The Indian Child Welfare Act of 1978: Does It Apply to the Adoption of an Illegitimate Indian Child?

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THE INDIAN CHILD WELFARE ACT OF 1978:
DOES IT APPLY TO THE ADOPTION OF
AN ILLEGITIMATE INDIAN
CHILD?

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), in response to a crisis in which public and private agencies removed Indian children from their homes more frequently than non-Indian children. The ICWA seeks to remedy this disparity of placement in foster homes and adoptive homes by providing the Indian child’s tribe with jurisdiction and a system of intervention in child custody proceedings. Furthermore, the ICWA establishes a placement preference guide for agencies placing Indian children in adoptive or foster homes.

Since the enactment of the ICWA, several courts have determined the applicability of the ICWA to different fact situations. The Kansas Supreme

5. Id. § 1911(c).
6. Id. § 1915.
Court, in *In re Adoption of Baby Boy L.*,\(^8\) addressed the applicability of the ICWA to illegitimate Indian children placed for adoption with non-Indian families. In this decision, the Kansas court developed the "existing Indian family" theory. Applying this theory, the court avoided the placement preferences of the ICWA by determining that the ICWA required a breakup of an existing Indian family before it applied.\(^9\) Therefore, the ICWA was inapplicable where an unwed, non-Indian mother voluntarily consented to the adoption of her newborn Indian infant by a non-Indian family because such an adoption failed to break up an existing Indian family.\(^10\) Expanding the reasoning of the Kansas court, the Indiana Supreme Court in *J. Q. v. D.R.L.*, *In re Adoption of T.R.M.*\(^11\) held that an adoption of a newborn Indian infant by a non-Indian family with the consent of an Indian mother also failed to break up an existing Indian family. Therefore, the ICWA was inapplicable.\(^12\)

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9. *Id.* at 205-06, 643 P.2d at 175.
10. *Id.* at 207, 643 P.2d at 176. Several other courts followed the Kansas Supreme Court's reasoning: the Arizona Court of Appeals in *In re Appeal in Maricopa County*, 136 Ariz. 528, 532, 667 P.2d 228, 232 (Ct. App. 1983) (involving non-Indian mother and Indian father); the Oklahoma Supreme Court in *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1063 (Okla. 1988) (same), cert. denied, 108 S. Ct. 1042 (1988); the Missouri Court of Appeals in *In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (same); and the South Dakota Supreme Court in *Claymore v. Serr*, 405 N.W.2d 650, 653 (S.D. 1987) (same). For further discussion of the existing Indian family theory, see *infra* notes 86-142, 155-68 and accompanying text.
11. 525 N.E.2d 298 (Ind. 1988).
12. *Id.* at 303.
The following day, however, the New Jersey Supreme Court, in In re Adoption of a Child of Indian Heritage, rejected the existing Indian family theory by holding that the ICWA applied to illegitimate Indian children voluntarily relinquished to a non-Indian family shortly after birth.

Prior to the decisions of the Indiana and New Jersey courts, Senator Daniel Evans introduced amendments to the ICWA in the Senate on December 19, 1987. On May 11, 1988, the Select Committee on Indian Affairs held a hearing on the amendments. The amendments were intended primarily to clarify and expand coverage of the ICWA and to increase tribal involvement and control over the adoption of Indian children. Second, the amendments were proposed to make placement preferences mandatory, and thereby keep families intact whenever possible. Finally, these amendments were aimed at ensuring more fair and expeditious placement proceedings, and at establishing compliance monitoring mechanisms. These amendments, if enacted as introduced, would remove any doubt that the ICWA applies to adoptions of illegitimate Indian children voluntarily relinquished shortly after birth.

This Comment first examines the provisions of the ICWA in light of its legislative history. Then, this Comment analyzes the line of cases holding that the ICWA is not applicable to adoptions of illegitimate Indian children given up at birth, and contrasts that line of cases with the opposing New Jersey approach. Next, this Comment contends that the New Jersey approach, by applying the ICWA to adoption proceedings involving illegitimate Indian children relinquished at birth, adheres more closely to congressional intent manifest in the ICWA. Finally, this Comment concludes by proposing that Congress enact those sections of the proposed 1987 amendments that clarify the applicability of the ICWA to illegitimate Indian children.

14. S. 1976, 100th Cong., 1st Sess., 133 CONG. REC. S18,532 (daily ed. Dec. 19, 1987) [hereinafter Amendments]. At the time of publication, the amendments had not been reintroduced. However, the Select Committee on Indian Affairs had scheduled another hearing for April 20, 1989, to discuss the civil rights issue. This Comment will note the pertinent changes that would be made by the amendments, if enacted, to the ICWA.
15. Id. at S18,538.
16. Id.
17. Id.
I. THE INDIAN CHILD WELFARE ACT OF 1978

A. The Crisis

The rate at which public and private agencies separate Indian children from their homes is significantly more frequent than for non-Indian children. Surveys conducted by the Association on American Indian Affairs (AAIA) illustrate the disparity that exists between the placement of Indian and non-Indian children in adoptive and foster care homes. On average, an estimated one out of twenty-four Indian children are adopted compared to one

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19. See 1977 Hearing, supra note 2, at 538-603; 1974 Hearing, supra note 2, at 72-94, 231-52; see also H.R. REP. No. 1386, supra note 18, at 9, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7531. Below is a compilation of the results of the study prepared by the AAIA.

### Indian Children in Adoptive and Foster Care

<table>
<thead>
<tr>
<th>State</th>
<th>Rate of Indians Adopted to Non-Indians</th>
<th>Rate of Indians in Foster Care to Non-Indians</th>
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</thead>
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<td>300</td>
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<tr>
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<td>270</td>
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<tr>
<td>California</td>
<td>840</td>
<td>270</td>
</tr>
<tr>
<td>Idaho</td>
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<td>400</td>
<td>1040</td>
</tr>
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</table>

1977 Hearing, supra note 2, at 539.
out of ninety non-Indian children.\textsuperscript{20} This is nearly four times the non-Indian adoption rate. Many of these adoptions occur prior to the Indian child’s first birthday.\textsuperscript{21} For instance, in Minnesota between 1971 and 1972, unrelated families adopted nearly one in every four Indian children under one year of age, compared to one in every thirty-seven non-Indian children under one year of age.\textsuperscript{22}

Similarly, one out of fifty Indian children are placed in foster care homes compared to one out of two hundred ninety-four non-Indian children.\textsuperscript{23} This is nearly six times the non-Indian placement rate. As a result of these placement rates, approximately twenty-five to thirty-five percent of all Indian children are placed in foster homes, adoptive homes, or institutions.\textsuperscript{24} Non-Indian families adopted or provided foster care to eighty-five percent of these children.\textsuperscript{25}

In a number of instances, the placement of Indian children in non-Indian homes resulted in dramatic effects on the children, as illustrated by the testimony before the Subcommittee of Indian Affairs in the 1974 and 1977 hearings.\textsuperscript{26} When raised in non-Indian homes, Indian children experience more social problems in adolescence and adulthood.\textsuperscript{27} Specifically, Dr. Carl Min-

\textsuperscript{20} Barsh, \textit{supra} note 3, at 1289 n.14 (weighted average of the adoption rate for Indian children and for non-Indian children in 19 states).

