THE WASHINGTON STATE INDIAN CHILD WELFARE ACT: PUTTING THE POLICY BACK INTO THE LAW

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INTRODUCTION

One of the fundamental tenets of Indian tribal sovereignty is the preservation of Indian tribal courts' exclusive jurisdiction over their land and people.[1] Prior to the enactment of the Indian Child Welfare Act[2] (ICWA), the policy of the federal and state governments was the assimilation and elimination of Indian tribes through the breakup of Indian families and the placement of Indian children in non-Indian homes. Since the 1970s, federal policy now supports Indian tribes in retention of their children through the ICWA. Washington State has recently enacted its own version[3] of the ICWA, entitled the Washington State Indian Child Welfare Act[4] (WSICWA), which mirrors the current federal policy. The

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[1] Worcester v. Georgia, 6 Pet. 515, 559 (1832)(the concept of tribal sovereignty recognizes that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government).; *see* United States v. Mazurie, 419 U.S. 544, 557 (1975); United States v. Kagama, 118 U.S. 375, 381-382 (1886)(although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations."). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 [1] [a] at 207(2012)

[2] 25 U.S.C. § 1901 (2006).

[3] WASH. REV. CODE § 13.38 (2013).

[4] WASH. REV. CODE § 13.38.010 (2013).

policy of Washington State is that it is in the *per se* best interest of Indian children to be placed in the homes of Indian families, and that at every stage of child custody cases involving Indian children Washington State courts must respect the jurisdictional rights of Indian tribes.

This article has four main purposes: (1) to examine the major litigated issues of the ICWA in Washington State courts; (2) to compare the WSICWA and its departure from Washington State courts' jurisprudence interpreting the ICWA; (3) to demonstrate that the WSICWA is rightfully more protective of Indian tribes and Indian children's interests than Washington State courts' jurisprudence; and (4) to analyze the merits of the recent United States Supreme Court decision on the ICWA, and demonstrate that the WSICWA also offers better protections for Indian tribes than the Supreme Court's jurisprudence.

I. BACKGROUND

In the late 1970s, Congress made findings, *inter alia*, "that an alarmingly high percentage of Indian families are broken up by the removal…of their children from them by nontribal public and private agencies" and "that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[5] Studies presented by the Association on American Indian Affairs in 1969 and 1974 "showed that 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."[6] In an effort to protect Indian tribal culture, Congress enacted the ICWA.[7] The law was passed in 1978 with the purpose "to protect the best interests of Indian tribes and families . . . by the establishment of minimum Federal standards for . . . the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian

[5] 25 U.S.C. § 1901 (2006).
[6] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (citing: Senate, *Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd Cong. 15 (1974) ; H.R. Rep. No. 95-1386, 9 (1978)).
[7] 25 U.S.C. § 1901 (2006).

culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."[8]

The ICWA has two main functions: (1) to give federally recognized Indian tribes[9] exclusive jurisdiction over Indian children residing or domiciled *on* the reservation;[10] and (2) to allow federally recognized Indian tribes to intervene in any state court "foster care placement" or "termination of parental rights" proceeding where the child subject to that proceeding is an Indian child residing or domiciled *off* the reservation.[11] To invoke the protections of the ICWA, one of the parties to the child custody proceeding must establish upon petition that the child subject to such proceeding is an Indian child as defined by the ICWA.[12] If any party to the child custody proceeding, usually a parent, Indian custodian, or intervening Indian tribe, establishes that the child does qualify as an Indian child, then the state court must transfer jurisdiction of the proceeding to the appropriate Indian tribal court.[13] There are, however, exceptions to the transfer from state court to Indian tribal court.[14] And these exceptions make up the body of state and federal jurisprudence for the ICWA.

The ICWA not only limits state court jurisdiction over Indian children, but also provides stringent procedural hurdles for state courts when terminating parental rights of Indian parents over their Indian children and placing children with non-Indian foster or adoptive parents. Unlike most federal legislation, however, the ICWA is enforced almost exclusively in state court. In response to the Washington State courts'

[8] 25 U.S.C. § 1902 (2006).
[9] A list of federally recognized Indians tribes is found in "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," 74 Fed. Reg. 40218 (Aug. 11, 2009).
[10] 25 U.S.C. § 1911(a) (2006).
[11] 25 U.S.C. § 1911(b) (2006). For a definition of "foster care placement" or "termination of parental rights" *see* 25 U.S.C. §1903(1)(i-ii) (2006).
[12] 25 U.S.C. § 1911(b)(2006); 25 U.S.C. § 1903(4)(2006)(defining an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.").
[13] 25 U.S.C. § 1911(b) (2006).
[14] *Id.* A state court must refuse to transfer jurisdiction if either parent of the Indian child objects to the transfer, the appropriate Indian tribe does not have a tribal court, or there is "good cause" to refuse the transfer.

decisions interpreting various provisions of the ICWA to the chagrin of local Indian tribes, the Washington State Legislature has developed the WSICWA with a stated goal of "clarifying existing laws and codifying existing policies and practices" for Indian child custody cases, and "promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe."[15]

II. WASHINGTON STATE COURTS AND ICWA LITIGATION

The ICWA is not without ambiguities and vague language. The Indian tribes and the Washington State Department of Social and Health Services (DSHS) have routinely litigated two issues. What is the role, if any, of state family law in relation to the ICWA? And, what is a "qualified expert witness" under § 1912 of the ICWA? In the case *In re Mahaney*,[16] the Supreme Court of Washington answered both questions.

