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Christine Metteer

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HARD CASES MAKING BAD LAW: THE NEED FOR REVISION OF THE INDIAN CHILD WELFARE ACT

Christine Metteer

I. INTRODUCTION

In 1978 Congress enacted the Indian Child Welfare Act1 ("ICWA" or "the Act") in response to the "rising concern in the mid-1970s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."2 However, state courts have continually disagreed about the Act's requirements and when it should be applied.3 A decade after the ICWA had been enacted, but before the United States Supreme Court had heard a case applying the Act, a commentator noted that the various state court decisions suggested that the Act's dual goals of tribal survival and the welfare of Indian children4 were not harmonious.5 The commentator ended with the hope that "in the next ten years, we will come closer to resolving the inconsistencies

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3. See discussion infra Part III.
among the Act’s laudable intentions."

Since then, the United States Supreme Court has only once addressed the application of the ICWA, in Mississippi Band of Choctaw Indians v. Holyfield. The Holyfield court broadly defined the term “domicile” in the Act to allow the tribe jurisdiction. The court reasoned that as a federal act, the ICWA’s terms must be “uniform[ly]” defined and applied. Therefore, most analysts of the Act agree that “[i]f Holyfield stands for anything, it is that states cannot create their own definitions for the ICWA.”

Yet state courts continue to create their own definitions for several key terms of the ICWA, such as: “good cause” not to transfer jurisdiction to the tribe, and “good cause” not to follow the Act’s placement preferences. Additionally, some state courts have created judicial exceptions to the Act; most notably, the “existing Indian family” exception which re-
quires that a state court determine what it means to be sufficiently “Indian” for the Act to apply. This determination in turn allows state courts randomly to define the term “Indian” and “Indian child” in 25 U.S.C. § 1903(3)-(4). Finally, courts have refused to apply some sections of the Act at all, such as: tribal intervention “at any point,” and withdrawal of voluntary consent to termination of parental rights or adoption. Such decisions clearly show that the Act’s terms are not uniformly defined or consistently applied. Therefore, according to one practitioner, “[a]s it stands, the outcome of a case involving an ‘Indian child’ depends . . . [on] the state in which the case is being heard.”

Additionally, state courts that want to retain jurisdiction to determine placement of Indian children often rule that the Act is inapplicable to the facts of the case before it. Many ICWA cases therefore result in protracted litigation as they wind their way through the appeal system. In these cases the Indian children involved generally remain with the foster or adoptive parents with whom they have been placed during this process. Therefore, even if the state’s high court eventually finds the Act applicable, the bonding of the Indian child with the adoptive or foster parents mitigates against following the Act’s placement preferences. In such cases, the courts have noted that the years involved in “[j]udicial and administrative delays” result in “a great deal of pain and anguish” for all involved. Moreover, the United States Su-

17. 25 U.S.C. § 1911(c) (1994); see, e.g., Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982). The court determined that the Act did not apply, and the tribe was denied intervention because there was no “existing Indian family,” and even if the Act did apply, the non-Indian mother did not want the children placed by the tribe and would withdraw consent to adoption so that the child would be returned to her. Id. at 177.
18. In re Bridget R., 49 Cal. Rptr. 2d 507, 515 (Ct. App. 1996). The appellate court overturned a trial court application of the Act to return twin girls to their Indian family and refused to apply the Act to allow an Indian father to revoke his consent to the termination of his parental rights unless it was determined upon remand that the Indian father had “significant social, cultural or political” ties to his tribe. Id. at 516. The appellate court, however, opined that “no such relationship existed.” Id. at 536.
20. 25 U.S.C. § 1915(b) (1994); see infra notes 24, 184-191 and accompanying text.
21. In re Adoption of Halloway, 732 P.2d 962, 971 (Utah 1986). The Supreme Court in Holyfield similarly observed: “[h]ad the mandate of the ICWA
preme Court has noted that “the law cannot be applied so as to automatically reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.”

The courts in these cases, obviously believing that hard cases make bad law, followed the mandate of the ICWA, and turned the cases over to the “experience, wisdom, and compassion of the...tribal courts.”

Not surprisingly, however, the tribal courts in these cases felt constrained to leave the Indian children with the non-Indian adoptive parents. Thus, the simple expedient of initially denying application of the Act, which resulted in protracted litigation, did reward the non-Indian parents for obtaining and retaining custody. The tribal courts were forced to make bad law, in contravention of the stated placement preferences of the Act, in the face of such hard cases.

However, resolution of these inconsistencies by the United States Supreme Court now seems unlikely. The Court has twice refused to grant certiorari in a case involving the use of the existing Indian family exception. Additionally, the Court has denied certiorari in a case determining good cause not to follow the Act’s placement preferences, in

been followed [at the inception of the proceedings] much potential anguish might have been avoided.” Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53-54 (1989).

22. See Holyfield, 490 U.S. at 54 (quoting Holloway, 732 P.2d at 972).
23. Id. (quoting Holloway, 732 P.2d at 972).

24. In Holyfield, the tribal court allowed the adoption of Indian twins by the prospective adoptive (non-Indian) mother. See Marcia Coyle, After the Gavel Comes Down: It’s Never Over When It’s Over, Parties Before the Supreme Court Find Out, NAT’L L.J., Feb. 25, 1991, at 1. Similarly, in Holloway, the tribal court left the Indian child with the adoptive family with whom he had lived for six years, although making him legally the son of his Indian mother, who was to retain visiting rights. See T.R. Reid, Mormon-Navajo Adoption Fight Settled: White Couple Keeps Indian Child; Biological Mother Retains Rights, WASH. POST, Oct. 30, 1987, at A3. Additionally, in an unreported case that nevertheless made national headlines, the Navajo tribal court again left an Indian child with the white couple with whom she had been living for a year, granting them permanent guardianship, although also enrolling the child in the Navajo Nation. See Todd J. Gillman, Baby Given to Couple by Navajo Court, L.A. TIMES, Sept. 1, 1988, at B1.

25. See In re Baby Boy Doe, 849 P.2d 925 (Idaho), cert. denied, 510 U.S. 860 (1993) (refusing to apply the exception and also raising the issue of whether the state courts had the right to determine who is eligible for tribal membership); In re Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996), cert. denied, 117 S. Ct. 693 (1997), cert. denied, 117 S. Ct. 1460 (1997) (applying the exception).
a case raising issues of tribal notice,\textsuperscript{27} and in a case raising issues of good cause not to transfer jurisdiction to the tribal court.\textsuperscript{28} Thus, problems of the state courts' independent interpretation of the ICWA will undoubtedly have to be solved by congressional amendment of the Act.

In 1995-96, the 104th Congress several times did battle with amending the ICWA. In May, 1996, the House of Representatives passed a bill that would make the ICWA inapplicable to an Indian child whose parents "do not maintain affiliation with their Indian tribe."\textsuperscript{29} The Clinton administration intimated it would not support such a section because it "could violate the Tribes' right of self-government."\textsuperscript{30} Eventually, Senator John McCain, then Chair of the Senate Committee on Indian Affairs, introduced a bill which incorporated some of the detailed proposals of the National Congress of American Indians ("NCAI") and achieved what Senator McCain called a "detailed, but not fragile, compromise."\textsuperscript{31} This bill, Senate Bill 1962,\textsuperscript{32} passed the Senate in September, 1996, shortly before the 104th Congress adjourned. It was reintroduced in the 105th Congress on April 14, 1997, as Senate Bill 569.\textsuperscript{33}

This bill represents the first step to finding a common sense, common ground approach to amending the ICWA. The "hard cases" that involve taking children from adoptive parents years after the initial suit was brought because of protracted litigation, have left parties on both sides with raw emotions. Any amendment to the Act must satisfy traditional adoption advocates, who tend to want to eviscerate the Act by allowing state courts to determine the Act's applicability; as well as the tribes, who fear a return to the condi-

\begin{enumerate}
\item H.R. 3286, 104th Cong. § 301 (1996).
\item Eric Schmitt, Adoption Bill Facing Battle over Measure on Indians, N.Y. TIMES, May 8, 1996, at A19; see generally, Metteer, supra note 14, at 651-52.
\item S. 1962, 104th Cong. (1997).
\end{enumerate}
tions of wholesale removal of their children, which led to the Act in the first place.

This article identifies and analyzes the inconsistencies in state court applications of the Act, examines the recent proposed congressional amendments to the Act to determine whether they will achieve consistency among state court opinions, and determines what further measures are needed to rectify these inconsistencies.

II. THE INDIAN CHILD WELFARE ACT OF 1978

The Indian Child Welfare Act came about in response to various congressional hearings during the 1970s. The 1974 Senate Oversight Hearings revealed statistics about the "wholesale removal" of Indian children from their families and tribes that one witness called "the most tragic aspect of Indian life today." Congress was presented with statistical studies showing that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." In fact, "[t]he 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." Furthermore, witnesses testified that Indian children suffered "serious social and psychological problems as adolescents and adults." Chief Calvin Issac, testifying before Congress, found such separation "one of the most serious failings" of the pre-ICWA system in which Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit the Indian child.

34. Holyfield, 490 U.S. at 32 (quoting Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong. 3 (1974) [hereinafter Hearings] (statement of William Byler)).
35. Id.
36. Hollinger, supra note 5, at 454.
37. Id. at 455.
38. Holyfield, 490 U.S. at 34-35 (quoting Hearings on S. 1214 Before the
Congress found these statistics so important that they were codified in 25 U.S.C. § 1901:

Congress finds—

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. . . .

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 39

The ICWA therefore embodies Congress’ intent that “an Indian child should remain in the Indian community” . . . by making sure that Indian child welfare determinations are not based on ‘a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.’” 40 It protects “the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” 41

The act has several times been the subject of further Oversight Hearings in which, for example, the tribes argued to amend the Act to preclude the use of the existing Indian family exception 42 and to create clearer, stricter tribal notice requirements. 43 Finally, in 1987, in response to the “still disproportionately high rate of Indian parent-child separations,” 44

40. Holyfield, 490 U.S. at 37 (quoting HOUSE REPORT, supra note 4, at 23).
41. Id. (quoting HOUSE REPORT, supra note 4, at 23).
42. See Hollinger, supra note 5, at 481 (citing In re Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982)).
43. See id. at 491.
the Senate introduced a bill (Senate Bill 1976) to significantly expand the rights and protections afforded to Indian children, families, and tribes. However, to date, the original Act of 1978 remains unchanged.

The ICWA includes both procedural and substantive provisions to forward Congress’ purpose of protecting Indian children and tribes by “the establishment of minimum [f]ederal standards for the removal of Indian children from their families and the placement of such children in . . . homes which will reflect the unique values of Indian culture.” Its procedural provisions include a dual jurisdictional scheme in which the tribe has exclusive jurisdiction “over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe,” except “where such jurisdiction is otherwise vested in the State by existing Federal law.” In addition, 25 U.S.C. § 1911(b) provides that when an Indian child is not domiciled on a reservation, “the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection of either parent.”

The United States Supreme Court has found 25 U.S.C. § 1911(b) to create “concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation.” These provisions are “the heart of the ICWA” in that they mandate “tribal primacy in matters of child custody and adoption.” Further procedural requirements include, inter alia, 25 U.S.C. § 1911(c), which provides for tribal intervention “at any point” in a state court proceeding involving foster care placement or termination of parental rights, and 25 U.S.C. § 1912(a) which provides that notice be given to the tribe “in any involuntary proceeding where

45. Id. For example, the proposed amendments “largely removed” the Act’s provisions allowing parental veto of transfer of jurisdiction to tribal court and good cause to deny transfer to tribal court under 25 U.S.C. § 1911(b). Id. The bill also eliminated the good cause provision in the placement preferences. See id. at 173.
49. Holyfield, 490 U.S. at 36.
51. Id. at 966.
the court knows or has reason to know that an Indian child is involved." Additionally, 25 U.S.C. § 1912(f) provides that evidence beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" be established before a court may order involuntary termination of parental rights.\

The ICWA also provides substantive provisions conferring certain rights and privileges on Indian children, parents, and tribes. Among these are provisions for establishing voluntary termination of parental rights, including the requirement that consent to termination be "executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood." The Act also provides that in any adoption placement under state law, an Indian child be placed according to a set of preferences. These provide that the child be placed, "1) with a member of the child's extended family; 2) other members of the Indian child's tribe; or 3) other Indian families," absent "good cause to the contrary. The Supreme Court has found the placement preferences to be "the most important substantive requirement imposed on state courts." Finally, 25 U.S.C. § 1914 provides that any violation of 25 U.S.C. §§ 1911, 1912, or § 1913 allows a tribe to petition to invalidate the subject action.