\textsuperscript{21} \textit{1977 Hearing, supra} note 2, at 568-603. The AAIA’s survey found the median age of Indian children at the time of adoption to be as follows: Michigan-5.4 months; Minnesota-5.3 months; North Dakota-2 months; Oregon-3.9 months; South Dakota-2.5 months; Utah-less than 1 month; and Washington-3.6 months. \textit{Id}.

\textsuperscript{22} \textit{1974 Hearing, supra} note 2, at 15, 76-79.

\textsuperscript{23} Barsh, \textit{supra} note 3, at 1289 n.14 (weighted average of the foster care placement rate for Indian children and for non-Indian children in 19 states).

\textsuperscript{24} See \textit{1974 Hearing, supra} note 2, at 15; H.R. REP. No. 1386, \textit{supra} note 18, at 9, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7531.


\textsuperscript{26} See generally \textit{1977 Hearing, supra} note 2; \textit{1974 Hearing, supra} note 2.

\textsuperscript{27} See \textit{1977 Hearing, supra} note 2, at 77 (statement of Bertram Hirsch, AAIA); \textit{1974 Hearing, supra} note 2, at 46-47 (statement of Dr. Joseph Westermeyer, Dep’t of Psychiatry, Univ. of Minnesota); \textit{id.} at 113-14 (prepared statement of Dr. James Shore, Director of Community Psychiatry Training Program and Assoc. Professor of Psychiatry, Dep’t of Psychiatry, Univ. of Oregon Medical School and William Nicolls, M.S.W., Director of Health, Welfare and Social Services, Confederated Tribes of the Warm Springs Reservation); \textit{id.} at 117-18 (statement of Mel Sampson, Northwest Affiliated Tribes presenting a statement by Don Morrison).
dell and Dr. Alan Gurwitt, both from the American Academy of Child Psychiatry, testified that Indian children raised in non-Indian homes experienced “ethnic confusion” and a “pervasive sense of abandonment” as a result of being treated as non-Indians during childhood and then as Indians during adolescence. Further, some studies indicate that separation of Indian children from their Indian families correlates with a higher incidence of alcohol abuse and higher suicide rates within the Indian community.

Congress found that cultural bias against Indians contributed to the high rate of placements in that non-Indian caseworkers were insensitive to, or ignorant of, traditional Indian values. Such caseworkers often misinterpreted Indian behavior to be neglect or abuse of the Indian child, especially where that behavior differed from middle-class, non-Indian behavior. In addition, state caseworkers often failed to recognize the concept of the extended family. An Indian extended family may consist of grandparents, aunts, uncles, brothers, sisters, nieces, nephews, and first and second cousins. Applying the concept of the nuclear family, caseworkers frequently viewed leaving the child with a member of the extended family as neglect. In addition, caseworkers often relied on other factors such as poverty, poor housing, lack of modern plumbing, overcrowding and alcoholism to determine the Indian’s fitness as a parent.

28. 1977 Hearing, supra note 2, at 114; see also 1974 Hearing, supra note 2, at 56.
29. See 1978 Hearing, supra note 18, at 53 (statement of Rick Lavis, Deputy Assistant Secretary for Indian Affairs, U.S. Dept' of Interior); 1977 Hearing, supra note 2, at 156-57 (prepared statement of the Nat'l Tribal Chairmen's Ass'n); 1974 Hearing, supra note 2, at 28 (statement of William Byler, Executive Director, AAIA).
31. See 1977 Hearing, supra note 2, at 281 (prepared statement of the Nez Perce Tribal Executive Comm.); id. at 140 (prepared statement of Dr. Marlene Echohawk, Nat'l Congress of Am. Indians); id. at 266 (prepared statement of Virgil Gunn, Chairman of the Health, Education, and Welfare Comm. of the Colville Business Council); id. at 316 (prepared statement of Howard E. Tommie, Chairman of the Nat'l Indian Health Bd.).
36. See 1977 Hearing, supra note 2, at 140 (prepared statement of Dr. Marlene Echohawk, Nat'l Congress of Am. Indians); id. at 317 (statement of Howard E. Tommie,
bias, more separations of Indian children from their families occurred than of non-Indian children from their families.

In the eyes of many federal legislators, these separations occurred at a "highly unwarranted" and "often unnecessary" rate.\textsuperscript{37} To rectify this situation, Congress enacted the ICWA.\textsuperscript{38} In the findings of the ICWA,\textsuperscript{39} Congress declared that it had the power to enact this legislation,\textsuperscript{40} and that it had a responsibility to do so.\textsuperscript{41} Further, Congress acknowledged that it had assumed the responsibility to protect Indian children\textsuperscript{42} against unwarranted and unnecessary removal from their families and against the alarmingly high rate of placement into non-Indian homes.\textsuperscript{43} Congress also found that non-Indian public and private agencies separating Indian children from their families failed to recognize the unique cultural and social standards of the


\textsuperscript{39} 25 U.S.C. § 1901. The 1987 amendments to the ICWA would add the following finding:

(6) that the Bureau of Indian Affairs, exercising federal authority over Indian affairs, has often failed to fulfill its trust responsibility to Indian tribes by failing to advocate rigorously the position of tribes with States and non-tribal public and private agencies and by failing to seek funding and planning necessary for tribes to effectively fulfill their responsibilities to Indian children.

Amendments, supra note 14, at S18,533.

\textsuperscript{40} 25 U.S.C. § 1901(1). The finding states: "[C]lause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes' and, through this and other constitutional authority, Congress has plenary power over Indian affairs." Id.

