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THE INDIAN CHILD WELFARE ACT OF 1978: A MONTANA ANALYSIS

INDIAN CHILDREN ONCE YOUNG FOREVER INDIAN

Debra DuMontier-Pierre

I. INTRODUCTION

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to prevent the unwarranted breakup of Indian families and to give Indian tribes a substantial role in matters concerning custody of Indian children. Through ICWA, Congress declared a national policy to keep Indian children with their families, to defer to tribal jurisdiction in child custody proceedings, and to place Indian children who have been removed from their homes with extended family members or within their own Indian tribe. To counter cultural biases, ICWA establishes minimum federal substantive and procedural requirements that state courts must follow in child custody proceedings involving Indian children.

Even though Congress enacted ICWA seventeen years ago, state courts, attorneys and agencies still ignore the letter and the spirit of ICWA. For example, the Idaho Supreme Court recently reversed the lower court's finding that ICWA did not apply in a child custody proceeding involving an Indian child. The court remanded the case and ordered the lower court to apply ICWA. In that case, the mother arranged for placement of her Indian child through an adoption agency. The agency placed the day-old baby with a non-Indian couple, the Swensons. Even though the adoptive parents notified the Indian tribe of the action to terminate the father's rights, apparently the mother

5. See, e.g., In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993) (finding no compliance with ICWA for failure to give notice to tribe).
8. 25 U.S.C. § 1911(c) (1988) (guaranteeing right of an Indian tribe or custodian to intervene in a child custody proceeding of Indian child); 25 U.S.C. § 1912(a)
and the adoptive parents delayed notifying the father and Indian tribe of the child's birth and subsequent adoption proceedings. The Indian tribe immediately moved to intervene, and sought placement of the Indian child with an extended family member as mandated by ICWA. Despite the Indian family placement preference required by ICWA, the Indian child remained with the Swensons throughout the four-year court battle.

In In re Baby Boy Doe, the adoption agency and the attorney for the non-Indian couple ignored ICWA, and the trial court attempted to circumvent the Act. The court's holding in that case demonstrates that ignoring the requirements of ICWA prolongs the custody dispute and promotes delay which is detrimental to all parties. Furthermore, it fosters public misunderstanding about the policy of ICWA and the Indian tribe's role in seeking to protect Indian children.

The United States Supreme Court has decided one case regarding ICWA. Still, no uniform application of ICWA exists on a national level. Numerous state decisions interpreting ICWA have resulted in confusion and inconsistency in the application of ICWA. This article concentrates on Montana's reaction and response to ICWA. Part II provides a brief background on the necessity for the enactment of ICWA. Part III examines the applicability of ICWA and the judicially created exception attempting to avoid application of ICWA. Part IV discusses the dual jurisdictional scheme of ICWA and the sole United States Supreme Court opinion interpreting ICWA.

(1988) (requiring party seeking termination of parental rights to notify parent, custodian or Indian tribe).


11. Id.

12. Id.; see also In re M.R.D.B., 241 Mont. 455, 787 P.2d 1219 (1990) (transferring jurisdiction to Indian tribe two years after tribe intervened since the Indian child was ward of the tribal court).

13. Lisa Morris, Welfare Act Fosters Racist Action, LAKE COUNTY LEADER (Polson, Mont.), Nov. 18, 1993, at 5A. The first paragraph states:

In Idaho last month, a child was taken from his parents. Mr. and Mrs. Leland Swenson of Nampa, Idaho, lost their child to the Oglala Sioux tribe. The Indian Child Welfare Act prevailed again. . . . But every time that I hear about another child being taken from a home that he is happy with, and placed in a home with "his" people, I get sick to my stomach.


The latter sections are devoted to Montana. Part V analyzes Montana child custody proceedings involving Indian children, before and after the enactment of ICWA. Part VI examines Montana's legislative response to ICWA. Part VII examines the Confederated Salish and Kootenai Tribes' commitment to implement ICWA. In conclusion, Part VIII finds that ICWA is in the best interest of the Indian child, that the tribal court system is the best forum to determine Indian child custody issues, and that ICWA is a law that should be followed, not ignored.

II. BACKGROUND

The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.\(^{16}\)

The ICWA became necessary to counteract the detrimental effects of past federal and state policies dealing with Indian tribes. The federal Indian policy of assimilation\(^{17}\) and termination\(^{18}\) nearly destroyed the Indian family. In 1968, the Association on American Indian Affairs (AAIA) conducted a survey of Indian child custody problems in states with large Indian populations.\(^{19}\) The AAIA reported that Indian children were "removed from their families and placed in adoptive care, foster care, special institutions, and federal boarding schools at rates grossly disproportionate to non-Indian [children]."\(^{20}\) After four years of investigative hearings,\(^{21}\) Congress found an alarmingly high percentage of Indian families separated by the unwarranted removal of their children.\(^{22}\) Additionally, the states' failure to


\(^{22}\) 25 U.S.C. § 1901 (1988). This code section provides as follows:
recognize the unique values of Indian culture contributed to the removal of Indian children from their homes.\textsuperscript{23}

Indian children adopted into non-Indian homes encounter serious adjustment problems in adolescence.\textsuperscript{24} Studies indicate that Indian children placed in non-Indian homes have significant social problems including a high rate of suicide and substance abuse.\textsuperscript{25} In 1974, the chairman from the Winnebago Tribe testified at an ICWA hearing:

I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that is A-1 in the state of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power \textsuperscript{* * *} To regulate Commerce \textsuperscript{* * *} with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

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

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


\textsuperscript{25} Donna Goldsmith, There is Only One Child, and Her Name is Children, 36 FED. B. NEWS & J. 446, 449 (1989).
think... destroy him.26

Congress enacted ICWA because it found that Indian children raised in non-Indian families lose ties with their tribal community, risking identity problems and alienation from both worlds.27

III. THE APPLICABILITY OF ICWA

The purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."28 Some of ICWA's safeguards include: notice of the proceedings to the parent and Indian tribe;29 appointment of counsel;30 an opportunity for the Indian tribe to intervene and request transfer of the proceeding to tribal court;31 requirement of proof beyond a reasonable doubt before terminating parental rights;32 and preferred placement of the child with an Indian family.33

All too often, dire consequences result when the applicability of ICWA goes unrecognized. The child's parent, custodian or Indian tribe may petition the court to invalidate a child custody proceeding that violates ICWA.34 In addition, if an attorney fails to follow the requirements of ICWA, the proceeding may result in an invalid proceeding and a malpractice action.35 Moreover, a violation of ICWA may result in civil tort liability if an individual, acting under the color of state law, violates another person's federal rights.36 Even before a child custody proceeding is filed in court, a caseworker or attorney should determine whether ICWA applies in the proceeding so that the child and the tribe receive the minimum federal protection.

35. Doe v. Hughes, 838 P.2d 804 (Alaska 1992) (holding that even though adoption decree was affirmed, law firm's failure to comply with terms of ICWA was malpractice).
A. The Two-Step Analysis

To satisfy the purpose and requirements of ICWA, adoption agencies, practitioners, social workers and courts of Montana should learn to recognize an ICWA case. An ICWA case has two pre-requisites: 1) a child custody proceeding, and 2) an Indian child. First, ICWA defines a child custody proceeding to include foster care placement, a termination of parental rights, a pre-adoptive placement, or an adoptive placement. The ICWA explicitly excludes divorce proceedings and juvenile criminal proceedings. Second, the child involved must be an Indian child as defined by ICWA. An "Indian child" means "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." The Indian tribe's determination whether a child is a member of that tribe is conclusive. Membership in an Indian tribe does not require enrollment of the child because an Indian tribe may recognize other criteria for membership. In addition, a state court may apply ICWA prior to the determination of the tribe that the child is eligible for membership. A state court is deemed notified that an Indian child is involved whenever informed of such by any party to the case.

