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NOTE

THOMPSON V. FAIRFAX COUNTY DEPARTMENT OF FAMILY SERVICES: DETERMINING THE BEST INTERESTS OF THE INDIAN CHILD

Katerina Silcox[†]

I. INTRODUCTION

“Children are a gift from the Lord” – *Psalm* 127:3.

*“Remember that your children are not your own, but are lent to you by the
Creator.” – Mohawk Proverb*

In the Virginia case of *Thompson v. Fairfax County Department of Family Services*,¹ the Virginia Court of Appeals declined to recognize the so-called “Existing Indian Family Exception” (hereinafter “EIF exception”) to the Indian Child Welfare Act (ICWA) due to a plain text interpretation of the ICWA that does not support application of the exception. The appellate court joined a chorus of state courts recognizing that such an exception fails to recognize Congress’ intent in enacting the ICWA: to promote the stability and security of Indian tribes and families.² In addition, rather than determining whether to transfer the case to a tribal court by applying Virginia’s best interests of the child factors, the court decided to break with precedent and instead introduced an immediate harm standard.³ The case was remanded to a trial court to determine whether the transfer to a tribal court would cause, or would present a substantial risk of causing, immediate emotional or physical damage to the child.⁴

[†] *Senior Staff*, LIBERTY UNIVERSITY LAW REVIEW, Volume 10. J.D. Candidate, Liberty University School of Law (2016); B.A., Philosophy, The College of William and Mary (2010). I dedicate this note to my parents, Charles and Darlene Silcox. All I have and will accomplish are only possible due to their love and sacrifices. I would like to thank the entire editorial staff of LIBERTY UNIVERSITY LAW REVIEW, Volume 10, for their tireless work and helpful guidance in shaping this note.

1. *Thompson v. Fairfax Cty. Dep’t of Fam. Servs.*, 62 Va. App. 350 (2013).

2. *Id.*; *see generally* Indian Child Welfare Act of 1978, Pub. L. No. 95–608, 92 Stat. 3069 (1978).

3. *Thompson*, 62 Va. App. at 376.

4. *Id.* at 384.

Thompson continues the recent trend of courts moving away from judicially-created exceptions—exceptions that have helped perpetuate the trend of state government interference in the placement of Native American children that the ICWA was drafted to prevent. While these exceptions originally sought to protect these children’s best interests, in retrospect, they have caused irreparable harm in these children’s lives and have only reflected American cultural biases.⁵ Yet, even today, history seems poised to repeat itself as other courts weigh factors such as their state’s relevant best interests of the child standard in determining when a transfer of the case to a tribal court is appropriate. Courts throughout the country are split on the issue of whether the child’s best interests are at all relevant in determining which court has jurisdiction.

Understandably, these courts want to make placement decisions that will most benefit the child in question. In doing so, transfers to tribal court are often denied, as transferring the case will often delay placement of the child in a permanent, loving home. Virginia, on the other hand, is the first state to propose a solution to the difficult situation in which courts find themselves when faced with the dual responsibility of satisfying requirements imposed by federal legislation and ensuring that there is as little delay as possible in placing a child. The longer a child is held in limbo, waiting for permanent placement, the greater the potential for permanent harm to that child. This fact is squarely at odds with the state’s duty as *parens patriae* to protect the health, safety, and welfare of the child. This case note urges other courts to adopt Virginia’s new standard.

II. BACKGROUND

Thompson presented a multifaceted sociological and legal case that must be viewed through the prism of prior race relations. In this case, the court faced two thorny legal issues posed by previous interpretations of the ICWA. First, the court rejected application of the EIF exception which required that the child in question has at some point resided in an “Indian” home in order for the ICWA to apply, effectively eliminating the exception in the Commonwealth of Virginia.⁶ Second, although the court continued the trend moving away from application of judicially-created exceptions to the ICWA, the Virginia court also rejected the “best interests of the child” test applied by most courts.⁷ Instead, Virginia adopted a new standard that requires the party

5. Stacy Byrd, *Learning from the Past: Why Termination of a Non-Citizen Parent’s Rights Should Not Be Based on the Child’s Best Interests*, 68 U. MIAMI L. REV. 323, 327 (2013).

6. *Thompson*, 62 Va. App. at 367.

7. *Id.* at 364-65.

opposing removal to show that removal to tribal court would cause the child immediate harm.⁸

A. *Statement of the Case*

1. Case Facts

B.N. was born in July of 2010. She has resided in Fairfax County, Virginia, since her birth, and is a domiciliary thereof for traditional jurisdictional purposes.⁹ For the first nine months of her life, she lived with her birth parents, Jasmine Thundershield (referred to here, as in the trial record, as Jasmine Vanderplas) and Minh-Sang Nguyen.¹⁰ Vanderplas is half Sioux,¹¹ while Nguyen is of Vietnamese descent.¹² The Bureau of Indian Affairs of the United States Department of the Interior (“BIA”) certified that B.N. is one-fourth Sioux,¹³ and thereby meets the minimum required degree of “Oceti Sakowin” Indian blood for enrollment in the Standing Rock Sioux Tribe.¹⁴ “The Standing Rock Sioux Tribe has enrolled B.N. as a member of the Tribe,”¹⁵ and “[t]here is no dispute that B.N. is a member of the Standing Rock Sioux Tribe, a federally recognized ‘Indian tribe’ within the meaning of the ICWA.”¹⁶

Unfortunately, both mother and father struggled with drug and alcohol abuse and were often in trouble with the law.¹⁷ The pair was convicted of numerous crimes before the Fairfax County Department of Family Services (“Family Services”) decided to intervene.¹⁸ Family Services “initiated a variety of steps designed to protect B.N.: a preliminary protective order, a foster care placement on April 11, 2011, and ultimately, a petition to terminate the parental rights of both parents.”¹⁹ The Juvenile and Domestic Relations

8. *Id.* at 374-76.

9. *Id.* at 356.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. CONSTITUTION OF THE STANDING ROCK SIOUX TRIBE Apr. 24, 1959, http://www.nd.gov/indianaffairs/image/cache/Standing_Rock_Constitution.pdf

15. *Thompson*, 62 Va. App. at 356.

16. *Id.* at 363; see Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868-01, 47871 (Aug. 10, 2012) (listing the Standing Rock Sioux Tribe of North and South Dakota as a federally recognized tribe).

17. *Thompson*, 62 Va. App. at 356.

18. *Id.*

19. *Id.*

District Court of Fairfax County terminated Vanderplas's and Nguyen's residual parental rights on May 3, 2012.²⁰

Since being removed from the custody of her biological parents, B.N. has resided with her foster parents, Tyrus and Ja'Ree Thompson.²¹ The Thompsons wish to adopt B.N.,²² who suffers from Reactive Attachment Disorder (RAD).²³ This disorder is codified as 313.89 in the Diagnostic and Statistical Manual of Mental Disorders. RAD is diagnosed through anecdotal evidence of "disturbed and developmentally inappropriate social relatedness in most contexts that begins before age 5" ²⁴ RAD "is associated with grossly pathological care that may take the form of . . . repeated changes of primary caregiver that prevent formation of stable attachments (e.g., frequent changes in foster care)."²⁵

B. Procedural History

Throughout implementation of the Family Services plan to protect B.N., Family Services attempted to keep the Standing Rock Sioux Tribe ("the Tribe") informed of the status of B.N.'s case. On April 15, 2011, the Tribe participated in the foster care placement hearing via telephone.²⁶ On May 2, 2011, the Tribe was notified of their right to intervene in the foster care proceedings, as per the ICWA, in a letter addressed to Terrance Yellow Fat, representative of the Tribe.²⁷ On May 10, 2011, the County mailed a copy of the adjudicatory order to Mr. Yellow Fat, informing him that a dispositional hearing on behalf of B.N. would take place on June 10, 2011.²⁸ Over the next year, Family Services continued attempts to notify the tribe by registered mail, via Mr. Yellow Fat, of various adjudicatory hearings, dispositional hearings, and hearings on the Family Service's petitions for permanency planning. On April 4, 2012, Family Services "attempted to contact Mr. Yellow Fat by telephone and by sending him a letter by certified mail . . . informing him of the upcoming court hearing scheduled for May 3, 2012, in Juvenile

20. *Id.* at 356-357.

