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The Existing Indian Family Exception To The Indian Child Welfare Act

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Introduction

The Indian Child Welfare Act (''ICWA'') defines an ''Indian'' as ''any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43.''[1] ICWA further defines ''Indian child'' as ''any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.''[2] In order to assist courts in determining exactly who is an Indian or an Indian child, the Bureau of Indian Affairs (''BIA'') Guidelines state that:

> . . . the best source of information on whether a particular child is Indian is the tribe itself . . . Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference.[3]

[1] 25 U.S.C. § 1903(3) (2006).
[2] *Id.* at § 1903(4).
[3] Department of Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 at B.1 Commentary (Nov. 26, 1979) (internal citations omitted). See http://pub.bna.com/fl/ICWABIA.htm.

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The Guidelines further state that ''[t]he determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.''[4] The text of the Indian Child Welfare Act gives no exceptions to application of ICWA's requirements in the case of Indians who do not live on the reservation or do not have ties to the tribe or its cultural practices. The BIA Guidelines similarly provide no exceptions to the application of ICWA's requirements for Indians who do not have ties to the reservation, tribe, or tribal cultural practices.

It seems reasonable, based upon this lack of express language, to think that Congress did not intend for such an exception to exist. As B.J. Jones, Chief Judge of the Turtle Mountain Tribal Court of Appeals, stated:

> The existing Indian family exception allows state courts to make the very value judgments pertaining to which Indians have sufficient contacts with their cultural and traditional antecedents that Congress felt the state courts were incapable of making.[5]

If Congress intended for this type of an exception, called the existing Indian family exception, to be included as an ingredient for jurisdiction, it likely would have included it in the express language of the statute.

Many state courts, however, have come to exactly the opposite conclusion. These states interpret a lack of express language as permission to create an exception to ICWA's application. Based on this premise, the existing Indian family doctrine was judicially-created to limit ICWA's application to Indian children whose family units lack ties to reservations or tribal culture.[6] However, this judicially-created doctrine fails to recognize the interests of the Indian child's tribe. It also fails to recognize that the interest of the tribe is a discrete interest which is separate from the interests of the parents or Indian custodians;[7] and that the ultimate goal of ICWA is to preserve the distinct cultures of the tribes by protecting the children of those cultures.[8] Courts, in states using the existing Indian family doctrine, refuse to apply ICWA ''to situations where an Indian child is not being removed from an existing Indian family,'' arguing that in those situations ''the underlying policies [of ICWA] are not furthered.''[9]

[4] *Id.* at B.1.

[5] D.H. Getches, C.F. Wilkinson, R.A. Williams, Jr. *Cases and Materials on Federal Indian Law*, 673 (Fifth Edition, 2005) (citing B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. Rev. 397, N.15).

[6] The existing Indian family exception has even been called ''judicial distortion of ICWA.'' B.J. Jones, Power Point Presentation and ICWA Training, *Indian Child Welfare Act* (South Dakota State Wide Education Services-SWES), July 19, 2007 (copy of Power Point available from B.J. Jones, who may be contacted at jones@law.und.edu).

[7] B.J. Jones, *The Indian Child Welfare Act Handbook*, chapter 4 (American Bar Association, Section of Family Law 1995).

[8] *Id.* at chapter 8.

[9] D.H. Getches, C.F. Wilkinson, R.A. Williams, Jr., *Cases and Materials on Federal Indian Law* at 673.

Application of the Existing Indian Family Doctrine Prior to *Holyfield*

Prior to the United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*,[10] many state courts adopted the existing Indian family doctrine and interpreted it as an exception to the application of ICWA's requirements. Those states include Indiana, Kansas, Missouri, Oklahoma, and South Dakota. However, only one state, New Jersey, has interpreted the existing Indian family exception as a distortion of ICWA and declined to adopt the exception.[11]