Despite the clear guidelines, however, state courts still violate ICWA. For example, in In re Baby Boy Doe, even though the

42. 25 U.S.C. § 1903(4).
44. Id. But see In re J.L.M., 451 N.W.2d 377 (Neb. 1990) (holding membership and enrollment synonymous).
45. See, e.g., THE LAW AND ORDER CODE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBES OF THE FLATHEAD INDIAN RESERVATION, MONTANA, Ch. VI, § 1(6)(o) (1986) ("Indian youth or Indian child" means a child of Indian descent who is either enrolled or enrollable in an Indian tribe, band, community or who is a biological descendant of an enrolled member and has significant contacts or identification with an Indian community.").
46. In re Baby Boy Doe, 849 P.2d 925, 931 (Idaho 1993). The party asserting the applicability of the ICWA has the burden of producing the necessary evidence for the trial court to make this determination. Id.
47. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (1979) [hereinafter BIA Guidelines]. In 1979, the BIA published the Guidelines for State Courts providing interpretations and assistance in implementing and applies the ICWA. Id. at 67,584.
child involved was one-half Indian blood quantum, the trial judge ruled that ICWA did not apply because the child was not an "Indian child." The child's tribe appealed the determination of the trial court. The appellate court found that the Indian tribe's appeal was frivolous and ordered the tribe to pay $8,500 in attorney fees. As discussed earlier, the Idaho Supreme Court reversed the "Indian child" determination finding the evidence presented satisfied ICWA and the federal guideline definition of an Indian child. The attitude of the lower court toward the Indian tribe's challenge illustrates the indifference and disrespect Indian tribes encounter when seeking to enforce ICWA's mandates.

B. Existing Indian Family Exception

Courts in some states have created judicial exceptions to avoid the mandates of ICWA, even though the plain language of the Act requires only two prerequisites to trigger application of ICWA. In In re Baby Boy Doe, the trial court adopted the "existing Indian family" test to avoid application of ICWA. The trial court reasoned that ICWA only applies when a child custody proceeding involves an Indian child who has been removed from an existing Indian family. The trial court held that ICWA did not apply because Baby Boy Doe lived with the non-Indian adoptive couple since his birth, had never lived in the Indian community, and had never been exposed to Indian cul-

48. Baby Boy Doe, 849 P.2d at 929. The Tribe's enrollment director advised the court that membership could not be determined because the birth certificate was missing from child's application. Id. at 930.

49. Id. at 931.

50. Id. at 931-34. The evidence included the Tribe's requirements for enrollment, the finding that the father was one of the child's parents, and that the father owned land on the reservation which established the child's eligibility for membership with the Tribe. Id.


54. Id.; see also Baby Boy L., 643 P.2d at 175; In re S.C. & J.C., 833 P.2d 1249, 1253 (Okla. 1992) (relying on existing Indian family exception to refuse to apply ICWA to father's efforts to invalidate adoption, and supporting judicially created exception with the failed 1987 amendment to the ICWA that would have overruled the exception).
Reversing the lower court, the Idaho Supreme Court refused to adopt the existing Indian family exception. The Idaho Supreme Court concluded that although other states have applied the Indian family requirement, the United States Supreme Court did not uphold this requirement. Similarly, in another case involving Montana Indian children, the Illinois Court of Appeals refused to adopt the existing Indian family exception and transferred a child custody proceeding to the Fort Peck Tribal Court in Montana. The Illinois appellate court reasoned that the emphasis of ICWA is not only on the child’s past and present ties to the Indian community, but also on whether such ties might be established in the future. Similarly, other state courts should reject the “existing Indian family” exception and require adoption agencies, state officials, and social workers to faithfully follow the mandates of ICWA.

IV. JURISDICTION

After finding ICWA applies in a case, the court will next address the jurisdiction issue. The heart of ICWA is the dual jurisdictional scheme based on the domicile of the Indian child. Seeking to address the unwarranted separation of Indian families, ICWA favors tribal court jurisdiction. Still, the state court determines the residence and domicile of the child, a major factor in the determination of jurisdiction.

A. Exclusive or Concurrent Jurisdiction

First, reaffirming the role of the Indian tribe, the ICWA grants the tribal court exclusive jurisdiction in a child custody proceeding involving an Indian child domiciled on the reservation or who is a ward of the tribal court regardless of domicile.

55. Baby Boy Doe, 849 P.2d at 928.
56. Id. at 931-32.
57. Id. at 931. See also Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (holding that twin babies immediately placed for adoption after birth, who never lived with an Indian family or returned to their Indian community, did not render the ICWA inapplicable).
59. Id. at 840.
60. Davis, supra note 52, at 495-96.
63. 25 U.S.C. § 1911(a) (1988). The statute provides an exception when jurisdic-
Second, ICWA allows concurrent jurisdiction between tribal court and state court if the Indian child is not domiciled on the reservation. Upon petition of either the parent, the Indian custodian or the child’s Indian tribe, the state court must transfer the proceeding to tribal court. However, ICWA provides three exceptions to the preferred jurisdiction of tribal court. First, the Indian tribe may decline jurisdiction. Second, either parent may object to the transfer of the proceeding to tribal court. Third, the state court may find that “good cause” exists not to transfer the proceeding to tribal court.

Acknowledging interracial relationships between Indian and non-Indian couples, ICWA includes political compromises evident in the jurisdictional portion of ICWA. For example, in In re Baby Boy Doe, the mother filed an objection to the Indian tribe’s motion to transfer and superseded the Indian tribe’s request to transfer the case to tribal court under ICWA. Congress has not passed legislation to remove the exceptions that mandate the transfer of a proceeding from a state court to a tribal court.

B. Holyfield Analysis: Definition of Domicile

A decade after the enactment of ICWA, the United States Supreme Court addressed the issue of domicile in Mississippi Band of Choctaw Indians v. Holyfield. In its only interpretation of ICWA, the Court affirmed the congressional intent and purpose of ICWA. Holyfield involved an unmarried couple who...
were both enrolled members of the Mississippi Band of Choctaw Indians and resided on the Choctaw Reservation, in Neshoba County, Mississippi. The couple drove 200 miles to an off-reservation hospital where the mother gave birth to twins on December 29, 1985.\(^7\) The couple voluntarily placed the twins for adoption with a non-Indian couple, the Holyfields.\(^7\)\(^4\) The trial court granted the Holyfield’s petition for adoption and entered the final decree less than one month after the birth of the twins.\(^7\)\(^5\) Two months later, the Indian tribe filed a motion to vacate the adoption based on a violation of ICWA.\(^7\)\(^6\) The Indian tribe claimed ICWA granted exclusive jurisdiction to the tribe.\(^7\)

Reasoning that the parents “went to some efforts” to see that the babies were born outside the confines of the reservation, the trial court denied the Indian tribe’s motion.\(^7\)\(^8\) The trial court held that the state court had jurisdiction because the twins, at no time from their birth to the present date, had ever resided on or physically been on the Choctaw Indian Reservation.\(^7\)\(^9\) The Supreme Court of Mississippi affirmed the finding that none of the provisions of ICWA applied and held the trial court properly exercised jurisdiction.\(^8\)\(^0\)

On appeal, however, the United States Supreme Court reversed the Mississippi court’s decision.\(^8\)\(^1\) Finding that ICWA applied, the Court determined the sole issue was whether the twins were “domiciled” on the reservation for purposes of jurisdiction.\(^8\)\(^2\) The Court emphasized that exclusive tribal jurisdiction is central to the overall scheme of ICWA.\(^8\)\(^3\) After reviewing ICWA and the legislative history, the Court reasoned that it was doubtful Congress intended state law to define key jurisdictional

\(^7\) Id. at 37.
\(^8\) Id. at 38.
\(^9\) Id. at 37 n.10. Mississippi state law required a six-month waiting period between interlocutory and final decrees of adoption, but also grants the court discretion to waive the requirement. Id.
\(^10\) Id. at 38 (basing motion on 25 U.S.C. § 1914 (1988)).
\(^11\) Id.
\(^12\) Id. at 39. No obstetric facilities were located on the reservation, but a hospital was located nearer to the reservation than 200 miles. Id. at 37.
\(^13\) Id. at 39 (remarking on the trial court’s one-page opinion relying on these two facts to reach its conclusion).
\(^15\) Holyfield, 490 U.S. at 40.
\(^16\) Id. at 42. It was undisputed that the state court adoption was a “child custody proceeding” and the twins were “Indian children” as defined by the ICWA. Id.
\(^17\) Id. at 41.
definitions. More importantly, the Court recognized the Indian tribe's interest stating:

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 the Indian Children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.