III. INCONSISTENCIES IN STATE COURT APPLICATIONS OF THE INDIAN CHILD WELFARE ACT

A. The "Existing Indian Family" Exception

One of the most problematic inconsistencies in state court decisions regarding the ICWA's application is the use or rejection of the so-called "existing Indian family" exception which, since 1982, has been the center of both judicial and

By its own terms, the ICWA specifies that it applies to any child who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe." The only exceptions allowed by Congress are "a placement based upon an act which, if committed by an adult, would be a crime, or upon an award, in a divorce proceeding, of custody to one of the parents." However, although the ICWA is federal legislation affecting Indian tribes and their members, and as such is "the exclusive province of federal law," state courts wanting to retain jurisdiction, place Indian children in contravention of the placement preferences or refuse to allow Indian parents to revoke consent to voluntary foster care or adoption placements, have carved out an exception to the Act's applicability.

This exception, sometimes referred to as a "minimum contacts" or "significant relationship/ties" test, has been especially problematic because of its overlap in other areas of state court determinations. For example, insufficient contacts, relationships, or ties to a tribe have been used to find "good cause" not to transfer jurisdiction to the tribe under 25...
U.S.C. § 1911(b), to refuse to allow tribal intervention under 25 U.S.C. § 1911(c), to refuse to deem the child an “Indian” child within 25 U.S.C. § 1903(4), and to refuse to allow parents to revoke consent to foster care or adoption placements under 25 U.S.C. § 1913(b)-(c) because they are not “Indian” within 25 U.S.C. § 1903(3). Thus, instead of relying on the Act’s own definitions of “Indian child” and Indian “tribal member,” the courts have devised a “second litmus test” to manipulate the application and implementation of the Act by variously defining their own criteria for “Indian-ness.”

The exception was created in 1982 when the Kansas Supreme Court, in In re Baby Boy L., refused to apply the Act because the child was not being removed from what the court deemed an “existing Indian family.” In that case, the child was the illegitimate son of an Indian father and a non-Indian mother. Over the objection of the father and his American Indian tribe, the mother had voluntarily given up the child at birth for adoption by non-Indian parents. The court reasoned that the intent of the Act was to prevent “removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.” The court therefore found that the Act did not apply to “an illegitimate infant who has never been a member of an Indian home or culture, . . . [and] so long as the mother is alive to object, would probably never become a part of the [father’s] or any other

64. See infra note 163 and accompanying text.
65. See infra note 205 and accompanying text.
66. See infra notes 72-74 and accompanying text.
67. See infra note 76 and accompanying text.
68. Davis, supra note 14, at 489. In addition to ties to the tribe, courts also consider whether the child has been exposed to or raised in an Indian “cultural setting,” and if so, whether the child has spent sufficient time in the Indian culture. Id. Both considerations are again subjective, and allow courts to variously define “cultural setting” and “sufficient time.”
69. 643 P.2d 168 (Kan. 1982).
70. Id. at 176.
71. Id. at 172.
72. Id. at 172. In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982), represents the most common scenario in which the exception has been invoked: challenges by unwed Indian fathers (who are Tribal members) and their Tribes to the adoption of their illegitimate children, born to non-Indian mothers. Usually these children have never lived with the father or with any other Indian family and the mother wants the child placed with a non-Indian family. See In re Adoption of Baby Boy D., 742 P.2d 1059 (Okla. 1985); Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987); see generally, Davis, supra note 14.
73. Adoption of Baby Boy L., 643 P.2d at 175.
Indian family.\textsuperscript{74}

Courts employing the exception in this scenario generally employ a "minimum contacts"\textsuperscript{75} analysis to determine whether the child's ties to its Indian father and tribe are sufficient in order to determine whether or not the Act applies. In this type of analysis, the courts, which "normally use 'minimum contacts' as a due process test for territorial jurisdiction . . . use the test . . . as an alternative method for defining subject matter jurisdiction . . . . A court would define an individual as 'Indian' only if he possessed some minimal relationship with a reservation, such as membership or cultural ties."\textsuperscript{76}

In addition to the split of authority in cases involving an illegitimate child of a non-Indian mother and Indian father, the exception has split courts on the issue of the Act's applicability to the child of an Indian mother who had previously consented to a non-Indian placement of her child, and later seeks to use the Act to invalidate that consent.\textsuperscript{77} In \textit{In re Adoption of T.R.M.},\textsuperscript{78} for example, an Indian mother changed her mind about the adoption of her child by a non-Indian couple, an adoption she had agreed to almost one year earlier.\textsuperscript{79} When she sought to invalidate the adoption under the ICWA, the court found that since the child had lived only a few days with her Indian mother, she was not part of an existing Indian family, and therefore the adoption proceeding did not "constitute[,] a 'breakup of the Indian family.'"\textsuperscript{80} However, in a classic example of an inconsistent, or ambiguous, application of the Act, three years after the Indiana Supreme Court applied the exception in \textit{T.R.M.}, the same court held in \textit{In re D.S.}\textsuperscript{81} that "where the mother is a Native American Indian, the mother and child, at least presumptively for

\begin{footnotes}
\item[74] \textit{Id.}
\item[75] Davis notes that the courts generally find that "[t]he contacts between the child and the father and the child and the father's tribe have usually been minimal." Davis, \textit{supra} note 14, at 480-81.
\item[76] Renner, \textit{supra} note 44, at 160-61 (footnote omitted).
\item[77] \textit{See} Davis, \textit{supra} note 14, at 486.
\item[78] 525 N.E.2d 298 (Ind. 1988).
\item[79] \textit{Id.} at 302.
\item[80] \textit{Id.} at 303 (referring to 25 U.S.C. § 1912(d)); \textit{see also}, \textit{In re Adoption of Crews}, 825 P.2d 305, 310 (Wash. 1992) (refusing to find the Act applicable "when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to the tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation.").
\item[81] 577 N.E.2d 572 (Ind. 1991).
\end{footnotes}
the purposes of initiating ICWA inquiries, constitute an 'Indian family.' Therefore, the court, among other things, reversed itself on the definition of an "Indian family," now finding that an Indian mother and child were an existing Indian family and therefore came within the Act's stated purpose of "prevent[ing] the breakup of the Indian family."3

Recently, in a variation on this scenario, a California appellate court extended the exception far past the narrow factual parameters of Baby Boy L., in which the child "would probably never become a part of . . . any . . . Indian family."8 In In re Bridget R., a California appellate court applied the exception in a case involving twin daughters of an American Indian father who was a member of the Pomo tribe and a mother who was of the Mexican Indian Yaqui tribe, who were living together with their two other children, though not married at the time of the twin girls' birth. The twins' grandmother soon after contacted the Pomo tribe, requesting intervention; she told the tribe that she wanted the twins

82. Id. at 574.
83. Id. (footnote omitted).
84. In re Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982).
85. 49 Cal. Rptr. 2d 507 (Ct. App. 1996).
86. The father became a member by virtue of his birth in 1972, at which time the tribe recognized members "solely by custom and tradition, under which any lineal descendent of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth." Id. at 516-17. The father and his twin daughters formally enrolled approximately four months after the twins' birth. Id.
87. Id. at 516. The parents sought to place the twins for adoption before their birth. Id. at 517. During the course of the proceedings, the father told the attorney handling the case that he was part Pomo Indian. The attorney allegedly told the Indian father that recording his ancestry would make adoption more difficult. Id. The Indian father then revised the form and omitted reference to his Native American ancestry. In re Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996). These facts were reported in greater detail locally during the trial below. See James Rainey, Birth Parents to Get Twins, Judge Rules, L.A. TIMES, June 15, 1995, at A36.
88. In re Bridget R., 49 Cal. Rptr. 2d at 516 n.3. The court stated that "the facts . . . are . . . substantially undisputed." Id. The twins were born in November, 1993, and approximately one month later, the Indian father told his mother of their birth and of his relinquishment of them. Id. at 518. In early February 1994, the twins' grandmother contacted the Pomo tribe. Id.

The tribe then requested intervention in the proceedings and asked that the twins' father be allowed to rescind his relinquishment. Id. The agency handling the placement refused, and the twins remained with the family seeking to adopt them, who did not formally file for adoption until May 4, 1994. Id. At the June 1995 trial, the judge ordered the twins returned to their birth parents. In re Bridget R., 49 Cal. Rptr. 2d at 515.
placed within the extended paternal family. However, the California court embraced the exception and found that the ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural, or political relationship with their tribe.

Unlike the child in Baby Boy L., however, the twins are part of a very real Indian family, biologically, tribally, and culturally, who want to raise these girls in an Indian home. The Act clearly seems to apply in this case because the twins became enrolled members of their Indian tribe within three months of their birth and had been previously eligible for membership as biological children of a member of the tribe, as required by 25 U.S.C. §1903(4). Additionally, the proceeding was not a divorce or delinquency proceeding, the only Indian child custody proceedings to which the ICWA is inapplicable.

When faced with such a scenario, other state courts have refused to apply the exception, generally citing two reasons: the plain language of the Act provides for no such exception, and the United States Supreme Court, in Holyfield, rejected a “minimum contacts” or “significant relationship” test.

First, some courts have noted that the problem with the existing Indian family exception is that “[t]he language of the Act contains no such exception to its applicability, and . . . it [is not] appropriate to create one judicially.” Therefore, in In re Adoption of a Child of Indian Heritage, the New Jersey Supreme Court rejected the Kansas court’s reasoning in In re Baby Boy L. and determined that the existing Indian family exception violates the congressional intent behind the Act because

89. In re Bridget R., 49 Cal. Rptr. 2d 507, 516 (Ct. App. 1996)
90. Id.
91. See id. at 516-17.
94. In re Junious M., 193 Cal. Rptr. 40, 46 (Ct. App. 1983); see also, In re Dependency and Neglect of N.S., 474 N.W.2d 96, 100 (S.D. 1991) (Sabers, J., concurring). “There is simply no statutory requirement for [the child] to have been born into an Indian home or community in order to come within the provisions of the ICWA, however much one might believe 25 U.S.C. § 1903(4) should have been written that way.” Id. (Sabers, J., concurring).
95. 543 A.2d 925 (N.J. 1988).
it posits as a determinative jurisdictional test the voluntariness of the conduct of the [parent(s)]... the Act itself specifies procedures for voluntary terminations of parental rights... the application of the ICWA to voluntary... adoptions is not inconsistent with the purposes of the Act... The effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same whether or not the placement was voluntary.66

Similarly, the South Dakota Supreme Court in In re Adoption of Baade97 found that the clear terms of the Act require only that an “‘Indian child’ is the subject of a ‘child custody proceeding’ as those terms are defined by the Act.”98 In addition, some courts have noted that Congress considered and rejected language which would have restricted the application of the ICWA.99

Secondly, many courts rejecting the existing Indian family exception look to Holyfield as a watershed case and find that after the United States Supreme Court’s decision, the exception is invalid. The Supreme Court in Holyfield found that one reason for the presumption against application of state law is “the danger that ‘the federal program would be impaired if state law were to control.’... For this reason, we look to the purpose of the statute to ascertain what is intended.”100 The Supreme Court reasoned that “the numerous prerogatives accorded the tribes through the ICWA[ ]... must be seen as [Congressional intent to]... protect not only

96. Id. at 932.
98. Id. at 490; see also, N.S., 474 N.W.2d at 101 n.(unnumbered) (Sabers, J., concurring) (“there is simply no statutory requirement for N.S. to have been born into an Indian home or an Indian community in order to come within the provisions of ICWA”); In re Crystal K., 276 Cal. Rptr. 619, 622 (Ct. App. 1991) (noting that the only exceptions provided for in the Act are for child custody disputes arising from divorce proceedings and placements of Indian children resulting from juvenile delinquency proceedings).
the interests of individual Indian children and families, but also of the tribes themselves." The Court focused on Congress' intent to protect Indian children and tribes from "cultural" removal rather than removal from what individual state courts might variously define as an existing Indian family. The Supreme Court therefore held that the Act applied even to twins who had been placed with a non-Indian family at birth and had never been on the reservation or spent time with their Indian family.

