of an Indian child
with “strangers” with the expectation that they will adopt the child?
By inference from the ICWA, direct, or non-agency placements may
be lawful if they occur in a state that generally allows them.
Although state law is likely to determine whether a private place-
ment can be made, the ICWA governs the procedure by which a
parent’s consent is obtained, as well as any efforts by the parent
to revoke her consent, or by the tribe to set it aside because it

\textsuperscript{174} In re Morgan, 140 Mich. App. 594, 364 N.W.2d 754 (1985). \textsuperscript{See also} D.H. v.

\textsuperscript{175} 25 U.S.C. § 1912(e), (f) (1982).

\textsuperscript{176} \textit{In re Welfare of T.J.J.}, 366 N.W.2d 651 (Minn. Ct. App. 1985); \textit{In re

\textsuperscript{177} \textit{See supra} text accompanying §§ 1 and O.

was allegedly procured in violation of the ICWA's procedural requirements.

There are a number of situations in which birth mothers living on or near their tribal reservation surrender their child to non-Indian prospective adoptors who live in another state. Sometimes, in order to avoid letting the tribe learn her intentions, the parent executes a formal consent before a judge in the adoptors' home state. More often, she probably executes only a temporary surrender of custody, and neither she nor the adoptors pay any attention to the Interstate Compact on the Placement of Children. If she later changes her mind and demands the return of her infant, the court where the adoption is pending, or has already been granted, is often at a loss as to how to proceed.

In the Pennsylvania case, the superior court ruled that the provisions of the ICWA that permit an Indian mother to reclaim her child from a consensual temporary placement with a licensed foster parent extend to an independent placement by the mother with a potential adoptive parent who is not a licensed foster parent. Because such independent placements are at risk, and necessarily temporary, until an adoption decree is issued, they can properly be called "foster care placements" under section 1913(b). This characterization is appropriate even though the placement is not with a licensed foster parent.

The mother in this case, a member of a Sioux tribe in South Dakota, left her child with a woman in Pennsylvania and assured the woman that she could adopt the child. The mother signed a statement transferring "temporary and complete custody," but never executed a formal consent to adoption. When she later attempted to reclaim her child, the court treated the situation as if it were a consensual foster care placement, and therefore subject to revocation by the mother. The court ordered the immediate return of the child to the Sioux mother.

The ruling by the Pennsylvania court construing the ICWA is similar to what the court is likely to have found if it had applied state law. In virtually all states, if a birth mother has never formally consented to the adoption of her child, another person with temporary custody might in some circumstances be able to retain custody, but would not be able to adopt the child over the mother's objection, assuming she was a fit parent.

It remains to be seen whether other courts will come to recognize that even when a parent has executed a valid consent, accord-

179. ADOPTION LAW AND PRACTICE, supra note 5, at chs. 3-4 and app. 3-A.
180. Id. at ch. 3 (Boskey, Placing Children for Adoption).
181. Id. at ch. 2 (Hollinger, Consent to Adoption).
ing to ICWA procedures,\textsuperscript{182} she has an unequivocal right to revoke it prior to the entry of a final decree of adoption, and a concomitant right to reclaim custody of her child.\textsuperscript{183} The Act's protection of an Indian parent's right to revoke consent serves as yet another reminder to attorneys to check into a child's ethnicity whenever they represent prospective adoptors who have received a child directly from a birth parent, or through a private intermediary. As more than one court has noted, prospective adoptors must be held to assume the risk that the parent of an Indian child may change her mind before the adoption is finalized.\textsuperscript{184}

R. ICWA Placement Preferences: How They Have Fared in State Courts

In the ICWA, Congress has expressed a strong policy choice that Indian children, including those who have one non-Indian parent, belong in an Indian home. Designed to prevent "culture shock" and the unwarranted disturbance of Indian homes, the Act clearly applies in situations where the state removes an Indian child from an Indian family and proposes to place the child in a non-Indian foster or adoptive home. In these situations, the Act's preferences for placing Indian children with Indian relatives or in Indian homes should prevail. Only an explicit waiver by the child's tribe, or other substantial reasons should permit a court to decline to follow the placement preferences.