21. *Id.* at 356.

22. *Id.* at 359.

23. *Id.* at 359.

24. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 116 (4th ed. 1994).

25. *Id.*

26. *Thompson*, 62 Va. App. at 357.

27. *Id.*

28. *Id.*

and Domestic Relations court.”²⁹ On June 19, 2012, Family Services mailed yet another certified letter to Mr. Yellow Fat informing the Tribe that the hearing for the termination of parental rights was scheduled for August 6, 2012, in the Fairfax County Circuit Court, and that the Tribe had the right to intervene in the proceedings.³⁰

The Tribe failed to intervene until August 1, 2012, when a motion to intervene was filed in Juvenile and Domestic Relations court.³¹ At the time, however, the case was already pending in circuit court.³² Because of this confusion, the “circuit court granted the parties’ motion to continue the trial date from August 6, 2012, to September 11, 2012, and again to September 12, 2012.”³³ On September 7, 2012, the Tribe filed a motion to intervene in the circuit court, where the case was currently being tried,³⁴ and the court granted the motion that same day.³⁵ On September 10, 2012, the Tribe, relying on the ICWA, moved to transfer jurisdiction of the case to the tribal court.³⁶ B.N.’s biological parents, Vanderplas and Nguyen, were in favor of the Tribe’s motion to transfer the case.³⁷

Opposing this motion, Family Services, B.N.’s putative adoptive parents, the Thompsons, and B.N.’s guardian ad litem, Nancy J. Martin, Esq., argued that transfer of the case at such a late date would be inappropriate for three reasons: first, the placement proceedings were at an advanced stage, and the tribe had failed to promptly petition for transfer of jurisdiction prior to adjudication, despite adequate notification per the IWCA; second, the evidence necessary to decide the case could not be presented adequately in the tribal court without undue hardship to Family Services, as well as the witnesses involved in the case, because Standing Rock Sioux Tribal courts are located in North Dakota, more than 1600 miles from Fairfax County; and finally, transfer of the case would cause immediate harm to B.N., given her diagnosis of RAD.³⁸ Additionally Ms. Martin, B.N.’s guardian ad litem, argued the EIF exception precludes application of the ICWA on these facts,

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 357-58.

34. *Id.* at 358.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

and thus the application of the ICWA in this case would be unconstitutional.³⁹

The circuit court rejected these arguments, and urged a finding of good cause to deny transfer. As to the Family Service's first argument, the court held that "the proceedings were not at an advanced stage because the Tribe presented its motion to transfer before the trial de novo on the termination of parental rights."⁴⁰ Furthermore, the parents had not been notified of their independent right to request transfer and were prejudiced by this lack of notice.⁴¹ As to the second argument, the court held that modern technologies—such as video conferencing—could mitigate any inconvenience posed to Family Services or their witnesses by trying the case in the Standing Rock Sioux Tribal courts in North Dakota.⁴² The counsel for the Tribe noted further that such practice has become "commonplace" in many workplaces, and that such technology has provided an adequate means of communication in similar cases.⁴³ As to the third argument, the court held that the best interests of the child was an inappropriate standard to use in determining whether to transfer the case to a tribal court.⁴⁴ As to the guardian ad litem's arguments, the court held that the statute was constitutional, both on its face and as applied.⁴⁵

The guardian ad litem filed an emergency motion to stay the court's order pending appeal and joined B.N.'s foster parents' motion to reconsider the trial court's transfer.⁴⁶ The foster parents contended further that because B.N.'s biological father was not a member of the Standing Rock Sioux Tribe, the tribal court had no jurisdiction to adjudicate the termination of his parental rights.⁴⁷ As such, "Fairfax County Circuit Court was the only court with jurisdiction over both parents."⁴⁸ Therefore, the court had good cause to refuse transfer.⁴⁹ The circuit court denied the motion to reconsider, and instead granted the motion to stay the order to transfer pending appeal.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 358-59.

46. *Id.* at 359.

47. *Id.*

48. *Id.*

49. *Id.*

C. *A Brief History of ICWA*

The ICWA was enacted on November 8, 1978.⁵⁰ The Act governs which court has jurisdiction over custody disputes involving Indian children. It provides that tribes “shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe”⁵¹ Once exclusive jurisdiction is established, the tribe retains exclusive continuing jurisdiction over the case, regardless of where the child is physically located. However, when custody proceedings involve an Indian child who resides or is domiciled outside of tribal lands, the tribe must share jurisdiction with the state in which the child resides or is domiciled.⁵² Further, the ICWA provides for certain placement preferences when Indian children are placed for adoption.⁵³ It allows the child’s tribe to intervene in custody proceedings and remove the case to tribal court for adjudication within the tribal system.⁵⁴

The purpose of the ICWA is to protect Indian children, preserve and strengthen Indian families, ensure placement permanency for Indian children, protect the continuing existence of Indian cultures, and ensure that tribes can exercise their sovereign authority over child custody proceedings.⁵⁵ It is through the preservation and maintenance of a relationship with family, elders, tribal community, and culture that the Indian child’s sense of permanence and identity is protected.⁵⁶ The ICWA recognizes the vulnerable nature of Native American tribes, and their need for protection. Native tribes stand in a unique relationship to the United States government; they possess special rights that must be recognized and protected in sensitive litigation, such as child placement proceedings.⁵⁷ As a part of the ICWA’s initial

50. Indian Child Welfare Act of 1978, Pub. L. No. 95–608, 92 Stat. 3069 (1978).

51. 25 U.S.C. § 1911(a).

52. 25 U.S.C. § 1911(b); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 60–61 (1989) (Stevens, J., dissenting) (“Section 1911(b), providing for the exercise of concurrent jurisdiction by state and tribal courts when the Indian child is not domiciled on the reservation, gives the Indian parents a veto to prevent the transfer of a state-court action to tribal court. ‘By allowing the Indian parents to ‘choose’ the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the court system that most reflects the parents’ familial standards.” (quoting Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1141 (1979))).

53. 25 U.S.C. § 1915.

54. 25 U.S.C. § 1911(c); 25 U.S.C. § 1918.

55. 25 U.S.C. § 1901.

56. *See* 25 U.S.C. §§ 1901–1902.

57. *Id.*

findings, Congress noted that, “[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children”⁵⁸ Tribes rely on their children to continue the culture of the tribe. By taking children away from their Native homes, or placing them in homes in which contact with their Native tribe was rendered ostensibly impracticable, the United States government was slowly destroying Native culture.