\textsuperscript{41} Id. § 1901(2). This section states: "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." Id.; see also 124 CONG. REC. 38,102 (1978) (statement of Rep. Udall); id. at 38,103 (statement of Rep. Lagomarsino).

\textsuperscript{42} 25 U.S.C. § 1901(3). This section provides "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." Id.; see also 124 CONG. REC. 38,102 (1978) (statement of Rep. Udall); id. at 38,103 (statement of Rep. Lagomarsino).

\textsuperscript{43} 25 U.S.C. § 1901(4). This section provides "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." Id.; see also 124 CONG. REC. 38,102 (1978) (statement of Rep. Udall); id. at 38,103 (statement of Rep. Lagomarsino).
Indian community. Furthermore, Congress declared that the policy of the nation is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” To accomplish its purpose, Congress established “minimum federal standards” for the removal of Indian children from their homes and a system of preferences for placing such children with families reflecting the “unique values of Indian culture.”

B. The Provisions of the ICWA

The ICWA operates where an Indian child is the subject of a child custody proceeding. Pursuant to section 1903 of the ICWA, child custody proceedings include foster care placement, termination of parental

44. 25 U.S.C. § 1901(5). This section provides “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” Id.; see also 124 CONG. REC. 38,102 (1978) (statements of Rep. Udall and Rep. Lagomarsino).

45. 25 U.S.C. § 1902. The amendments to the ICWA would declare Congress’ intent to promote an Indian child’s relationship with his tribe by adding the following purpose: “to protect the right of Indian children to develop a tribal identity and to maintain ties to the Indian community within a family where their Indian identity will be nurtured.” Amendments, supra note 14, at §18,533.

46. 25 U.S.C. § 1902; see id. §§ 1911-1914.

47. Id. § 1902; see id. § 1915.


49. 25 U.S.C. § 1903(1). The 1987 amendments to the ICWA would add the following language to the definition of a child custody proceeding to “include any proceeding referred to in this subsection involving an Indian child regardless of whether the child has previously lived in Indian Country, in an Indian cultural environment or with an Indian parent.” Amendments, supra note 14, at §18,533. This additional language, if enacted, would overrule the theory developed by several courts that Congress did not intend for the ICWA to apply unless a breakup of an “existing Indian family” occurred. See generally infra notes 86-142, 155-68 and accompanying text (cases developing existing Indian family theory).

50. 25 U.S.C. § 1903(1)(i). The ICWA defines foster care placement as:

Any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

Id. The 1987 amendments to the ICWA would change the definition of foster care placement
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rights, and preadoptive placement, and adoptive placement. The ICWA specifically excludes from child custody proceedings placements resulting from an act of the child that would constitute a crime if committed by an adult and placements resulting from a divorce proceeding. The ICWA defines "Indian child" as an unmarried person less than eighteen years old who is either a member, or eligible for membership, of an Indian tribe. Once these threshold requirements are met, the other provisions of the ICWA apply.

to mean "any administrative, adjudicatory or dispositional action, including a voluntary proceeding under section 103 of this Act, which may result in the placement of an Indian child in a foster home or institution, group home or the home of a guardian or conservator." Ammends, supra note 14, at S18,533.

51. 25 U.S.C. § 1903(1)(ii). The ICWA defines termination of parental rights as "any action resulting in the termination of the parent-child relationship." Id. The 1987 amendments to the ICWA would change this definition to "any adjudicatory or dispositional action, including a voluntary proceeding under section 103 of this Act, which may result in the termination of the parent child relationship or the permanent removal of the child from the parent's custody." Amendments, supra note 14, at S18,533.

52. 25 U.S.C. § 1903(1)(iii). The ICWA defines preadoptive placement as "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." Id. The 1987 amendments would not change this definition. Amendments, supra note 14, at S18,533.

53. 25 U.S.C. § 1903(1)(iv). The ICWA defines adoptive placement as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." Id. The 1987 amendments would revise this definition to include "any administrative, adjudicatory or dispositional action or any voluntary proceeding under section 103 of this Act, whether the placement is made by a public or private agency or by individuals." Amendments, supra note 14, at S18,533.

54. 25 U.S.C. § 1903(1). The Bureau of Indian Affairs clarified the meaning of "an act which would be a crime if committed by an adult" by affirmatively stating in the regulations promulgated under the ICWA that "status offenses, such as truancy, [and] incorrigibility" are not such acts. Therefore, placements which result from status offenses are child custody proceedings under the ICWA. 25 C.F.R. § 23.2(b)(5) (1988); see also Guidelines, supra note 30, at 67,587.

55. 25 U.S.C. § 1903(1). The 1987 amendments would clarify this exclusion: "[Child custody proceeding] shall also not include a placement based upon an award of custody to one of the parents in any proceeding involving a custody contest between the parents. All other child custody proceedings involving family members are covered by this Act." Amendments, supra note 14, at S18,533.

56. 25 U.S.C. § 1903(4). If the child is not a member of an Indian tribe, but is eligible for membership in an Indian tribe, then the child must also be the biological child of an Indian tribe member. Id. The 1987 amendments would further provide that "if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered." Amendments, supra note 14, at S18,534.

57. See sources cited supra note 48. But see infra notes 86-142, 155-68 and accompanying text (discussion of cases requiring a third prerequisite, a breakup of an existing Indian family).
I. Minimum Federal Standards

To accomplish the purposes of the ICWA, Congress set forth several provisions with respect to jurisdiction of a tribal court to allow the Indian tribe effective participation in child custody proceedings. First, the ICWA provides that an Indian tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who is either residing or domiciled.

59. Id. § 1911(a). Congress failed to define “resides” and “domiciled.” Further, the Bureau of Indian Affairs decided that existing state law already defined these terms, therefore, they declined to define “resides” and “domiciled” in the regulations. See Indian Child Welfare Act; Implementation, 44 Fed. Reg. 45,096, 45,100 (1979) [hereinafter Final Rules]; Guidelines, supra note 30, at 67,585.

The issue of whether an Indian child, whose parents live on the reservation, resides or is domiciled on the reservation when the Indian child is born off the reservation and has never been physically present on the reservation, was decided by the Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, 57 U.S.L.W. 4409 (U.S. Apr. 3, 1989).

This case involved the adoption of illegitimate Indian twins by the Holyfields, a non-Indian family. Both the Indian mother and Indian father consented to the adoption. Id. at 4411. Furthermore, the Indian mother left the reservation for the sole purpose of having the babies, intending to return, and in fact returning to the reservation thereafter. Id. The twins, however, did not return to the reservation with their mother. Id.