1. "Good Cause" Exceptions to the Placement Preferences

Much less clear, however, is whether the statutory language that the preferences apply to "any adoptive placement" should be construed to include voluntary placements by a child's parent or parents or Indian custodians. Similarly unresolved is the issue posed by Baby Boy L.:\textsuperscript{185} should the preferences apply to voluntary or involuntary placements of an Indian child who has never been exposed to Indian society or culture? Some child welfare professionals argue that it could be detrimental for a child with some Indian blood, who has always been raised as a non-Indian, to be removed from that environment and placed in an Indian foster or adoptive home. This is simply the other side of the culture shock

\textsuperscript{182} See supra text accompanying § I.
\textsuperscript{183} At least one state appellate court has treated an Indian mother's voluntary relinquishment of her child as a final "abandonment" of her parental rights under state law, and has completely sidestepped the issue of whether her efforts to reclaim custody of her child prior to the entry of an adoption decree constituted an effort to revoke her consent which was arguably valid pursuant to the ICWA, In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988).
The Act permits an agency or a court to depart from the mandatory placement preferences for "good cause." The remoteness of a proposed Indian home for a child, or the length of time since a child has resided in an Indian community, may be valid considerations in deciding whether such good cause exists.

The wishes of the child's parents may also be a valid reason for departing from the Act's placement preferences. This is especially so if the placement is voluntary, and neither a state nor a tribe is seeking the involuntary removal of the child from the parents. Moreover, if the voluntary placement is being made by a non-Indian parent of an Indian child who has not resided in an Indian community, that parent's preferences may arguably be conclusive against the Act's general placement scheme. The Act itself recognizes that the preferences of a parent and of the child should be given some weight "where appropriate," as should those of a consenting parent who "evidences a desire for anonymity." A great many state courts have construed this provision liberally in order to defer to parental preferences which have been strongly opposed by tribal representatives.

2. Permanent Guardianship: A Viable Compromise?

Even tribal courts that have wrested jurisdiction over a proposed adoption from a state court pursuant to the ICWA's exclusive tribal court jurisdiction provision, have on occasion deferred to an Indian parent's wish to place, or leave her child with a non-Indian couple. When Indian children have lived for a considerable amount of time with non-Indian prospective adoptors, and subsequently become subject to tribal court jurisdiction, the tribal court may approve a legal status of "permanent guardianship" that enables those who have acquired custody of the child to have most, but not all, of the legal rights and duties of parents. The child's legal ties to the biological family are not severed, as they are in a traditional American adoption, and personal contact between the child and tribal relatives may continue.

A permanent guardianship arrangement was used to settle the bitter dispute about Jeremiah Halloway. Once the Navajo Nation
had vindicated its claims to exclusive jurisdiction over Jeremiah's placement, a settlement agreement was in fact reached. It has many of the characteristics of the "open adoption" plans referred to by the Utah Supreme Court.\(^{192}\) The Carters were granted "permanent guardianship" of Jeremiah, a status that enables them to retain custody and to act in most respects as if they are his lawful parents. This arrangement is not identical, however, to what state laws would define as an adoption. Unlike a standard adoption, for which there is no precedent in Navajo law, the permanent guardianship status is consistent with Navajo tribal customs. Jeremiah's legal ties to his parents and to the Navajos are not severed, nor is his right to claim any financial or other benefits that follow from his tribal membership. In most respects, however, he becomes the Carters' child, a result that the 10 year old boy repeatedly told the Navajo court he wanted.\(^{193}\)