Courts rejecting the exception do so because they view *Holyfield* as standing for the proposition that "even without contact with the tribe or reservation since birth, and even though [the] Indian parents did not want tribal involvement... the tribal court was the appropriate forum to determine the custody of children of members of the tribe." Soon after the *Holyfield* decision, the Alaska Supreme Court declined to invoke the exception, noting that *Holyfield* stood for the proposition that "Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress also sought to protect the interests of Indian tribes and communities, and the interests of Indian children themselves." The Alaska court, in fact, believed that "the adoption in *T.R.M.* was exactly the type of scenario in which Congress sought to impose federal safeguards in order to protect the rights of Indian parents and their tribe."

Additionally, in 1991, a California court, in *In re Adoption of Lindsay C.*, reasoned that "*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny." The *Lindsay C.* court then held that the Act applied to the illegitimate child of an Indian father and non-Indian mother, even when the child had spent seven years living with a non-Indian family. This holding is a strong challenge to the *Baby Boy L.* court's reasoning that a child who had spent less than a year and one-half in a non-

101. *Id.* at 49.
102. *Id.* at 53.
105. *Id.*
107. *Id.* at 199. The court relied on *Holyfield*'s reasoning that "[t]ribal jurisdiction under [the Act] was not meant to be defeated by the actions of individual members of the tribe." *Id.* (quoting *Holyfield*, 490 U.S. at 49).
108. *Id.*
Indian family was not being taken from an existing Indian family.

Similarly, in *Yavapai-Apache Tribe v. Mejia*, a Texas appellate court reasoned that the Act is not limited to children taken from an existing Indian family, and that "Indian tribes still have a legitimate interest in the welfare of members who [do] not have previous significant contact with the tribe or the reservation." The court found that by the terms of the Act itself "only when a parent is not available and the child is over five years of age should a state court intervene and make a determination involving lack of contact with a tribe."

Moreover, courts have found that the application of the judicially created existing Indian family exception ignores Congress' admonition, codified in 25 U.S.C. § 1901(5), that "the States . . . have often failed to recognize essential tribal relations of Indian people, and the cultural and social standards prevailing in Indian communities and families." In fact, virtually all courts rejecting the exception do so because they view the Act's underlying assumption to be that "it is in the Indian child's best interest that its relationship with the tribe be protected."

Based on the interpretation of the ICWA by the Supreme Court in *Holyfield*, many states have re-evaluated their prior use of the existing Indian family exception. Oklahoma recently passed legislation calling for state courts to "recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian par-

110. Id. at 171.
112. Id.
114. In re Appeal in Pima County Juvenile Action S-903, 635 P.2d 187, 189 (Ct. App. Ariz. 1981); see In re Junious M., 193 Cal. Rptr. 40 (Ct. App. 1983) and its post-*Holyfield* progeny in California, In re Kahlen W., 285 Cal. Rptr. 507 (Ct. App. 1991); In re Adoption of Lindsay C., 280 Cal. Rptr. 194 (Ct. App. 1991); In re Crystal K., 276 Cal. Rptr. 619, 625 (Ct. App. 1990) ("Pima stated the purpose of the Act was to establish minimum federal standards . . . to prevent the separation of Indian children from their family, tribal and cultural heritage . . . ."). See also Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 16 UCLA L. REV. 1051, 1062 (1989) ("The Act clearly rests on the congressional belief that the best interests of Indian children would be served by protecting the tribal role.").
ent or Indian custodian at the time state proceedings are initiated."\textsuperscript{115} Similarly, the North Dakota Supreme Court invalidated its previous holding in \textit{Claymore v. Serr},\textsuperscript{116} in which it had invoked the existing Indian family exception, stating, it is incorrect, when assessing the ICWA's applicability to a particular case, to focus only on the interests of an existing Indian family . . . . Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the act . . . . "Holyfield also carries the clear message that [ICWA] must be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents . . . ."\textsuperscript{117}

However, recent decisions, such as \textit{Bridget R.}, show that the existing Indian family exception is still being used to avoid application of the Act, and continue to show that the outcome of a case involving an Indian child depends not only on the state in which the case is being heard, but also on the court within that state.\textsuperscript{118}

B. \textit{Inconsistent Definitions}

1. \textit{Definition of "Indian"}

The problem most closely intertwined with the existing Indian family exception is state courts' different determinations of who is an "Indian child" for purposes of the Act. 25 U.S.C. § 1903(4) specifies only that the child need be a member of the tribe or eligible for membership as the biological child of a member.\textsuperscript{119} The Act, however, contains no defini-

\textsuperscript{115} 10 OKLA. STAT. ANN. tit. 10 § 40.1 (West Supp. 1995) (footnotes and citations omitted). This piece of legislation may have the effect of invalidating the cases invoking the Existing Indian Family exception. \textit{See In re Adoption of Baby Boy D.}, 742 P.2d 1059 (Okla. 1985); \textit{In re S.C.}, 833 P.2d 1249 (Okla. 1992).

\textsuperscript{116} 405 N.W.2d 650 (S.D. 1987).

\textsuperscript{117} \textit{In re Adoption of Baade}, 462 N.W.2d 485, 489-490 (N.D. 1990) (citation omitted) (invalidating \textit{Claymore}, 405 N.W.2d 650); \textit{see also, In re Baby Girl Doe}, 865 P.2d 1090, 1095 (Mont. 1993), in which the Montana Supreme Court found that "[i]t is clear from the legislative findings and expressions of policy, and the United States Supreme Court's application of the ICWA . . . that the principle purposes of the Act are to promote the stability and security of Indian tribes by preventing further loss of their children; and to protect the best interests of Indian children by retaining their connection to the tribes."


\textsuperscript{119} \textit{See 25 U.S.C. § 1903(4) (1994).}
tion of tribal membership. Therefore, the application of the Act and the operation of its substantive provisions is often dependent upon who determines tribal membership, the tribes themselves or the individual state courts.

Neither the questions of who should decide tribal membership nor how state courts should make this determination are answered consistently. For example, in a particularly hard case, the Supreme Court of Oregon refused to allow the mother of a child to revoke consent to adoption under the Act when the mother had initially stated that she did not know of any Indian heritage, but three weeks later determined that she was part Cherokee. She then officially registered with the tribe, who later filed an affidavit stating that the mother and father were registered members. In the absence of statutory language specifying admissibility of evidence in determining applicability of the Act, the court applied the state Evidence Code. The court then found the affidavit of the Registrar of the Cherokee Nation to be hearsay and refused to admit testimony by the father that he was a member.

Although the court accepted the fact that the “Cherokee Nation requires particular facts be established for eligibility,” the court would not accept the evidence offered by the tribe that the parents and child did meet those criteria, although the court failed to specify what evidence would have been acceptable.

Other state courts have ruled counter to Quinn on three points: the Act specifies no time frame for determining tribal membership with respect to the Act, there is no time limit in which to establish the paternity of a tribal member, and determination of tribal membership is the exclusive province of the tribes, not the states, and as such, is conclusive.

120. See In re Angus, 655 P.2d 208, 212 (Or. Ct. App. 1982). This is probably because different tribes have different methods of determining their own members, and therefore this power is reserved for the tribes. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978).
121. See Quinn v. Walters, 881 P.2d 795, 798 (Or. 1994).
122. Id.
123. Id. at 800.
124. Id.
125. Id.
127. Yavapai-Apache Tribe, 906 S.W.2d at 172-73.
128. See In re Adoption of Riffle, 902 P.2d 542, 545 (Mont. 1995).
der such reasoning, a California court, in *In re Kahlen W.*,\(^{129}\) held that notice to the tribe was required even if the Indian status of the child is not certain at the time the proceedings began.\(^{130}\) Similarly, a Texas court, in *Yavapai-Apache Tribe v. Mejia*,\(^{131}\) held that it was unnecessary for the father of an illegitimate child to establish paternity prior to invoking the Act.\(^{131}\) The Texas court reasoned that to do so would "further erode the family unit at a time when this country and Indian tribes are involved in a struggle to maintain the integrity of the family."\(^{132}\) The court therefore found the father to be an "Indian parent" under the Act.\(^{133}\)

Additionally, in *Junious M.*,\(^{134}\) the California appellate court held that the trial court's determination that the child was not an "Indian child" within the meaning of the Act because neither he nor his mother was an "enrolled" member of the tribe, was in error.\(^{135}\) The court, realizing that the tribe and not the state court was to determine membership, admitted that "[e]nrollment is not always required ... [as] [s]ome tribes do not have written rolls."\(^{136}\) The court therefore held that tribal notification of the proceedings was required under the Act.\(^{137}\)

Similarly, the Montana Supreme Court in *In re Adoption of Riffle*\(^{138}\) found that the trial court's determination that a child is not an "Indian child" under the Act, because of her blood quantum (one eighth), was erroneous.\(^{139}\) The court held that "[b]lood quantum does not dictate whether or not an individual is to be considered an 'Indian child' pursuant to ICWA."\(^{140}\) The court found that the tribe was "the ultimate authority on eligibility for tribal membership," not only over state court determinations, but also over the Bureau of Indian Affairs ("BIA") Guidelines, and found that the tribe's de-

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130. *Id.* at 511.
131. *Yavapai-Apache Tribe*, 906 S.W.2d at 173.
132. *Id.* at 174.
133. *Id.* at 175.
135. *Id.* at 45.
136. *Id.*; see also, *In the Interest of H.D.*, 729 P.2d 1234, 1238 (Kan. Ct. App. 1986) (quoting United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)).
139. *Id.* at 545.
140. *Id.*
termination is "conclusive." The court therefore found the ICWA applicable to the proceedings. Thus, the inconsistencies regarding who is an Indian, for purposes of the Act's applicability, stem immediately from state courts' independent and various determinations of who is to determine tribal membership and by what criteria.

2. **Definition of "Good Cause"**

   a. "Good Cause" not to Transfer Proceedings to the Tribe

Under 25 U.S.C. § 1911(b), a state court "shall transfer" a child custody proceeding involving an Indian child to the child's tribe, absent objection by either parent or "good cause to the contrary," subject to declination by the tribal court. However, the Act does not define "good cause;" therefore, state courts have had a field day finding good causes.

Most state courts have relied on the BIA Guidelines to determine "good cause." Under these Guidelines, "good cause" not to transfer a case to the tribal court includes: (1) a proceeding that was at an advanced stage when the petition for transfer was received and the tribe did not file promptly after receiving notice, (2) the necessary evidence in the case cannot be adequately presented in tribal court without undue hardship to the parties or witnesses (forum non conveniens), and (3) the parents of the child are unavailable and the child has little or no tribal contact. Alternatively, the Guidelines prohibit consideration of the socio-economic conditions of the tribe and the perceived inadequacy of tribal or BIA services or judicial systems.

However, each of these "good causes" has itself been variously defined by the state courts. The first of these, untimely delay by the tribe, has been found to exist when there was a five month delay between the notice to the tribe of

141. *Id.*
142. *Id.*
144. The BIA Guidelines are accorded great weight in construing the ICWA, but they are not binding upon the courts. *See In re Interest of Armell*, 550 N.E.2d 1060, 1065 (Ill. Ct. App. 1990) (citation omitted).
146. *Id.*
termination proceedings and tribal petition for transfer, a year and a half after the proceedings began. The court found "[t]he significance of this chronology... obvious... [since during this time the Indian child] had bonded to his foster-adoptive family." On the other hand, in In re J.L.P., the court found that tribal intervention "one year after it received notice of the proceedings[... can be construed as a prompt request for transfer of jurisdiction."