The Court held that to allow an individual tribal member to defeat the exclusive jurisdiction of the tribe simply by giving birth off the reservation would nullify the purposes of ICWA.

The Court declared the adoption invalid and held that the tribal court had exclusive jurisdiction pursuant to ICWA. The Court noted that if the state court had initially complied with the mandates of ICWA, it would have avoided three years of delay and anguish. In addition, the Court refused to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing [and protracted] litigation." The Court concluded that "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." Accordingly, Holyfield confirms that maintaining contact with the Indian tribe serves the Indian child's interest, as well as the survival of Indian culture dependent on the Indian tribe's ability to continue as a self-governing community.

84. Id. at 45.
85. Id. at 49.
86. Id. at 50 (citing House Report at 12, 1978 U.S.C.C.A.N. at 7534 ("One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family.").
87. Id. at 54.
88. Id.; In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) (involving Navajo boy placed with Utah non-Indian couple with consent of mother. Six years after the removal of the child, the Utah Supreme Court declared the state adoption invalid and concluded that the Navajo Tribal Court had exclusive jurisdiction.).
89. Holyfield, 490 U.S. at 54 (quoting Halloway, 732 P.2d at 972).
90. Id. Mr. Holyfield died while this case was pending. Upon remand to tribal court, the court terminated the parental rights and granted the adoption petition of Mrs. Holyfield. See Diane Allbaugh, Tribal Jurisdiction Over Indian Children: Mississippi Band of Choctaw Indians v. Holyfield, 16 AM. INDIAN L. REV. 534, 558 (1991).
91. Holyfield, 490 U.S. at 33.
V. MONTANA'S JUDICIAL INTERPRETATION OF ICWA

The evolution of ICWA involves Montana court decisions, Indian children and Indian tribes. Montana is home to seven federally recognized Indian reservations.\(^\text{92}\) The removal of Indian children from their homes is a national crisis, and Montana shares this problem.\(^\text{93}\) In Montana, the Native American population comprises a little less than five percent of the state's residents.\(^\text{94}\) In 1978, however, Congress found that Indian children of Montana were thirteen times more likely to be placed in adoptive or foster care homes than non-Indian children.\(^\text{95}\) Currently in Montana, forty-two percent of children placed out of the home for two years or more are Indian children.\(^\text{96}\)

A. Pre-ICWA

The Pre-ICWA decisions of the Montana Supreme Court portray Montana as one of the states Congress found insensitive to tribal jurisdiction in Indian child custody proceedings.\(^\text{97}\) In 1972, Montana reported the first case allowing a state court to assume jurisdiction of an Indian child allegedly abandoned off the reservation by his parents.\(^\text{98}\) In *In re Cantrell*, the mother resided on the reservation, and prior to the state court proceeding, the Tribal Court of the Fort Peck Indian Reservation adjudicated custody proceedings of the Indian child. Nevertheless, the Montana Supreme Court reasoned that the abandonment of the child occurred off the reservation, continued for over a year, thereby vesting jurisdiction of the custody proceeding with state court.\(^\text{99}\)

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94. LOPACH ET AL., supra note 92, at 3.
96. Telephone Interview with Trudy Flamand Miller, Indian Child Welfare Specialist, Department of Family Services, Helena, Mont. (Apr. 5, 1995) (During interview, Ms. Miller indicated this statistic includes state, tribal and Bureau of Indian Affairs placements).
99. Cantrell, 159 Mont. at 71, 495 P.2d at 182.
Again the Montana Supreme Court attempted to defeat tribal jurisdiction supporting an individual's choice to use a state forum rather than deferring to tribal jurisdiction in a child custody proceeding involving an Indian child.\(^{100}\) Despite Montana's equal protection concern, the United States Supreme Court reversed.\(^{101}\) In *Fisher v. District Court*, the Court held that tribal court has exclusive jurisdiction in an adoption proceeding involving parties who are all tribal members and residents of Indian reservation.\(^{102}\) The Court found that tribal jurisdiction benefits the plaintiff's class and furthers congressional policy of Indian self-government.\(^{103}\) For those reasons, the Court concluded that tribal jurisdiction outweighed the denial of a state forum to the Indian plaintiff.

In contrast, another Montana tribal court claimed exclusive jurisdiction of a child custody proceeding involving an Indian child filed in a Maryland state court. In *Wakefield v. Little Light*, the Crow Tribal Court of Montana appointed a non-Indian couple the legal guardian of an Indian child for a limited period.\(^{104}\) After leaving the reservation, the non-Indian couple petitioned the Maryland state court seeking custody of the child over the objections of the Indian mother and Indian tribe.\(^{105}\) The Maryland Court of Appeals declared that child-rearing is an essential tribal function and that state interference in custody matters of Indian children is a significant infringement on the right of Indian tribes to govern themselves.\(^{106}\) The Maryland court held that the child's domicile should be used to determine subject matter jurisdiction, and in this case the Crow Tribal Court of Montana had exclusive jurisdiction of an Indian child domiciled on the reservation.\(^{107}\) Consequently, Congress codified the *Fisher* principle in ICWA jurisdiction scheme.\(^{108}\)

\(^{100}\) Firecrow v. District Court, 167 Mont. 139, 536 P.2d 190 (1975), cert. granted, 424 U.S. 382 (1976).

\(^{101}\) Fisher v. District Court, 424 U.S. 382, 391 (1976) (per curiam).

\(^{102}\) Id. at 389.

\(^{103}\) Id. at 390-91. See also Morton v. Mancari, 417 U.S. 535 (1974) (upholding the Bureau of Indian Affairs race-based policy in employee promotions because it furthered Indian self-governance).

\(^{104}\) Wakefield v. Little Light, 347 A.2d 228, 230 (Md. 1975).

\(^{105}\) Id. at 230-31.

\(^{106}\) Id. at 237-38 (citing Williams v. Lee, 358 U.S. 217, 219-20 (1959) which held that Indian tribes have the right to make laws and be governed by those laws. States may act where essential tribal relations are not involved and where the rights of Indians are not jeopardized).

\(^{107}\) Id. at 239.

As a result of the high population of Native Americans in Montana, the Montana Supreme Court has considered several ICWA cases. Twenty-five percent of state foster care placements in Montana are Indian children. A chronological analysis of these cases demonstrates the court's vacillating position construing ICWA. The Montana Supreme Court's interpretation of ICWA is both supportive and restrictive. Montana acknowledges the importance of ICWA but does not advance the literal and broad interpretation of Holyfield in construing ICWA.

Shortly after the passage of ICWA, the Montana Supreme Court restricted the application of ICWA creating a judicial exception for intra-family disputes involving custody of Indian children. In In re Bertelson, a custody dispute arose between the non-Indian mother and the Indian paternal grandparents. Relying on congressional policy, the Montana Supreme Court reasoned that ICWA did not apply in an intra-family dispute because the purpose of ICWA was to "preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution."