It remains to be seen if this compromise will work. During the years of wrangling in the Utah courts, the tensions between Navajo and Mormon culture were constantly erupting. The Carters had few kind words for Navajo traditions, which encourage the raising of children outside a nuclear family, or for Jeremiah's relatives, whom they considered unstable, alcoholic and abusive.\(^{194}\) Navajo representatives were similarly unsympathetic towards the Carters, regarding them as committed to the "insidious, perhaps racially prejudiced" Mormon mission to convert Indian children and tear them away from their heritage.\(^{195}\) Now that they have won the authority to decide cases like Jeremiah's, however, the Navajos may be willing to allow the Carters to raise Jeremiah according to their personal and religious values. No doubt the tribe has also learned that it must intervene in a more timely manner if it wants to discourage similar placements of Indian children with non-Indian adoptors.

The Navajo Nation also agreed to a permanent guardianship arrangement in another highly-publicized case, the one in which an Indian mother placed her child at birth with the non-Indian California couple with whom the mother had been living.\(^{196}\) The infant will be raised by the California couple, who will become her permanent guardians, but her birth mother and her tribal relatives will have some visitation rights. The child is also to remain a member of the Navajo Nation.\(^{197}\)

When tribal courts exercise their original jurisdiction over an

\(^{192}\) Halloway, 732 P.2d at 972 n.11.


\(^{194}\) Id. (quoting the Carters).

\(^{195}\) Id. (quoting tribal representatives and attorneys).

\(^{196}\) See discussion supra § N(3).

\(^{197}\) Gillman, Baby Given to Couple by Navajo Court, L.A. Times, Sept. 1, 1988, Part
Indian child custody proceeding where the child had never been off the reservation, they often resort to a version of permanent guardianship. They place a child with a relative or other tribal member empowered to act on the child's behalf, but the rights of the biological parents are typically not terminated, even if the parents are ordered not to have much to do with the child.

3. Dealing with the Objections to ICWA Placement Preferences

Many Indian tribes and their legal advisors insist that the Act's goal of assuring the survival of Indian communities is undermined whenever state courts are allowed to use a liberal construction of what constitutes good cause for departing from the Act's placement preferences. These critics object to what they say is the deliberate creation by non-Indian child welfare workers of a conflict between the best interests of Indian children and of Indian tribes. In their view, the interests of all Indian children are always well served by placing them with members of their extended Indian families, or with some other tribal member. This is so, regardless of where these children have lived prior to an ICWA proceeding, and regardless of whether they are voluntarily or involuntarily removed from their parents.\(^1\)

Indian lawyers complain that state agencies assist parents who want to circumvent the Act by having them sign affidavits that declare they do not want their infants raised by any relatives or tribal members, or that they want to preserve their own anonymity by having their child placed far away from their reservation with non-Indians who will not encourage the child to learn about his or her lineage.\(^2\) The possibility that a birth mother's desire for anonymity will be allowed to defeat the Act's placement preferences is anathema to many tribal governing bodies.

Indian lawyers and other tribal representatives also call for more flexible and culturally-sensitive criteria for the selection of Indian foster or adoptive parents. The traditional criteria imposed by many state public and private agencies have excluded many Indians who, according to tribal mores, would be appropriate substitute caregivers. The squeamishness of state child welfare workers about placing Indian children with other tribal families is said to help perpetuate the high rates of Indian children who are placed with non-Indians, and therefore, to necessitate vigorous enforcement of the ICWA preferences in the future.

---


198. *See, e.g., 1987 Oversight, supra note 4 (statements from Navajo Nation, Cherokee Nation, American Indian Law Center, Native American Coalition, and others).*

199. *1984 Oversight, supra note 4, at 107.*
Because not many tribal codes recognize the concept of adoption as it is known in American statutory and case law, 200 tribal governing bodies cannot be expected to take over the task of placing children with adults other than their parents without being given assistance in how to define the roles of these substitute caregivers. Some compromise is needed between the customary reliance on extended families and the importance of identifying one or two adults with clear responsibility for the child’s well-being. Non-Indian child welfare workers, as well as lawyers and judges, clearly need more education about how to work with Indian communities, and how to ferret out those people within these communities who can best care for young children.