In *Mahaney,* a non-Indian grandmother appealed termination of her non-parental custody over her Indian grandchildren[17] pursuant to the Nonparent Custody Act, under the Revised Code of Washington (RCW) 26.10.[18] The petitioning grandmother had been awarded foster care custody by the Superior Court, but subsequently had her custody terminated by the Court of Appeals.[19] The Washington Supreme Court reversed the Court of Appeals decision and reinstated the petitioning grandmother's custody of the Indian children.[20]

The Supreme Court found that the "…fact that [the] ICWA applies should not signal to state courts that state law is replaced by the act's mandate," and held that Washington State's "best interest of the child"

[15] WASH. REV. CODE § 13.38.030 (2013).
[16] *In re* Mahaney,146 Wash.2d 878 (2002).
[17] 25 U.S.C. §1903(4) (2006) (defines Indian child as an "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.").
[18] *In re* Mahaney,146 Wash.2d at 881. WASH. REV. CODE § 26.10.030 (2013)(the Non Parent Custody Act allows a person "other than a parent to petition a court for custody of a child"). WASH. REV. CODE § 26.10.100 (2013)(the court shall determine custody "in accordance with the best interest of the child").
[19] *In re* Mahaney,146 Wash.2d at 885-86.
[20] *Id*. at 898.

test[21] still applied to dependency cases for Indian children.[22] The Supreme Court reasoned that its holding was consistent both with other state court opinions, which also applied state laws in Indian children child custody cases,[23] and with the legislative history of the ICWA that "Congress did not intend [for the ICWA] 'to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits'."[24]

Furthermore, the Supreme Court found that the trial court complied with 25 U.S.C § 1912(e). Section 1912 (e) reads in its pertinent part:

> Foster care placement orders; evidence; determination of damage to child. No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of *qualified expert witnesses* that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. . . . [25]

[21] WASH. REV. CODE § 26.09.002 (2013)(the "best interest of the child" test is applied to all Washington State child custody cases and is defined as a parenting arrangement that "best maintains a child's emotional growth, health and stability, and physical care"); *In re* Marriage of Allen, 28 Wash. App 637, 648 (1981)(there is no bright line rule of what is in the best interest of children. Each situation regarding children is decided on the circumstances of the case. Generally the court has to balance the competing interests of the parents, the child custodian, and sometimes the State in order to maximize the optimal placement for the child).

[22] *See In re* Mahaney,146 Wash.2d at 893.

[23] *In re* Maricopa County Juvenile Action No. A–25525, 136 Ariz. 528 (1983) (applying "best interests of the child" test to an Indian child dependency case); *In re* Santos Y., 112 Cal.Rptr.2d 692 (2001) (applying "existing Indian family doctrine" to award custody of an Indian child to non-Indian de facto parents); *In re* TM, 245 Mich. Ct. App. 181 (2001) (applying Michigan state law in the termination of parental rights of an Indian parent over his Indian child).

[24] *In re* Mahaney,146 Wash.2d at 893-94 (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 at 58 (1989) (quoting H.R. Rep. No. 95–1386, at 19 (citing 1978 U.S.C.C.A.N. 7541, 7530)).

[25] 25 U.S.C. § 1912(e)(2006)(emphasis added); 1 U.S.C. § 1 (2102)(emphasis added)(while the ICWA calls for a plural number of "qualified expert witnesses," federal statutory rules of construction provide that "unless the context indicates otherwise…words importing the plural include the singular").

At the trial level, the "qualified expert witness" that the Superior Court relied on when making its decision had only specialized training in medical, psychological, and special needs of children.[26] The expert witness lacked special knowledge of, and sensitivity to, Indian culture.[27] The issue was whether witnesses who had specialized knowledge of medical, psychological, and special needs of children, but no understanding of Indian culture, were in fact "qualified expert witnesses."[28]

The Washington Supreme Court partially adopted the Bureau of Indian Affairs (BIA) guidelines by holding that a "qualified expert witness" should normally be an individual with specialized "knowledge of tribal culture and childrearing practices."[29] Nevertheless, the Supreme Court made an exception that a "qualified expert witness" need not necessarily have "special knowledge of and sensitivity to Indian culture" so long as the expert testimony offered does not "inject cultural bias or subjectivity."[30] The Supreme Court, however, did not specify what sort of testimony would or would not "inject cultural bias or subjectivity." Nevertheless, in examining the facts of *Mahaney* and other state court decisions which share the same interpretive rule, "a qualified expert witness" need not have "special knowledge of and sensitivity to Indian culture" for foster care placement cases involving alleged substance abuse by the Indian parents.[31]

The dissent in *Mahaney* criticized the majority's decision for resting on emotion rather than a straightforward application of the law. The dissent writes, "I sympathize with my colleagues' desire to keep the

[26] *In re* Mahaney,146 Wash.2d at 897.
[27] *Id*. at 897.
[28] *Id*.
[29] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979).
[30] *In re* Mahaney,146 Wash.2d at 897, (quoting State *ex rel*. Juvenile Dep't of Lane Cnty. v. Tucker, 76 Or. App. 673 (1985)).
[31] *Id.* at 884-85; *see also* Thea G. v. State, Dep't. of Health & Soc. Services, Office of Children's Services 291 P.3d 957, 964 (Alaska 2013) (holding that foster care or termination of parental rights cases involving issues of parental substance abuse do not implicate cultural mores); Dep't of Human Services v. K.C.J., 228 Or. App. 70, 84 (2009) ("Because this case implicates no cultural bias, the tribal representative is not the only 'qualified expert witness' whose testimony can be considered to support the court's finding….").

Mahaney children with their paternal grandmother who has nurtured and protected them and provided them with a stable environment since 1993. It is, however, incumbent on this Court to enforce the laws of the United States."[32] The dissent questioned the majority's interpretation of a "qualified expert witness" and the Supreme Court's affirmation of the trial court's application of the "best interest of the child" test.