Although the Montana Supreme Court found that ICWA did not apply, it remanded Bertelson requiring the trial court to apply a balancing test to determine whether jurisdiction was more appropriate in state or tribal court. The Montana Supreme Court cautioned the trial court to respect tribal sovereignty and to consider the rights of the Indian child and the Indian tribe in deciding whether to accept or decline jurisdiction. Identifying its goal to choose the most appropriate forum, the

111. See In re Bertelson, 189 Mont. 524, 617 P.2d 121 (1980).
112. Id. at 528, 617 P.2d at 124. Initially, the Montana Supreme Court reversed the District Court decision holding that the tribal court was the best forum for the custody dispute. Id. However, the court granted the mother's petition for rehearing alleging the court relied on erroneous facts. Id. at 528, 617 P.2d at 124.
113. Bertelson, 189 Mont. at 531, 617 P.2d at 125.
114. Id. at 540-41; 617 P.2d at 130-31. Initially, the state court took jurisdiction of the case because the father voluntarily sought a divorce in state court. In re Stanley, 7 Indian L. Rep. (Am. Indian Law. Training Program) 4039, 4039-40 (June 6, 1980).
115. Bertelson, 189 Mont. at 533, 617 P.2d at 126.
Montana Supreme Court cautioned the lower court not to ignore the importance of the child's Indian heritage and customs when determining jurisdiction.\textsuperscript{116}

However, due to the significant tribal interests and the mandates of ICWA, the Montana Supreme Court should have transferred the custody dispute to tribal court when it arose instead of remanding the matter. The child, an enrolled tribal member, was a ward of the tribal court. The child resided with her grandparents on the Rocky Boy Reservation, and the mother had voluntarily left the child with the grandparents.\textsuperscript{117} Despite the Montana Supreme Court's recognition of tribal interests, \textit{Bertelson} circumvented ICWA protection. A custody dispute within the extended family is not excluded by ICWA definition of a child custody proceeding.\textsuperscript{118} Consequently, other courts have declined to follow \textit{Bertelson} finding the Montana Supreme Court's exception in the case “contrary to the express provisions of the ICWA.”\textsuperscript{119}

Even though the Montana Supreme Court created a judicial exception to avoid application of ICWA, the court has also stressed the necessity to follow the mandates of ICWA. For instance, a court's failure to appoint counsel for an indigent parent or Indian custodian, as required by the express language of ICWA to ensure procedural fairness, is reversible error.\textsuperscript{120} Also, the Montana Supreme Court acknowledges a responsibility to promote and protect the unique Indian culture in applying state law and ICWA.\textsuperscript{121} In \textit{In re Baby Girl Jane Doe}, the Montana Supreme Court faced a conflict between a mother's interest in anonymity\textsuperscript{122} and the Indian tribe's interest in enforcing the

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.} at 540, 617 P.2d at 130.
  \item \textsuperscript{117} \textit{Id.} at 528, 617 P.2d at 124.
  \item \textsuperscript{118} 25 U.S.C. § 1903(1) (1988) (explicitly excluding application of the ICWA in divorce or juvenile delinquency proceedings).
  \item \textsuperscript{120} \textit{In re M.E.M.}, 195 Mont. 329, 335, 635 P.2d 1313, 1316-17; \textit{see also In re G.L.O.C.}, 205 Mont. 352, 668 P.2d 235, 237 (1983) (stating trial court must determine non-Indian parent's right to counsel prior to transfer of ICWA case).
  \item \textsuperscript{121} \textit{M.E.M.}, 195 Mont. at 332, 635 P.2d at 1316. \textit{But see}, Newville v. State, ___ Mont. ___, 883 P.2d 793, 796 (1994) (involving negligence action for injuries suffered by Indian child while in foster care. The Montana Supreme Court stated: "Adoptive placement was further complicated because any adoptive placement had to comply with the provisions of the Indian Child Welfare Act 25 U.S.C. § 1915.").
  \item \textsuperscript{122} \textit{In re Baby Girl Jane Doe}, 262 Mont. 380, 885 P.2d 1090 (1993); 25 U.S.C.
\end{itemize}

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statutory preference for placement of an Indian child. Reversing the lower court, the Montana Supreme Court held an Indian tribe's statutory right to enforce the placement preference in an adoption of an Indian child is paramount to achieve the goals of ICWA and to protect the best interest of the child.

Assisting state courts with interpretation and implementation of ICWA, the Bureau of Indian Affairs published guidelines for state courts. While the BIA guidelines are not binding on a state court, the Montana Supreme Court has held in In re M.E.M. that the BIA Guidelines are applicable and should be considered in ICWA cases. In that case, the Montana Supreme Court vacated the lower court's order terminating parental rights and remanded the case for determination of the jurisdictional issue. The Montana Supreme Court directed the trial court to consider the BIA Guidelines in determining whether to transfer jurisdiction to the intervening tribal court.

Without citing a source, however, the Montana Supreme Court reinstated the best interest of the child principle to prevent a transfer of jurisdiction to tribal court. Contrary to the protective measures of ICWA, the court incorporated the state's subjective and vague standard which Congress sought to remove by enacting ICWA. Congress recognized that state agencies and judges are accustomed to non-Indian values and often make subjective decisions detrimental to Indian children based on those values. The congressional policy clearly states that the underlying principle of ICWA, instead of a judge's subjective

§ 1915(c) (1988) (regarding anonymity in application of preferences).
123. 25 U.S.C. § 1915(a) (1988) provides as follows:
   In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with
   (1) a member of the child's extended family;
   (2) other members of the Indian child's tribe; or
   (3) other Indian families.
124. Baby Girl Jane Doe, 262 Mont. at 388, 865 P.2d at 1095.
125. BIA Guidelines, supra note 47, at 67584.
126. M.E.M. 195 Mont. at 336-37, 635 P.2d at 1318 (finding that "qualified expert witness" was not defined by ICWA, but that BIA guidelines provided state court with definition to consider).
127. Id. at 337, 635 P.2d at 1318.
128. Id. at 336, 635 P.2d at 1317.
129. Id.; see, e.g. In re N.L., 754 P.2d 863, 869 (Okla. 1988) (citing In re M.E.M. and holding that the trial court may consider the best interest of the Indian child as a factor in determining whether to transfer the case to tribal court).
opinion, is in the best interest of the child.131

Justice Sheehy's dissent in In re M.E.M. suggests that non-Indian subjective values were factored into the court's majority decision of jurisdiction. Justice Sheehy stated that instead of remanding the matter, the case should be transferred immediately to the intervening tribal court of North Dakota.132 Justice Sheehy accused the trial court of refusing to transfer jurisdiction because it disapproved of the tribal court's child custody arrangements.133 He stressed that "the purpose of the ICWA is to remove as far as possible the white man's perceptions in these matters where Indian values may conflict."134 Justice Sheehy added that the case should be transferred to the tribal court, "before a federal court does it for us."135

Inconsistently claiming to recognize the policies of the ICWA, the Montana Supreme Court in another case, In re M.E.M., Jr., allowed a child custody proceeding to bypass the procedural safeguards of ICWA.136 In that case, the mother alleged that the prior temporary custody proceeding violated ICWA and requested that the Montana Supreme Court invalidate both the temporary and permanent custody proceedings.137 Assuming arguendo that the temporary custody proceedings violated ICWA, the Montana Supreme Court nonetheless refused to invalidate the permanent custody proceeding because the court found that it complied with ICWA.138 Still, the court encouraged "the district courts to diligently follow the requirements of the ICWA" emphasized in the mother's brief.139 The federal minimum protection of ICWA seeks to ensure procedural fairness and requires strict adherence. Thus, a violation of ICWA, regardless at what stage of the process, should invalidate a proceeding.