Indiana adopted the existing Indian family doctrine in the 1988 case of *In the Matter of Adoption of T.R.M.*[12] The child, T.R.M., was born in Hot Springs, South Dakota to a mother who was a member of the Oglala Sioux Indian Tribe.[13] The paternity of the child was not established.[14] The mother met the adoptive parents when the adoptive parents were travelling on the Pine Ridge Indian Reservation; and they subsequently became friends.[15] On multiple occasions prior to the birth of T.R.M., the birth mother and the adoptive parents discussed their plans for the adoption of T.R.M.[16] The child was born in June 1981, off the reservation, and the adoptive mother returned at that time to take T.R.M. from the birth mother.[17] At that time, the birth mother signed a form consenting to the adoption of T.R.M. by the couple.[18] The adoptive parents filed a petition for adoption of the child in September 1982.[19] The trial court granted the adoption; but the decision was reversed by the Court of Appeals, who stated that exclusive jurisdiction had vested in tribal court.[20] The Indiana Supreme Court reversed, stating that ''the central thrust and concern of the ICWA is . . . the establishment of minimum federal standards for the removal of Indian children from *their* families.''[21] The court admitted that T.R.M.'s biological ancestry was Indian, but stated that

> [f]rom the unique facts of this case, where the child was abandoned to the adoptive mother essentially at the earliest practical moment after childbirth and initial hospital care, we cannot discern how the subsequent adoption proceedings constituted a breakup of the Indian family. We therefore hold that . . . the ICWA should not be applied to the present case in which the purpose and intent of Congress cannot be achieved thereby.[22]

Kansas adopted the existing Indian family exception in 1982 in *Matter of Adoption of Baby Boy L.*[23] Baby

[10] 490 U.S. 30, 15 FLR 1025 (1989).

[11] It does not appear that the remaining states have addressed the issue in case law.

[12] 525 N.E.2d 298, 14 FLR 1460 (Ind. 1988).

[13] *Id.* at 301.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 301-02.

[17] *Id.* at 302. The former husband of the birth mother was not present at the time of the transfer of T.R.M. and did not object to the transfer. *Id.* Additionally, it is not clear that the former husband of the birth mother was ever established as the father of T.R.M. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 302-03 (emphasis added; internal quotation omitted).

[22] *Id.* at 303.

[23] 643 P.2d 168 (Kan. 1982).

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Boy L. was born out of wedlock to a non-Indian mother and the putative father, a member of the Kiowa Tribe.[24] On the day of the child's birth, his mother executed a form consenting to the adoption of the child by the adoptive parents; and they filed a petition for adoption on the same day.[25] The birth father was given notice of the adoption proceedings as well as notice of a petition for termination of his parental rights.[26] When it was brought to the court's attention that the birth father was a member of the Kiowa Tribe, the case was continued to provide notice of the proceedings to the tribe.[27] The child was even enrolled as a member of the Kiowa Tribe during the pendency of the proceedings.[28] The trial court subsequently held a hearing and determined that ICWA was inapplicable to the situation.[29] On appeal, the Kansas Supreme Court cited the legislative history and express language of ICWA as support for application of the existing Indian family exception to ICWA's mandates.[30] The court stated:

> A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother . . . Numerous provisions of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation as is before the court.[31]

Missouri adopted the existing Indian family doctrine in 1986 in the case of *In Interest of S.A.M.*[32] The child involved in the dispute was an illegitimate child born to a non-Indian mother and an Indian father who was an enrolled member of the Kickapoo Tribe.[33] The father appealed the termination of his parental rights arguing that the trial court erred by not applying ICWA to the proceedings.[34] The appellate court reproduced § 1912(f) of ICWA in its opinion, which states that in order for parental rights to an Indian child to be terminated, a determination ''that the *continued* custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.''[35] The court concluded that because the father had never had custody of S.A.M., it would be impossible for his custody of the child to ''continue.''[36] Thus there would be no breakup of an existing Indian family by termination of his parental rights; and ICWA should not apply to the case.[37]

Oklahoma adopted the existing Indian family doctrine in two cases in 1985: *Matter of Adoption of Baby Boy D*[38] and *Matter of Adoption of D.M.J.*[39] In *Baby Boy D*, the father was a member of the Seminole Nation of Oklahoma and the mother was a non-Indian.[40] The mother consented to adoption of Baby Boy D and the child was adopted without notice to the father and without his consent.[41] After learning that the child had been adopted, the father filed a petition seeking to vacate the adoption on grounds that the child was an Indian child and that the adoption proceedings were thus subject to ICWA.[42] The trial court denied the father's petition.[43] On appeal, the Oklahoma Supreme Court stated that ''Congress seeks to protect the Indian child by setting minimum federal standards for the removal of that Indian child from an existing Indian family unit. Here we have a child who has never resided in an Indian family, and who has a non-Indian mother'' and because the child was not a member of an existing Indian family, the father lacked standing to ask the court to apply ICWA.[44] The case of *Baby Boy D* has a dissenting opinion in which the dissenting justice states that the majority has misconstrued ICWA in holding that ICWA may be disregarded if the child has not been living in an Indian familial setting.[45]