The Mississippi Supreme Court held that state law defines the term “domicile.” Applying state law, the court decided that where the Indian child is born off the reservation and has never been physically present on the reservation, the child neither resides nor is domiciled on the reservation, even though his natural parents reside and are domiciled on the reservation. Id. The court reasoned that the state domicile rule, that domicile of minor children follows that of the parents, failed to apply in this case because the Indian mother voluntarily surrendered and legally abandoned the twins to the adoptive parents off the reservation. Id. By so holding, the court’s new definition of domicile subverted the federal scheme under the ICWA of promoting the stability and security of Indian tribes and families.

By a 6-3 majority, the Supreme Court reversed the Mississippi Supreme Court decision. Id. at 4415. The majority held that Congress intended a uniform federal law of domicile to be used under the ICWA. Id. In supporting its conclusion, the majority first stated that the purpose of the ICWA clearly suggested that Congress did not intend to rely on a state’s definition of such a “critical term.” Id. Second, Congress could not have intended to allow forum shopping to avoid unfavorable state-law definitions of domicile. Id. Further, the majority held that “domicile” should be given its ordinary meaning. Id. at 4413-14. Under this definition, an illegitimate child could not have a domicile in a place where the child had never been. Id. at 4414. The majority also found the minority view that abandonment of the child changes the child’s domicile to that of a person who stands in loco parentis inconsistent with Congress’ intent to promote the stability and security of Indian tribes. Id. The majority therefore rejected the reasoning of the Mississippi court and vacated the state’s adoption decree. Id. at 4415.

The 1987 amendments would define domicile as:

‘Domicile’ shall be defined by the tribal law or custom of the Indian child’s tribe, or in the absence of such law or custom by Federal common law applied in a manner which recognizes that (1) many Indian people consider their reservation to be their domicile even when absent for extended periods and (2) the intent of the Act is to defer to tribal jurisdiction whenever possible. Amendments, supra note 14, at § 18,533. This definition of domicile would be consistent with the Supreme Court’s
within that tribe's reservation or is a ward of the tribal court.\textsuperscript{60}

However, where the Indian child fails to meet the requirement of residing or being domiciled within the reservation, the tribal court has concurrent jurisdiction with the state court over child custody proceedings involving foster care placement or termination of parental rights.\textsuperscript{61} The ICWA requires a state court to transfer the proceeding to the tribal court upon petition by either parent,\textsuperscript{62} the Indian custodian of the child,\textsuperscript{63} or the Indian child's tribe,\textsuperscript{64} unless either parent objects\textsuperscript{65} or the state court finds good

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\textsuperscript{60} 25 U.S.C. § 1911(a). An exception to exclusive jurisdiction is provided where jurisdiction is vested in the state under existing federal law. \textit{Id.}

\textsuperscript{61} 25 U.S.C. § 1911(b). The 1987 amendments would expand the scope of this subsection by eliminating the restriction that the child custody proceeding involve a foster care placement or termination of parental rights. Amendments, \textit{supra} note 14, at S18,534.

\textsuperscript{62} 25 U.S.C. § 1903(9). The ICWA defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." \textit{Id.} Additional language in the 1987 amendments would further clarify the definition of parent:

Except for the purposes of sections 103(c) and (d), 104, 105(f), 106(a) and (b), 107, 301, the term parent shall not include any person whose parental rights have been terminated. It includes the unwed father where paternity has been established under tribal or state law, or recognized in accordance with tribal custom, or openly proclaimed to the court, the child's family, or a child placement or adoption agency. For the purpose of section 102(a)(involuntary child custody proceedings), it also includes an unwed father whose paternity has not been so established, recognized or proclaimed.

Amendments, \textit{supra} note 14, at S18,534.

\textsuperscript{63} 25 U.S.C. § 1903(6). The ICWA defines Indian custodian as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." \textit{Id.}

\textsuperscript{64} \textit{Id.} § 1903(5). The ICWA defines Indian child's tribe as:

(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

\textit{Id.}

For a discussion of significant contacts, see Guidelines, \textit{supra} note 30, at 67,586-87.

\textsuperscript{65} 25 U.S.C. § 1911(b). The 1987 amendments to the ICWA would limit the parent's objection to an unrevoked one which is "determined to be consistent with the best interests of the child as an Indian." Amendments, \textit{supra} note 14, at S18,534. Furthermore, the amendments would not allow a "parent whose rights have been terminated or who has consented to an adoption" to object to the transfer. \textit{Id.}
cause to the contrary. Finally, the ICWA gives the Indian child's tribe and the child's Indian custodian the right to intervene at any point in a state court, child custody proceeding involving a foster care placement or termination of parental rights. Thus, Congress intended that tribes exercise responsibility for child welfare matters in as many cases as possible involving Indian children.

The ICWA further provides that in any involuntary child custody proceeding involving a foster care placement of, or termination of parental rights from, an Indian child, the party seeking such action must notify the parents, or the Indian custodian, and the Indian child's tribe. The party seeking the action must provide notice by registered mail with return receipt requested. Significantly, the ICWA fails to make a similar provision for voluntary proceedings.

66. 25 U.S.C. § 1911(b). The tribal court may decline, however, to accept the transfer. Id. The Bureau of Indian Affairs provides state courts with some guidance as to what would constitute "good cause to the contrary": 1) where there is no tribal court; 2) where the proceedings are at an advanced stage and the petition was not filed promptly after receiving notice; 3) where an Indian child, over 12 years old, objects to the transfer; 4) where necessary evidence cannot be adequately presented in the tribal court without undue hardship to parties or witnesses; 5) where the parents of a five year old child, who has had little or no contact with the tribe, are not available. Guidelines, supra note 30, at 67,590-92. The 1987 amendments would limit denial of transfer by a state court to the situation where the proceedings are at an advanced stage and the petition was not filed promptly after receiving notice. Amendments, supra note 14, at S18,534; see also J.Q. v. D.R.L. (In re Adoption of T.R.M.), 525 N.E.2d 298, 307 (Ind. 1988) (discussing "good cause to the contrary").