The Montana Supreme Court has not always neglected the policy of ICWA. Two years later, In re M.E.M., Jr. returned to the Montana Supreme Court for consideration of the substantive...
requirements of ICWA. The Montana Supreme Court properly permitted the aunt of the Indian child, an extended family member, to intervene in the adoption proceeding commenced by a non-Indian family. Further, the Montana Supreme Court held that on remand the competing petitions for adoption of the child must be considered in light of ICWA's placement preference.

In another positive response to ICWA, in *In re M.R.D.B.*, the Montana Supreme Court held that the tribal court retains exclusive jurisdiction of a minor child, who is a ward of the tribal court, and that the parent may not prevent the transfer. More importantly, the Montana Supreme Court rejected the family bond argument and properly deferred the determination of the best interest of the child to the tribal court. In a specially concurring and dissenting opinion, however, Justice Weber expressed shock at the disregard for the due process rights of the mother in establishing the child as a ward of the tribal court. Justice Weber also expressed concern that the United States Supreme Court opinion in *Holyfield* held the interests of the Indian tribe superior to the interests of the parents.

Unfortunately, Justice Weber's opinion reflects the all-too-common non-Indian's misunderstanding of the Indian community. Initially, ICWA forces Indian tribes into an adversary role if the tribe wishes to invoke the procedural and substantive requirements of ICWA. Indian tribes are viewed as placing the rights of the child secondary to the desires of the tribe.

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141. *Id.* at 236, 725 P.2d at 213.
143. *In re M.R.D.B.*, 241 Mont. 455, 462, 787 P.2d 1219, 1223 (1990) (responding to situation in which mother initially consented to tribal jurisdiction, but later attempted to prevent transfer to tribal court by withdrawing her consent); see also 25 U.S.C. § 1911(a) ("Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.").
144. *M.R.D.B.*, 241 Mont. at 463, 787 P.2d at 1224 (expressing full confidence that tribal court will consider the best interest of all parties). In fact, the White Mountain Apache Tribal Court, persuaded by the adoptive parents' commitment to the child's heritage, allowed the non-Indian couple from Colorado to adopt the seven-year-old girl. The Associated Press, *Apaches OK Girl's Adoption by Anglos*, ARIZONA REPUBLIC, Mar. 20, 1991, at B4.
a parent relinquishes the right to raise the child, however, the tribe has not only an interest, but an obligation to protect the best interests of the child.\textsuperscript{149} Anglo society places the rights of an individual over the rights of the community.\textsuperscript{150} Society considers the right to raise one’s child an essential and basic civil right. In contrast, the Indian community focuses on the collective rights of the community as a large cultural group and not on individual rights.\textsuperscript{151}

Again demonstrating resistance to tribal jurisdiction, in \textit{In re T.S.}, the Montana Supreme Court refused to transfer a child custody proceeding of an Indian child to an Alaskan tribal court, claiming the transfer would not be in the best interests of the child.\textsuperscript{152} A child custody proceeding involving an Indian child may remain in state court if the Indian tribe declines jurisdiction or either parent objects to the transfer to tribal court.\textsuperscript{153} In addition, the state court may avoid tribal court jurisdiction if the court finds “good cause to the contrary” exists to refuse transfer of the proceeding. Unfortunately, a state court is free to use its discretion to create a definition of “good cause” to prevent transfer to tribal court.\textsuperscript{154}

For example, in \textit{In re T.S.}, the Montana Supreme Court considered the BIA Guidelines which interpret “good cause to the contrary” not to transfer a proceeding to tribal court.\textsuperscript{155} The

\textit{Templation of All, the Best Interests of None}, 43 \textit{RUTGERS L. REV.} 761 (1991) (claiming that the goals of the ICWA—to protect the best interests of the Indian child and promote stability and security for Indian tribes—are unattainable).

\textsuperscript{149} Myers, supra note 1, at 48 (emphasizing that the accomplishment of objectives of ICWA is the responsibility of Indian tribes, Indian organizations and Indian parents).


\textsuperscript{151} Id.


\textsuperscript{153} 25 U.S.C. § 1911(b). In \textit{T.S.}, the mother and the Indian tribe sought transfer to tribal court. 245 Mont. at 244, 801 P.2d at 79.

\textsuperscript{154} Connelly, supra note 67, at 483.

\textsuperscript{155} See BIA Guidelines, supra note 47, at 67,591:

\textsection{C.3} Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child’s tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exist:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

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court did not, however, fashion a "good cause" remedy to avoid transfer under the BIA Guidelines. Rather, the court defeated ICWA's preference for tribal court jurisdiction using the vaguely defined "best interest of child" factor created in an earlier ICWA case. The Montana Supreme Court refused to transfer jurisdiction out of concern that the Alaskan tribal court would remove the child from the longest, most stable and protected environment she had ever known. Attempting to justify this decision, the Montana Supreme Court noted that the Indian child resided in a home with a Native American foster mother who was fully capable and willing to teach the child about "her Indian heritage." As the dissent reveals, it is doubtful the culture of the Eskimo tribe of the King Island Native Community compares to the Plains Indian Tribe of the foster mother.

In Holyfield, the United States Supreme Court cautioned state courts to limit review in jurisdictional proceedings to the determination of who should make the custody determination pursuant to ICWA, not what the outcome of the determination should be. Nevertheless, in In re T.S. the Montana Supreme Court confused the legal issue of jurisdiction with the determina-

(ii) The Indian child is over twelve years of age and objects to the transfer.
(iii) The evidence necessary to decide the case could not be ade- quately presented in the tribal court without undue hardship to the parties or the witnesses.
(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
(c) Socio-Economic conditions and the perceived adequacy of tribal or Bu- reau of Indian Affairs social services or judicial systems may not be consid- ered in a determination that good cause exists.
(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

156. In re T.S., 245 Mont. 242, 247, 801 P.2d 77, 79 (citing In re M.E.M., 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981)). Noting that the primary responsibility for interpreting the ICWA lies with the state court, the Montana Supreme Court, citing the BIA Guidelines, claimed the legislative history of the ICWA used the term "good cause" to provide state courts with flexibility to determine the disposition of a child custody proceeding involving an Indian child. T.S. at 246, 801 P.2d at 80.
157. Id. at 249, 801 P.2d at 81.
158. Id. at 248, 801 P.2d at 81. In Holyfield, the United States Supreme Court stressed that the Indian Placement preference is the most important substantive requirement imposed on state courts. 490 U.S. at 36-37.
159. T.S., 245 Mont. at 251, 801 P.2d at 83 (Sheehy, J., dissenting).
160. Holyfield, 490 U.S. at 53 ("We have been asked to decide the legal question of who should make the custody determination . . . not what the outcome of that determination should be.").
tion of the child's placement. The Montana Supreme Court boldly declared that the United State Supreme Court decision did not control because, unlike Holyfield, the Indian child in this case was not domiciled on the reservation. In addition, In re T.S. advocated the “existing Indian family” exception, not to avoid the application of ICWA, but to avoid tribal court jurisdiction. The court claimed:

When the child has been domiciled on the reservation and has significant contacts with the Tribe it is reasonable to assume that jurisdiction should be transferred to the Tribe. In this case we have the opposite circumstance which § 1911(b) is meant to address. T.S. has never lived on the reservation, is not a member of the Tribe and has never had any contact whatsoever with the Tribe. The record demonstrates a total absence of evidence demonstrating that it is in T.S.'s best interest that jurisdiction be transferred to the Tribe.