In *Matter of Adoption of D.M.J.*, custody of D.M.J. was awarded to her non-Indian mother after a divorce between the mother and D.M.J.'s father, a member of the Cherokee Nation of Oklahoma.[46] Six years after the divorce, the birth mother arranged for an adoption of D.M.J. by a non-Indian married couple.[47] Adoption proceedings began, and the birth father and the Cherokee Nation of Oklahoma appeared at the hearing to oppose the adoption.[48] The trial court terminated the birth father's parental rights for nonsupport of D.M.J., and D.M.J. was adopted by the married couple.[49] The father appealed the termination of his parental rights because of the failure of the trial court to comply with ICWA.[50] On appeal, the Oklahoma Supreme Court adopted the position that the Indian family had been broken up since the divorce of the birth parents, so remedial services and rehabilitative programs, as required by ICWA, were unnecessary and could not repair the relationship or prevent the breakup of the family.[51] In support of its position that no existing Indian family existed and thus ICWA need not apply, the court stated:

> Congress appreciated, as do we, the culture-shock and underlying trauma in yanking a child from an Indian environment and placing the child in a non-Indian one. In like manner, it provided no mandate that a child such as D.M.[J.] be

[24] *Id.* at 172.
[25] *Id.*
[26] *Id.* at 172-73.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 175.
[31] *Id.*
[32] 703 S.W.2d 603 (Mo. App. 1986).
[33] *Id.* at 603-04.
[34] *Id.* at 604.
[35] *Id.* at 607 (emphasis in original opinion but not in statute; citing 25 U.S.C. § 1912(f)).
[36] *Id.* at 607.
[37] *Id.* at 609.
[38] 742 P.2d 1059, 12 FLR 1088 (Okla. 1985).
[39] 741 P.2d 1386 (Okla. 1985).
[40] 742 P.2d 1059, 1060.
[41] *Id.*
[42] *Id.* The father also claimed that the adoption should be vacated because he had been denied due process and because of the fraud practiced on the part of the birth mother. *Id.*
[43] *Id.* at 1061.
[44] *Id.* at 1064.
[45] *Id.* at 1074.
[46] 741 P.2d 1386, 1387.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* The Cherokee Nation also complained of lack of notice to the tribe. *Id.*
[51] *Id.* at 1388-89

> uprooted from a non-Indian environment and placed in an Indian one.[52]

The Oklahoma Supreme Court concluded that ICWA only applies when Indian children are removed from existing Indian family environments.[53]

South Dakota adopted the existing Indian family exception in 1987 in *Claymore v. Serr*.[54] The child involved in that case, Danette, was born out of wedlock to a non-Indian mother and a father who was a member of the Cheyenne River Sioux Tribe.[55] The mother was the sole caregiver and provider for Danette for her early life; and the father paid no child support and very few of Danette's expenses.[56] When Danette was about five years old, the mother met and married a man named Greg Serr; and about two years later, they commenced proceedings for Serr to adopt Danette.[57] When the birth father learned of these adoption proceedings, he filed an action in circuit court to restrain further adoption efforts.[58] The Cheyenne River Sioux Tribe was notified of the petition for adoption pursuant to ICWA and it requested transfer of the proceedings to tribal court.[59] The mother and her husband objected to transfer; and the tribe then made a motion to intervene in the proceedings.[60] That motion was denied and the circuit court made the determination that the tribal court was not entitled to either exclusive or concurrent jurisdiction over the case.[61] The birth father's parental rights were terminated and the adoption of Danette by the mother's husband was approved.[62] The birth father appealed to the South Dakota Supreme Court, raising two issues:

> (1) whether the Indian Child Welfare Act mandated dismissal of the circuit court action due to lack of jurisdiction; and, (2) whether the trial court erred in terminating the [birth father's] parental rights to his minor child.[63]