Secondly, state courts have inconsistently found good cause under the doctrine of forum non conveniens. The BIA Guidelines state that good cause is found under a "modified doctrine of forum non conveniens." The doctrine is modified in that courts usually use the doctrine to refuse taking jurisdiction themselves; however, under 25 U.S.C. § 1911(b), the courts use the doctrine to decide whether the tribal court is inconvenient.

Many courts have used this doctrine to deny transfer, especially when the parents are not living on the reservation. For example, while admitting that "[a]pplication of this criterion will tend to limit transfers to cases involving children who do not live very far from the reservation[,]" the court in Yavapai-Apache Tribe v. Mejia found that "undue hardship to parties and witnesses" was sufficient to deny transfer. Even though the Arizona tribe offered to sit in Houston in order to have the case transferred to its jurisdiction, the Texas court refused, noting that there was no authority that authorized a tribal court to "sit outside its territorial limits and issue binding orders and judgments."

However, using distance from the tribal court as good

148. Robert T., 246 Cal. Rptr. at 173.
150. Id. at 1257-58.
153. See In re Alexandria Y., 53 Cal. Rptr. 2d 679 (Ct. App. 1996); In re T.S., 801 P.2d 77 (Mont. 1990); Yavapai-Apache Tribe, 906 S.W.2d at 165.
155. Id. at 166.
156. Id. The court did note that the BIA guidelines suggested that the problem might be "alleviated in some instances by having the court come to the witnesses." Id. (citation omitted).
cause not to transfer a case to the tribe will allow many cases involving indisputably Indian children to be heard by state courts, in direct contravention of the "presumptively tribal jurisdiction" envisioned by the Act for non-domiciliaries. Therefore, other courts have refused to apply the doctrine to establish good cause not to transfer. For example, in In re Armell, the Illinois court allowed transfer to the tribal court in Kansas. The court used essentially the same reasoning as the Texas court in Yavapai-Apache Tribe to come to the opposite conclusion. The court argued that "liberal expansion of the forum non conveniens doctrine would preclude transferring jurisdiction to tribal courts except in cases where the child resides on or near a reservation." Since the child involved lived in California, the court reasoned that it was no more inconvenient to hear the case in Kansas than in Illinois.

However, in the most extreme example, a Pennsylvania court remanded a case involving the termination of a mother's right to revoke consent to adoption for a determination of the mother's fitness (rather than transferring to the tribal court), even though the mother lived on the reservation. This meant, ultimately, that the state court decided the child's placement, based on its determination of the child's best interests. The tribe, therefore, had no say in determining the placement of a child of a domiciliary of the reservation.

Such scenarios exemplify another state court determination of good cause not to transfer the proceeding to the tribe—consideration of the Indian child's best interests. Again, courts are split as to whether or not the best interests of the child involved are a valid consideration in determining the jurisdiction of the case (a preliminary inquiry to determining the substantive question of the child's placement).

159. Id.
160. Id. at 1067.
161. Id.
163. Interestingly, courts considering whether the child's best interest is an appropriate consideration in denying transfer of jurisdiction to the tribe are divided in their determination of this question along the same lines as they are
The BIA Guidelines suggest that the best interest of the child has no place in jurisdictional determinations. Nevertheless, many courts which defer to the Guidelines in determining other good cause factors do not follow the Guidelines in determining jurisdiction under 25 U.S.C. § 1911(b).

Most courts which use a best interests of the child analysis to determine jurisdiction do so on the basis that the Congressional intent of the ICWA is to "protect the best interests of Indian children." In fact, in In re T.R.M., the Indiana Supreme Court found such a determination "paramount." The best interests test for finding good cause not to transfer to the tribe was initiated by the Montana Supreme Court in In re M.E.M. In this decision, the court instructed the district court that not only could the good causes outlined in the BIA Guidelines be used to prevent transfer to the tribe, but so could the best interests of the child involved, upon a clear and convincing showing by the state. The courts following Montana's lead have found clear and convincing evidence that an Indian child's best interests would be served by denying transfer of jurisdiction to the tribes most often in testimony that the child had "bonded" with the foster or adoptive parents, and/or that it would be psychologically damaging to remove the child from his or her pres-

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164. See Yavapai-Apache Tribe, 906 S.W.2d at 168 (citations omitted).
165. See supra notes 144 and 152 and accompanying text.
166. The author wishes to express her indebtedness to Ms. Carol Abernathy for this insight, and for much of the analysis on good cause not to transfer jurisdiction to the tribe based on the child's best interests and lack of contacts.
However, many courts have refused to use the best interests test to determine jurisdiction because they find that "the best interest test is relevant to issues of placement, not jurisdiction." These courts, setting in context the phrase from 25 U.S.C. § 1902, "to protect the best interests of Indian children," reason that Congress intended to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." Thus, looking at the best interests of Indian children as the sole criterion for applying the Act, "defeats the very purposes for which the Act was enacted, for it allows Anglo cultural biases into the picture." These courts further reason that by answering the substantive issue of the case—where is the Indian child best placed—in order to determine jurisdiction, the best interests test illustrates a state court's assumption that "relying on an Indian determination... would not truly result in what is best for the Indian child... [which] defeats the sovereignty of Indian tribes in custody matters; the very idea for which the ICWA was enacted."

Another group of cases have followed the BIA Guidelines and determined, contrary to cases such as Robert T and Alexandria Y., that "any psychological effects the transfer may have... are not factors which should be considered when deciding jurisdiction." The Arnell court recognized the

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172. See Robert T., 246 Cal. Rptr. at 175; Maricopa County, 828 P.2d 1245, 1250-51 (Ariz. Ct. App. 1991); see also, In re Alexandria Y., 53 Cal. Rptr. 2d 679, 682 (Ct. App. 1996) (expert testimony from a psychologist that removal of child from her present circumstances would cause her to suffer "negative emotional consequences").


175. Yavapai-Apache Tribe, 906 S.W.2d at 170.


177. See supra, notes 171-72, and accompanying text.

178. Arnell, 550 N.E.2d at 1065; see also, In re J.R.H., 358 N.W.2d 311, 322 (Iowa 1984) ("[C]ultural and socioeconomic considerations... would clearly be inappropriate under the ICWA.").

Interestingly, the _M.E.M._ court was divided on just this point, for the dissent argued that "[i]t cannot... be 'good cause' to refuse transfer of the proceedings to a tribal court on the perception that the tribal court may not act with respect to the child in the way we would wish it to act. The purpose of the
“potentially disruptive effect transfer of this case to the tribal court could have” on the Indian child, but determined that its holding in the case was not related “to placement but to jurisdictional considerations . . . [and w]e have no reason to believe that the . . . tribal court . . . will not . . . be sensitive to the best interests of [the Indian child].”179 This reasoning seems to stem from the fact that these courts, as well as the United States Supreme Court, believe that the Act is based on a “fundamental assumption that it is in the best interests of the Indian child not to be separated from the tribe.”180 Thus, the best interests test for determining good cause not to transfer shows a split in jurisdictions not only in terms of whether the test is appropriate, but also in the determination of what is in the best interest of an Indian child.

b. “Good Cause” Not to Follow Placement Preferences

A similar split occurs in state court determinations of whether an Indian child’s best interests are “good cause” not to follow the placement preferences outlined in 25 U.S.C. § 1915. The Act specifies that in adoptive placement, “a preference shall be given, absent good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the child’s tribe; or (3) other Indian families.”181 Again, the BIA Guidelines define good cause. They specify that to show good cause there must be one or more of the following considerations: (1) the request of the biological parents or the Indian child if of a sufficient age, (2) the extraordinary physical or emotional needs of the child, as established by a qualified expert, or (3) the unavailability of suitable families for placement after a diligent search has been completed.182

As in determining good cause not to transfer proceedings to the tribes, courts which fail to follow the Act’s placement preferences most often do so because they apply a best interests of the Indian child test, and then make an Anglo deter-

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179. Armell, 550 N.E.2d at 1069.
mination of the Indian child’s best interests. Generally, the factors cited as “good cause” based on the child’s best interests are the child’s need for a permanent placement and the psychological attachment or bonding the child has established with the foster or adoptive parents.

For example, in In re Adoption of F.H., the Alaska Supreme Court found that good cause not to follow the Act’s placement preferences may include a consideration of “the best interests of the child” and found good cause to place the child with non-Indian adoptive parents because of the bond between the Indian child and the adoptive mother, and the “uncertainty of the child’s future if the adoption were not allowed.” The court found the uncertainty of the child’s future good cause to deviate from the placement preferences although the child’s maternal cousin was the “first place adoptive placement preference under ICWA” and the Division of Family and Youth Services had conducted a “home study” and concluded that F.H. should be placed with her. The court reasoned that since “further legal proceedings would have been necessary for a permanent adoption” by the child’s cousin, the child’s situation would be “uncertain” if her non-Indian adoptive parent’s adoption petition were dismissed, and upheld the trial court’s finding of good cause to deviate from the placement preferences.

Similarly, in In re Bridget R., the California appellate court raised a constitutional challenge and determined that all children have a right to a placement that is “stable [and] permanent.” The court, therefore, found that Indian twins had a “constitutionally protected interest in their relationship with the only family they have ever known.” Based on such reasoning, the court refused to apply the Act, honor the parents’ revocation of consent to the adoption of their children, and place the twins with the immediate paternal fam-

184. Id. at 1363.
185. Id. at 1362.
186. Id. at 1365; see also In re Interest of Bird Head, 331 N.W.2d 785, 791 (Neb. 1983) (“best interests of the child in are paramount”); In re T.R.M., 525 N.E.2d 298, 308 (Ind. 1988) (good cause not to follow the placement preferences based on child’s emotional attachment to her adoptive parents).
187. 49 Cal. Rptr. 2d 507 (Ct. App. 1996).
188. Id. at 524.
189. Id. at 526.
These courts’ views have troubled other courts, however, because they defy the reasoning of the Supreme Court in *Holyfield*, that

[w]hile stability in child placement should be a paramount value, it cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged. Such a standard would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.¹⁹¹

Some courts, therefore, refuse to apply the best interests test to determine good cause not to follow the placement preferences.

In *In re S.E.G.*,¹⁹² for example, the Minnesota Supreme Court reversed an appellate court decision approving the Alaska court’s determination in *In re F.H.* that “a child’s need for permanence may be considered in determining the child’s extraordinary emotional needs, although by itself the need for permanence does not constitute ‘good cause’ to deviate from the adoption placement preferences in the Act.”¹⁹³ Relying on the plain language of the Act, its legislative history and the United States Supreme Court’s reasoning in *Holyfield*, the Minnesota Supreme Court determined that “a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child’s best interests.”¹⁹⁴ The court noted that “[p]roblems can arise when a system that is largely white, with middle-class values is called upon to evaluate cultural and racial norms that are neither white nor necessarily middle-class.”¹⁹⁵ The court reasoned that “the plain language of the Act read as a whole and its legislative history . . . [make it] ‘most improbable’ that Congress intended state courts to find good cause whenever they determined that a placement outside the preferences of 25 U.S.C. § 1915 was in the child’s best in-

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¹⁹⁰. *Id.*


¹⁹². 521 N.W.2d 357 (Minn. 1994).


¹⁹⁴. *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994).