“The ‘wholesale separation of Indian children from their families’ was widely viewed as the ‘most tragic and destructive aspect of American Indian life.’”⁵⁹ While this separation began as early as the 1800s when the government began attempts to assimilate Native Americans by forcing American Indian children into boarding schools, it reached its climax during the 1970s, immediately before the ratification of the ICWA.⁶⁰ The ICWA “was the product of 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”⁶¹ Congress faced mounting pressure from states with large Native American populations, where approximately twenty-five to thirty-five percent of Native American children had been removed from their Native homes.⁶² According to a 1969 study that examined the racial demographics of foster care placements of Native American children across sixteen states, approximately eighty-five percent of the children who had been removed from their homes were placed in non-native foster homes.⁶³ In South Dakota, Native American children were sixteen times more likely than their non-native peers to be placed in foster care.⁶⁴ Adoption of Native American children in Washington State was nineteen times the national average.⁶⁵

Often, these children were removed from their Native homes by non-native judges and social workers who lacked a thorough understanding of Native American child rearing practices.⁶⁶ For example, parental rights of

58. *Id.*

59. Cheyanna L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 735 (2006) (quoting H.R. REP. NO. 95-1386, at 9 (1978)).

60. *Id.* at 734-35.

61. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

62. B.J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* 2 (2d ed. 2008).

63. *Id.* at 4.

64. *Id.* at 2.

65. *Id.*

66. *Id.*

Native parents were terminated routinely for alleged neglect and emotional abuse. The grounds for these claims were that the custodial parent left the child with a non-nuclear family member for an extended period of time.⁶⁷ While the practice of leaving one's child in the care of an extended family member for a protracted period of time is contrary to Anglo-Saxon traditions, it is commonplace in Native American communities. In fact, it is expected that the extended tribal family will raise the child.⁶⁸

This common occurrence has shaped the narrative of many young Indian lives. Larry Ahenakew of the Ahtahkakoop Cree, for instance, was removed from his maternal grandmother's custody when he was three and a half years old.⁶⁹ As per the Native American concept of family, those with whom a child could be reared "included not only those in the nuclear family but also those related by marriage or by some other traditional bond."⁷⁰ Other traditional bonds included extended family members, such as aunts, uncles, grandmothers, and grandfathers. As per Cree tradition, it was expected that, because Larry was the eldest male child, his maternal grandmother would raise him.⁷¹

However, Montana Child Protective services disagreed with Cree tradition, and determined that Larry's grandmother was an unfit caregiver.⁷² For years, Larry was disconnected from his tribal community and identity. At the age of thirty-one, Larry was able to reunite with his family.⁷³ Although he had learned both Cree and English as a child and had a good understanding of both languages when he was removed from his grandmother's care, Larry was unable to speak Cree with his grandmother upon their reunion.⁷⁴ In order to remedy the issues presented in cases like Larry's, and protect the unique standing of Native American tribes in relation to the United States government, Congress passed a series of acts in the 1970s to facilitate Native American self-determination, of which the ICWA was a large part.

67. *Id.* at 3.

68. *Id.*

69. Lizbeth González, *The Real Meaning of ICWA Noncompliance*, 86-APR N.Y. St. B.J. 29 (2014).

70. JONES ET AL., *supra* note 62, at 3.

71. González, *supra* note 69, at 29.

72. *Id.*

73. *Id.* at 30.

74. *Id.*

D. Judicially Created Exceptions

1. Constitutionality of the ICWA

While implementation of the ICWA has served to ameliorate some of the evils caused by cultural insensitivity and lack of oversight with respect to Native custody hearings, many have questioned the constitutionality of the Act. It has been characterized as a usurpation of states' rights in state juvenile proceedings and social service agencies.⁷⁵ The ICWA derives its jurisdictional authority from the Commerce Clause, which provides that "Congress shall have Power. . . To regulate commerce. . . with Indian tribes . . . and, through this and other constitutional authority, Congress has plenary power over Indian affairs."⁷⁶ Historically, most effective attacks on the ICWA's constitutionality—and in fact, the only ones to have any influence on the courts—have come in the form of equal protection claims.⁷⁷

2. The "Existing Family Exception"

The "Existing Family Exception" is a judicially created doctrine that originated in Kansas in the 1980s.⁷⁸ This exception precludes the courts from applying the ICWA to cases where the child in question has not been removed from a traditionally Native home. Thus, if the "child's parents have not maintained . . . significant social, cultural, or political" affiliations with their tribe of origin, the court can decide unilaterally that the child's custody determination is not protected by the provisions of the ICWA.⁷⁹ While some have argued that this exception is necessary to maintain the constitutionality of the ICWA, others have viewed it as "a back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child custody cases involving American Indian children."⁸⁰

As previously noted, the EIF exception was first proposed by the Supreme Court of Kansas in the 1982 case *In re Adoption of Baby Boy L.*⁸¹ Allegedly, the exception was necessary to preserve the constitutionality of the ICWA.⁸²

75. JONES ET AL., *supra* note 62, at 1.

76. 25 U.S.C. § 1901 (2015) (quoting U.S. CONST. art. I, § 8).

77. See *In re Santos Y.*, 92 Cal. App. 4th 1274, 1305 (2001); *Guardianship of Zachary H.*, 73 Cal. App. 4th 51 (1999); *Crystal R. v. Super. Ct.*, 59 Cal. App. 4th 703 (1997); *In re Alexandria Y.*, 45 Cal. App. 4th 1483 (1996); *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996).

78. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

79. Jaffke, *supra* note 59, at 741-42.

80. *Id.* at 741.

81. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

82. Jaffke, *supra* note 59, at 743.

A line of California cases have held that any application of ICWA, based solely upon the child's race, rather than "substantial social, cultural, or political affiliations" turns the ICWA into a race-based statute.⁸³ As such, California courts contend, it must withstand strict scrutiny in order to satisfy the guarantee of equal protection under the Fourteenth Amendment.⁸⁴ This argument, discussed in further detail below, is flawed in that the essential element of the ICWA is that it is not triggered by the race of the child in question, but rather, the child's citizenship.⁸⁵ In order for the ICWA to apply, the child must either be a member of a federally recognized tribe, or eligible for tribal membership.⁸⁶

In *Baby Boy L.*, a non-native mother sought termination of a Native American father's parental rights.⁸⁷ Baby Boy L. was born to an unwed non-Indian mother and an Indian father.⁸⁸ The non-native mother consented to the adoption of Baby Boy L. by non-native adoptive parents.⁸⁹ The biological father, a five-eighths Kiowa Indian, his paternal grandparents, and the Kiowa Indian tribe of which the biological father was an enrolled member, sought review of the judgment of the Sedgwick County District Court.⁹⁰ The court entered a decree of adoption of Baby Boy L. in favor of the non-native adoptive parents, and denied the tribe's motion to intervene in the adoption proceedings.⁹¹ On appeal, the Kiowa Tribe claimed that § 1901 of the ICWA applied to the adoption proceedings and that the tribe had a right to intervene.⁹² The Kansas Supreme Court held that the trial court was right to determine that the plain text of the ICWA did not apply to Baby Boy L., as he was only five-sixteenths Indian.⁹³ Further, he had never been removed from an existing Indian family.⁹⁴ The court additionally held that any error that

83. See *In re Santos Y.*, 92 Cal. App. 4th 1274, 1305 (2001); *Guardianship of Zachary H.*, 73 Cal. App. 4th 51 (1999); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703 (1997); *In re Alexandria Y.*, 45 Cal. App. 4th 1483 (1996); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (1996).

84. Jaffke, *supra* note 59, at 743.

85. 25 U.S.C. § 1901 (2015).