The South Dakota Supreme Court acknowledged that the case involved both an Indian child and a child custody proceeding, but declined to apply ICWA because ''there was no existing 'Indian family' losing an Indian child.''[64] The court cited to the Kansas case of *Matter of Adoption of Baby Boy L.* in support of its position, but recognized that ICWA did not set forth the requirements of an existing Indian family in outlining the jurisdictional requirements of ICWA.[65] The court said that even though the existing Indian family doctrine was not included in ICWA, it ''is implied throughout the Act'' and held that because Danette had not been a part of or been removed from an existing Indian family, ICWA's mandates did not apply to her.[66]

In contrast, New Jersey declined to adopt the existing Indian family exception in 1988 in *Matter of Adoption of a Child of Indian Heritage*.[67] In that case, the putative father of a child who may have been eligible for membership in the Rosebud Sioux Tribe moved to vacate the adoption of the child on grounds that he was not provided notice of the proceedings in accordance with ICWA's mandates.[68] Both the putative father and the birth mother of the child were members of the Tribe; but neither resided on the reservation.[69] Prior to the birth, the child's mother made plans to place the child for adoption in New York.[70] Six days after the child's birth, the mother traveled to New York, executed her consent to the adoption and termination of her parental rights, met the adoptive parents,[71] and turned the child over to them.[72] In overturning the adoption proceedings, the New Jersey Supreme Court stated that the primary purpose of ICWA is ''preserving the continued existence and integrity of Indian tribes by preventing the unwarranted removal of Indian children from their families by nontribal public and private agencies.''[73] The court rejected the existing Indian family exception because, as it stated, the doctrine makes the voluntariness of the mother's termination of parental rights the determinative jurisdictional test, and because the language of ICWA does not include it as a factor of jurisdiction.[74]

Mississippi Band of Choctaw Indians v. Holyfield

In *Mississippi Band of Choctaw Indians v. Holyfield*,[75] the United States Supreme Court dealt with the status of twin babies who were born out of wedlock to parents who were both enrolled members of the Mississippi Band of Choctaw Indians (''Tribe'') as well as residents and domiciliaries of the Choctaw Reservation.[76] On January 10, 1986, the twins' mother deliberately gave birth to the twins in a county some 200 miles from the reservation and executed a consent-to-adoption form in that same county.[77] The twins' father signed a similar form.[78] On January 16, 1986, the Holyfields filed a petition for adoption of the twins in the same court; and the adoption proceedings were concluded on January 28, 1986 with the issuance of a Final Decree of Adoption.[79] The adoption decree contained no reference to ICWA or mention of the twins' Indian background, despite the Chancery Court's apparent awareness of both.[80]

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[52] *Id.* at 1389.
[53] *Id.* As with *Baby Boy D, D.M.J.* included a dissenting opinion which stated that the existing Indian family doctrine was inapplicable and ICWA should have been applied. *Id.* at 1389-90.
[54] 405 N.W.2d 650, 13 FLR 1414 (S.D. 1987).
[55] *Id.* at 651.
[56] *Id.* at 652.
[57] *Id.*
[58] *Id.* The action also included a request for a declaratory judgment concerning his paternity, entry of an order requiring payment of child support, and scheduled visitation rights. *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 653.
[62] *Id.*
[63] *Id.* (internal citation omitted).
[64] *Id.*
[65] *Id.* (citing 643 P.2d 168 (Kan. 1982)).
[66] *Id.* at 653-54.
[67] 543 A.2d 925, 14 FLR 1459 (N.J. 1988).
[68] *Id.* at 928.
[69] *Id.*
[70] *Id.*
[71] The adoptive parents are New Jersey residents. *Id.*
[72] *Id.*
[73] *Id.* at 930 (internal citations omitted).
[74] *Id.*
[75] 490 U.S. 30, 15 FLR 1025.
[76] 490 U.S. at 30 and 37.
[77] *Id.*
[78] *Id.* at 38.
[79] *Id.*
[80] *Id.*