S. Conclusions About Implementation of ICWA

Perhaps the most serious limitation on the effectiveness of ICWA is that a decade is too short to change ingrained ways of doing things. The adverse impact of poverty on family life on many reservations remains grim. Congressional funding for the remedial services authorized by the ICWA has consistently been lower than the $12 million per annum recommended by the Senate Select Committee. State welfare programs are often unavailable for reservation domiciliaries. 201 The locus for dealing with Indian child custody disputes may indeed be shifting, in practice and not just in theory, from state to tribal governments. But the disputes, and the underlying social and economic problems that generate them, do not go away. Some tribal governing bodies do not push to resume original jurisdiction, or to request transfers of cases from state courts, because they know they are unable to handle the child’s and the family’s problems.

It is unfortunate, but perhaps not too surprising that the rate of off-reservation placement for Indian children remains high. A decade after the enactment of the ICWA, Indian children are still being placed out of their original families at a rate nearly five times greater than that for all children in the United States. South Dakota remains at the top of the list, with more than twenty-five times more Indian children placed out than non-Indian children. 202 It is not clear how many of these placements are consensual, and how many are ordered over the objection of one or both parents. Nor is it known whether the number of adoptions of Indian children by non-Indians has leveled off. In addition to the high rates of placement of children away from their parents, there are nearly as many other

200. Id. at 19 (statement of Administrator for Native Americans, U.S. Dep’t of Health and Human Services).
201. Id. at 17.
202. Id. at 15.
signs of disintegration of family life on many Indian reservations as there were twenty years ago.\footnote{Id.; Shabecoff, \textit{Plight of Indians on Reservations is Worsening, Interior Department Says}, N.Y. Times, Dec. 11, 1986, at 19.}

In the past, many placements of Indian children outside their homes, and off their reservations, were the result of the over-zealous efforts of social workers to "rescue" Indian children from allegedly alcoholic and abusive parents, or from impoverished living conditions. This is clearly documented in the 1977 congressional hearings that preceded the enactment of the ICWA.\footnote{1977 Hearings, \textit{supra} note 10.} Since then, many caseworkers have become sensitive to the need to preserve, or to work within Indian tribal cultures. They hesitate to deal with a troubled family situation by immediately removing the children from their parents.

While there are encouraging signs of non-Indian child welfare personnel trying to improve the lives of children in their original families, or within their tribal communities, some parents, and especially birth mothers, are desperately eager to leave the reservation themselves, or at least to place their children with non-Indian couples. They distrust the rhetoric of tribal preservation and want their children's destiny linked to mainstream American society. This is what happened in the notorious California situation described above, and in many of the other cases discussed in this Article: mothers who want a better life for themselves and for their children than the tribe seems able to offer, and who are unmarried and penniless, may find that placing their child outside the Indian community is an attractive option. Should tribal governing bodies be able to prevent these mothers, and at times, fathers as well, from placing their children outside the Indian community? This author believes that the parents of Indian children should not have any fewer rights than do the parents of non-Indian children to decide the circumstances in which their children will be raised. In order to take account of the legitimate interests of Indian tribes in their own survival, however, "open" adoptions or permanent guardianship may be preferable when Indian children are involved than a more traditional, exclusive adoption in which all personal and legal ties to the original family are severed.\footnote{These issues are analyzed more fully in \textit{Adoption Law and Practice, supra} note 5, at ch. 13 (Hollinger, \textit{The Aftermath of Adoption: Legal and Social Consequences}).}

The ICWA may proclaim that the dual goals of tribal survival and the welfare of Indian children are harmonious, but our experience with the Act in its first decade suggests otherwise. Perhaps in the next ten years, we will come closer to resolving the inconsistencies among the Act's laudable intentions.