86. *Id.*

87. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 173 (Kan. 1982).

88. *Id.* at 172.

89. *Id.*

90. *Id.* at 172.

91. *Id.* at 188.

92. *Id.* at 172.

93. *Id.* at 175.

94. *Id.*

could have occurred by refusing the Indian tribe's petition to intervene was harmless, and there was overwhelming evidence that the Indian father was unfit to assume his parental duties.⁹⁵ For this latter reason, and because the biological father had failed to support Baby Boy L. for the two years prior to the termination of his parental rights, the court held that the father's consent to the adoption of his illegitimate baby was not required.⁹⁶ The court affirmed the judgment of the trial court, which entered a decree of adoption of the baby in favor of the adoptive parents and denied the Indian tribe's motion to intervene.⁹⁷

The court held that the Act was intended only to apply to situations where a child was being removed from an existing Indian family unit.⁹⁸ In the years following the decision in *Baby Boy L.*, approximately half of the states adopted the EIF exception, even though this exception is absent from the actual text of the ICWA.⁹⁹ Since its inception, the EIF exception has come under harsh criticism. The exception essentially requires courts to assess the "Indianness" of a particular Indian child, parent, or family, a subjective determination that courts "are ill-equipped to make."¹⁰⁰ Most states have abandoned this judicially created exception. However, some states—including: Alabama,¹⁰¹ California,¹⁰² Indiana,¹⁰³ Kentucky,¹⁰⁴ Louisiana,¹⁰⁵ Missouri,¹⁰⁶ and Tennessee¹⁰⁷—still apply the EIF exception. Alabama and Indiana have limited the doctrine so that it only applies under certain rare and extenuating circumstances.¹⁰⁸

In *Thompson*, both the foster parents and the guardian ad litem relied on persuasive case law from California, which holds that a failure to recognize

95. *Id.* at 180.

96. *Id.* at 188.

97. *Id.* at 188.

98. *Id.* at 175.

99. Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 687 n.10 (2010).

100. *Thompson v. Fairfax Cty. Dep't of Family Servs.*, 62 Va. App. 350, 368 (2013) (internal quotations omitted).

101. *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990).

102. *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996).

103. *In re Adoption of T.R.M.*, 525 N.E. 2d 298 (Ind. 1988).

104. *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

105. *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995).

106. *C.E.H. v. R.H.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

107. *In re Morgan*, 1997 Tn. App. LEXIS 818 (1997).

108. Lewerenz & McCoy, *supra* note 99, at 687 n.11.

the EIF exception raises doubts as to the constitutionality of the ICWA.¹⁰⁹ They argued that statutes should be construed so as to avoid such doubts.¹¹⁰ California has invoked the EIF exception on numerous occasions, and “in each case the effect of applying the [EIF exception] was to deny a tribe jurisdiction or the right to intervene.”¹¹¹ California courts have cited two primary arguments for the necessity of applying the EIF exception: (1) without the exception, the ICWA violates the equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution,¹¹² and (2) application of the ICWA to familial situations where strong cultural ties do not already exist violates the purpose of the ICWA.¹¹³

The appellant’s argument in the 1996 California Court of Appeals case of *In re Bridget R.*¹¹⁴ is a prime example of this type of constitutional argument. In *In Re Bridget*, the court held under the Fifth, Tenth, and Fourteenth Amendments that:

[T]he ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an American 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.¹¹⁵

In re Bridget R. and similar cases have found that there is no equal protection violation when custody determinations are based on Native Americans’ social, cultural, or political relationships with their tribes.¹¹⁶ “However, when such social, cultural, or political relationships do not exist or are very attenuated, they find the only remaining basis for applying the ICWA is the child’s race.”¹¹⁷ Arriving at its determination by viewing the ICWA as a race-

109. *Thompson v. Fairfax Cty. Dep’t of Family Servs.*, 62 Va. App. 350, 367 (2013). See *Eaton v. Davis*, 176 Va. 330, 339 (1940) (“[A] statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.”).

110. *Thompson*, 62 Va. App. at 367.

111. Jaffke, *supra* note 59, at 742.

112. *Id.* at 743.

113. *Id.* at 744.

114. *In re Bridget R.*, 41 Cal. App. 4th 1483 (Cal. Ct. App. 1996).

115. Jaffke, *supra* note 59, at 743-44.

116. See *In re Santos Y.*, 92 Cal. App. 4th 1274, 1306 (2001); *Guardianship of Zachary H.*, 73 Cal. App. 4th 51, 63 (1999); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703 (1997); *In re Alexandria Y.*, 45 Cal. App. 4th 1483, 1485 (1996); *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996).

117. Jaffke, *supra* note 59, at 743.

based statute, the *In re Bridget R.* court applied strict scrutiny as the appropriate standard of review.¹¹⁸

This is a misinterpretation of the ICWA. Rather than being a race-based statute, eligibility for ICWA protection is predicated on whether the child in question is a member of a federally recognized tribe, or is eligible to apply for membership in such a tribe.¹¹⁹ Each sovereign tribe decides its own qualifications for tribal membership. Requirements for tribal citizenship are separate and distinct from the requirements one must meet in order to be eligible for benefits and services through the BIA. Citizenship, not race, is the determining factor that triggers application of the ICWA. Given the increased rate of biracial and multiracial births within the past decade,¹²⁰ it is not unfeasible that there could be an instance where a child may meet the federal standards to qualify as Indian, but lack the requisite qualifications to be eligible for tribal membership.¹²¹ In this instance, the child would be eligible for benefits through the BIA but ineligible for ICWA protections. In this way, a child's rights under the ICWA are more analogous to those of a non-citizen than they are akin to historically persecuted minority groups.¹²² As such, strict scrutiny is an inappropriate basis of review.

Another reason cited by the California courts for applying the EIF exception is that they believe the purpose of the ICWA is to maintain American Indian culture. If however, there is no culture to maintain, then there is no need to apply the ICWA. As the California Court of Appeals stated in *In re Bridget*, "It is almost too obvious to require articulation that 'the unique values of Indian culture' will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture."¹²³ The determination of who is fully assimilated into non-Indian culture is then left to the court itself. California is not alone in this approach. Several other states have refused to apply the ICWA unless an American Indian child is being

118. *In re Bridget R.*, 49 Cal. Rptr. 2d at 523.

119. See 28 U.S.C. § 1903(4).

120. Carol Morello, *Number of Biracial Babies Soars Over Past Decade*, THE WASHINGTON POST (Apr. 26, 2012), https://www.washingtonpost.com/local/number-of-biracial-babies-soars-over-pastdecade/2012/04/25/gIQAWRiAiT_story.html.

121. Tribal membership eligibility standards vary by Tribe. Many, but not all, require a certain blood quantum ranging from 1/2 (like the Mississippi Band of Choctaw Indians to 1/32 (like the Kaw Nation). The Mississippi Band of Choctaw Indians, *Title XXII: Tribal Enrollment*, MISSISSIPPI BAND OF CHOCTAW INDIANS, http://www.choctaw.org/government/tribal_code/Title%20XXII%20-%20Tribal%20Enrollment.pdf; CONSTITUTION OF THE KAW NATION 2011, http://kawnation.com/?page_id=3312.

122. Byrd, *supra* note 5, at 346.

123. *In re Bridget R.*, 49 Cal. Rptr. at 526.

removed from an existing Indian family.¹²⁴ These states misinterpret the purpose of the ICWA by limiting it to the protection of American Indian children from improper removal from their existing Indian family units to promote the stability and security of American Indian tribes.