¹⁹⁵. *Id.* at 364 (citing Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, 16 HAMLINE L. REV. 477, 631 (1993)).
The Minnesota Supreme Court found that the appellate court had defined the need for "permanence" as the need to be adopted, rather than placed with an available Indian foster family, a definition so "narrow[ ] as to threaten or substantially reduce placements in Native American homes," and therefore reversed.\(^{197}\)

Similarly, in a case in which the Montana Supreme Court distinguished its previous holding in \textit{M.E.M.},\(^{198}\) the court cited the plain language of the Act and its legislative intent, as well as the United States Supreme Court's decision in \textit{Holyfield}, in support of its reasoning that state court determinations regarding Indian children "are a part of the problem the ICWA was intended to remedy."\(^{199}\) The court reasoned that the best interests standard "by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture."\(^{200}\) The court therefore refused to consider the best interests of the child as good cause for deviating from the placement preferences, finding such a test an "unnecessary and inappropriate analysis under the ICWA."\(^{201}\)

Thus, the split in the courts' reasoning, not only about whether the good cause/best interests test is an appropriate consideration in determining whether to deviate from the placement preferences, but also about what an Indian child's best interests are, parallels the split apparent in the good cause/best interests analysis used in denying transfer of the proceedings to the tribe. In fact, as the Montana Supreme Court pointed out, some courts even seem to confuse the two.\(^{202}\)

\(^{196}\) \textit{Id.} at 362-63 (citing \textit{Holyfield}, 490 U.S. at 45).
\(^{197}\) \textit{Id.} at 364.
\(^{198}\) The court noted:
\[\text{[I]n \textit{M.E.M.}, we stated that, in determining whether to transfer jurisdiction to the tribal court, "the best interest of the child could prevent transfer upon 'clear and convincing' showing by the state." [In this instance,] however, we are not considering the transfer of jurisdiction to a tribal court; rather we are considering adoption placement preferences . . . .} \]
\(^{199}\) \textit{Id.} (citing \textit{Holyfield}, 490 U.S. at 44-45).
\(^{200}\) \textit{Id.}
\(^{201}\) \textit{Id.} at 515.
\(^{202}\) \textit{See supra} note 198 and accompanying text.
C. **Refusal to Apply Provisions of the Act**

The invocation of the existing Indian family exception and their independent and varied definition of terms of the Act, as illustrated above, have allowed state courts to determine in some instances that the ICWA does not apply at all, thereby leading to further inconsistencies. The most problematic areas are determinations of whether a tribe will be allowed to intervene in a child custody proceeding, whether and when a tribe must be given notice of such a proceeding, and whether and when an Indian parent may revoke consent to a foster care or adoptive placement.

1. **Tribal Intervention**

As part of its jurisdictional provisions, 25 U.S.C. § 1911(c) allows a tribe to “intervene at any point” in a “state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child.” However, in the furthest-reaching denial of a tribe’s right to intervene, the Kansas Supreme Court, after creating the existing Indian family exception in *In re Baby Boy L.*, then used it to uphold the trial court’s holding that the tribe could not intervene. The trial court had denied intervention because the intervention request was not filed within twenty days, and further found that 25 U.S.C. § 1911 would not apply because the child was the illegitimate child of a non-Indian mother and the proceeding was a voluntary adoption. Though finding that the Act did not apply and the tribe was not entitled to intervene since the child was not taken from an existing Indian family, the Kansas Supreme Court also stated that, even if the Act did apply to the proceedings and the tribe was allowed to intervene under 25 U.S.C. § 1911(c), the trial court’s error would have been harmless because the placement preferences of the Act would not have been followed since the mother would have revoked consent to the adoption. The Kansas Supreme Court determined that under such circumstances the tribe’s intervention would have been “useless.”

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204. 643 P.2d 168 (Kan. 1982).
205. See id.
206. Id. at 174.
207. Id. at 177.
208. Id.
However, some courts, after determining that 25 U.S.C. § 1911(c) did not apply, have nevertheless allowed the tribe to intervene under state law which protects the rights of parties with an interest in the subject litigation. In these cases, the courts broadly interpret the purpose of the Act to protect the independent right of the tribe in retaining its children in its society as sufficient interest.

However, in In re A.E.V., the Colorado appellate court found that the tribe did not have sufficient interests to allow it to intervene either under the Act or as an interested party under state law. In that case, the children involved did not become members of the tribe until the tribe adopted a resolution which broadened membership three years after the proceedings. Only then did the tribe officially accept the children as members. Although the court recognized that Congress sought to protect the tribes’ interest in their children, the court reasoned that the tribe had no identifiable interest because “the Tribe had notice of dependency and neglect action and of foster placement, [but] it failed to change its membership requirements until several years after the placement.

In addition, although 25 U.S.C. § 1911(c) states that a tribe has the right to intervene in a proceeding for foster care placement or termination of parental rights, the right does not seem automatically to apply when such a termination was voluntarily consented to and/or when preliminary to an adoptive (as opposed to foster care) placement. However, some courts have determined that despite the maxim “unius est exclusio alterius” (the expression of one thing is the exclusion of another), the Act does not prohibit intervention in such cases.

For example, in In re J.R.S., the Alaska Supreme Court interpreted 25 U.S.C. § 1911(c) as “distinguishing between ‘adoptive placement’ and ‘termination of parental rights’; only in the latter case does 25 U.S.C. § 1911(c) sup-

210. See, e.g., id.
212. Id. at 859.
213. Id.
214. Id. at 860.
However, the court also reasoned that nothing in the Act's legislative history allowed the contrary conclusion, that tribes were forbidden to intervene in adoptive proceedings. Therefore, the court found that the Act "does not limit a state court's power to allow intervention in such cases," and allowed the tribe to intervene based upon Alaska state law which allows intervention in an action in which one has an interest which cannot be otherwise protected. While seeming to come to its determination that the trial court's decision was "fatally flawed" under state law, the court based its reasoning on the Act itself. The court found that the tribe had a substantial interest in having the Act's placement preferences followed and retaining its children, and thus must be allowed to participate in a proceeding in which the rights Congress sought to protect under the ICWA were implicated.

In Baby Girl A., the California appellate court, fourth district, later analogized to J.R.S. to determine that the Act did not expressly grant a tribe intervention in "adoptive placement[s]." The court then similarly found that the tribe had a right to intervene under state law as a party "who has an interest in the matter in litigation." This court, too, relied on the intent of the Act to determine that "the interests of the tribe under the Act are sufficiently important to support allowing it to join this proceeding." Another California court not only refused to apply the existing Indian family exception to deny a tribe intervention, but also broadly interpreted the Act to allow tribal intervention regardless of whether or not the proceeding was voluntary. In In re Lindsay C., the court based its holding on the reasoning of Holyfield, in which the Supreme Court determined that the application of the Act to protect the tribes' interests in their children, as specifically defined as Congress' policy in 25 U.S.C. § 1902, "cannot be any different be-

216. Id. at 15.
217. Id. at 16.
218. Id. at 16-17.
219. Id. at 15.
221. See id. at 108.
222. Id. at 109.
223. Id.
225. Id.
cause the [Indian child is] 'voluntarily surrendered' by [the Indian parent]."

Therefore, as the above cases demonstrate, the tribes' right to intervene as defined by 25 U.S.C. § 1911(c) has been inconsistently determined. This is due to the courts' use or rejection of the existing Indian family exception to determine the Act's applicability, the courts' broad or narrow interpretation of the tribes' interest in retaining their children, and the voluntariness of the proceeding before the court.

2. Notice to Tribes

Since "the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending," 25 U.S.C. § 1912(a) provides that in any involuntary proceeding in a state court, where the court knows or has reason to believe that an Indian child is involved, the party seeking foster care placement or termination of parental rights "shall notify . . . the child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." Along with the specific requirements of notice set out in 25 U.S.C. § 1912(c), federal regulations require that notice include:

- the child's name, birthdate and birthplace;
- the child's tribal affiliation;
- the parents' or Indian custodians' names, birthdate, birthplace and the mother's maiden name;
- a copy of the petition or other document by which the proceeding was initiated; and
- a statement of the right of the biological parents, Indian custodians and the Indian tribe to intervene in the proceedings.

Despite these rigorous requirements, many hard cases result because tribes are not given timely notice. Tribes may "learn about the placement, if at all, indirectly, often after the child has lived with prospective adopters for a long time, or after the adoption decree has been granted." 230 "[T]he emo-

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226. Id. at 198-99 (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989)).
229. In re Pedro N., 41 Cal. Rptr. 2d 819, 821 n.2 (Ct. App. 1995) (citing 25 C.F.R. § 23.11(a), (c), (d)(1)).
230. Hollinger, supra note 5, at 491 (citing Oversight of the Indian Child Welfare Act of 1978: Hearing Before the Senate Select Comm. on Indian Affairs,
tional toll on all parties, especially the Indian child, is heavy. Secondly, although courts have consistently held that failure to comply with the notice provisions of the Act requires remand, courts are split on what will constitute compliance.

Many courts, for example, have held that strict compliance with the notice requirements is not necessary; substantial compliance will suffice. Others require strict compliance with the Act’s requirements. The courts are split over whether there need be strict compliance in four main areas: the time frame of the notice, the mailing requirements, the specific information which the tribe must be given, and the certainty of the child’s “Indian-ness.”

First, courts are split about when notification must be given. In In re S.Z., for example, the court found that although notice was not sent until after the parents’ first court appearance (in contravention of 25 U.S.C. § 1912(a) which requires that no foster care or termination proceeding commence until ten days after receipt of notice by the tribe) the tribe was not prejudiced by the delay because it did receive notice one year before the final adjudication took place. Another court, however, has held that immediate notice is mandatory no matter how late in the proceeding a child’s tribal affiliation is discovered, and that a tribe’s mere “awareness” of a proceeding is not sufficient. That court also found that the agency causing the delay could not argue that rapid resolution of the case, to the exclusion of delayed tribal notice, is in the best interests of the child.

Second, courts are split over whether or not there need be strict compliance with the mailing requirements. Several courts have held that the notice need not be sent by regis-

100th Cong. 106 (1987)).
231. Hollinger, supra note 5, at 491.
233. See e.g. In re M.S.S., 936 P.2d 36, 40 (Wash. Ct. App. 1997) (“technical compliance with the act is not required if there has been substantial compliance with the notice provisions of the ICWA”).
234. See Kahlen W., 285 Cal. Rptr. at 511 (stating that although “there are cases applying the Act which hold technical compliance is not required where has been substantial compliance with the notice provisions of the Act... the statute and all cases applying the Act unequivocally require actual notice to the tribe”).
235. 325 N.W.2d 53 (S.D. 1982).
236. S.Z., 325 N.W.2d at 55.
237. See Kahlen W., 285 Cal. Rptr. at 511.
238. Id. at 514.
tered mail, with return receipt requested, although specifically required in 25 U.S.C. § 1912(a). The South Dakota Supreme Court in, In re S.Z., allowed use of certified mail.\textsuperscript{239} Additionally, the California sixth district court of appeal found that telephone calls, letters by regular mail, and faxes,\textsuperscript{240} while not in strict compliance with the Act, did not prejudice the tribe's interests.\textsuperscript{241}

 Courts have also split over whether there must be strict compliance with the substance of the notice as specified in the Act. In In re S.Z.,\textsuperscript{242} for example, the court held that although the notice sent to the tribe did not specifically inform the tribe of the right to intervene as required by 25 U.S.C. § 1912(a), the "general tenor" of the notice informing the tribe of the pending proceeding and the Act's independent provision for tribal intervention in 25 U.S.C. § 1911(c), was substantial compliance with the Act's notice requirement, especially since the ICWA had only been in effect for approximately two weeks.\textsuperscript{243} However, the California court in Kahlen W.\textsuperscript{244} held that notice is insufficient under the Act if the tribe is not informed of its right to intervene, or the consequences of the failure to intervene, or of the right to request a continuance.\textsuperscript{245}

 Finally, courts have split over whether notice must be given to the tribe when the child's Indian heritage and/or the specific tribal affiliation cannot be positively determined. In fact, the fifth district California court of appeal is itself split, and provides a clear example.\textsuperscript{246} In In re Pedro N.,\textsuperscript{247} the fifth district did not allow an Indian mother to raise a notice issue on appeal when she had broadly stated her tribal affiliation as "Mono."\textsuperscript{248} The Department sent notice to the BIA because

\textsuperscript{239} See S.Z., 325 N.W.2d 53; see also, In re A.L. 442 N.W.2d 233 (S.D. 1989).
\textsuperscript{240} See In re Krystle D., 37 Cal. Rptr. 132, 136 n.2 (Ct. App. 1994).
\textsuperscript{241} Id. at 142.
\textsuperscript{242} 325 N.W.2d 53 (S.D. 1982).
\textsuperscript{243} Id. at 55-56. The dissent noted that the recent enactment of the ICWA, if anything, argued for, rather than against, strict compliance with the notice requirements. Id. at 57 (Wollman, J., dissenting).
\textsuperscript{244} 285 Cal. Rptr. 507 (Ct. App. 1991).
\textsuperscript{245} Id. at 512-13.
\textsuperscript{246} The court in In re Pedro N., however, distinguished Kahlen W on the fact that there, the Indian mother made no showing that she knew the consequences of her Indian status and knowingly relinquished them. Pedro N., 41 Cal. Rptr. 2d 819, 823 (Ct. App. 1995).
\textsuperscript{247} 41 Cal. Rptr. 2d 819 (Ct. App. 1995).
\textsuperscript{248} Id. at 821.
it understood that the Mono tribe was Canadian, not a federally recognized tribe. At a later hearing the Indian mother represented her tribe as “Northfork,” a California tribe of Mono Indians. However, the appellate court found that the mother’s appeal on the issue of delay of notice to the tribe was not timely because she waited two years after the court terminated her rights. The court effectively found either that there was no “reason to know” that the mother was of a federally-recognized tribe, or that if there was reason to know, the possibility that the Mono tribe was Canadian was sufficient reason not to require strict compliance with 25 U.S.C. § 1912(a)’s requirement that the tribe be notified if the court “has reason to know that the child is an Indian.”