68. See Mississippi Band of Choctaw Indians v. Holyfield, 57 U.S.L.W. 4409, 4414 n.24 (U.S. Apr. 3, 1989); 1978 Hearing, supra note 18, at 62 (statement of Chief Calvin Isaac, Nat'l Tribal Chairmen's Ass'n); Guidelines, supra note 30, at 67,585-86; see also Amendments, supra note 14, at S18,539 ("The fundamental premise of the [ICWA] is that the interests of the child will best be served by recognizing and strengthening the capacity of the tribe to be involved in any legal matters dealing with the parent-child relationship.").

69. 25 U.S.C. § 1912(a). Where the identity or location of such parties cannot be determined, the ICWA provides that notice be given to the Secretary of the Interior, who shall have 15 days to notify such parties. Id.; cf. 25 C.F.R. § 23.11(d)-(e) (1988) (providing that the Bureau of Indian Affairs make a diligent effort to notify the parties within 10 days after receipt of the notice).

70. 25 U.S.C. § 1912(a). The ICWA further provides that such proceeding will not be held until at least 10 days after receipt of notice on such parties, including the Secretary, if applicable. Id. The 1987 amendments would increase this minimum period to 15 days where notice is sent to the parent(s), the Indian custodian or the Indian child's tribe and 30 days where notice is sent to the Secretary. Amendments, supra note 14, at S18,534. Furthermore, the ICWA provides that such parties, excluding the Secretary, shall be granted an additional 20 days to prepare, upon request to the state court. 25 U.S.C. § 1912(a). The regulations require the Bureau to inform the state court if it has been unsuccessful in notifying such parties within 10 days after receipt of notice of the proceeding. At that point, the state court determines whether or not to proceed. 25 C.F.R. § 23.11(e) (1988).

71. 25 U.S.C. § 1913(a). But see Amendments, supra note 14, at S18,535 (providing that
In the case of voluntary proceedings, the ICWA establishes certain provisions regarding consent to foster care placement, termination of parental rights, and adoptive placement. First, consent to foster care placement or termination of parental rights must be in writing and recorded before a judge of a court of competent jurisdiction. Second, the judge must certify that the consent was fully explained to the consenting individual and that such individual fully understood the proceeding. Third, the ICWA provides that consent to such proceedings will be invalid if "given prior to, or within ten days after, birth of the Indian child." Fourth, consent may be withdrawn at any time for a foster care placement and at any time prior to a final decree for termination of parental rights or for adoption.

2. Preference for Placements

The ICWA sets forth placement preferences, to be followed in the absence of good cause to the contrary, to guide state courts and agencies in placing an Indian child in a foster care or adoptive home. In adoption placements, the ICWA directs that a preference be given in the following order: to the child's extended family, other members of the Indian child's tribe, and other Indian families. Similarly, a preference in foster care or preadoptive placements is to be given first to the child's extended family, second to a foster home approved by the Indian child's tribe, third to an Indian foster home, and finally, to an institution for children approved by an Indian tribe or operated by an Indian organization.

The preferences in the ICWA are not absolute. The Indian child's tribe may adopt a resolution changing the order of preferences. State courts and notice of a voluntary child custody proceeding be given to the Indian child's tribe and the non-consenting parent, if any, at least 10 days prior to the proceeding).

73. Id. See generally Guidelines, supra note 30, at 67,593-94 (guidelines for execution and content of consent).
74. 25 U.S.C. § 1913(a). The ICWA requires the explanation to be in a language other than English where necessary. Id.
75. Id.
76. Id.
78. 25 U.S.C. § 1913(c). After an entry of a final decree, consent may be withdrawn only within two years (unless provided otherwise under state law) if such consent was obtained through fraud or duress. Id. § 1913(d).
79. Id. § 1915.
80. Id. § 1915(a).
81. Id. § 1915(b). The state court should place the Indian child in the "least restrictive setting which most approximates a family and in which his special needs, if any, may be met." Id.
82. Id. § 1915(c).
agencies must follow such resolutions in the placement of Indian children. The ICWA allows state courts and agencies to consider the preference of the Indian child or parent when determining placement of the Indian child. The ICWA also permits placement with a non-Indian family where placement in one of the stated preferences cannot be found.

II. BREAKUP OF AN "EXISTING INDIAN FAMILY"

A. Illegitimate Indian Children of a Non-Indian Mother: Not Part of an "Existing Indian Family"

Shortly after Congress enacted the ICWA, the courts began to determine the extent of the ICWA's provisions. The Supreme Court of Kansas, in In re Adoption of Baby Boy L., became one of the first courts to hold that the ICWA did not apply to adoption proceedings involving an illegitimate Indian child given up by his non-Indian mother. Baby Boy L. was the illegitimate son of Miss L., a non-Indian mother, and Perciado, a five-eighths Kiowa Indian father. On the day of Baby Boy L.'s birth, his mother executed a consent to adoption. The adoptive parents filed their petitions for adoption on the same day and the court granted them temporary custody of Baby Boy L. Notice of the adoption proceeding was personally served on Perciado at the Kansas State Industrial Reformatory. Perciado answered the amended petition asking that he be found a fit parent, that his parental rights not be severed, and that he be given permanent custody of Baby Boy L.
At trial, the court found that because Perciado was an enrolled member of the Kiowa Tribe, the ICWA might apply. The lower court continued the trial for thirty days to allow notice to be provided to the Kiowa Tribe. The Kiowa Tribe filed a petition to intervene, followed by petitions to change temporary custody and to transfer jurisdiction. During this time, the Kiowa Tribe enrolled Baby Boy L. as a member of the tribe against the express wishes of his non-Indian mother.

The trial court found that the ICWA did not apply, denied the Kiowa Tribe's petition to intervene, and held that the tribe's other petitions were moot. The court further found that Perciado would be an unfit parent and granted the adoption of Baby Boy L. to the adoptive parents.

The Supreme Court of Kansas affirmed the trial court's conclusion that the ICWA did not apply to these proceedings. To support its conclusion, the court looked to the legislative history and the language of the ICWA. The Kansas court found that Congress intended to maintain existing family and tribal relationships. Furthermore, it concluded that Congress did not intend to "dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."