The dissent found the "best interest of the child" test used in Washington State family law to be inapposite to § 1912(e) because the § 1912(e) standard is centered on the parent(s) rather than the child.[33] The text of the statute reads that a court must find "clear and convincing evidence . . . that the *continued custody* of the child by the parent . . . *is likely to result* in serious emotional or physical damage to the child. . ." before there can be any foster care placement.[34]

"The majority is wrong in concluding that the best interests of the child must be found by clear and convincing evidence," the dissent writes, "[c]lear and convincing evidence must support a finding of parental unfitness to care for the child."[35] The dissent concluded that the majority's application of the "best interest of the child" test, while "laudable," results in the court "doing precisely what the ICWA was designed to prevent: it applies non-Native American values with little appreciation for the value of Native American tribes, their culture, and their influence."[36]

The dissent, however, did not dismiss the majority's exception that a "qualified expert witness" need not always have a "special knowledge of and sensitivity to Indian culture."[37] Instead, the dissent interpreted a narrower exception allowing a "qualified expert witness" to lack special knowledge of Indian culture for cases "when cultural bias is clearly not implicated *and* when there is no dispute about the parental inadequacy at

[32] *In re* Mahaney,146 Wash.2d at 899.
[33] *Id*. at 902-03.
[34] 25 U.S.C. § 1912(e) (2006) (emphasis added).
[35] *In re* Mahaney,146 Wash.2d at 903.
[36] *Id*. at 902.
[37] *Id*. at 903.

the time of the hearing."[38] Examples cited by the dissent were cases where the Indian parents suffered from mental illness[39] or paranoia.[40]

In re Mahaney was wrongly decided mainly for the reasons stated by the dissent. The majority's application of the "best interest of the child" test inappropriately undermines both the statutory scheme of the ICWA and Congress' explicit goal of "…the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture…."[41] Additionally, the *Mahaney* majority opinion erroneously relied on the United States Supreme Court case *Holyfield*[42] to support its holding.

The *Mahaney* majority cites the legislative history of the ICWA found in *Holyfield* to justify the application of Washington State family law in conjunction with the ICWA.[43] The reliance on that particular excerpt of legislative history by the *Mahaney* majority is problematic because it is found in the dissent of *Holyfield* and stands in complete contravention to *Holyfield*'s holding and supporting dicta.

Holyfield is one of two[44] United States Supreme Court decisions interpreting the ICWA. The case, as is normal of any child custody proceeding, was highly emotional. In fact, when Justice Scalia was asked what was the most personally wrenching decision that he ever had to

[38] *Id*. (emphasis added).
[39] State ex rel. Juvenile Dep't of Lane Cnty. v. Tucker, 76 Or. App. 673, 683–84 (1985) (holding that the Indian parent's undisputed mental illness precluded the need for "qualified expert witnesses" to possess special knowledge of Indian life).
[40] *See* In re Oscar C., Jr., 147 Misc.2d 761, 763–64 (1990) (finding that the Indian parent suffered from paranoia that was a chronic, lifelong disorder absent psychological intervention).
[41] 25 U.S.C. § 1902 (2006).
[42] *See generally* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 30 (1989).
[43] *In re* Mahaney,146 Wash.2d at 893-94 (congress did not intend [for the ICWA] 'to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits'").
[44] The second case, Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. 2552 (2013) was decided on June 25, 2013. Adoptive Couple v. Baby Girl, 398 S.C. 625, 631 (2012), *reh'g denied* (Aug. 22, 2012), *cert. granted*, 133 S. Ct. 831, 184 (2013).

make as a Supreme Court Justice he answered that it was *Holyfield*.[45] The breakdown of the votes also reveals the controversy surrounding the case. The majority was authored by Justice Brennan with Justices Scalia, White, Marshall, Blackmun, and O'Conner joining, while the dissent was authored by Justice Stevens with Chief Justice Rehnquist and Justice Kennedy joining.[46] Both the majority and the dissent include Justices across the spectrum of liberal, moderate, and conservative jurisprudence.

In *Holyfield*, two Indian parents of the Mississippi Band of Choctaw Indians (Choctaw Nation) residing on the Choctaw Nation's reservation gave birth to a set of Indian twins at an off-reservation hospital, and less than a month later, signed their consent to an adoption decree with the Mississippi State Chancery Court.[47] Six days later the Holyfields, a non-Indian couple, filed a petition for adoption for the children, which the Chancery Court granted, giving the Holyfields custody of the Indian twins.[48] Two months later, the Choctaw Nation moved the Chancery Court to vacate its adoption decree on the ground that, under the ICWA, exclusive jurisdiction was vested in the tribal court.[49] After the Chancery Court refused to vacate the order, the Choctaw Nation appealed to the Supreme Court of Mississippi.[50] The Mississippi Supreme Court found that under State law the Indian children were domiciled off the reservation, thus distinguishing any of the Choctaw Nation's claims of exclusive jurisdiction.[51] The Choctaw Nation then appealed to the United States Supreme Court, who reversed the Supreme Court of Mississippi.[52]

The United States Supreme Court held that that states could not apply state laws of domicility that would undermine Indian tribal jurisdiction over Indian child custody proceedings.[53] The *Holyfield* majority writes, "We

[45] Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES (Dec. 24, 2012), http://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html?_r=1& (last visited Dec. 29, 2013).
[46] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 30.
[47] *Id*. at 37-38.
[48] *Id*. at 38.
[49] *See* 25 U.S.C. § 1911(a) (2006).
[50] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 39.
[51] *Id*. at 40.
[52] *Id*. at 41.
[53] *Id*. at 53.

start, however, with the general assumption that 'in the absence of a plain indication to the contrary. . . .Congress when it enacts a statute is not making the application of the federal act dependent on state law.'"[54] The reasons for this general presumption are (1) that "federal statutes are generally intended to have uniform nationwide application;" and (2) with application of state law there is a danger that "the federal program would be impaired if state law were to control."[55] Thus, in analyzing the statutory scheme of the ICWA, the United States Supreme Court found "beyond dispute" that Congress intended to establish a uniform federal law of domicility under the ICWA."[56]

Applying that logic to *Mahaney*, if Congress intended uniform application of the domicility requirement of the ICWA, then it would necessarily follow that Congress intended uniform application of *all* provisions of the ICWA by the states unless the context of the particular statute clearly indicates otherwise. In *Mahaney*, however, the application of Washington State's' "best interest of the child" test exemplifies the very problem cited in *Holyfield* of states impairing federal programs by establishing completely different standards for state courts to examine child custody proceedings involving Indian children.