The Montana Supreme Court’s analysis reflects a lack of faith in the actions of tribal court. The Montana Supreme Court implied that it, rather than the Alaskan tribal court, knew the best interests of an Indian child. Furthermore, In re T.S. reveals the need for educating courts and agencies regarding the policy and application of ICWA. The court’s application of ICWA in this case fails on at least three points. First, the Montana Supreme Court did not defer to the Indian tribe seeking jurisdiction of one of its own tribal members. Second, the Montana Supreme Court used a procedural rule to refuse considering the Indian Child Welfare specialist’s recommendation to transfer jurisdiction to the tribal court. Lastly, the guardian ad litem expressed misgivings about ICWA. The trial court admonished the guardian ad litem that his thoughts about ICWA

162. Id. at 250, 801 P.2d at 82.
163. Id. at 250, 801 P.2d at 82.
164. Connelly, supra note 68, at 487. See also BIA Guidelines, supra note 47, at 67,591 (providing recommendations for implementing 25 U.S.C. § 1901-63 and stating that in most cases state courts should not determine whether or not a child’s contacts with a reservation are so limited that a case should not be transferred).
165. "State courts seem to believe that Tribal Courts eat Indian children. Tribal Court determines the best interest of the Indian child when jurisdiction is returned." Lecture by Evelyn Stevenson, Managing Attorney, Confederated Salish and Kootenai Tribes, Univ. of Montana, School of Law (May 12, 1994).
166. T.S. was eligible for membership in the King Island Native Community. T.S., 245 Mont. at 244, 801 P.2d at 78.
167. Id. at 251, 801 P.2d at 83.
were irrelevant, but it is doubtful that an individual with apprehension of ICWA will promote the Act. Similar to pre-ICWA cases, the Montana Supreme Court still appears willing to subordinate the Indian tribe's interests to what it perceives as the best interest of the Indian child.\textsuperscript{168}

VI. MONTANA'S LEGISLATIVE RESPONSE TO ICWA

When state and federal law conflict in a child custody proceeding involving an Indian child, federal law controls.\textsuperscript{169} However, whenever state law provides a higher standard of protection than ICWA, application of state law is appropriate.\textsuperscript{170} Some states have enacted legislation to improve the protection of Indian children in state court proceedings.\textsuperscript{171} Generally, the state ICWA only applies in a proceeding if the federal ICWA is also applicable.\textsuperscript{172} The state of Montana has not enacted a state Indian Child Welfare Act and the Montana Code fails to reference ICWA in sections dealing with child custody proceedings. For example, the factors considered in the adoption policy, to ensure that the best interest of the child is met, do not refer to ICWA requirements.\textsuperscript{173} Further, a court ordered investigation into an adoption proceeding does not include a finding of whether ICWA applies or if efforts were made to comply with ICWA.\textsuperscript{174} For private adoption organizations arranging adoption placements, the Montana Code fails to provide notification

\begin{enumerate}
\item[170.] 25 U.S.C. § 1921.
\item[173.] MONT. CODE ANN. § 40-8-114 (1993).
\end{enumerate}
procedures to Indian tribes for child custody proceedings involving Indian children.\textsuperscript{175} Finally, the General Index of the Montana Code under adoption of children does not refer to ICWA or Indian children.\textsuperscript{176}

In 1987, however, in a more enlightened move, the legislature created the Indian Child Welfare specialist position.\textsuperscript{177} This position is a unique measure of Montana's commitment to ICWA. The specialist acts as a liaison with Indian tribes and the state.\textsuperscript{178} The position requires a thorough knowledge of ICWA and Montana Tribes, as well as superior negotiation and conflict management skills.\textsuperscript{179}

The duties of the specialist include:

1. developing Indian foster homes and other Indian placement resources;
2. providing technical advice to tribal, state and county agencies and district courts on matters pertaining to Indian child welfare;
3. providing assistance in negotiating cooperative agreements to provide foster care services to Indian children;
4. conducting training seminars on implementing ICWA;
5. applying for and accepting grants and other funds for Indian child welfare activities;
6. developing and maintaining a list of attorneys to represent indigent parents and Indian custodians in Indian child welfare proceedings;
7. making recommendations to the department on legislation and rules concerning Indian child welfare matters; and
8. performing other duties concerning Indian child welfare

\textsuperscript{175} MONT. CODE ANN. § 40-8-108 (1993) (entitled "Who may place a child for adoption"); MONT. CODE ANN. §§ 52-2-401 to -407 (1993) (setting forth requirements for child adoption agencies). However, note that section 41-3-108 of Montana Code provides for child protective teams to assess the needs and treatment plans for child and family. In 1989, the Montana Legislature amended the statute to include “[I]f an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters [should be included in the team].” See also MONT. CODE ANN. § 41-5-525 (1993) (detailing youth court proceedings). Likewise MONT. CODE ANN. § 41-3-205(i) the exceptions to the confidential nature of case reports concerning children include “an agency of an Indian tribe or the relatives of an Indian child if disclosure of the records is necessary to meet requirements of the federal Indian Child Welfare Act.”

\textsuperscript{176} Statutes involving Indian Tribes or Indian people are generally listed under “Indians” in the General Index of the Montana Code.

\textsuperscript{177} MONT. CODE ANN. § 52-2-117 (1993).

\textsuperscript{178} Telephone Interview with Shirley Brown, Administrator, Department of Family Services, Helena, Mont. (Apr. 22, 1994).

\textsuperscript{179} Id.
matters as determined by the director.\textsuperscript{180}

The responsibilities and goals of the specialist include:

a. improving the IV-E foster care contracts with reservations by monitoring each contract annually;
b. negotiating new IV-E contracts as requested by the tribe;
c. maintaining current IV-E State/Tribal Agreements;
d. coordinating training on Native American cultural issues and ICWA;
e. improving the knowledge of Department of Family Services' staff about ICWA through clarification and interpretation;
f. informing the legislature, agencies and the public about Indian child welfare issues; and
g. other duties and responsibilities such as representing the department on ICWA related committees, task forces and other work groups; coordinating intra/interagency linkages and activities to promote mutual understanding and service planning and clarifying policies and resolving conflicts; promoting awareness of Indian Child Welfare Services through public appearances and written documents as requested by the supervisor.\textsuperscript{181}

To successfully achieve the goals of the Indian Child Welfare specialist, however, the state should consider hiring more than one individual to fulfill these numerous duties. As demonstrated in \textit{In re T.S.}, the district court may disregard the specialist's recommendation. In that case, the specialist had not reviewed the entire file or interviewed the child, her mother or foster parents.\textsuperscript{182} Nonetheless, the court should have at least considered the specialist's recommendation as an expert on the policy of ICWA.\textsuperscript{183}

In addition, the state is installing a new computer system to centralize information regarding placement of Indian children.\textsuperscript{184} Available in 1996, the Child and Adult Protective Ser-

\textsuperscript{180} S.B. 217, 54th Sess. (1995) (amending MONT. CODE ANN. § 52-2-217 (1993) to include: 1) a requirement that the secretary of state send a copy of this section to each of the seven Montana reservations and to the tribal chairperson of the Little Shell Band and 2) to allow the director of the Department of Family Services (DFS) to appoint an individual who is not an employee of the DFS as the specialist).

\textsuperscript{181} Department of Family Services Employee Performance Appraisal Form, State of Montana, Helena, Mont. (1994).