93. Id.
94. Id.
95. Id. at 203, 643 P.2d at 173.
96. Id.
97. Id. The trial court concluded that the ICWA did not apply because of the following factors: 1) the illegitimate child of a non-Indian mother was involved; 2) the non-Indian mother voluntarily consented to the adoption on the day of the child's birth and released the child to the adoptive parents; 3) the child was never in the care of the putative Indian father; 4) preservation of the Indian family was not an issue since the child was never a part of any Indian family relationship; 5) the Kiowa Tribe enrolled the child as a member of the Tribe after initiation of these proceedings and over the expressed objection of the non-Indian mother; 6) neither a state nor federal agency was unilaterally removing an Indian child from his family; and 7) absent the mother's consent, it appeared the child would never be part of an Indian family. Id. at 204-05, 643 P.2d at 174-75.
98. Id. at 203, 643 P.2d at 173.
99. Id.
100. Id. at 203, 643 P.2d at 174.
101. Id. at 207, 643 P.2d at 176. In addition, the Kansas Supreme Court argued in the alternative that even if the ICWA applied, the adoption would still have been granted, and therefore, the trial court's ruling would have been harmless error at best. Id. at 208-11, 643 P.2d at 176-78.
102. Id. at 205-06, 643 P.2d at 175 (citing 25 U.S.C. §§ 1901(4), 1911(a), 1912(d)-(f), 1914, 1916(b), 1920, 1922).
103. Id. at 205, 643 P.2d at 175.
104. Id. at 206, 643 P.2d at 175.
The Kansas court also cited several provisions of the ICWA to support its conclusion that an Indian family must exist prior to the operation of the ICWA. First, the court cited section 1901(4), which expresses Congress' finding that Indian families are broken up by public and private agencies. Section 1901(4) supported the court's conclusion because an Indian family could not be broken up until it existed. The court next cited section 1911(a), which provides exclusive jurisdiction to the Indian tribe over "any child custody proceeding involving an Indian child who resides or is domiciled within the reservation." Section 1911(a) also supported the court's conclusion because this section implied that a relationship with the tribe existed. The court then cited section 1912(d), which provides that efforts must be made to prevent the breakup of the Indian family. Again, the reference to a breakup of an Indian family in this section implies that an Indian family must exist. Sections 1912(e) and (f), which refer to the continued custody of the child by the parent or Indian custodian, also supported the court's conclusion. The language "continued custody" suggests that a physical relationship exists between an Indian parent and an Indian child. Next, the court cited section 1914, which refers to the removal of the child from the parent or Indian custodian. Finally, the court cited sections 1916(b), 1920, and 1922, which also reflect concern for the removal of an Indian child from an existing Indian family. The court found

105. Id. (citing 25 U.S.C. §§ 1901(4), 1911(a), 1912(d)-(f), 1914, 1916(b), 1920, 1922).
106. Id. at 206, 643 P.2d at 175; see 25 U.S.C. § 1901(4) (1982); see also supra note 43 (text of § 1901(4)).
107. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1911(a); see also infra notes 58-60 and accompanying text (discussion of § 1911(a)).
108. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1912(d); see also infra note 212 (text of § 1912(d)).
109. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1912(e)-(f); see also infra note 212 (text of § 1912(e)-(f)).
110. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1914. This section states, in pertinent part, that "[w]here any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian . . . the court shall decline jurisdiction over such petition." Id. (emphasis added).
111. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1916(b). This section provides that "[w]henever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter." Id. (emphasis added).
112. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1920. This section provides that "[w]here any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian . . . the court shall decline jurisdiction over such petition." Id. (emphasis added).
113. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; see 25 U.S.C. § 1922. This section provides that "an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation [may be removed in an emergency situation] in order to prevent imminent physical damage or harm to the child." Id.
that each of these sections referred to an "existing Indian family." Therefore, the court reasoned that the ICWA only applied where the removal of an Indian child from an existing Indian family resulted in a breakup of the Indian family.

The Arizona Court of Appeals, in *In re Appeal in Maricopa County*, took up the issue the following year. In *Appeal in Maricopa County*, R.M., a non-Indian, gave birth to a baby girl who was placed in a foster home to be adopted. The putative father was Edmund Jackson, a Pima Indian. After being informed about the baby, Jackson neither acknowledged nor attempted to establish his paternity. The lower court granted the agency's petition to terminate Jackson's parental rights. Finding that Jackson knew of the baby, but had failed to establish paternity, the trial court concluded that he had abandoned the child. More than a year later, the tribe moved to intervene in both the adoption and termination of parental rights proceedings. Several months later, Jackson signed and filed an affidavit acknowledging paternity. Shortly thereafter, the trial court granted the final order of adoption, concluding that despite the ICWA's placement preference, the "'best interests' of the child required her continued placement with the adoptive parent."

In affirming the trial court's decision, the Arizona Court of Appeals found that before the ICWA applies two prerequisites must be met: one, a child...
custody proceeding, as defined under section 1903(1); and two, an Indian child, as defined under section 1903(4). The Arizona court found that Jackson consistently declined to acknowledge the child until three years after the child was born, and further, that Jackson could not have been considered a parent until he had done so. The court reasoned that Congress, by the definition of parent, did not intend to extend the ICWA to an illegitimate child whose mother is non-Indian and whose putative Indian father has not even acknowledged the child. The Arizona court concluded that this construction was in agreement with the stated purpose of the ICWA in that the child cannot be considered an Indian child until the Indian father acknowledges it. Therefore, the court reasoned, no breakup of an existing Indian family could occur. Consequently, the Arizona court limited the application of the existing Indian family theory to those instances where a child is born out of wedlock to a non-Indian mother and the putative Indian father fails to acknowledge or establish paternity.

Within two years of the Arizona Court of Appeals decision, the issue of the ICWA’s applicability to an adoption of an illegitimate Indian child voluntarily relinquished at birth by his non-Indian mother came before the Oklahoma Supreme Court in *In re Adoption of Baby Boy D.* As in *Appeal in Maricopa County,* the unwed, non-Indian mother of Baby Boy D. gave him up for adoption shortly after birth. The putative father knew of the baby but showed no interest in him or his mother until after the lower court ordered a decree of adoption. The lower court found that the father lacked standing to request that the decree of adoption be vacated, that the ICWA did not apply, and that the father had failed to establish a relationship with the child that could be constitutionally protected.