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Two months after the Final Decree of Adoption, the Tribe moved to vacate the adoption decree on the ground that the tribal court should have exclusive jurisdiction over the twins.[81] The Chancery Court overruled the motion and held that the Tribe had ''never obtained exclusive jurisdiction over the children.''[82] That court primarily relied upon a few facts in reaching this conclusion; first, that the twins' mother ''went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation,'' second, that the parents had promptly arranged for the adoption of the twins by the Holyfields, and third, that ''at no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation.''[83] The Supreme Court of Mississippi subsequently affirmed the Chancery Court's decision[84] and stated:

> The Indian twins . . . were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi.[85]

The Mississippi Supreme Court also distinguished state cases appearing to establish that ''the domicile of minor children follows that of the parents.''[86] The court said that the domicile of the twins was off the reservation and that the state court properly had jurisdiction over the adoption proceedings of those twins.[87] In support of its position, the Supreme Court of Mississippi stated that the lower court judge ''did conform and strictly adhere to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, service of process, etc.,'' while at the same time concluding that the provisions of ICWA were inapplicable by stating that ''these proceedings . . . actually escape applicable federal law on Indian Child Welfare.''[88]

On appeal, the United States Supreme Court recognized that the proceeding at issue was a ''child custody proceeding'' and that the children involved in that proceeding were ''Indian children.''[89] Because the twins fit into these portions of ICWA, the issues for determination by the Court were whether the state law definition of ''domicile'' should control, and whether under the ICWA definition of ''domicile'' the twins were nondomiciliaries on the reservation.[90] The Supreme Court recognized that the language of ICWA does not define ''domicile;'' and that the definition is a matter of Congressional intent.[91] The Court began with a canon of construction, stating that ''in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.''[92] It reached this conclusion because ''federal statutes are generally intended to have uniform nationwide application,''[93] and because of the presumption that ''the federal program would be impaired if state law were to control.''[94] Congress very clearly did not intend for the critical terms in ICWA to rely on state law for definition, and actually was quite concerned with curtailing state authority.[95] In support, the Court stated:

> Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.[96]

In fact, the Court was concerned that a State might apply a definition of domicile that would render ICWA inapplicable, or that an ''adoption brokerage business'' might develop if Mississippi's position were sustained.[97]

Because the United States Supreme Court determined that state law does not control the definition of ''domicile,'' it relied upon the term's generally uncontroverted and widely used definition.[98] The Court stated that domicile for adults is ''established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there.''[99] The Court continued that the domicile of minors is determined by the domicile of their parents because ''most minors are legally incapable of forming the requisite intent to establish a domicile'' of their own, and that the domicile of illegitimate children means the domicile of the mother.[100]

Because the domicile of the unwed mother and father in *Holyfield* was, at all relevant times, the Choctaw Reservation, the domicile of the twin babies, at the time of their birth, was also the reservation.[101] The Court continued that the mother's voluntary surrender of the twins to the Holyfields does not render this finding of domicile on the reservation incorrect.[102] In perhaps the most significant statement on ICWA and the portion of the opinion which most directly affects the existing Indian family doctrine, the United States Supreme Court declared:

> 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

[81] *Id.*
[82] *Id.* at 39 (internal citations omitted).
[83] *Id.* (internal citations omitted).
[84] *Id.*
[85] *Id.* at 40 (ellipsis in original; internal citations omitted).
[86] *Id.*
[87] *Id.*
[88] *Id.* (ellipsis in original).
[89] *Id.* at 42.
[90] *Id.* at 42 and 47.
[91] *Id.* at 43.
[92] *Id.* (ellipsis in original; internal citations omitted).
[93] It appears that the Supreme Court's admonishment that ICWA be applied uniformly across the country is being mostly ignored by the states and that the application of the Act will, in many circumstances (including with the existing Indian family doctrine, among others), depend upon where a child custody proceeding is commenced. B.J. Jones, *The Indian Child Welfare Act Handbook* at chapter 6.
[94] *Id.* (internal citations omitted).
[95] *Id.* at 45.
[96] *Id.* at 46.
[97] *Id.*
[98] *Id.* at 48.
[99] *Id.* (internal citation omitted).
[100] *Id.* (internal citations omitted).
[101] *Id.* at 48-49.
[102] *Id.*

> the tribes themselves of the large numbers of Indian children adopted by non-Indians.[103]

The Court continued, stating that ''the protection of this tribal interest [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents.''[104] In line with this position, the United States Supreme Court (with three justices dissenting) reversed the judgment of the Supreme Court of Mississippi and remanded the case.