However, in In re Kahlen W., the court found that the status of the Indian child need not be certain in order for the notice requirements to apply, and if the state cannot locate or ascertain the tribe, there is still an affirmative obligation to give notice to the BIA to enable it to continue with efforts to locate the tribe. Additionally, the court found that “[n]otice is mandatory, regardless of how late in the proceedings the child’s possible Indian heritage is uncovered.

One final problem area facing state courts on the notice requirement is 25 U.S.C. § 1912(a)’s specification that notice is required in “involuntary” state court proceedings without mention of notice in voluntary proceedings. Therefore, the Act seems to limit notice to involuntary proceedings, while making no such limitation in the tribal intervention “in any state court proceeding” provision of 25 U.S.C. § 1911(c). Since it is very unlikely that a tribe can intervene in a voluntary proceeding under 25 U.S.C. § 1911(c) if it has no notice of the proceeding, these sections of the Act seem to be in conflict. However, rather than make the more logical assumption that 25 U.S.C. § 1911(c) and 25 U.S.C. § 1912(a), when read together, make it apparent that the notice requirements specify involuntary proceedings while not excluding voluntary proceedings, courts have usually required strict com-

249. Id. at 822.
250. Id.
251. Id. at 823.
254. Id. at 513 (citing In re Junious M., 193 Cal. Rptr. 40 (Ct. App. 1983)).
255. See In re J.R.S., 690 P.2d 10, 16 (Alaska 1984). The J.R.S. court found that by specifying intervention in foster care placements the Act did not ex-
ppliance with the Act's specification that the proceeding be involuntary. However, as one judge has recognized:

[t]he tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.

He reasoned that since the purpose of the Act as a whole was to "help Indian tribes preserve their identity,... a tribal right to notice [in voluntary proceedings] is necessarily implicit in the tribe's fundamental and unqualified intervention right under 25 U.S.C. § 1911(c)." This reasoning was based upon the United States Supreme Court's conclusion in Holyfield, which had been decided a few months earlier, that "Congress determined to subject [placements of Indian children in non-Indian homes] to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." Thus, not only is 25 U.S.C. § 1912(a) subject to inconsistent application, it is also ripe for inconsistent interpretation vis-à-vis the 25 U.S.C. § 1911(a) intervention provision, with which it must necessarily work in tandem.

3. Voluntary Withdrawal of Parental Consent

A final inconsistency in the Act's application occurs in determining an Indian parent's right to withdraw consent to termination of his or her parental rights. The ICWA provides that such consent "shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were
fully explained in detail and were fully understood.\textsuperscript{260} In addition, the ICWA provides for a withdrawal of consent to foster care placement "at any time,"\textsuperscript{261} and withdrawal of consent to termination of parental rights to adoptive placement of an Indian child "at any time prior to the entry of a final decree of termination or adoption, as the case shall be."\textsuperscript{262}

However, courts are split not only about whether to follow the letter of the Act, in allowing nearly absolute revocation of consent to Indian parents, but also about whether to apply this section of the Act at all. Courts applying 25 U.S.C. § 1913 and strictly following its provisions proceed from the presumption that "Congress was not concerned with the reason a parent might have for withdrawal of consent. The Act unquestionably provides a higher standard of protection to the rights of [Indian] parents in termination proceedings."\textsuperscript{263} When the requirements of this higher standard are not met, the Indian parent's consent is deemed invalid under the Act.\textsuperscript{264}

Interpreting the letter of 25 U.S.C. § 1913(b)-(c), some courts have found that "a purely consensual placement [of an Indian child] is . . . merely temporary . . . until such time as a final decree fixing parental rights and awarding permanent custody is entered."\textsuperscript{265} In its furthest-reaching implications, 25 U.S.C. § 1913 means that "[w]hen an Indian child within the purview of the Act is involved, adoption agencies and prospective adoptive parents must be held to assume the risk that a[n Indian] parent . . . might change her mind before the adoption is finalized."\textsuperscript{266} Under such reasoning, courts have allowed an Indian parent to revoke consent months and even years after it was given, far into the custody proceeding, even

\begin{itemize}
\item \textsuperscript{260} 25 U.S.C. § 1913(a) (1994).
\item \textsuperscript{261} 25 U.S.C. § 1913(b) (1994).
\item \textsuperscript{262} 25 U.S.C. § 1913(c) (1994).
\item \textsuperscript{264} See In re Angus, 655 P.2d 208 (Or. Ct. App 1982) (finding Indian parents entitled to return of child when consent to placement given before, or within, ten days of birth, and not given before a judge who certifies that the parents understood the consequences of the consent); see also, In re Baby Boy Doe, 902 P.2d 477 (Idaho 1995) (finding Indian mother's consent found invalid when it was obtained without judge's certification that the terms and consequences of the consent were fully explained to her).
\item \textsuperscript{265} K.L.R.F., 515 A.2d at 37.
\end{itemize}
though adoption was the “ultimate objective” of the parent at the time of consenting to a termination of parental rights.\textsuperscript{267}

Such “hard cases” have persuaded some courts to refuse to apply the Act to the action before it, or to severely limit its broad protections. In these instances Indian parents are not afforded the Act’s greater protections.

For example, in \textit{In re Adoption of Crews},\textsuperscript{268} the Washington Supreme Court noted that at trial, the court determined that the Act did not apply because the court determined that the child was not eligible for membership in his tribe until some months after his birth.\textsuperscript{269} More importantly, in affirming the trial and appellate court rulings, the Washington court determined that although the child might have been an Indian child “based on the Choctaw Constitution, we do not find an existing Indian family unit or environment from which [he] was removed or to which he would be returned.”\textsuperscript{270} The court found that even if it were to apply the ICWA, the Act’s provisions would not invalidate the termination of the Indian mother’s parental rights because under the Act, a parent’s right to withdraw consent is cut off “once a final decree of termination is entered even if the adoption is not yet final.”\textsuperscript{271} The court reasoned that 25 U.S.C. § 1913 refers to two kinds of consent: termination of parental rights and consent to adoption, and that

\begin{quote}
[a] consent to termination may be withdrawn at any time before a final decree of termination is entered; a consent to adoption at any time before a final decree of adoption. If Congress had intended consents to termination to be revocable at any time prior to entry of a final decree of adoption, the words “as the case may be” would not appear in the statute.\textsuperscript{272}
\end{quote}

Alternatively, courts have found that the parent’s revocation of consent and the subsequent return of the child to

\begin{footnotes}
\textsuperscript{267} See K.L.R.F., 515 A.2d at 35-36; \textit{Pima County Juvenile Action No. S-903}, 635 P.2d at 189 (consent revoked six months after given, but before final decree of adoption).
\textsuperscript{268} 825 P.2d 305 (Wash. 1992).
\textsuperscript{269} \textit{Id.} at 308; see supra notes 121-25 and accompanying text); see also, \textit{In re Quinn}, 881 P.2d 795 (Or. 1994) (refusing to apply the Act to a child who was not an “Indian” by the court’s definition).
\textsuperscript{270} \textit{See Adoption of Crews}, 825 P.2d at 310.
\textsuperscript{271} \textit{Id.} at 311 (citations omitted).
\textsuperscript{272} \textit{Id.} (citations omitted) (quoting \textit{In re J.R.S.}, 690 P.2d 10, 14 (Alaska 1984)).
\end{footnotes}
his or her Indian parent is not in the child's best interests. For example, in *Hampton v. J.A.L.*, the trial court allowed an Indian mother to revoke consent to adoption, but nonetheless awarded custody of the Indian child to the adoptive parents, which the court determined would be in the child's best interests. The appellate court then went even further, overturning the portion of the judgment below that decreed that the Act applied, and then affirming the judgment below "in all other respects."

Interestingly, the California court in *In re Bridget R.*, managed to do both, first refusing to apply the Act to Indian parents without sufficient contacts with the tribe, and then arguing that even if the Act applied and the voluntary termination of parental rights was found invalid, the children's best interests would argue against returning them to their natural parents. In *Bridget R.*, the court applied the existing Indian family exception to determine that the Act did not apply to parents who did not maintain a "social, cultural, or political relationship" with the tribe. Therefore, the court found that the parents could not revoke their consent to the adoption of their twins because under California law, a parent's right may be waived, if the waiver is knowingly and intelligently made. Moreover, the court concluded that the Indian parents knowingly waived their parental rights "for reasons which reflected that their primary concern was for the twins' future welfare." The court reasoned that in this case, the parents' knowing waiver, at very least, constituted a "voluntary subordination of their constitutional rights to those of the children," and found that the children had a "constitutionally protected interest" in staying with the prospective adoptive family.

Additionally, the court reasoned that even if the Act applied, the revocation of parental consent was not absolutely

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274. *See id.*
275. *Id.* at 337. *But see* *Owens v. Willock*, 690 So. 2d 948, 952 (La. Ct. App. 1997) (finding the best interest of the child is not a question for the state court to decide and distinguishing *Hampton* on the basis of the exclusive tribal jurisdiction in the *Owens* case).
276. 49 Cal. Rptr. 2d 507 (Ct. App. 1996).
277. *Id.*
278. *Id.* at 516.
279. *Id.* at 525.
280. *Id.* at 532.
281. *Id.* at 526.
guaranteed because

[t]he reach of section 1913 is limited by the twins' interest in having a stable and secure home, which . . . is an interest of constitutional dimension . . . [W]e believe it would be a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement, based upon statutory violations which occurred in making the placement . . . .

In this extremely hard case, the court left the children with their adoptive parents and remanded the case to determine whether the parents had sufficient ties to the tribe to warrant application of the Act. However, the court implied that applying 25 U.S.C. § 1913 would be unconstitutional if it were interpreted to afford Indian parents greater protection of their parental rights at the expense of the state court's determination of the best interests of the Indian children. Therefore, as in courts' refusal to apply the jurisdictional and placement provisions of the Act, courts have refused to apply the higher standard of protection afforded to parents by 25 U.S.C. § 1913 when they find that the child is not being taken from an existing Indian family and that the parents' interests conflict with what the court might perceive as the best interests of the Indian child.

D. Inconsistency Due to the Act's Silence

The ICWA contains no provision to determine whether and when a party's rights may have been prejudiced because of a failure to divulge the Indian status of the parent(s) and/or child, either unintentionally or willfully. Usually, these cases involve a birth parent who voluntarily gave up a child for adoption and at that time either did not know or did not divulge his or her Indian status. Later, when the Indian status of the parent was discovered, either the parent or the tribe has tried to assert rights, either to revoke parental consent to the placement under 25 U.S.C. § 1913 or, in the

283. Id. at 536-37.
284. See id. at 526.
285. See In re Interest of Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990) (mother failed to divulge her Indian status and later sought to revoke consent under the Act); In re Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988) (child's Indian heritage was unknown to court at time of proceeding and Indian father, who had not acknowledged paternity at the time of proceedings,
case of the tribe, to take jurisdiction or intervene in the proceedings under 25 U.S.C. § 1911(b) or 25 U.S.C. § 1911(c).286 In these cases, the courts have had no guidelines to follow in their determinations.