A majority of the Oklahoma Supreme Court found that the “central

125. *Id.; see also supra* note 48 and accompanying text (other courts identifying these prerequisites).
126. *Appeal in Maricopa County,* 136 Ariz. at 532, 667 P.2d at 232; see 25 U.S.C. § 1903(9); *see also supra* note 62 (definition of parent does not include an unwed father where paternity has neither been acknowledged nor established).
127. *Appeal in Maricopa County,* 136 Ariz. at 532, 667 P.2d at 232.
128. *Id.* at 533, 667 P.2d at 233.
129. *Id.*
130. *Id.*
131. *Id.* at 532, 667 P.2d at 232.
133. *Id.* at 1061.
134. *Id.* at 1064. The putative father had neither received notice of, nor consented to, the adoption. *Id.* at 1061.
135. *Id.* at 1060. For the Oklahoma court’s discussion of the constitutionally protected rights of the unwed father, see *id.* at 1064-69.
The Indian Child Welfare Act of 1978 thrust and concern of the ICWA [was] 'the establishment of minimum federal standards for the removal of Indian children from their families.' 

Like the Kansas Supreme Court, the Oklahoma court cited several provisions of the ICWA, including sections 1901(4), 1911(a) and 1912(d)-(f) to support its findings. From the statutory language, the court concluded that the ICWA only applies to the removal of Indian children from an existing Indian environment. In addition, the Oklahoma court found that the putative father was not a parent as defined by the ICWA, and, more importantly, that the child, never having been in the father's custody, was not removed from his custody. Consequently, the father lacked standing to invalidate the adoption under section 1914 of the ICWA.

Stating that it was grounded in flawed premises, Justice Kauger dissented from the majority opinion. First, Justice Kauger disagreed with the majority opinion that the provisions of the ICWA did not apply to unwed fathers. Relying on section 1903(9), Justice Kauger reasoned that unwed fathers are excluded only if the father fails to acknowledge or establish paternity. In this case, Justice Kauger noted that the father had attempted to acknowledge paternity. Therefore, Justice Kauger concluded that the father had standing to challenge the adoption proceeding under the ICWA.

Second, Justice Kauger disagreed with the majority’s premise that the ICWA does not apply to children who are not domiciled in Indian homes. To support her position, Justice Kauger looked to the legislative history and the language of the ICWA. She found that the legislative history, particularly the hearings, identified several factors that Congress relied upon in en-

136. Id. at 1063.
137. See In re Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982); see also supra notes 101-15 and accompanying text (discussion of Kansas Supreme Court holding).
138. Adoption of Baby Boy D., 742 P.2d at 1063.
139. Id. But see infra text accompanying notes 176-228 (rebuttering the existing Indian family theory).
140. Adoption of Baby Boy D., 742 P.2d at 1064; see 25 U.S.C. § 1903(9) (1982); see also supra note 62 (definition of parent).
141. Adoption of Baby Boy D., 742 P.2d at 1064.
142. Id. The 1987 amendments to the ICWA would remove the restriction of custody by the parent, and thereby provide a non-custodial parent standing to challenge a state court action for violation of the ICWA. Amendments, supra note 14, at S18,535; see also infra text accompanying notes 255-58 (discussion of amendment).
143. Adoption of Baby Boy D., 742 P.2d at 1073 (Kauger, J., dissenting).
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id. at 1075.
acting the ICWA. First, Indian culture differs from Anglo-Saxon culture. Second, a significantly higher rate of Indian children, especially those under one year of age, were separated from their Indian families compared to non-Indian children. Third, the separation of Indian children from their Indian culture robbed them of their cultural heritage and often was detrimental to their later development. Each of these factors applied equally to the adoption of illegitimate Indian children by non-Indian families. Therefore, Justice Kauger concluded that Congress intended the ICWA to apply to all Indian children.

B. Illegitimate Indian Children of an Indian Mother: Not Part of an “Existing Indian Family”

*In re Adoption of T.R.M.* is factually similar to the cases discussed above, with one significant exception: the unwed mother relinquishing her child was Indian. J.Q., an Indian woman, voluntarily gave up her seven day old son, T.R.M., to non-Indian friends who agreed to adopt him. Shortly thereafter, J.Q. consented in writing to the adoption. Approximately one year later, J.Q. filed a habeas corpus action in the state circuit court and the tribe filed a similar action claiming jurisdiction. The circuit court dismissed the tribe's action and denied J.Q.’s petition. One day prior to the filing of the adoption petition by the adoptive parents, the Indian tribal court entered an order of wardship of the child. The circuit court granted the adoption the following year. The court of appeals reversed the circuit court order on grounds that, pursuant to section 1911(a) of the ICWA, the

151. *Adoption of Baby Boy D.*, 742 P.2d at 1075 (Kauger, J., dissenting); see supra note 32 and accompanying text.
152. *Adoption of Baby Boy D.*, 742 P.2d at 1075 (Kauger, J., dissenting); see supra notes 19-25 and accompanying text.
153. *Adoption of Baby Boy D.*, 742 P.2d at 1075 (Kauger, J., dissenting); see supra notes 26-29 and accompanying text.
154. *Adoption of Baby Boy D.*, 742 P.2d at 1077 (Kauger, J., dissenting). Justice Kauger also pointed out that no distinction is made in the ICWA based on reservation status or environmental circumstances. *Id.*; cf. supra note 49 (1987 amendments providing that no such distinction be made); infra notes 243-44 and accompanying text (further discussion of amendment).
155. 525 N.E.2d 298 (Ind. 1988).
156. *Id.* at 302.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
Indian tribal court had exclusive jurisdiction over the matter.\footnote{162}

The Indiana Supreme Court reversed the court of appeals, stating that where the purpose and intent of Congress could not be achieved, the ICWA should not be applied.\footnote{163} The Indiana court looked to the reasoning of the Oklahoma court in \textit{Adoption of Baby Boy D.},\footnote{164} and accepted the existing Indian family requirement imposed by that court.\footnote{165} The Indiana court found no breakup of the Indian family because the Indian mother had abandoned the child\footnote{166} at the earliest possible moment after childbirth.\footnote{167} Therefore, the court concluded that the ICWA did not apply to this case.\footnote{168} This decision expanded the theory of an existing Indian family to a fact situation involving an Indian mother.