The *Mahaney* majority interpretation of a "qualified expert witness" falls short of a comprehensive definition of the term. Admittedly, Congress failed to define what exactly the qualifications for a "qualified expert witness" are. Even in context, the term is still unclear and is susceptible to more than one reasonable interpretation. Given that the term "qualified expert witness" is susceptible to more than one reasonable interpretation, the term is ambiguous as a matter of Washington State law.[57] Accordingly, the *Mahaney* majority should have "resort[ed] to principles of statutory construction, legislative history, and relevant case law to assist in interpreting [the term]."[58]

[54] *Id*. at 43 (citing Jerome v. United States, 318 U.S. 101, 104 (1943)).
[55] *Id*. at 44 (citing *Jerome,* 318 U.S. at 104).
[56] *Id*. at 47.
[57] *See* Cockle v. Dep't of Labor & Indus., 142 Wash.2d 801, 808 (2001).
[58] State v. Watson, 146 Wash.2d 947, 955 (2002).

The majority, however, made no citation to any of the legislative history in hopes of finding the meaning of a "qualified expert witness." It is true that the *Mahaney* majority cited relevant case law from the Oregon Court of Appeals[59] that defines a "qualified expert witnesses" as someone generally qualified through their "special knowledge of and sensitivity to Indian culture."[60] But the *Mahaney* majority fails to analyze how the Court of Appeals came to that conclusion. In fact, the Court of Appeals of Oregon relied heavily on the House Reports and the BIA guidelines in reaching its conclusion that a "qualified expert witness" should have an understanding of Indian culture.[61]

The Court of Appeals of Oregon specifically relied on the House Report for the ICWA:

> The courts tend to rely on the testimony of social workers who often lack the training and the insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA [Association on American Indian Affairs] has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to contradict the allegations offered by the social worker. . .
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> The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and require a sharper definition of standards of child abuse and neglect.[62]

Furthermore, the Court of Appeals of Oregon relied on the BIA guidelines which give three definitions of a "qualified expert witness," two of which

[59] State *ex rel.* Juvenile Dept. of Multnomah Cnty. v. Cooke, 88 Or. App. 176 (1987).
[60] *In re* Mahaney, 146 Wash.2d 878, 897 (2002).
[61] *See* State *ex rel*. Juvenile Dept. of Multnomah Cnty. v. Cooke, 88 Or. App. at 178 (citing State *ex rel.* Juvenile Dept. of Multnomah Cnty. v. Charles, 70 Or. App. 10, 16 (1984)
(quoting H.R.1386, 95th Cong.,10 (1978) *in* U.S. CODE CONG. & ADMIN. NEWS 7532–7533 (1978))).
[62] State *ex rel*. Juvenile Dept. of Multnomah Cnty. v. Charles, 70 Or. App. at 16, (quoting H.R. 1386, 95th Cong. 10 (1978), *in* U.S. CODE CONG. & ADMIN.NEWS 7532–7533 (1978)).

require that the "qualified expert witness" be either a member of the child's tribe or a lay expert in Indian culture.[63]

The *Mahaney* majority omits any discussion of the BIA guidelines and this portion of the House Report in its interpretation of a "qualified expert witness." Instead, the only legislative history that the majority cites is the portion from the House Report that "Congress did not intend [for the ICWA] 'to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits.'"[64] Yet, relying on this piece of legislative history is problematic in two ways. The first problem is that the majority has fallen, as justice Scalia has described, into the trap of using legislative history "as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[65] In interpreting its broad exception for allowing a "qualified expert witnesses" to have no knowledge of Indian culture or child rearing practices when testifying in Indian child custody cases involving substance abuse, the majority ignores what amounts to be very probative legislative history cited by the Court of Appeals of Oregon indicating to the contrary. Secondly, the majority's failure to cite legislative history when interpreting the term "qualified expert witness," and its citation of legislative history as justification for application of Washington State law's "best interest of the child" test, is the reverse approach to Washington State jurisprudence regarding statutory interpretation. When confronted with the ambiguous "qualified expert witness" term, the majority fails to cite legislative history. But when applying the state law "best interest of the child" test, a standard unambiguously precluded by the statutory scheme of the ICWA, the majority chooses to cite and rely on legislative history.

III. THE WASHINGTON STATE INDIAN CHILD WELFARE ACT

The WSICWA was passed on April 21, 2011, almost nine years after the *Mahaney* decision. The Act is a codification into Washington State law of the federal ICWA and certain provisions of the BIA

[63] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979).
[64] *In re* Mahaney,146 Wash.2d at 893-94.
[65] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993).

guidelines.[66] The WSICWA creates uniform procedures for all child custody cases involving Indian children in Washington State, and gives state courts better direction on the vague language contained in the ICWA.

A. The WSICWA's Response to Mahaney

In one of its very first sections, the WSICWA abridges *Mahaney*'s holding that the state law "best interest of the child" test still applied to child custody cases for Indian children in Washington State courts. The WSICWA reads in pertinent part "[t]his chapter shall apply in all child custody proceedings as that term is defined in this chapter. Whenever there is a conflict between chapter 13.32A, 13.34, 13.36, 26.10, or 26.33 RCW, the provisions of this chapter shall apply."[67] The enumerated chapters in RCW 13.38.020 are Washington State's dependency, juvenile, and family law provisions. Particularly, RCW 26.10's "best interest of the child" test was the very standard that the *Mahaney* court applied under the Nonparent Custody Act.[68] Thus, RCW 13.38.020 precludes any other application of state family law in a child custody proceeding involving an Indian child.

As written, the language of RCW 13.38.020 was not strong enough to protect the "best interest of the Indian child" in a child custody case. Therefore, the Washington State Legislature included in the WSICWA, a separate and distinct definition for the "best interest of the *Indian* child."[69] In doing so, the Washington State Legislature essentially took a flamethrower to the *Mahaney* majority opinion. The WSICWA defines the "best interest of the Indian child" as:

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[66] 25 U.S.C. § 1921 (2006) provides:
In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.
Accordingly, the WSCIWA should not be preempted by the ICWA.
[67] WASH. REV. CODE § 13.38.020 (2013).
[68] *See In re* Mahaney,146 Wash.2d at 887.
[69] WASH. REV. CODE §13.38.040(2) (2013) (emphasis added).