\textsuperscript{184} Telephone Interview with Francis A. Kromkowski, Department of Family Services, Helena, Mont. (Apr. 22, 1994).
vices (CAPS) system will track both state and tribal cases and provide the state with complete statistical information regarding ICWA issues. 185 CAPS will require state social workers to immediately identify whether the child involved is an Indian child. In addition, CAPS will provide information to assist the social worker in locating an available Indian home for preferred placement as required under ICWA. 186

In August, 1994, the state issued a memorandum of understanding establishing the Indian Advisory Council consisting of representatives from the Department of Family Services, Bureau of Indian Affairs, each of the seven Indian tribes in Montana and two urban Indian organizations. The Council meets quarterly to discuss social services issues and address problems arising due to the lack of education regarding ICWA. 187 For example, ICWA provides that when a final decree of adoption of an Indian child is vacated or set aside, the biological parent may petition for return of custody. 188 Unfortunately, county attorneys representing the Department of Family Services may not be familiar with ICWA and do not often consider the biological parent as a placement resource in this situation. 189 Furthermore, the biological parents do not realize they have a right to petition under ICWA. 190

Acknowledging that many Indian children are placed in non-Indian homes, the state is attempting to expand its pool of available Indian homes by employing the assistance of Native American organizations to recruit Indian parents for foster care and adoptive placements. 191 For example, the Department of Family Services, in partnership with one Indian tribe, has hired a tribal member to recruit Indian homes for placements on that reservation. 192 Indian tribes of Montana should recruit qualified members of their community to participate in state foster care and adoptive placements and to coordinate information with the
Montana's creation of an Indian Child Welfare specialist position is a positive effort to implement ICWA. However, continued efforts are necessary to achieve the goals designated by the legislature. The Indian tribes of Montana should coordinate their efforts with the Montana Indian Child Welfare specialist to educate the public, attorneys and state officials regarding ICWA. In addition, the legislature should amend all child custody proceeding statutes in the Montana Code with references to ICWA. Amendments or annotations to child custody proceeding statutes would alert Montana practitioners to the potential for federal pre-emption of state law and may prevent delays and misunderstandings in child custody proceedings involving Indian children.

VII. THE COMMITMENT OF CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION TO ICWA

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (CS & KT or Tribes) is a progressive nation in terms of self-governance. The Flathead Reservation is located in Montana's northwest region, consisting of 1.24 million acres. On October 28, 1935, the CS & KT adopted a Tribal Constitution and Bylaws, the first Indian tribe to do so under the Indian Reorganization Act. The CS & KT is committed to self-governance and has seriously considered its role in the implementation of ICWA.

193. Lack of an Indian home may constitute "good cause to the contrary" not to place the child pursuant to the ICWA.

194. The enactment of a state ICWA in Montana is a debate for another day. Some of the greatest loopholes in the ICWA are created in a state with a state Indian Child Welfare Act. See, e.g., OKLA. STAT. TIT. 10, § 40.3 (1987 & Supp. 1995) (listing exceptions making the ICWA inapplicable); In re Adoption of Baby Boy W., 831 P.2d 643, 648 (Okla. 1992) (requiring that child is part of an existing Indian family before finding the ICWA applicable); In re S.C., 833 P.2d 1249 (Okla. 1992) (determining that Holyfield did not invalidate existing Indian family exception).


196. LOPACH ET AL., supra note 92, at 153.

197. LOPACH ET AL., supra note 92, at 157.

198. LOPACH ET AL., supra note 92, at 157. For an excellent analysis of the tribal courts in Montana see Brown & Desmond, supra note 110.

199. For more information regarding the history of the Confederated Salish and
ICWA: A MONTANA ANALYSIS

A. Tribal Children's Code

In 1986, the CS & KT adopted the Tribal Children's Code. The Tribal Children's Code recognizes and honors the customs and traditions of an Indian child's particular Tribe; it is consistent with the Indian Civil Rights Act and with the needs and realities of the tribal members living on the Flathead Reservation. The purpose statement of the Tribal Children Code demonstrates the CS & KT's commitment to ICWA:

The Confederated Salish and Kootenai Tribes have adopted this Tribal Children's Code, recognizing that Tribal children are the Tribes' most important resource and their welfare is of paramount importance to the Tribes. It is the purpose of this Code to provide and assure that each Tribal child within the jurisdiction of the Tribal Court shall receive the care and guidance needed to prepare such children to take their places as adult member (sic.) of the Tribes; to prevent the unwarranted breakup of Indian families by incorporating procedures that recognize the rights of the children and parents or other custodial adults, and, where possible, to maintain and strengthen the family unit; to preserve and strengthen the child's individual, cultural, and Tribal identity. Wherever possible, family life shall be strengthened and preserved, and the primary efforts will be toward keeping the child with his or her family, and if this is not possible, then efforts shall be made toward maintaining the child's physical and emotional ties with the child's extended family and with the Tribal community.

The Tribal Children's Code provides a speedy and effective procedure for processing referrals under ICWA, because trib-
al courts seeking transfer of jurisdiction have limited time to petition after receiving notice. The Tribal Children's Code designates the chief tribal judge as responsible for ensuring a proper investigation is conducted and determining whether a transfer is in the best interest of the child. In considering whether the transfer of the case is in the best interest of the child, the court may consider the following factors:

1. past and present residences of the child;
2. the child's or child's family ties with the Tribes or the Tribal community;
3. special conditions of the child and the Tribal or reservation facilities to deal with such conditions;
4. when jurisdiction should be taken—before or after the adjudication stage of the proceedings;
5. consider the location of the witnesses and other evidence and any process limitations of Tribal jurisdictions;
6. continuing the child's surroundings and emotional contact; and
7. the wishes of the child's immediate or extended family and other interested persons.

Contrary to the state of Montana's concern, the CS & KT does not decline jurisdiction of an ICWA referral on the basis of difficulty or expense of a case. Considering all circumstances, the Tribes. It is intended that the Tribes will investigate cases referred to them, and will act to transfer to the Tribal Court those cases in which transfer is in the best interest of the child. The procedures found in this Section are aimed at producing a thoughtful and wise decision in the matter of transfers.

205. 25 U.S.C. § 1912(a) (1988) provides that:

No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for such proceeding.

206. LAW AND ORDER CODE supra note 200, ch. VI, § 5, ¶ 5(e). In addition, the Tribal Children's Code definition section is more extensive than the ICWA providing definitions for "expert witness" and "tribal member" lacking in the ICWA. Compare LAW AND ORDER CODE supra note 196, ch. VI, § 1, ¶ 6(j), (w) with 25 U.S.C. § 1903 (1988).

207. LAW AND ORDER CODE supra note 200, ch. VI, § 5, ¶ 5(e)-(g).

208. "[T]ribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts . . . will have no choice but to accept those cases." H.R. REP. No. 1386, 95th Cong., 2d Sess. 44 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7566 (dissent to passage of the ICWA by Richard A. Weber, Staff Attorney, Office of Legal Affairs, Montana Dep't of Soc. and Rehab. Serv. sent to Montana Rep. Ron
common sense best determines whether to request a transfer of a proceeding from a state court.\footnote{209} If the CS & KT decides not to petition for transfer of an ICWA case, the Tribes will file a Notice of Tribal Intervention in the state court requesting to monitor the proceedings.\footnote{210} The jurisdiction remains in state court but the intervention allows the Tribes to monitor the proceedings and ensure that the state court complies with ICWA.\footnote{211} In addition, the CS & KT retains an interest in the child even if he or she is placed off the reservation. Many times a child will return to the CS & KT for information regarding his or her background.\footnote{212} The CS & KT is in a better position to assist those children through a continued involvement with the child.

As the Tribal Children's Code demonstrates, the CS & KT's interest is not a competing interest with its tribal members. The tribal court balances the interests of the family and the child, with the CS & KT's interest of sovereignty and self-governance, to determine the best interests of the child.