Application of the Existing Indian Family Doctrine After *Holyfield*

In the time since *Mississippi Band of Choctaw Indians v. Holyfield*[105] was decided in 1989, several states that had not previously decided the issue of the existing Indian family doctrine addressed it and declined to adopt the exception. Those states included Alaska,[106] Arizona,[107] Idaho,[108] Michigan,[109] New York,[110] North Dakota,[111] and Utah.[112] Still other states that had not previously decided the issue adopted the existing Indian family exception after *Holyfield*. Those states included Alabama,[113] Illinois,[114] Kentucky,[115] Louisiana,[116] Tennessee,[117], and Washington.[118] Colorado,[119] Nebraska,[120] Wisconsin,[121] and Wyoming[122] have taken cases which have addressed the topic of the existing Indian family doctrine, but decided those cases on separate grounds, thus deferring their decisions on whether to adopt the existing Indian family doctrine.

California has mixed case law coming out of its Courts of Appeal as to the existing Indian family exception. To deal with this conflict of case law, the California Legislature enacted Section 360.6 of the California Welfare and Institutions Code. It defined ''Indian child'' the same way ICWA defines the term, and declared:

> (a) The Legislature finds and declares the following:
>
> (1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe.
>
> (2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected.
>
> (b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child.
>
> (c) A determination by an Indian tribe that an unmarried person who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.[123]

After this legislation was enacted, however, a California Court of Appeal rejected the authority of the state to enact legislation regarding ''the family relations of members of federally recognized Indian tribes.''[124] Since that time the Supreme Court of California has not taken a case to resolve this conflict over the existing Indian family doctrine between the state Courts of Appeal and the state legislature.

The Iowa legislature appears to have made the decision on the issue of whether to adopt the existing Indian family doctrine for the judiciary. The legislature adopted Iowa Code Section 232B.5(2)[125]. That Section states:

> The federal Indian Child Welfare Act and this chapter are applicable without exception in any child custody proceeding involving an Indian child. A state court does not have discretion to determine the applicability of the federal Indian Child Welfare Act or this chapter to a child custody proceeding based upon whether an Indian child is part of an existing Indian family.[126]

Based upon this language, the courts of Iowa have no discretion allowing them to adopt the existing Indian family doctrine. If a party wanted the court to adopt the exception, it appears that an argument similar to the one adopted in the California Court of Appeal case, *In re Santos Y.*[127] could be used. It is unlikely that Iowa would accept that argument, however, based upon the decisions of the North Dakota Supreme Court in *In the*

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[103] *Id.* at 49.
[104] *Id.* at 52.
[105] 490 U.S. 30.
[106] See *In re Adoption of T.N.F.*, 781 P.2d 973, 16 FLR 1017 (Alaska 1989).
[107] See *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 26 FLR 1477 (Ariz. App. 2000).
[108] See *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993).
[109] See *In re Elliott*, 554 N.W.2d 32 (Mich. App. 1996).
[110] See *In re Baby Boy C.*, 27 A.D.3d 34, 32 FLR 1087 (N.Y. App. Div. 2005).
[111] See *In re A. B.*, 663 N.W.2d 625, 29 FLR 1389 (N.D. 2003).
[112] See *Interest of D.A.C.*, 933 P.2d 993, 23 FLR 1225 (Utah App. 1997).
[113] See *Ex Parte C.L.J.*, 946 So.2d 880 (Ala. Civ. App. 2006).
[114] See *In re Adoption of S.S.*, 657 N.E.2d 935, 21 FLR 1597 (Ill. 1995).
[115] See *Rye v. Weasel*, 934 S.W.2d 257, 22 FLR 1042 (Ky. 1996).
[116] See *Hampton v. J.A.L.*, 658 So.2d 331 (La. App. 1995).
[117] See *In re Morgan*, 1997 WL 716880, 24 FLR 1064 (Tenn. Ct. App. 1997).
[118] See *Adoption of Crews*, 825 P.2d 305, 18 FLR 1237 (Wash. 1992).
[119] See *In the Matter of Catholic Charities and Community Services of the Archdiocese of Denver*, 942 P.2d 1380 (Colo. App. 1997).
[120] See *In re Adoption of Kenten H.*, 725 N.W.2d 548, 33 FLR 1117 (Neb. 2007).
[121] See *In re Termination of Parental Rights to Branden F.*, 695 N.W.2d 905 (Wis. App. 2005).
[122] See *In re S.N.K.*, 108 P.3d 836 (Wyo. 2005).
[123] Cal. Welf. & Inst. Code § 360.6 (superseded by Welf. & Inst. Code § 224 (see also Fam. Code § 175, and Prob. Code § 1459)).
[124] D.H. Gethes, C.F. Wilkinson, R.A. Williams, Jr. *Cases and Materials on Federal Indian Law* at 676 (citing *In re Santos Y.*, 112 Cal. Rptr. 692, 27 FLR 1586 (Cal. App. 2d Dist. 2001)).
[125] Iowa Code Ann. § 232B.5(2) (West 2007).
[126] *Id.*
[127] *Supra.*