> the use of practices in accordance with the federal Indian child welfare act, this chapter, and other applicable law, that are designed to accomplish the following: (a) Protect the safety, well-being, development, and stability of the Indian child; (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of this chapter.[70]

RCW 13.38.020's mandate that only the WSICWA be applied in Indian child custody cases, coupled with RCW 13.38.040(2)'s definition of the "best interest of the Indian child," leaves no room for doubt that Washington State courts may not apply the Washington State's traditional family law "best interest of the child" test in Indian child custody proceedings.

The WSICWA also statutorily overturns the *Mahaney* court's interpretation of a "qualified expert witness" whose testimony is necessary in any foster care placement or termination of parental rights case. The WSICWA established two procedures based on two different factual scenarios:

Scenario 1**:** If the Indian child's tribe has intervened or, in the case that DSHS is the petitioner and the Indian child's tribe had entered into an agreement with DSHS, the petitioner must "notify the child's Indian tribe of the need to provide a 'qualified expert witness' at least twenty days prior to

[70] *Id*.

any evidentiary hearing in which the testimony of the witness will be required;" [71]

Scenario 2: If the child's Indian tribe has not intervened, the child's Indian tribe has not entered into a local agreement with DSHS,[72] or the child's Indian tribe has not responded to a request to identify a "qualified expert witness" for the proceeding on a timely basis, the petitioner shall provide a "qualified expert witness" who meets one or more of the statutory requirements in a prescribed descending order of preferences.[73]

As a result, the WSICWA gives intervening Indian tribes an opportunity to choose who exactly is a "qualified expert witness," that is, "knowledgeable regarding tribal customs as they pertain to family organization or child rearing practices."[74] In addition, in a case where a child's Indian tribe fails to intervene, or has not timely responded to a petitioner's request, the WSICWA codifies, almost verbatim, the BIA Guidelines' definition of a "qualified expert witness." The BIA Guidelines define a "qualified expert witness" as someone who is either a recognized member of the child's Indian tribe knowledgeable in tribal customs and childrearing; a lay expert who has substantial experience in the delivery of child and family services to Indians, and has extensive knowledge of customs and childrearing practices within the Indian child's tribe; or a professional person having substantial education and experience in the area of his or her specialty.[75] The WSICWA thus ensures that a Washington State court hears testimony from someone who understands Indian tribal customs and culture before there can be any breakup of an Indian family or placement of an Indian child in foster care.

[71] WASH. REV. CODE §13.38.130(4)(a)(2013).
[72] Provided DSHS is the petitioner.
[73] WASH. REV. CODE §13.38.130(4)(b)(2013)(the descending order of preferences are found in (4)(b)(i-iv)).
[74] WASH. REV. CODE §13.38.130(2013).
[75] *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979).

B. The WSICWA's Response to the ICWA

The WSICWA also seeks to cure other vague language found throughout the ICWA. Both the WSICWA and the ICWA require "active efforts" on the part of the petitioner to provide "remedial services and rehabilitative programs" to Indian parents before there can be any breakup of an Indian family. [76] The ICWA, however, fails to give any guidance on what exactly are "active efforts," and what exactly are "remedial and rehabilitative programs" that must be provided to Indian parents.

The WSICWA defines "active efforts" for DSHS and other petitioners.[77] The WSICWA defines "active efforts" for DSHS as a duty to work "with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family beyond simply providing referrals to such services."[78] For petitioners other than DSHS, or those without statutory or contractual duty to the Indian child, "active efforts" means a "documented, concerted, and good faith effort" to facilitate "remedial and rehabilitative services."[79]

Additionally, the WSICWA requires DSHS and other petitioners to provide or facilitate "reasonably available and culturally appropriate preventive, remedial, or rehabilitative services" for Indian parents, including "services offered by tribes and Indian organizations whenever possible."[80] Accordingly, the WSICWA differs significantly from the ICWA by requiring petitioners to provide or facilitate "remedial or rehabilitative services" for Indian parents that are geared towards Indian families and, if possible, to involve Indian tribes in the provision of these services.[81] However, the WSICWA fails to enumerate what these "remedial and rehabilitative services" are exactly. But given that each child custody case is highly factual, specific enumeration of remedial services might have been too constraining.

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[76] WASH. REV. CODE §13.38.130(1)(2013); 25 U.S.C. § 1912(d)(2006).
[77] WASH. REV. CODE §13.38.40(1)(a)(2013).
[78] WASH. REV. CODE §13.38.40(1)(a)(2013)(the "active efforts" requirement for all other petitioners is found in subsection (b)).
[79] WASH. REV. CODE §13.38.040(b)(2013).
[80] *Id*.
[81] *Id*.

The Court of Appeals of Washington has given some guidance on this matter when it found that DSHS had complied with the "active efforts" requirement in the ICWA[82] by providing an Indian family "psychological, parenting and substance abuse evaluations, parenting classes, mental health counseling, skills training, financial assistance, a public health nurse, and transportation." Additionally, DSHS referred the parents to culturally appropriate mental health services at the parents' request."[83] Admittedly, the Court of Appeals was interpreting the "active efforts" requirement of ICWA rather than the new requirement in the WSICWA, but given the similarities of the statutes, the Court of Appeals decision is still instructive.

The "active efforts" requirement clearly imposes upon DSHS affirmative duties and the burden of showing to the Court that there was a good faith effort on DSHS's part to provide and engage Indian parents in appropriate rehabilitative services, including services geared towards Indian families, before there can be any breakup of an Indian family. More simply put, petitioners have complied with the "active efforts" requirement by showing the court that they have done everything they reasonably could have done to prevent the breakup of the Indian family. Likewise, petitioners other than DSHS must also show the court they that have made a good faith and documented effort to facilitate Indian parents' engagement in appropriate rehabilitative services before there can be any breakup. By its language, the WSICWA mandates strict compliance with the "active efforts" requirement.