Most recently, the Supreme Court of the United States considered the issue of the constitutionality of the EIF exception to the ICWA in the case of *Adoptive Couple v. Baby Girl*.¹²⁵ In this case, Dusten and Robin Brown sought to adopt four-year-old baby Veronica.¹²⁶ “The Browns based their adoption petitions on the Indian preference provisions of the Indian Child Welfare Act . . . and the assumption that the *Baby Girl* Court did not affirm the EIF exception doctrine”¹²⁷ Baby Veronica was born to a non-native mother and a Native father.¹²⁸ The baby was a member of the Cherokee Nation.¹²⁹ When Baby Veronica’s biological mother and father ended their relationship, the father relinquished his parental rights,¹³⁰ and Baby Veronica’s birth mother placed her for adoption.¹³¹ The Browns commenced adoption proceedings, at which time the biological father sought custody of Baby Veronica.¹³² The South Carolina Supreme Court affirmed a decision granting the father custody under §§ 1901-1963 of the ICWA.¹³³ The U.S. Supreme Court granted certiorari to review the case.¹³⁴

At no time, either prior to Baby Veronica’s birth or subsequently, did her biological father provide any financial support for the child,¹³⁵ nor did he ever have custody of the girl.¹³⁶ The Browns provided financial support during the

124. Including Alabama, Indiana, Kentucky, Louisiana, Missouri, and Tennessee. *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996); *In re Adoption of T.R.M.*, 525 N.E. 2d 298 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995); *C.E.H. v. R.H.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re Morgan*, 1997 Tn. App. LEXIS 818 (1997).

125. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

126. Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine is Not Affirmed, but the Future of the ICWA’s Placement Preferences is Jeopardized*, 42 CAP. U.L. REV. 327, 327 (2014).

127. *Id.*

128. *Baby Girl*, 133 S. Ct. at 2558.

129. *Id.* at 2556.

130. *Id.* at 2558.

131. *Id.*

132. *Id.* at 2558-59.

133. *Id.* at 2559.

134. *Id.*

135. *Id.* at 2558.

136. *Id.* at 2557.

biological mother's pregnancy and had custody of the child prior to the state court's ruling.¹³⁷ The Supreme Court held that, "The phrase 'continued custody' therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."¹³⁸ The court held that this interpretation was consistent with both the plain text of the statute and the purpose: to counteract the unwarranted removal of Indian children.¹³⁹ "[W]hen . . . the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated."¹⁴⁰ The court found that § 1912(d), which addresses remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,¹⁴¹ applied only where the breakup of an Indian family occurs as a result of the termination of the parent's rights.¹⁴² When, as in this case, a Native parent abandoned his child prior to birth and never had custody, there was no relationship in existence, nor any existing family to break up.¹⁴³ The ICWA's adoption preferences under § 1915(a) were not implicated in this case because the father had not sought custody of Baby Veronica.¹⁴⁴ Rather, he was arguing that his parental rights were terminated wrongfully.¹⁴⁵

Marcia Zug, Associate Professor of Law at the University of South Carolina School of Law, recently wrote an article concerning the Supreme Court's decision in *Adoptive Couple v. Baby Girl*.¹⁴⁶ She argues that the Court's ruling ought to be limited to ICWA § 1912(d) and (f). As such, *Baby Girl* should not be taken as a confirmation or endorsement of the EIF exception. Nonetheless, she extrapolates that it will potentially "curtail the applicability of the placement preferences in many future ICWA cases."¹⁴⁷

Clearly, the way in which courts will interpret and apply the EIF exception to the ICWA is, at best, unclear. What is clear is that courts, such as the

137. *Id.* at 2558.

138. *Id.* at 2560 (emphasis removed).

139. *Id.* at 2561.

140. *Id.*

141. 25 U.S.C. § 1912(d).

142. *Baby Girl*, 133 S. Ct. at 2562.

143. *Id.*

144. *Id.* at 2564.

145. *Id.*

146. Zug, *supra* note 126, at 327.

147. *Id.* at 328.

Kansas Supreme Court in *Baby Boy L.*, have historically used the EIF exception to prevent application of the ICWA. Thus, many tribes have been denied the protections supposedly guaranteed to them by the ICWA, as it was never applied. Rather than judicially enshrining a practice that has led to such abuse, courts ought to declare the EIF exception unnecessary, as Virginia did in *Thompson*, and allow ICWA protections to safeguard tribal interests as Congress originally intended.

E. Determination of Good Cause

Ensuring that ICWA protections are not obviated by judicially created doctrines like the EIF exception is only one piece of the puzzle. Even when courts have not outright refused to apply the ICWA, courts will still try to hold on to jurisdiction over the proceedings by loosely interpreting the appropriate standard for removal. 25 U.S.C. § 1911(b) states that “[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary.”¹⁴⁸ However, that which constitutes “good cause” is never adequately defined. In the absence of a definition within the statute, the courts have endeavored to determine what constitutes “good cause.”

1. Best Interests of the Child

Many courts have adopted a test that weighs various factors in consideration of the best interests of the child in determination of whether good cause exists to deny a transfer of a case to tribal court.¹⁴⁹ In fact, a best interest standard is the standard currently championed by the Bureau of Indian Affairs guidelines. Still, other courts have rejected this type of analysis as irrelevant.¹⁵⁰ The *Thompson* opinion articulates the rationale underlying

148. 25 U.S.C. § 1911(b).

149. See *In re Appeal in Maricopa Cty. Juvenile Action No. JS-8287*, 828 P.2d 1245, 1249 (Ariz. Ct. App. 1991); *Weigle v. Devon T. (In re Robert T.)*, 200 Cal. App. 3d 657, 663 (1988); *J.Q. v. D.R.L. and E.M.L. (In re Adoption of T.R.M.)*, 525 N.E.2d 298, 307 (Ind. 1988); *In re T.S.*, 801 P.2d 77, 80 (1990); *In re J.L.*, 654 N.W.2d 786, 790 (S.D. 2002); see also *Carney v. Moore (In re N.L.)*, 754 P.2d 863, 876-77 (Okla. 1988) (Opala, J., concurring in part and dissenting in part).

150. See *People ex rel. J.L.P.*, 870 P.2d 1252, 1258-59 (Colo. App. 1994); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990); *T.W. v. L.M.W. (In re C.E.H.)*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992); *State v. Elise M. (In re Zylena R.)*, 825 N.W.2d 173, 184-86 (Neb. 2012); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 456 (N.M. Ct. App. 1993); *Hoots v. K.B. (In re A.B.)*, 663 N.W.2d 625, 633-34 (N.D. 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168-71 (Tex. App. 1995).

the approach taken by the courts that do not apply the best interest factors. “[B]y providing tribal courts with presumptive jurisdiction, Congress presumed that [the tribal courts, rather than the state] courts would consider a child’s best interests in adjudicating a termination of parental rights case.”¹⁵¹

In Virginia, there are ten factors that the court considers in determining the best interests of the child. These are: (1) the age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs; (2) the age and physical and mental condition of each parent; (3) the relationship that exists between each parent and each child, giving due consideration to the positive involvement in the child’s life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child; (4) the needs of the child, giving due consideration to other important relationships of the child, including, but not limited to, siblings, peers and extended family members; (5) the role that each parent has played and will play in the future, in the upbringing and care of the child; (6) the propensity of each parent to support the child’s contact and relationship with the other parent actively, including whether a parent has unreasonably denied the other parent access to or visitation with the child; (7) the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child; (8) the reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference; (9) any history of family abuse or sexual abuse; and (10) any other factors that the court deems necessary and proper to the determination.¹⁵² After reaching a decision based on the merits of these factors, a judge shall communicate, either orally or in writing, his findings regarding factors relevant to his/her custody decision.¹⁵³

2. Proposed Solution: Immediate Harm

As a solution to the quandary posed by the jurisdictional split on the application of the analysis of the best interests of the child, the Court of Appeals of Virginia proposed the application of a new standard. They “conclude[d] that the appropriate test is whether the transfer of jurisdiction itself would cause, or would present a substantial risk of causing immediate, serious emotional or physical damage to the child.”¹⁵⁴

151. *Thompson v. Fairfax Cty. Dep’t of Family Servs.*, 62 Va. App. 350, 374 (2013).