  FLR ISSN 0148-7922

Interest of A.B.[128] and the Oklahoma Supreme Court in *In the Matter of Baby Boy L.*[129]

Mississippi originally adopted the existing Indian family doctrine in *Matter of B.B.*[130], but the case's jurisdiction was postponed by *Mississippi Band of Choctaw Indians v. Holyfield*[131], which then reversed the judgment of *B.B.* It appears that because of and after the decision in *Holyfield*, Mississippi has not adopted the existing Indian family exception in subsequent cases.

In the aftermath of *Mississippi Band of Choctaw Indians v. Holyfield*[132], three states reversed their decisions to adopt the existing Indian family exception. Those states were Oklahoma in its code and in the case of *In the Matter of Baby Boy L.*,[133] South Dakota in the case of *Matter of Adoption of Baade*,[134] and Kansas in the case of *In the Matter of A.J.S.*[135]

In Oklahoma Statutes Annotated title 10, section 40.3(B), the Oklahoma legislature stated:

> Except as provided for in subsection A of this section, the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody court proceedings involving Indian children, regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.[136]

Subsequent to the adoption of this legislation in 1997,[137] the Oklahoma Supreme Court declined to adopt the existing Indian family doctrine in *In the Matter of Baby Boy L.*[138] That case involved a non-Indian mother who placed her newborn baby for adoption without the consent of the Indian father who was a member of the Muscogee Creek Indian Nation of Oklahoma.[139] The child's paternity and the membership of the father in the tribe were undisputed.[140] The mother found a non-Indian couple from another state who wished to adopt the child and informed the father of this decision.[141] The child was born off the reservation; and after the birth, the birth mother sought an order in state court for termination of the father's parental rights without consent because the father had not contributed to the birth mother's support during the pregnancy.[142] Notice of the proceedings was given to the father, the BIA, and to the Muscogee Creek Nation.[143] The father objected to the adoption; and the tribe filed a motion to intervene acknowledging that the child was eligible for membership in the tribe.[144] The tribe's motion to intervene was granted; and the tribe filed a motion to dismiss the adoption proceedings because ICWA placement preferences required that the child be given to the father.[145] The trial court denied the tribe's motion and determined that the existing Indian family exception to ICWA applied because the father had not contributed to the support of the mother during the pregnancy.[146] The father appealed and the Court of Civil Appeals affirmed the trial court's judgment.[147] On appeal, the Oklahoma Supreme Court cited *Holyfield* as a ''watershed opinion.''[148] The Court stated that the Oklahoma statute[149] was enacted in response to *Holyfield* and the Oklahoma Supreme Court case of *Matter of S.C.*,[150] in which the state Supreme Court had determined that *Holyfield* did not invalidate the existing Indian family exception.[151] After analysis of the constitutionality of the statute, the Oklahoma Supreme Court relied on North Dakota's decision in the case of *In the Interest of A.B.*[152] and determined that the statute was constitutional, overturned *Matter of S.C.*, and declared the existing Indian family doctrine to be inapplicable in Oklahoma.[153]