The WSICWA reinforces the ICWA by ensuring state and federal laws are the same in Indian child custody cases. WSICWA's elimination of the traditional "best interest of the child" test strongly limits Washington State courts from placing Indian children with non-Indian foster or adoptive parents. Furthermore, by defining a "qualified expert witness" the Washington legislature has created bright-line standards which not only conform to the BIA guidelines but also give Washington State courts direction on the vague language found in the ICWA in a way that is in

[82] 25 U.S.C. § 1912(d)(2006)(the "active efforts" requirement in this section of the ICWA is almost identical to WASH. REV. CODE § 13.38.130(1)(2013)).
[83] *In re* Welfare of L.N.B.L., 157 Wash. App. 215, 248 (2010).

better keeping with Congress' explicitly stated goals. Moreover, the new requirement for "qualified expert witnesses" not only places a burden on the state to create a list of "qualified expert witnesses" but also requires better coordination between DSHS and the Indian tribes in training and selecting "qualified expert witnesses" among non-Indians.

Nevertheless, the WSICWA could have gone a bit further to cure other vague language in the ICWA. Particularly, the WSICWA could have defined when a court has "good cause" to refuse transfer of foster care placement or termination of parental rights cases to an Indian tribe's jurisdiction,[84] and when a court has "good cause" to deviate from the foster and adoptive care placement preferences.[85]

The *Mahaney* majority referenced the trial court's refusal to transfer the child custody proceeding to Indian tribal court for "good cause."[86] The trial court found that "good cause warranted that the matter remain in the trial court" because of "concern for the safety of the children . . . [the] special needs of the children, an . . . disruption of [the] children's lives"[87] In addition, the trial court ordered a guardian ad litem to appear.[88] Neither the majority nor the dissent weighed the merits of the trial court's decision since, "no assignment of error was made to the court's denial of the motion to transfer."[89] A likely explanation for the appellants' failure to assign error to the refusal of the transfer is that they could not make a good faith argument that the refusal was an abuse of discretion. Like the "active efforts" requirement to provide remedial services, the "good cause" requirement is highly fact intensive, and the Washington State Legislature wanted to give broad discretion to trial courts. Still, it would have been helpful to have some statutory guidance on the matter.

The Washington State Legislature, however, should have better addressed the placement preferences for Indian children removed in

[84] WASH. REV. CODE §13.38.080(2013); 25 U.S.C. § 1911(b)(2006).
[85] WASH. REV. CODE §13.38.180(2013); 25 U.S.C. § 1915(2006).
[86] *See In re* Mahaney,146 Wash.2d 878, 888 (2002).
[87] *Id*.
[88] *Id*.
[89] *Id*.

emergency settings.[90] What happens often in a child custody proceeding is that the Indian child is temporarily placed with a non-Indian foster family, especially if the Indian child is domiciled off the reservation. Child custody proceedings, like most legal proceedings, are protracted. Therefore, time is a factor that potentially leads to the Indian child bonding to a non-Indian foster family and assimilating, contrary to the policy of the ICWA.

The Supreme Court of Alaska has found that such attachment can create "good cause" to deviate from the placement preferences. In *Roy S. v. State Department of Health & Social Services*,[91] the Alaska Supreme Court relied on the expert testimony from the trial record of a child psychologist that the Indian child "was very fully bonded with and 'embedded' in her foster family, and losing contact with them would be 'a very significant loss' for her."[92] The Supreme Court of Alaska has also previously affirmed decisions to deviate from the ICWA placement preferences based on findings that "another separation is certain to cause serious emotional harm and would create a significant likelihood that [the child's] ability to attach would be irrevocably destroyed."[93]

It is of course not appropriate, in this article, to question an expert of child psychology about the effects of separation anxiety. But in the case of an emergency removal of an Indian child living off the reservation, it is likely that the child will be placed with non-Indian foster care, with whom the child may become attached. To avoid placing Indians with non-Indian foster care or adoptive parents, the WSICWA, to better meet the stated goals of the ICWA, should require that Indian children, even in an emergency removal situation, be placed with Indian families, Indian approved foster care families, or with non-Indian families sympathetic to Indian culture.

[90] WASH. REV. CODE §13.38.180(2013).
[91] In Roy S. v. State, Dept. of Health & Soc. Services, 278 P.3d 886 (Alaska 2012).
[92] *Id*. at 892.
[93] *Id*.

IV. THE RECENT SUPREME COURT JURISPRUDENCE AND THE IMPORTANCE OF THE WSICWA

The Supreme Court of the United States recently decided the case *Adoptive Couple v. Baby Girl*[94] in a 5-4 decision. The decision was very unpopular with Indian tribes who saw the decision as undermining the ICWA.[95] The Supreme Court decision, however, is important because it underscores the advantages of Washington State's enactment of the WSICWA. In addition to creating state legislation that is insulated from unfavorable federal precedent, the WSICWA also dispels constitutional concerns that Justice Thomas believed plagued the ICWA.

A. Adoptive Couple v. Baby Girl

In *Adoptive Couple*, the majority held that the language of the ICWA prevents unwed fathers who have never had custody of their children from asserting custody rights normally guaranteed to them under the ICWA.[96] Furthermore, the majority held that in order for Indian tribes to be given placement preferences under § 1915(a) of the ICWA they have to actually file a petition for adoption rather than just intervening in the child custody case.[97] The majority's holding, however, seizes on a latent ambiguity in the text of the ICWA, and in so doing undermines the intent of the ICWA to keep Indian children with their biological parents and Indian tribes. Additionally, the majority's holding that an Indian tribe must actually file a petition for adoption rather than just intervene in a child custody case to be given placement preference under § 1915(a) of the ICWA is patently absurd.