152. VA. CODE ANN. § 20-124.3 (2012).

153. *Id.*

154. *Thompson*, 62 Va. App. at 374-75.

III. ANALYSIS

In order to appreciate fully the ramifications of the court's decision in *Thompson*, it is necessary to evaluate the rights of the interested parties. "In cases involving children there is often no obvious 'bad guy.'"¹⁵⁵ Excluding sporadic cases involving malice, each party to a custody dispute simply seeks a placement that is in the best interests of the child. Conflicts arise when the parties disagree as to what those best interests are. In order to weigh and balance the competing interests, it is important to first examine the concept of best interests.

A. *Interests of the Parties Involved*

1. Child's Interests

Native children pose a unique challenge in placement, as they have unique best interests. In these cases, the court cannot merely take into consideration the best interests of that individual child, but also must consider what is in the best interests of continuing that child's cultural legacy. This is a lofty task for any court. For this reason, the ICWA sets a standard that is sufficiently malleable to adapt to the individual circumstances of the case, while maintaining certain presumptive preferences and preserving the right of the Tribe to intervene.

"[A] parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring."¹⁵⁶ Correspondingly, a child's right to protection of the relationship he shares with either or both parents "derives from the psychic importance to him of being raised by a loving, responsive, reliable adult."¹⁵⁷ This language speaks to the right of each and every child, regardless of race or citizenship, to remain connected to that from which he or she came; a right to remain in contact with their culture or their "roots." This notion is embodied in the practice of placing children preferentially with family members before seeking to place them within the foster system. The ICWA takes this notion a step further to require that Native children presumptively be placed in Native homes.¹⁵⁸ In this way, these children are able to remain in

155. Byrd, *supra* note 5, at 327.

156. Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983).

157. *Id.*

158. 25 U.S.C. § 1915 (2012).

touch with their cultural “roots” and ensure the continuation of Native culture for future generations of their own progeny.

The right to a sense of belonging is an internationally recognized right for children.¹⁵⁹ The United Nations “Convention on the Rights of the Child” provides for such rights, such as the right of the child to “preserve his or her identity, including nationality, name, and family relations, as recognized by law, without lawful interference.”¹⁶⁰ Further, when the child’s right to preserve his or her identity is interfered with or “[w]here a child is illegally deprived of some or all of the elements of his or her identity, States’ parties shall provide appropriate assistance and protection, with a view to reestablishing speedily his or her identity.”¹⁶¹ Under the convention, children maintain a recognized right to freedom of thought, conscience, and religion,¹⁶² as well as the right to freedom of association and peaceful assembly.¹⁶³ The U.S. is not currently a signatory to this convention.¹⁶⁴ However, international public opinion seems to want standards set by an international governing body, like the United Nations, as *de facto* minimums, even though they may not be *de jure*.¹⁶⁵

2. Parents’ Interests

Parents have a fundamental right to raise their children.¹⁶⁶ Virginia courts have historically held that, “[n]o bond is so precious and none should be more zealously protected by the law as the bond between parent and child.”¹⁶⁷ “A parent’s right to the custody of his or her children is an element of ‘liberty’ guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.”¹⁶⁸ Only when the state shows that a parent is unfit to adequately care for the needs of his or her child may the state intervene in the parent/child relationship.¹⁶⁹ These protections are “not confined to the protection of citizens[,] . . . [t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard

159. Hon. Peter J. Herne, *Best Interests of an Indian Child*, N.Y. St. B.J. 22, 23 (2014).

160. G.A. Res. 44/25, Art 8, §1 (Nov. 20, 1989).

161. *Id.*, Art. 8, § 2.

162. *Id.*, Art. 14, § 1.

163. *Id.*, Art. 15, § 1.

164. Herne, *supra* note 159, at 23 n.10.

165. *See generally id.*

166. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

167. *Carson v. Elrod*, 411 F. Supp. 645, 649 (E.D. Va. 1976).

168. *In re Gentry*, 369 N.W.2d 889, 892 (Mich. Ct. App. 1985).

169. *Troxel*, 530 U.S. at 68-69.

to any differences of race, of color, or of nationality.”¹⁷⁰ The state may only interfere with parental rights, of either a citizen or noncitizen, if there is evidence that a parent is unfit to care for the needs of the child.¹⁷¹

In *Thompson*, the state was able to show that both the biological mother and father were unfit to the task of parenthood,¹⁷² and because of their individual frailties, they were unable to care for the daily needs of their child.¹⁷³ However, their participation in the case is evidence that the termination of their parental rights did not eliminate their interest in their child’s wellbeing. Given the circumstances, it is noteworthy that the court allowed the disenfranchised parents to continue to participate in the proceedings, as well as noting the parents’ preferences throughout the opinion.¹⁷⁴ The court in *Thompson* made specific mention of B.N.’s parents’ support of the motion to transfer the case to tribal court.¹⁷⁵ While B.N.’s parents had lost their right to any legal claim over her, the court recognized their wishes, as though it were recognizing the important role this connection to her parents’ wishes would play in her life.

3. Tribal Interests

“Tribal Nations are possessed with inherent sovereignty . . . [and] relationships between a Tribal Nation and its members are within the exclusive jurisdiction of the Tribal Nation.”¹⁷⁶ Native American Tribal Nations stand in a unique political relationship to the United States of America.¹⁷⁷ Tribal nations are sovereign entities that possess exclusive jurisdiction over tribal matters.¹⁷⁸ This legal status grants Native American children unique legal status as well, which, in turn, must be observed during child custody disputes wherein the ICWA grants the Tribe exclusive

170. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

171. *Troxel*, 530 U.S. at 68.

172. *Thompson v. Fairfax Cty. Dep’t of Family Servs.*, 62 Va. App. 350, 356-57 (2013).

173. *Id.*

174. *Id.*

175. *Id.* at 358.

176. *Herne*, *supra* note 159, at 22. *See also* *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a ‘separate people’ possessing ‘the power of regulating their internal and social relations.’”) (citations omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) and *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 173 (1973)).

177. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *see generally* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

178. *Mazurie*, 419 U.S. at 557.

jurisdiction. Though some have challenged the constitutionality of the ICWA on the grounds of equal protection, this unique legal status is not due to any consideration of the child's race. Rather, an Indian child enjoys certain rights and privileges by virtue of his or her citizenship or membership of a sovereign nation or tribe.¹⁷⁹ These rights include, but are not limited to: those provided for by federal law, state statute, or Indian treaty; certain educational benefits offered by the BIA and various other organizations; various healthcare benefits offered by the BIA and other organizations; international border crossing rights; the right to own and inherit reservation property; a right to participate in Tribal Governance; entitlement payments from their tribal government, and, finally, a right to a sense of belonging.¹⁸⁰ As such, the "best interests of an Indian child" are inherently different from the "best interests of a child" standard.