What has emerged is an ad hoc set of rules synthesized from a few cases. Generally, courts have found that a simple failure to divulge affiliation with an Indian tribe (even if there was an opportunity to do so), does not stop a party from asserting his or her rights under the Act.287 What is necessary is purposeful deception or willful concealment which prejudices a party's rights.288 Thus, courts have found that even when there was a question of fact about the “good faith behavior of the . . . attorney” involved in the case in concealing an Indian parent’s heritage, such concealment, even if willful, is not significant if it “did not materially affect petitioner’s rights.”289 Similarly, courts have found that neither a social services agency nor the court itself has a duty to investigate a child's Indian ancestry.290

Such unguided determinations, however, have opened the way for another hard case. In In re Bridget R.,291 a California court found that an Indian father purposefully concealed his Indian heritage when acting on the advice of the attorney handling the adoption case.292 The attorney had told the father to change the form he had filled out identifying himself as “one quarter American Indian,” and fill in his “basic ethnic group” as “white,” in order to prevent the adop-

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286. See, e.g., In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) (mother and aunt purposefully tried to conceal removing the child from the reservation).
287. See Armell, 550 N.E.2d at 1067 (holding against the public guardian’s contention that Indian mother should be estopped from asserting her rights under the Act because she remained silent about her Indian heritage for two and one half years). The Armell court found that “[t]he ICWA provides no basis to deny [the Indian mother] the power to exercise her rights . . . . [T]he ICWA gives parents the absolute right to withdraw their consent to adoption at any time up to the time a final decree is granted.” Id.
288. See In re Adoption of Crews, 825 P.2d 305, 312 (Wash. 1992). “[I]f a child’s Indian status is not known due to failure to disclose information regarding the child’s ancestry and the petitioner is prejudiced thereby, even an adoption decree may be challenged.” Id. (citing In re Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988)).
289. Child of Indian Heritage, 543 A.2d at 941 (finding that Indian father was not allowed to assert his rights under the Act because he had not timely acknowledged his paternity, not because of the misrepresentation of the adoptive parents' attorney).
290. See id.
291. 49 Cal. Rptr. 2d 507 (Ct. App. 1996).
292. Id.
tion from being “delayed or prevented.” However, by the time the case came to trial the court knew of the father’s Indian heritage. In fact, the trial judge believed that the attorney “clearly failed in terms of his responsibility to his clients . . . Had he addressed these issues in the initial interview, we would not all be here today.” However, the appellate court refused to apply the Act because the Indian parents were “assimilated” into white culture and found that the case was “even weaker where assimilated parents have previously concluded a reasoned and voluntary relinquishment of a child.”

This is an especially hard case since, although the appellate court refused to find that the attorney’s actions materially prejudiced the rights of the Indian parents, the adoptive parents filed suit against the attorney for, inter alia, fraud, misrepresentation, and concealment. Thus, the Act’s lack of any provision for active concealment of a parent’s Indian status has also caused inconsistency among the courts.

IV. THE PROPOSED AMENDMENTS

As the above synthesis of cases shows, most of the problems of inconsistency in applying the Act arise in the context of voluntary Indian child custody proceedings. This seems to be because state courts fail to realize that the voluntary acts of the Indian parents cannot unilaterally determine application of the Act and/or placement of the Indian children, to the exclusion of the right of the tribe to have a voice in child custody proceedings involving its children. As the United States Supreme Court pointed out in Holyfield, the tribes have an interest, protected by the ICWA, in “retain[ing] children in [their] society.” Thus, the bill’s intent is

293. See id. at 517-18.
294. This case is thus distinct from Child of Indian Heritage, 543 A.2d 925, in which the court never had any reason to know the child was of Indian heritage.
296. Bridget R., 49 Cal. Rptr. 2d at 526.
299. Holyfield, 490 U.S. at 37 (citation omitted).
to "preserve the most basic rights of Indian tribes: tribal self-preservation and self-determination."\footnote{300. 143 CONG. REC. S3122 (daily ed. Apr. 14, 1997) (statement of Sen. Ben Nighthorse Campbell (R-Col.), Chair of Senate Committee on Indian Affairs).}

The ICWA was enacted to protect the tribes' interest in their children, over and above any interest the tribes may have had and lost in the children's parents,\footnote{301. See John McCain, Senate Comm. on Indian Affairs, H.R. Rep. No. 104-335 (1996) (report to accompany S. 1962, 104th Cong. (1996) (reintroduced as S. 569 in the 105th Congress)) [hereinafter REPORT]. The Senate Committee on Indian Affairs emphasized that "[o]ff reservation children and parents, some of whom may be . . . alienated from their tribal community, are a uniquely vulnerable segment of the American Indian and Alaska Native population and the ICWA specifically recognizes the tribal interest in such individuals." Id. at 20; see also Metteer, supra note 14, at 673.} even when there is a total lack of contact between the children's parents (who may have assimilated into Anglo culture) and the tribe.\footnote{302. See In re Interest of Armell, 550 N.E.2d 1060, 1069 (Ill. App. Ct. 1990) (citing Holyfield, 490 U.S. at 30).} The Congressional intent behind the ICWA is that the tribes have the opportunity to establish contact and develop cultural ties with its children.\footnote{303. See Metteer, supra, note 14 at 682.} Therefore, in the case of an Indian child, not only the parents' right, but also the tribe's right to stand \textit{in loco parentis} is protected.\footnote{304. See id; see also REPORT, supra note 301, at 20 ("[T]he Committee wishes to emphasize that an Indian tribe has a parens patriae relationship with all children who are members or who are eligible for membership and who are children of tribal members.").}

In the present bills to amend the ICWA before both houses of Congress,\footnote{305. S. 569 105th Cong. (1997) and H.R. 1082, 105th Cong. (1997) [hereinafter the Amendment(s) or the Bill(s)]. The text of these amendments are identical, as such, they will be referred to jointly in this article.} this intent is again apparent. The Report accompanying the Senate bill articulates the purpose of the amendments. The Amendments are intended to make "the process that applies to voluntary Indian child custody and adoption proceedings more fair, consistent and certain, in order to further advance the best interests of Indian children without eroding tribal sovereignty."\footnote{306. REPORT, supra note 301, at 7.} While the Amendments represent Congress' determination to "enhance the best interests of Indian children by guaranteeing speed, certainty, and stability in the adoption process," the provisions of the bills also "preserve fundamental principles of tribal governments by recognizing the appropriate role of
these governments in the lives of Indian children." This is because the congressional intent underlying the ICWA is a "recognition by all parties that an Indian child has a vital interest in retaining a connection with his or her Indian tribe." However, after nearly twenty years of inconsistent application of the Act in voluntary Indian child custody proceedings, the hard cases detailed above have lead Congress "to address the problems of implementing ICWA in voluntary adoption proceedings."

In order to accomplish the "speed, certainty, and stability" necessary to avoid the hard cases involving "lengthy, protracted litigation causing great anguish for the [Indian] children, their adoptive families, their birth families, and their Indian tribes," the Amendments establish procedures to insure congressional intent that the tribes receive "early notice and information . . . [in a proceeding] seeking to place an Indian child in an adoptive situation or otherwise terminate parental rights." Thus, the first important change to be made in application of the ICWA is to unequivocally establish that tribes "shall" receive "written notice of the placement or proceeding" in all Indian child custody proceedings, including "voluntary placement of an Indian child or the voluntary termination of the parental rights of an Indian child." This clarification should resolve state courts' uncertainty and subsequent inconsistency in applying the Act to voluntary proceedings. The Amendments then specify precise time frames for providing notice to the tribes in order to guarantee that the Act apply at the inception of the child custody proceeding.


309. Id. (statement of Sen. McCain).

310. Id. (statement of Sen. Campbell).

311. Id. (statement of Sen. McCain).

312. Id. (summarizing S. 569); see also REPORT, supra note 301, at 19. This amendment is appended to 25 U.S.C. § 1913(a) (1994). 25 U.S.C. § 1913 is entitled, "Parental rights; voluntary termination," and subsection (a) is entitled, "consent; record; certification matters, invalid consent."


314. See supra notes 255-59 and accompanying text.

315. Not later than: 100 days after any foster care placement, 5 days after
Additionally, section 6 of the Amendments determines that notice to the tribes is required even after the applicable periods have expired if a party "discovers that the child may be an Indian child." This provision should effectively resolve the problems courts have had in determining whether notice is necessary when a child's Indian heritage has not been positively determined. Finally, section 7 of the Amendments provides that the notice to the tribes "shall contain" specific, detailed information about the proceeding. This would seem to reinforce Congress' intent that the content of the notice is as important as the notice itself, and argue for strict compliance with the notice requirements.

The Amendments also provide new requirements regarding tribal intervention, and, in exchange for early and detailed notice to the tribes, set limitations on when and how a tribe may intervene. In the context of voluntary adoptions (25 U.S.C. § 1913) the Amendments add new subsections which grant tribal intervention in voluntary adoption proceedings, although limiting the time the tribe has to intervene. 25 U.S.C. § 1911(c) provides tribal intervention "at any point," in only "foster care placement of, or termination of parental rights to" an Indian child, remaining silent about adoptive proceedings. Because of the inconsistent interpretation by state courts about whether or not adoptive proceedings are specifically excluded, the Amendments propose limited intervention in both voluntary proceedings to terminate parental rights and voluntary adoption proceedings. In a voluntary adoption proceeding, the tribe's right to intervene must be filed not later than the later of ninety days after receiving notice of the adoptive placement, or thirty days after receiving notice of the voluntary adoptive proceeding.

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316. Amendments, supra note 305, § 6. If such a discovery is made, the party shall provide notice "not later than 10 days after discovery." Id.
317. See supra notes 246-54 and accompanying text.
318. See Amendments, supra note 305, § 7 (amending 25 U.S.C. § 1913(d)).
319. See supra notes 233-45 and accompanying text.
321. Id.
322. See supra notes 216-27 and accompanying text.
324. Id.
Section 8 of the Amendments also effectively ties the notice requirements to the intervention requirements, since the tribes' right to intervene is meaningless if they have not received timely notice.\textsuperscript{325} The Amendments provide that despite the new limitations on tribal intervention, the child's tribe retains the right to intervene "at any time" in a voluntary custody proceeding in which the tribe "did not receive written notification" in accordance the notice requirements.\textsuperscript{326}

Furthermore, "no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding . . . ."\textsuperscript{327} Congress has found that the tribes have a substantial interest in having the provisions of the Act\textsuperscript{328} applied in adoption proceedings as well as foster care proceedings rather than deferring to state law. This Amendment therefore seeks to protect those interests by guaranteeing the tribes early notice and a chance to intervene at the beginning of an Indian child custody proceeding.

Finally, in order to guarantee that the state courts do not determine a tribe's interest by determining tribal membership or eligibility for membership,\textsuperscript{329} the Amendments provide that when a tribe files a motion to intervene in a state court proceeding, the tribe shall submit to the court "a certification that includes a statement that documents, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law."\textsuperscript{330} This Amendment would effectively

\textsuperscript{325} See supra note 257 and accompanying text.

\textsuperscript{326} Amendments, supra note 305, § 8 (amending 25 U.S.C. § 1913 by adding this as new subsection (2)(A)).

\textsuperscript{327} Amendments, supra note 305, § 8 (amending 25 U.S.C. § 1913 by adding this as new subsection (g)).

\textsuperscript{328} See supra note 226 and accompanying text.

\textsuperscript{329} In presenting Senate Bill 569 to the 105th Congress, Senator Ben Nighthorse Campbell stated that "[t]he right of any sovereign nation, including Indian nations, includes the right to determine who is and who is not a member citizen." 143 CONG. REC. S3122 (daily ed. Apr. 14, 1997) (statement of Sen. Ben Nighthorse Campbell).