The United States Supreme Court granted certiorari to *Adoptive Couple* from the Supreme Court of South Carolina.[98] In *Adoptive Couple,*

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[94] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. 2552 (2013).
[95] Rob Capriccioso, *"Supreme Court Thwarts ICWA Intent in Baby Veronica Case,"* INDIAN COUNTRY TODAY (June 25, 2013), http://indiancountrytodaymedianetwork.com/2013/06/25/supreme-court-thwarts-icwa-intent-baby-veronica-case-150103 (last visited Nov. 24, 2013).
[96] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. at 2562.
[97] *Id.* at 2564-65.
[98] *See* Adoptive Couple v. Baby Girl, 398 S.C. 625 (2012), *reh'g denied* (Aug. 22, 2012), *cert. granted*, 568 U.S. _, 133 S. Ct. 831 (2013).

the biological father (the Father), who is a member of the Cherokee Nation, had a child (Baby Girl) with his fiancée (the Mother), who was a non-Indian.[99] After the birth of Baby Girl, the Father and the Mother's relationship deteriorated and the two broke up.[100] After ending his relationship with the Mother, the Father did not provide Baby Girl or the Mother with any financial support, either during pregnancy or after Baby Girl's birth.[101] When the Mother asked the Father whether he would rather provide financial support or terminate his parental rights, the Father said that he would rather terminate his parental rights.[102] Following this communication the Mother put Baby Girl up for adoption through a private adoption agency and chose Adoptive Couple (a couple from South Carolina) to be the parents of Baby Girl.[103] Upon receiving notice of the adoption from Adoptive Couple and the private adoption agency, the Father initially agreed but later revoked his waiver of parental rights and sought custody of Baby Girl in South Carolina State Family Court.[104] Additionally, the Cherokee Nation intervened in the South Carolina State Family Court adoption proceeding for Baby Girl.[105]

The South Carolina State Family Court held that under the ICWA the Father, as Baby Girl's Indian parent, was entitled to custody of Baby Girl because Adoptive Couple could not prove, per § 1912(f) of the ICWA, that custody by the Father would result in Baby Girl suffering serious emotional or physical damage.[106] The South Carolina Supreme Court affirmed.[107] The United States Supreme Court granted certiorari and reversed and remanded the South Carolina Supreme Court decision.[108]

[99] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. at 2558.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*. at 2558-59.
[105] *Id*. at 2564-65.
[106] *Id*. at 2559.
[107] *Id*.
[108] *Id*. at 2559-65.

The majority[109] held that the text of § 1912(f) of the ICWA only prevents termination of parental rights when the termination would disturb "continued custody" of the child.[110] Simply put, an Indian parent must have had physical or legal custody under state law of the Indian child since birth, or since before the child custody proceeding, in order to qualify for protections under the ICWA.[111] The majority found that the Father's absence from Baby Girl's care, as well as his failure to claim paternity of Baby Girl under South Carolina law, precluded him from seeking Baby Girl's adoption and invoking his rights under the ICWA.[112]

The dissent, however, did not find the majority's reading of § 1912(f) of the ICWA to be so unambiguous. Justice Scalia dissented on the grounds that "continued" is defined as "[p]rotracted in time or space," and therefore, it does not unequivocally follow that § 1912(f) of the ICWA applies only to initial or temporary custody.[113] Justice Sotomayor's dissent criticizes the majority for coming to a decision "by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it."[114]

Rather than relying, as the majority did, on state law definitions of custody for a federal statute when the federal statute is explicitly meant to establish "minimum *Federal* standards for …the placement of [Indian] children in foster or adoptive homes,"[115] the court should have found, as the dissent found, that the ICWA's definition section qualified the Father as a "parent."[116] His paternity had been established during the proceeding, and he was therefore entitled to protection under the ICWA for his "*parent-child relationship*" with Baby Girl.[117] The dissent further demonstrated that multiple provisions in the ICWA, like those respecting

[109] Authored by Alito, and joined by Breyer, Kennedy, Thomas, and Chief Justice Roberts.
[110] *Id*. at 2557.
[111] *Id*. at 2562.
[112] *Id*.
[113] *Id*. at 2571-72 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 577 (1950)).
[114] *Id*. at 2572.
[115] 25 U.S.C § 1902 (2006) (emphasis added).
[116] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. at 2574.
[117] *Id*.

notice,[118] the right to counsel,[119] and the right to inspect reports and documents filed with the court,[120] refer to and focus on the defined "parent" standard rather than state custody law standards.[121]

Looking at both arguments, the dissent makes a stronger case for its reading of the statute and the ICWA. The majority's use of state custody law in applying the ICWA is inconsistent with United States Supreme Court precedent, which emphasizes that the ICWA was explicitly enacted to create a uniform federal standard for Indian child placement.[122] Furthermore, the majority's holding undermines the explicit policy goals of the ICWA.

The majority writes that denying non-custodial parents' protection under the ICWA is not inconsistent with the policies of the ICWA, which was designed to prevent "removal" of Indian children from Indian families.[123] But the majority is once again taking the ICWA out of context. ICWA explicitly states that its purpose is to "establish minimum Federal standards for the removal of Indian children from their families *and* the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."[124] But a holding that applies state custody law to determine rights under the ICWA, and a holding that goes out of its way to cut off Indians' parental rights, both undermines Congress' clearly stated goal of creating minimum *federal* standards and placing Indian children in either Indian homes or homes that foster the Indian child's heritage.

The second part of the majority's holding, that the Cherokee Nation's failure to file an adoption petition precluded its rights to placement preference under § 1915(a) of the ICWA, is a pedantic reading of the law. It was reasonable for the Indian tribe to be given placement preference

[118] 25 U.S.C. § 1912(a)(2006).
[119] 25 U.S.C. § 1912(b)(2006).
[120] 25 U.S.C. § 1912(c)(2006).
[121] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. at 2574-75.
[122] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989).
[123] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. at 2555; *See* 25 U.S.C. §1901(4)(2006).
[124] 25 U.S.C § 1902(emphasis added)(2006).

just by intervening in the child custody proceeding. After all, the Cherokee Nation intervened in a *child custody case*. It makes sense that they were intervening *in order to* take custody of the child by placing Baby Girl with a Cherokee family subject to their own tribal court proceedings. To hold otherwise would be the equivalent of thinking people make doctors' appointments just to sit in the waiting room. Accordingly, the majority should have found that when an Indian tribe intervenes in any child custody proceeding for an Indian child of their tribe, the state court should view the intervention as an automatic petition for adoption.