4. States' Interests

As *parens patriae*, the state has an interest in the health, safety, and welfare of children.¹⁸¹ *Prince v. Massachusetts* established that the society's interest in protecting children is a compelling state interest¹⁸² that may trump a parent's right to the custody of his or her children when the child's safety and well-being are at risk.¹⁸³ The State has a duty to protect that child and, if necessary, intrude on the parents' right to raise the child by both retaining custody and directing the child's religious and moral upbringing.

B. Effect of a Judicially Created Exception

1. Existing Indian Family Exception

In her 1997 testimony before the Joint Hearing of the House Resources Committee and the Senate Committee on Indian Affairs, Assistant Secretary of the Interior, Ada Deer, of the Menominee Indian Tribe of Wisconsin stated:

[W]e want to express our grave concern that the objectives of the ICWA continue to be frustrated by State court created judicial exceptions to the ICWA. We are concerned that State court judges who have created the "existing Indian family" exception are delving into the sensitive and complicated areas of Indian cultural

179. Herne, *supra* note 159, at 22.

180. *Id.* at 22-23.

181. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

182. *Id.* at 165.

183. *Id.* at 167.

values, customs, and practices[,] which under existing law have been left exclusively to the judgment of Indian tribes. . . . We oppose any legislative recognition of the concept.¹⁸⁴

The EIF exception to the ICWA is a prime example of a state court reading public bias into the law. It obviates the law by allowing the court to make its own individual determination of the “Indian-ness” of the child in question. Further, it uses racial stereotypes to meet these objectives. For example, one test used by courts to evaluate whether the child had previously been part of an existing Indian family includes determining whether the child had previously lived “in an ‘actual Indian dwelling,’ apparently thinking of a teepee, hogan, or pueblo.”¹⁸⁵

2. Application of the best interests of the child standard

The ICWA itself uses “best interest” language.¹⁸⁶ However, it would be a mistake to assume that application of traditional best interest factors is what the legislation intended. “It is likely that most attorneys simply consider Indian child merely as a racial factor in the standard. This response, however, fails to recognize that a best interest of an Indian child standard is inherently different from [the state’s] best interest of a child standard.”¹⁸⁷ The “best interests of the child” are not coterminous with the “best interests of the Indian child.” Rather, the language must be read in the context of the ICWA as a whole. The statutory language links the best interests of the Indian child with the best interests of the Indian parent.¹⁸⁸ In turn, these interests are linked with the best interests of the tribal community as a whole.¹⁸⁹ “ICWA is not the only place to find the phrases ‘best interest’ and ‘Indian child,’ however. In fact, it has been at the state level that some of the most

184. *Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on H.R. 1082 and S. 569, Bills to Amend the Indian Child Welfare Act of 1978*, 105th Cong. (June 18, 1997) (statement of Ada E. Deer, Assistant Secretary of Indian Affairs, Department of the Interior) http://naturalresources.house.gov/uploadedfiles/ada_e_deer_testimony_6.18.97.pdf.

185. Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption under the Indian Child Welfare Act*, in *MIXED RACE AMERICA AND THE LAW: A READER* 393, 398 (Kevin R. Johnson ed., 2003).

186. 25 U.S.C. § 1902 (2012).

187. Herne, *supra* note 159 at 22.

188. *Id.* at 23.

189. *Id.*

noteworthy efforts at joining these terms into a ‘best interest of an Indian child’ standard can be found.”¹⁹⁰

C. *Potential Effects of Applying an Immediate Harm Standard*

1. Advantages

There seem to be more advantages than drawbacks to the application of this standard. First, it appropriately respects tribal interests. Narrowly defining “good cause” as that which would not cause immediate harm to the child is more consistent with Congress’ intent in enacting the ICWA, thus ensuring Indian children are not capriciously ripped away from their culture in a short sighted attempt at assimilation. The immediate harm standard preserves the right of Tribes to intervene and limits the degree to which courts can interfere with this right. It demonstrates a proper respect for and deference to tribal courts. Tribal courts are composed of tribe members. These individuals, the ones most familiar with the culture and its importance—not only the child, but the tribe as a whole—are the ones best situated to determine the best interests of the Indian child. The court in *Thompson* writes that Congress presumed that “in the event of a transfer, tribal courts are fully competent to consider the child’s best interests in adjudicating the termination of parental rights proceeding.”¹⁹¹

Second, it adequately takes into consideration the rights and interests of the child. An immediate harm standard retains a certain degree of latitude in its application. It is a malleable enough standard to anticipate that there may be some instances in which removal would harm the child. For instance, as the putative adoptive parents contended in *Thompson*, removing the case to tribal court may have a profound effect on a child with pronounced attachment issues.¹⁹² In these instances, the immediate harm standard provides an escape mechanism.

2. Drawbacks

Although applying an “immediate harm” standard is a more appropriate standard than that of the “best interest of the child” for the reasons

190. *Id.* See also *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1355-56 (2014); *In re N.B.*, 199 P.3d 16, 23-24 (Colo. Ct. App. 2007); *Seminole Tribe v. Dep’t of Children & Families*, 959 So. 2d 761, 766 (Fla. Dist. Ct. App. 4th Dist. 2007); *In re Rules of Juvenile Prot. Procedure Including Amendments Effective July 1, 2014*, 2014 Minn. LEXIS 417, *254 (Minn. July 1, 2014); *In re S.B.C.*, 340 P.3d 534, 540 (Mont. 2014); *In re Zylena R. v. Elise M.*, 825 N.W.2d 173, 186 (Neb. 2012); *Hoots v. K.B. (In re A.B.)*, 663 N.W.2d 625, 630 (N.D. 2003).

191. *Thompson v. Fairfax Cty. Dep’t of Family Servs.*, 62 Va. App. 350, 376 (2013).

192. *Id.* at 359.

aforementioned, it nonetheless imposes judicial reasoning on the statute. Section 1911(b) is vague with respect to what constitutes “good cause” to deny transfer. As with any new standard, there may be unforeseen disadvantages in defining “good cause” with an immediate harm standard. It may take time before any potential unforeseen harm becomes known. In the meantime, other courts may be slow to adopt Virginia’s standard.

IV. A CALL FOR CHANGE

The ICWA, as applied, fails to meet its intended purpose. Native American advocates claim that the ICWA hurts those it was intended to protect.¹⁹³ They are angry that “[f]ederal tax dollars are being used across the country to support the enactment and adherence to this law; however in thousands of cases, the law is destroying loving, stable families and placing children in harmful and difficult situations.”¹⁹⁴

Due to alleged abuses of judicial discretion, there has been a recent movement for increased federal oversight over the implementation of, and compliance with, ICWA. In early 2014, several Native American advocacy organizations, including the National Congress of American Indians, the Native American Rights Fund, the National Indian Child Welfare Association, and the Association on American Indian Affairs sent a letter to the Department of Justice urging them to investigate ICWA violations nationwide.¹⁹⁵ In December 2014, President Obama hosted the White House Tribal Nations Conference in Washington, D.C.¹⁹⁶ The conference provided leaders from the 566 federally recognized tribes a forum in which to discuss pertinent issues with U.S. leaders, including the President and members of the White House Council on Native American Affairs.¹⁹⁷

193. *Amending the Indian Child Welfare Act*, COAL. FOR THE PROT. OF INDIAN CHILDREN AND FAMILIES (Sept. 11, 2015), <http://coalitionforindianchildren.org/amending-icwa/>.