The South Dakota Supreme Court took a more direct approach to the existing Indian family doctrine after *Mississippi Band of Choctaw Indians v. Holyfield*[154] and overturned its decision, from *Claymore v. Serr*,[155] to adopt the existing Indian family exception. In *Matter of Adoption of Baade*[156], the South Dakota Supreme Court dealt with the case of a child, born to a non-Indian mother and a father who was a member of the Sisseton-Wahpeton Sioux Tribe, and adopted by the birth mother's sister and brother-in-law.[157] The birth father was served with notice of the adoption proceedings and petitioned the state court to transfer the proceedings to tribal court.[158] The mother objected to the transfer and it was denied.[159] The father subsequently began a paternity action in tribal court, was adjudged to be the father of the child; and the child was enrolled as a member of the Sisseton-Wahpeton Sioux Tribe.[160] The tribe then received notice of the adoption proceedings.[161] On appeal of the adoption, the father claimed that his parental rights could not be terminated without evidence beyond a reasonable doubt that his continued custody of the child would likely result in serious emotional or physical damage to the child.[162] The adoptive parents claimed that *Claymore v. Serr*[163] controlled and that because the child had never been a member of an existing Indian family, ICWA did not apply to the proceedings. The South Dakota Supreme Court stated that it read *Holyfield* to overrule the existing Indian family excep-

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[128] 663 N.W.2d 625, 29 FLR 1389 (N.D. 2003).
[129] 103 P.3d 1099, 31 FLR 1077 (Okla. 2004). See below for analysis of that case.
[130] 511 So.2d 918, 13 FLR 1527 (Miss. 1987).
[131] *Supra.*
[132] *Supra.*
[133] 103 P.3d 1099 (Okla. 2004).
[134] 462 N.W.2d 485 (S.D. 1990).
[135] 204 P.3d 543, 35 FLR 1255 (Kan. 2009).
[136] Okla. Stat. Ann. tit. 10, § 40.3(B) (West 2007).
[137] D.H. Getches, C.F. Wilkinson, R.A. Williams, Jr., *Cases and Materials on Federal Indian Law*, at 676.
[138] *Supra*.
[139] 103 P.3d 1099, 1101-02.
[140] *Id.* at 1102.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1103.
[147] *Id.*
[148] *Id.*
[149] Okla. Stat. Ann. tit. 10 § 40.3(B).
[150] 833 P.2d 1249 (Okla. 1992).
[151] 103 P.3d 1099, 1104-05.
[152] *Supra.*
[153] 103 P.3d 1099, 1107.
[154] *Supra.*
[155] *Supra.*
[156] 462 N.W.2d 485.
[157] *Id.* at 487.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 489 (citing 25 U.S.C. § 1912(f).
[163] *Supra.*

tion.[164] The court stated that the existing Indian family doctrine ''fails to recognize the legitimate concerns of the tribe that are protected under the Act''[165] and that ''Congress clearly intends that the only prerequisite to the operation of the ICWA be the involvement of an Indian Child in a child custody proceeding.''[166]

In 1996, Ohio Congresswoman Deborah Pryce proposed legislation to amend ICWA.[167] That bill would have required that before state courts apply ICWA they determine if the child is a natural child of a parent who ''maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.''[168] The bill passed the United States House of Representatives in that form, but was rejected by the Senate Committee on Indian Affairs because of tribal opposition.[169]

Conclusion

The United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*[170] has been called the ''death knell'' of the existing Indian family doctrine, yet state courts have resurrected the doctrine ''in a further attempt to defeat the application of ICWA.''[171] Courts which continue to apply the existing Indian family concept have stated that because *Holyfield* never specifically addressed and rejected the doctrine, it is applicable. The law regarding the existing Indian family remains in a state of flux. States differ with one another regarding whether the doctrine is applicable, and some states even have mixed holdings within their own courts on the topic. The confusion and disagreement will likely continue until the issue is definitively addressed by Congress or the United States Supreme Court.

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[164] 462 N.W.2d 485, 489.

[165] *Id.* (internal citation omitted).

[166] *Id.* (citing M.L. Lehmann, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 Cath. U. L. Rev. 511, 540 (1989)).

[167] D.H. Gethes, C.F. Wilkinson, R.A. Williams, Jr. *Cases and Materials on Federal Indian Law* at 675.

[168] *Id.* (citing H.R. Rep. No. 104-542 at 4 (1996)).

[169] *Id.*

[170] *Supra.*

[171] B.J. Jones, *The Indian Child Welfare Act Handbook* at 16.

  FLR ISSN 0148-7922