B. The WSICWA and Adoptive Couple

The United State Supreme Court decided *Adoptive Couple* after the passage of the WSICWA, preventing the Washington Legislature from directly addressing the case by either changing or keeping the "continued custody" language of the ICWA. Nevertheless, there are still added protections in the statutory language of the WSICWA and other Washington State family law statutes that guard against the decision reached in *Adoptive Couple*. Furthermore, because the WSICWA is state legislation, there should be no concerns about the constitutionality of the WSICWA as compared to the ICWA as an application of Congress' power under the Indian Commerce Clause. So while *Adoptive Couple* has a profound effect on Indian child custody cases tried pursuant to the ICWA throughout the United Sates, the case should have no effect on Indian child custody cases tried in Washington State.

In South Carolina and other states, unwed fathers lose their right to legal custody[125] if they fail to file a claim of paternity with the state's father registry agency before a party files either a petition for adoption or petition for termination of parental right for the child.[126] Unlike South Carolina and many other states, Washington family law liberally grants legal custody to unwed fathers once paternity has been acknowledged or established, regardless of any initiated legal proceedings.[127] The WSICWA extends

[125] In other words, the right to notice and to be joined as a party to legal proceedings concerning the child.
[126] S.C. CODE ANN. § 63-9-820(D)(F)(2013).
[127] WASH. REV. CODE §26.26.320(2013).

this same protection for unwed Indian fathers.[128] Under the WSICWA and other state family law statutes, once the unwed Indian father has acknowledged or established paternity, Washington law confers upon him "all of the rights and duties of a parent."[129] This means that the unwed Indian father in Washington State has legal custody of the child, and must be given notice and joined as a party to any child custody proceeding.[130] Thus, should the facts of *Adoptive Couple* occur in Washington State, the father would have legal custody of the Indian child under the WSICWA and Washington State family law, and thus, would have been able to keep custody of his child. So while the ICWA and WSICWA both contain identical language as to the "continued custody" language found in § 1912(f) and RCW 13.38.130, the WSICWA extends legal custody to unwed fathers who acknowledge or establish paternity.

Finally, the WSICWA accomplishes the goals of the ICWA while obviating Justice Thomas' constitutional concerns. In his concurrence, Justice Thomas questioned the applicability of the Indian Commerce Clause[131] as a justification for the ICWA.[132] He reasoned that because the Indian Commerce Clause only gives Congress the power to regulate tribes and not states, and because child custody proceedings cannot be considered a form of "commerce," therefore "there is simply no constitutional basis for Congress' assertion of authority over such proceedings."[133]

Justice Thomas, who is a strict constitutional textualist, is concerned that the ICWA regulates state family law proceedings, an area of "traditional state concern," without any enumerated authority granted to Congress by the Constitution to pass such a law.[134] Justice Thomas would

[128] WASH. REV. CODE §13.38,040(13)(2013).
[129] WASH. REV. CODE §26.26.320(2013).
[130] WASH. REV. CODE §26.26.190(2013)(if a parent relinquishes or proposes to relinquish for adoption a child, the other parent shall be given notice of the adoption proceeding and have the rights provided under the provisions of chapter WASH. REV. CODE § 26.33 (2103)); WASH. REV. CODE § 26.33.110 (2013)(right of notice to all parents and inform alleged father of his right to file a claim of paternity within twenty days of service).
[131] 25 U.S.C § 1901(1)(2102).
[132] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. 2552, 2571 (2013).
[133] *Id*. at 2565.
[134] *Id*. at 2566.

agree, however, that the WSICWA obviates those concerns. The WSICWA is state legislation and is a proper exercise of Washington State's police power.

CONCLUSION

The United States Supreme Court majority's conclusion in the *Holyfield* case is instructive to understanding the ICWA. While conceding that "a separation [between the Indian children and their adoptive mother] at this point would doubtless cause considerable pain," the *Holyfield* majority concluded, "[w]hatever feelings we might have as to where the twins should live, however, it is not for us to decide that question."[135] The Court continues, "[t]he law places that decision in the hands of the…tribal court" and "we must defer to the experience, wisdom, and compassion of the…tribal courts to fashion an appropriate remedy."[136]

After all, why should a state or federal court be afraid to give jurisdiction of a child custody case to a tribal court? Is there any reason to believe that a tribal court will not make an equitable and just decision? In fact, following the *Holyfield* case, the Choctaw Nation tribal court did just that. The tribal court allowed the children to remain with their adoptive family, saying that "it would have been cruel to take them from the only mother they knew."[137] At the same time, the court ordered that the children stay in contact with their extended family and tribe.[138] Tribal courts are in a better position and often have more flexibility to determine the welfare of the Indian children by nurturing the Indian children's relationship to their Indian family and heritage.

The statutory scheme of the WSICWA reinforces the ICWA's stated policy of preserving the unique values of Indian culture by requiring that Indian tribes be given exclusive jurisdiction over Indian child custody proceedings. In rare cases where state courts retain jurisdiction over the child custody case, the WSICWA prescribes deference to the Indian tribe's input as to the child's relationship to tribal culture and customs. At all

[135] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).
[136] *Id*. at 53 (quoting *In re* Adoption of Halloway, 732 P.2d 962, 972 (1986)).
[137] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 30.
[138] *Id*.

stages of the proceeding tribal sovereignty is to be preserved by the WSICWA's notice and intervention provisions.

Additionally, The WSICWA serves as a model for sister states to adopt. In addition to creating greater protections for Indian tribes and children, the WSICWA is state legislation which obviates any constitutional concerns over the scope of the Indian Commerce Clause,[139] and places Indian child custody proceedings firmly within the realm of state and Indian tribal court law and jurisprudence.

The WSICWA makes great strides in protecting Indian tribal sovereignty, tribal integrity, and continued tribal existence by letting Indian tribes and their members either decide the appropriate remedies for Indian child custody proceedings, or give Indian tribes a voice in state courts. The WSICWA both ensures that the policy goals of the ICWA are followed and strengthens the ties between Indian courts and state courts in acting in the "best interest of the Indian children."

[139] Adoptive Couple v. Baby Girl, 568 U.S. _, 133 S. Ct. 2552, 2571 (2013) (Thomas, J. concurring).