194. *Id.*

195. Letter from the National Congress of American Indians, the Native American Rights Fund, the National Indian Child Welfare Association, and the Association on American Indian Affairs to Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice and Eve L. Hill, Deputy Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice (Feb. 3, 2014) (on file with Dept. of Justice), http://narf.org/bloglinks/narf_nicwa_ncai_aaia_ltr_to_doj.pdf.

196. Press Release, The White House Office of the Press Secretary, President Obama Announces 2014 White House Tribal Nations Conference (Oct. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/10/20/president-obama-announces-2014-white-house-tribal-nations-conference>.

197. *Id.*

V. PROPOSED SOLUTIONS

At the conclusion of the Conference, U.S. Attorney General Eric Holder briefly outlined the administration's plan to enhance compliance with the ICWA. This included an unprecedented announcement that the Department of Justice will begin to intervene by filing *amicus* briefs in state court cases involving Native American children in order to make sure that state agencies comply with the act. Holder announced, "We are working to actively identify state-court cases where the United States can file briefs opposing the unnecessary and illegal removal of Indian children from their families and their tribal communities."¹⁹⁸ The administration would be "redoubling" its efforts to support the ICWA, in order to "protect Indian children from being illegally removed from their families; to prevent the further destruction of Native traditions through forced and unnecessary assimilation; and to preserve a vital link between Native children and their community that has too frequently been severed."¹⁹⁹

In contrast to the Obama administration's proposed suggestion that the solution to historical unjust application of the ICWA lies in increased federal governmental intervention in state juvenile and domestic relations courts, other organizations have agreed that the time has come to amend the ICWA. One such organization, the Coalition for the Protection of Indian Children and Families (CPICF), states that its "mission is to successfully advocate for reasonable and timely amendments to the Indian Child Welfare Act in order to ensure Indian children and families are free from unnecessary pain and suffering."²⁰⁰ The organization believes that "children of Indian descent will be granted greater access to loving, permanent homes regardless of heritage by minimizing the barriers caused by the Indian Child Welfare Act."²⁰¹ To protect children who have Native American heritage and their families, amendments must be made to the Indian Child Welfare Act. Proposed amendments include:

1. Ensure an Indian child has a "parent" as defined by the law and the parent has properly established paternity under state law.

198. Attorney General Eric Holder, Remarks during the White House Tribal Nations Conference (Dec. 3, 2014), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-during-white-house-tribal-nations>.

199. *Id.*

200. *Mission and Vision*, COAL. FOR THE PROT. OF INDIAN CHILDREN AND FAMILIES (Sept. 11, 2015), http://coalitionforindianchildren.org/about/mission_vision/.

201. *Id.*

2. Provide fit birth parents of Indian children the right to choose healthy guardians or adoptive parents for their children without concern for heritage.
3. Ensure that the “qualified expert witness” is someone who is able to advocate for the well-being of the Indian child, first and foremost.
4. Clarify that the ICWA [applies] to family court disputes, not just divorce proceedings, over Indian children.
5. Clarify that the ICWA allows transfer only of foster care and termination proceedings and that transfer motions must be filed within 30 days from the start of the proceeding.
6. Clarify that an Indian birth mother does not need to consent to adoption in court.
7. Limit a parent’s right to revoke to 30 days versus the current practice allowing birth parents to revoke their consent up to 12 months after a child has been placed.
8. Clarify that final adoptions may only be vacated for fraud within limits under state law. The ICWA currently gives parents two years. There are adoptive parents who are terrified for two years after the adoption is final due to this requirement.
9. Define “good cause” to allow for the birth parent’s preference, lack of Indian home after search, and the child’s emotional, physical, and developmental needs.²⁰²

The coalition suggests that these amendments “must be made to this law to help ensure children of Indian heritage have the same rights as all other children in the United States,” and ensure they find safe, happy, healthy, permanent homes.²⁰³

Amending the ICWA is an attractive solution. Statutory drafting requires prudent decision-making. Drafters can use vague language in order to give the courts a certain degree of latitude when deciding an issue. However, they run the risk of allowing inconsistent applications of the law throughout the various jurisdictions. This is exactly what has occurred with the ICWA to date. While courts have attempted to apply good judgment in defining what constitutes “good cause” for transfer, they yet again find themselves in the difficult position of setting precedent that will allow cultural bias to seep in and corrode the foundations of the law, thereby obviating its intended purpose, and allowing historical abuses to be perpetuated.

202. *Amending the ICWA*, *supra* note 193.

203. *Id.*

While the amendment of the ICWA would be an ideal long-term solution, the process can be lengthy. Rather than allowing increased federal oversight of state domestic relations courts, this case note suggests that state juvenile and domestic relations courts throughout the country follow Virginia's lead in adopting an immediate harm standard when deciding whether to transfer a case to tribal court under § 1911(b).

VI. CHRISTIAN PERSPECTIVE

"All Scripture is breathed out by God and profitable for teaching, for reproof, for correction, and for training in righteousness."²⁰⁴ Scripture, in the form of the Holy Bible, provides the foundation of the Christian worldview. Under a Christian worldview, the child is not the creature of the state, but rather a child of God. God entrusts parents and families to rear their children in a manner that is glorifying to God. Ephesians 6:4 states, "Fathers, do not provoke your children to anger, but bring them up in the discipline and instruction of the Lord."²⁰⁵ By specifically instructing fathers to lead children in the discipline and instruction of Lord, God is making an exclusive grant of authority to the family, and not the civil government. However, this does not imply that the civil government has no role in the governance of children. Romans 13:4 states that the civil government is "God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain; for he is God's minister, an avenger to execute wrath on him who practices evil."²⁰⁶ This grant of divine authority allows the civil government to punish evildoers, or in the realm of child welfare, remove children from abusive or neglectful parents.

The Supreme Court of the United States echoed this view in the 1925 case of *Pierce v. Society of the Sisters*.²⁰⁷ Writing for a unanimous court, Justice McReynolds wrote, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²⁰⁸ The *Pierce* case dealt with the rights of the parents to choose appropriate education for their children.²⁰⁹ It stands for the principle that parents have a right to help guide their child's development, free of unnecessary government intervention.

204. 2 Timothy 3:16 (ESV).

205. Ephesians 6:4 (ESV).

206. Romans 13:4 (NKJV).

207. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

208. *Id.* at 535.

209. *Id.*

Similarly, many cases regarding the ICWA, like *Thompson*, stand for the rights of the Tribe, acting as parent, to help guide the development of Native children.

VII. CONCLUSION

The Supreme Court has recognized that “while there is still reason to believe that positive, nurturing parent-child relationships exist, the State’s interest as *parens patriae* favors preservation, not severance, of natural familial bonds.”²¹⁰ For Native children, this idea of familial bonds extends to include tribal bonds. Short of an amendment to the ICWA, courts deciding whether to transfer a case to tribal court under § 1911(b) should apply the immediate harm standard because it best balances the competing interests of the child and continuation of tribal culture. Further discussion of this topic will help to better interpret an ill-defined and often misapplied standard. Insofar as courts are currently split on this issue, further discussion is necessary in order to achieve a uniform and reliable system of justice that will serve the needs of children, families, and Native tribes adequately.

210. *Stantosky v. Kramer*, 455 U.S. 745, 766-67 (1982).