\textbf{B. Foster Care Handbook}

In addition to the Tribal Children's Code, the CS & KT enacted regulations for foster care homes. The Tribal Family Assistance Program has also prepared a handbook on the role of the parent to assist foster care families.\footnote{213} The CS & KT's policy stresses the importance of keeping the family together. However, the Tribe also recognizes the need for Indian homes in which to place children.\footnote{214} The Montana Department of Family Services recognizes tribal licensing of foster care homes on the Flathead Reservation.\footnote{215} The CS & KT's effort to find suitable foster care

\begin{itemize}
\item \textit{Marlenee).}
\item \textit{Interview with Chief Tribal Judge W. Joseph Moran, Confederated Salish and Kootenai Tribes, Tribal Court, in Pablo, Mont. (Mar. 17, 1994).}
\item \textit{Law and Order Code, supra note 200, ch. VI, § 5, ¶ 5(i).}
\item \textit{Interview with Chief Tribal Judge W. Joseph Moran supra, note 209.}
\item \textit{A Tribe may request either a record of placement from the State or, upon the request of the adopted Indian child over the age of eighteen, disclosure of information for enrollment. 25 U.S.C. §§ 1915(e), 1951(b) (1988).}
\item \textit{The Tribal Social Service Department advertises in the C.S. & K. Tribe's weekly newspaper for foster care homes. Char-Koosta News (Pablo, Mont.), Mar. 3, 1995, at 10.}
\item \textit{Mont. Code Ann. § 52-2-722(2) (1993) (allowing applications by Indians on an Indian reservation for foster care licensing to be made through the tribal government).}
\end{itemize}
and adoption placement on the Reservation is evidence of its commitment to the policy of ICWA.

Pursuant to ICWA and the State-Tribal Cooperative Agreements Act, the parties have entered into an agreement regarding Indian children on the Flathead Reservation. The State of Montana and the CS & KT share jurisdiction over child abuse and neglect proceedings involving Indian children residing on the Flathead Reservation. The agreement provides that the CS & KT shall investigate reports involving children residing on the reservation who are enrolled members of any federally recognized Indian tribe, or who possess one-quarter Indian blood quantum, regardless of the tribal affiliation. The state investigates all other referrals concerning children residing on the reservation. The agreement provides for reciprocal reporting and notification procedures between state and tribal agencies.

C. Tribal Court Administration

ICWA recognizes that tribal courts are the best forum to decide an Indian child custody proceeding. Due to a lack of understanding, state courts and non-Indian individuals may perceive tribal courts as inferior systems. To correct this misconception, ICWA requires state and tribal courts to give full faith and credit to an Indian tribe's public acts, records, and judicial proceedings in Indian child custody proceedings. Furthermore, as one state court recognized:

[The] relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic

217. Child Welfare Agreement Between the Department of Family Services and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, (1991). The agreement was originally intended to remain in effect until June 30, 1992; however, the agreement's duration was extended to Feb. 1, 1994. (on file with the Montana Law Review).
218. 25 U.S.C. § 1911 (1988). Unfortunately, tribal court involvement is curtailed until the state court notifies the parent or Indian tribe of the child custody proceeding. 25 U.S.C. § 1912(a) (1988); see also Robert J. McCarthy, Indian Tribes and the Custody of Indian Children, THE ADVOCATE 8, 10 (1993) (noting that Indian parents receive notice of child custody proceedings in only 65% to 70% of the cases under state jurisdiction).
cultures found in the United States. . . . It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of [a child] custody [proceeding].

The CS & KT strongly exemplifies a system that allows an Indian tribe to effectively pursue and implement the policy of ICWA. First, the CS & KT Council appoints its tribal court judges. To ensure a sensitivity to the CS & KT's culture, a tribal court judge must be a member of the Confederated Salish and Kootenai Tribes, unless approved otherwise. Next, the CS & KT contributes sufficient financial resources to effectively implement ICWA. For example, funds are available for a representative of the CS & KT to appear at the child custody hearings. The CS & KT's legal services department is available to represent the interests of a parent or Indian child. The Tribal Court employs an in-house social worker to investigate ICWA cases and report directly to the court. The state employs one Indian Child Welfare Specialist, with the assistance of legal staff, to serve the seven Indian reservations regarding ICWA. In comparison, the CS & KT employs a team of experts (attorneys, judges, social workers) with a personal self-interest in the protection of their Indian children and the survival of the Tribe.

In many aspects, the stronger tribal court systems resemble the Anglo system. The similarity may reduce the non-members' fear of a tribal system created by the lack of understanding and ignorance of the Indian Tribes' motives to govern its own people. Unfortunately, few Indian tribes have the resources to develop a system such as the CS & KT. Congress did not provide funding

221. In re Adoption of Halloway, 732 P.2d 962, 969-70 (Utah 1986).
222. Each judge of the Tribes is appointed by the Tribal Council for four years. LAW AND ORDER CODE, supra note 200, ch. 1, § 3, ¶¶ 2-3. Tribal judges are not required to hold a juris doctorate; however, the current chief tribal judge of the Tribes is a licensed attorney. The appointed judges continually participate in judicial training throughout their judicial career.
223. LAW AND ORDER CODE, supra note 200, ch. 1, § 3, ¶ 4.
224. The Tribe may send a tribal attorney, the tribal court social worker, or both to the state court proceedings virtually anywhere in the United States. Interview with Evelyn S. Stevenson, Managing Attorney, Legal Services Department, Confederated Salish and Kootenai Tribes, in Pablo, Mont. (Mar. 30, 1995).
for Indian tribes to effectively participate in ICWA proceedings, so Indian tribes must find alternative resources.226 Of course, Indian tribes have a concern for the best interest of their children; however, many tribes lack funding to adequately enforce their concern.227 As the CS & KT's system illustrates, adequate funding empowers an Indian tribe to employ attorneys and social workers, to develop codes and policies for tribal agencies, to monitor the welfare of Indian children, and to timely intervene in state court proceedings.

VIII. CONCLUSION

The ICWA was enacted in response to the culture bias found in state court child custody proceedings involving Indian children.228 In Holyfield, the United States Supreme Court demonstrated a great deal of faith in tribal courts to adjudicate a proper remedy in child custody proceedings. However, state courts continue to show a distrust of tribal courts by attempting to limit the application of ICWA. The result is delay in adjudication of a custody proceeding when courts are forced to follow the mandates of ICWA. The ultimate consequence is misunderstanding and bitterness toward Indian tribes who pursue enforcement of ICWA. The United States Supreme Court confirmed that an Indian tribe's interest is unique in a child custody proceeding involving an Indian child. If the child resides off the reservation, state courts should defer jurisdiction and allow the tribal court to determine the factors of forum, personal jurisdiction, and the availability of its resources to transfer the case to tribal court. The state of Montana should follow the broad and liberal interpretation of Holyfield when handling ICWA cases. It is doubtful an Indian tribe will pursue jurisdiction of a case for any reason other than seeking to protect the best interest of the child.

Centuries of paternalistic attitudes have sought to require

227. See Dorsay et al, supra note 15, at 182 (citing In re Birdhead, 331 N.W.2d 785 (Neb. 1983); In re T.R.M., 489 N.E.2d 156 (Ind. Ct. App. 1986), vacated, 525 N.E.2d 298 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989); In re Robert T., 246 Cal. Rptr. 168 (Cal. Ct. App. 1988)). Dorsay notes that some state courts are basing decisions on Indian tribe's financial inability to participate in ICWA proceedings and penalizing Indian tribes for their failure to participate. Id.
the Indian community to conform to Anglo norms. The ICWA attempts to preserve Indian heritage and culture by providing an Indian child the opportunity to learn his or her cultural identity which is in the best interest of the child. Instead of challenging the mandates of ICWA, practitioners and courts should learn the policy of ICWA, and accept that Indian tribes provide the best forum to determine the future of Indian children. Clearly, ICWA is in the best interest of the Indian child, family and tribe.