\textsuperscript{330} Amendments, supra note 305, § 8(2)(B); see supra note 212-214 and accompanying text for problems with state courts determining tribal membership and eligibility in allowing intervention; see also supra Part III.B.1 (discussing problems with state courts' various definitions of "Indian" for purposes of applying the Act, as they arise when state courts take it upon themselves to determine tribal membership).
codify Congress' intent, as expressed in the Report accompanying the bill, that

[in recognition of long-standing and fundamental principles of Federal Indian law... tribal determinations of membership under tribal law are conclusive for the purpose of determining whether a child is an Indian child subject to the ICWA... Indian tribes will follow a specified set of rules based upon their own membership requirements which they have established under tribal law.\textsuperscript{331}

In addition to limiting the tribes' right to intervene in voluntary adoptions, the Amendments also set new limitations on when an Indian parent may withdraw consent to adoption or termination of parental rights. State courts have strongly reacted against the seemingly open-ended right of an Indian parent to withdraw consent to the termination of parental rights as well as consent to foster care and adoptive placements.\textsuperscript{332} 25 U.S.C. § 1913(b)-(c) allow parents to withdraw consent "at any time,"\textsuperscript{333} which, as state courts have determined, forces adoptive or foster care parents to "assume the risk" that an Indian parent might change his or her mind at any time in the proceeding before a final decree is entered.\textsuperscript{334} This has often caused courts to refuse to apply the Act.\textsuperscript{335}

Section 5 of the Amendments therefore adds to 25 U.S.C. § 1913(b) a provision that "a consent to adoption of an Indian child or termination of parental rights to an Indian child may be revoked only if (A) no final decree of adoption has been entered; and (B) the adoptive placement specified by the parent terminates."\textsuperscript{336} Additionally, the revocation must occur before the later of the end of the 180-day period beginning on the date the tribe receives notice of the proceeding or the thirty day period beginning on the date on which the parent who revokes consent receives notice of an adoption proceeding which includes an explanation of the revocation period.\textsuperscript{337} Setting such limits will insure that the

\textsuperscript{331} REPORT, supra note 301, at 16.
\textsuperscript{332} See supra notes 265-67 and accompanying text.
\textsuperscript{334} See supra note 266 and accompanying text; see also supra note 265 and accompanying text.
\textsuperscript{335} See supra notes 269-72 and 278-82 and accompanying text.
\textsuperscript{337} Id.
hard cases, in which children who have bonded with new parents are removed from placements after many months or even years have gone by, are not repeated.\textsuperscript{338}

However, along with the time limits set on withdrawal of parental consent, the Amendments clarify the existing provisions of the ICWA that specify the validation of consent before a judge and further require a judge to "certify that the birth parents have been informed of their placement options and of their rights under the ICWA."\textsuperscript{339} The intent behind this additional information is to "increase the opportunity for birth parents to fully consider their placement options at the very beginning of the procedure and more fully understand their right[s]."\textsuperscript{340} In turn, providing the Indian parent with this information at the outset "should help lessen the number of disputes which can arise later on in the process because parents were unclear about their available options when they placed the child for adoption."\textsuperscript{341}

In addition, section 5 of the Amendments provides that when an Indian parent makes a timely revocation under section 5, paragraph (2) of the Amendments, described above, the Indian child "shall be returned to the parent who revokes consent immediately."\textsuperscript{342} This provision seems to show Congress' intent that a state court may not refuse to return an Indian child to his or her parents upon proper parental revocation of consent under the Act, based on a finding that a return to the Indian parent is not in the child's "best interests."\textsuperscript{343} Therefore, contrary to the court's reasoning in \textit{In re Bridget R.}, that "the reach of section 1913 is limited by the [Indian child's] interest in having a stable and secure

\begin{footnotes}
\item[338] See \textit{In re Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 191 (Ariz. Ct. App. 1981)} (consent revoked six months after given, but before final decree of adoption); \textit{In re Adoption of K.L.R.F., 515 A.2d 33, 38 (Pa. Super. Ct. 1986)} (consent revoked one year after given, but before final decree of adoption). This provision works in tandem with the early notice to the tribe provision of the Amendments to insure that the opposite does not occur either: that adoptive parents are rewarded because they have been able to keep the child through "protracted litigation," during which time they have bonded with the child, such that neither state nor tribal courts will remove the child and place him/her according to the Act's placement preferences. See \textit{Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54} (1989).
\item[339] \textit{REPORT, supra} note 301, at 17.
\item[340] Id.
\item[341] Id.
\item[342] Amendments, \textit{supra} note 305, § 5(3).
\item[343] \textit{See supra} notes 274-84 and accompanying text.
\end{footnotes}
home," the Amendments would limit the time in which an Indian parent may revoke consent, but not the reach of 25 U.S.C. § 1913. When a parent has complied with the revocation requirements, the Amendment would preclude a state court from determining that it is not in the Indian child's best interests to be returned to the Indian parents. This provision shows a recognition of the fundamental assumption that it is in the Indian child's best interest that its cultural ties be protected.  

Section 5 also responds to the "hard case" presented in In re Bridget R. by including a paragraph specifying that when a court of competent jurisdiction finds that the Indian parent's consent to adoption or voluntary termination of parental rights was obtained by "fraud or duress," consent may be revoked beyond the newly imposed time limits set out in paragraph (2) of the Amendments. However, in keeping with Congress' other stated intent, "to guarantee ... speed [and] certainty ... in the adoption process," section 5 lastly provides that "no adoption that has been in effect for a period of longer than or equal to 2 years may be invalidated under this subsection." However, the Amendments would add to the ICWA a provision for criminal sanctions against "a person, other than a birth parent of the child" upon conviction, if such person "knowingly and willfully falsifies, conceals," or misrepresents the status of an Indian parent or child.

V. CONCLUSION

These Amendments, along with a provision for open adoptions and enforceable visitation rights, even when such rights do not exist in state law, constitute the highlights of

345. See REPORT, supra note 301, at 11 (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 (1989)).
346. See Amendments, supra note 305, § 5(3)(B). The Amendments are clearly a response to many "high profile" hard cases, but specifically to Bridget R. Senator McCain has written that the case of "a non-Indian Ohio couple, Jim and Colette Rost, who have been trying to adopt twin daughters—now nearly 3 years old—placed with them at birth by an adoption attorney who failed to disclose that the children were Indians" led to the compromise bill Senate Bill 1962 introduced to the 104th Congress (reintroduced as Senate Bill 569 in the 105th Congress). John McCain, Amity in Indian Adoptions, WASH. POST, Aug. 2, 1996, at A21.
347. FEDERAL DOCUMENT CLEARING HOUSE, supra note 307.
348. Amendments, supra note 305, at § 5(6).
349. Id., section 114; see also supra notes 285-97 and accompanying text.
the bills presently before both houses of Congress.\textsuperscript{351} If enacted, they will go a long way in remedying many of the abuses of the ICWA by state courts over the last two decades. However, two large areas of concern remain if the ICWA is to be consistently applied: a determination of whether the existing Indian family exception is a valid exception to applying the Act, and a definition or deletion of “good cause” in both the jurisdictional provisions of 25 U.S.C. § 1911(b) and the placement preferences of 25 U.S.C. § 1915(a).

First, any Amendments to the Act must contain a specific statement of Congressional intent that the Act applies to all children who are members of a tribe or eligible for membership as the child of a member. Implicit within this requirement is the requirement that the tribes’ determination of their membership is necessary and conclusive. The Report accompanying the Senate bill to Amend the ICWA states that the existing Indian family exception is completely contrary to the entire purpose of the ICWA.... Indian tribes have the authority to define their membership.... The ICWA, as amended, is to be applied to all Indian children regardless of their individual circumstances....[T]he adoption of [the Amendments of S.569] should be construed as a rejection of “existing Indian family exception doctrine” in all its manifestations.\textsuperscript{352} However, this statement of Congressional intent must be incorporated into the Act to avoid further judicial interpretation of what Congress really did intend, in the Act itself.

The courts have a history of interpreting the Act to their own purposes in areas in which Congressional intent is not strictly spelled out. The existing Indian family exception was judicially created although “[t]he language of the Act contains no such exception to its applicability,”\textsuperscript{353} and despite the

\textsuperscript{351} Amendments, supra note 305.

\textsuperscript{352} REPORT, supra note 301, at 14.

\textsuperscript{353} In re Junious M., 193 Cal. Rptr. 40, 46 (Ct. App. 1983); see also, In re N.S., 474 N.W.2d 96 (S.D. 1991). “There is simply no statutory requirement for [the child] to have been born into an Indian home or community in order to come within the provisions of the ICWA, however much one might believe 25 U.S.C. § 1903(4) should have been written that way.” Id. at 101 n.(unnumbered) (Sabers, J., concurring) (emphasis in original); In re Adoption of S.S., 657 N.E.2d 935, 953 (Ill. 1995) (McMorrow, J., dissenting) (“There is no provision in the ICWA that an Indian child be born into or be living in an Indian family unit to be subject to its provisions. However much one might be-
fact that legislation affecting Indian relations is the exclusive province of federal law. Additionally, the courts created the exception and have continued to apply it although Congress considered and rejected proposed language which would have so restricted the application of the ICWA.

Furthermore, the exception has persisted despite the Supreme Court's holding that the Act applied even to twins who had been placed with a non-Indian family at birth and had never been on the reservation or spent time with their Indian family. The Supreme Court reasoned that

tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned, not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.

Although the Supreme Court's opinion would seem to make it clear that the Act is not limited to children taken from an existing Indian family, and that "Indian tribes still have a legitimate interest in the welfare of members who do not have previous significant contact with the tribe or the reservation," state courts have still applied the exception. Therefore, despite the statement of the intent behind the 1997 Amendments included in the accompanying Report, that intent must be somewhere incorporated into the text of the Act in order to insure that state courts do not apply the existing Indian family exception.

Second, the Amendments must either specifically define or else delete the "good cause to the contrary" language from both 25 U.S.C. § 1911(b) and 25 U.S.C. § 1915. This vague
language has allowed state courts to inconsistently determine both tribal jurisdiction to determine the placement of Indian children and then make the ultimate placement decision according to the courts' own view of what is best for an Indian child. While one practitioner has suggested that Congress provide a "specific list of what does and does not constitute 'good cause to the contrary,'" she is also the first to point out that such a list "would, of course, not be exhaustive." However, a non-exhaustive list of good causes would allow the courts much the same latitude they have now in determining good causes. Rather than interpreting what Congress intended good cause to be, they would simply interpret which good causes beyond those on the list Congress intended to be included.

Therefore, others have suggested that, rather than including a partial list of what is good cause not to follow the mandates of 25 U.S.C. § 1911(b) or 25 U.S.C. § 1915, the Amendments might list the "limited circumstances in which the state may retain jurisdiction" or determine placement contrary to 25 U.S.C. § 1915. However, since the state courts have broadly construed the good cause exceptions to retain jurisdiction and make placements, there is every reason to believe they would also broadly construe any circumstances which specifically detailed Congress' grant of jurisdiction and/or the power to determine placement of Indian children to the state courts.

Accordingly, the "good cause" exceptions to 25 U.S.C. § 1911(b) and 25 U.S.C. § 1915 should be deleted to take away any possibility that the state courts will variously define the term and make exceptions to provisions regarding tribal jurisdiction and the placement of Indian children which are the heart of the ICWA. This proposal is supported by the United States Supreme Court's pronouncement in Holyfield that the Act, as a "federal statute," was intended to have "uniform nationwide application" achieved by "nationwide uniformity" in statutory definitions, as well as

359. Bakeis, supra note 11, at 586.
360. See supra notes 144-202 and accompanying text.
Congress' admonition, codified in 25 U.S.C. § 1901(5), that "the States... have often failed to recognize essential tribal relations of Indian people, and the cultural and social standards prevailing in Indian communities and families."

At the time of this writing, the Amendments before both houses of Congress seem destined to pass into law. This is needed legislation, which should make the ICWA a viable vehicle for protecting the interests of not only Indian children and parents, but also of the tribes themselves. The tribal compromises limiting the time for tribal intervention and an Indian parent's revocation of consent under the Act also insure that adoptive parents can enter into the adoption of Indian children in the limited circumstances provided for in the Act with new confidence that such adoptions will be "certain, stab[le], and final[]." However, in order to insure that the "hard cases" that have made bad law for nearly two decades do not continue, the Amendments may need even further revision so that state courts do not continue to find exceptions to the Act's application. But there is reason to hope that the ICWA will continue to protect an Indian child's "best interest that its relationship to the tribe be protected."