\textbf{C. Rejecting the Existing Indian Family Theory}

In \textit{In re Adoption of a Child of Indian Heritage},\footnote{169} an unwed Indian mother voluntarily gave up her child, Baby Larry, for adoption seven days after the child's birth.\footnote{170} Nearly two years later, the putative Indian father filed a motion to vacate the adoption order.\footnote{171} The trial court denied the motion without prejudice.\footnote{172} On the father's renewed petition, the trial court found that the child was not an Indian child\footnote{173} under the ICWA and that the father had failed to acknowledge paternity at the time of the adoption proceedings.\footnote{174} Therefore, the trial court held that the ICWA did not apply as a separate and independent basis for its decision, and concluded that the adoption should stand. \textit{Id.}

\begin{itemize}
  \item \textit{Id. at 302}; see \textit{In re Adoption of Baby Boy D.}, 742 P.2d 1059 (Okla. 1985); see also \textit{supra} notes 132-42 and accompanying text (discussion of the Oklahoma court holding).
  \item \textit{Adoption of T.R.M.}, 525 N.E.2d at 303.
  \item \textit{Id. But see Amendments, \textit{supra} note 14, at 318-335 (consent to adoptive placement shall not be deemed abandonment of the child by the parent).}
  \item \textit{Adoption of T.R.M.}, 525 N.E.2d at 303.
  \item \textit{Id.} In the rest of the opinion, the Indiana Supreme Court decided the case as if the ICWA did apply as a separate and independent basis for its decision, and concluded that the adoption should stand. \textit{Id.}
  \item 111 N.J. 155, 543 A.2d 925 (1988).
  \item \textit{Id. at 162, 543 A.2d at 928}. Neither the Indian mother nor the Indian father lived on the Rosebud Sioux reservation, but resided in towns bordering the reservation. \textit{Id.} at 161, 543 A.2d at 928.
  \item \textit{Id. at 164, 543 A.2d at 929}. The motion to vacate was filed one day before the one-year period to overturn a judgment on the basis of fraud would have expired under New Jersey law. \textit{Id.}
  \item \textit{Id. at 165, 543 A.2d at 929}.
  \item \textit{Id. at 165, 543 A.2d at 930}. The Rosebud Sioux Tribe noted that Baby Larry did “not meet the one-quarter blood quotient requirement” for enrollment since his mother only had 9/32 Rosebud Sioux blood. \textit{Id.; see 25 U.S.C. § 1903(4) (1982); see also \textit{supra} note 56 and accompanying text (defining Indian child).}
  \item \textit{Adoption of a Child of Indian Heritage}, 111 N.J. at 165, 543 A.2d at 930.
\end{itemize}
The New Jersey Supreme Court disagreed with the interpretation that the ICWA does not apply where an unwed mother voluntarily relinquishes her child for adoption shortly after birth. The court declared that such an interpretation "posits as a determinative jurisdictional test the voluntariness of the conduct of the mother." The New Jersey court noted that although "voluntariness" is important in the application of the ICWA, lack of "voluntariness" is not a prerequisite for the ICWA to apply. The New Jersey court found further support for its holding in the definition of child custody proceeding, which includes "any action resulting in the termination of the parent-child relationship." Furthermore, the New Jersey court maintained that, where the unwed father has not consented to the adoption, "the application of the ICWA to voluntary private placement adoptions is not inconsistent with the purposes of the [ICWA]." In such cases, there may be an involuntary termination of the father's parental rights which should be given the protections provided by section 1912 of the ICWA. The New Jersey court also noted that the effects of the separation, loss of cultural heritage and higher potential for psychological harm remain the same regardless of whether the placement was voluntary or involuntary. Furthermore, the court noted that the economic factors that concerned Congress with respect to induced voluntary relinquishments to state agencies are also implicated in private placements. Finally, the New Jersey court asserted that consideration be given to the rights of the Indian child's father and Congress' belief that maintaining a relationship with the Indian tribe is in the best interest of the Indian child. For these reasons, the New Jersey court held that the ICWA did apply in this case.

175. Id.
176. Id. at 169, 543 A.2d at 932.
177. Id.
178. Id. at 169-70, 543 A.2d at 932.
180. Adoption of a Child of Indian Heritage, 111 N.J. at 170, 543 A.2d at 932; see supra notes 71-78 and accompanying text (discussion of § 1913 dealing with voluntary consent).
181. Adoption of a Child of Indian Heritage, 111 N.J. at 170, 543 A.2d at 932.
182. Id.
183. Id. The New Jersey Court cites Barsh, supra note 3, at 1299, in support of this contention. See also H.R. REP. NO. 1386, supra note 18, at 11, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7533.
184. Adoption of a Child of Indian Heritage, 111 N.J. at 170, 543 A.2d at 932; see also supra note 68 and accompanying text.
185. Adoption of a Child of Indian Heritage, 111 N.J. at 170-71, 543 A.2d at 932.
III. THE EXISTING INDIAN FAMILY THEORY: A NARROW CONSTRUCTION OF THE ICWA

A. The Legislative History of the ICWA: More than One Purpose

The legislative history of the ICWA supports the view of the New Jersey court in Adoption of a Child of Indian Heritage186 and the dissenting opinion of Justice Kauger in Adoption of Baby Boy D.187 that the ICWA applies to illegitimate Indian children voluntarily relinquished for adoption shortly after birth to a non-Indian family. First, Congress recognized that adoptions of Indian children by non-Indian families constituted part of the Indian child welfare crisis.188 Second, Congress determined that consent to adoption often was coerced189 or obtained from parents uninformed as to the legal effect of the consent to their relinquishment of their parental rights.190 The report accompanying the ICWA further suggested that private individuals, as well as state agencies, may have an economic incentive in obtaining a voluntary consent of adoption for an Indian child.191 Moreover, as the New Jersey court pointed out, the effects of separation192 of the Indian child from his Indian family, and usually from his Indian culture,193 are the same regardless of whether the separation was voluntary or involuntary.194 Clearly, the concern of Congress in enacting the ICWA, as illustrated by the legislative history, includes the adoption of illegitimate Indian children.

The Kansas,195 Oklahoma196 and Indiana197 courts interpreted the purpose of the ICWA, "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the re-

186. Id. at 155, 543 A.2d at 925; see supra notes 169-85 and accompanying text (discussion of case).
188. See supra notes 3, 19-26 and accompanying text (discussion of the high rate of adoptions of Indian children).
190. Id.
191. Id.
192. See supra notes 27-29 and accompanying text.
193. See supra note 25 and accompanying text.
moval of Indian children from their families," as implying that the over-
riding concern of Congress was to maintain existing Indian families. With this interpretation, these courts excluded illegitimate Indian children from the definition of the existing Indian family. In light of the legislative history of the ICWA, the existing Indian family theory is thus contrary to the intent of Congress.

B. The Language of the ICWA: The Other Provisions

The Kansas, Oklahoma, and Indiana courts base their conclusions that the ICWA fails to apply to adoptions of illegitimate children primarily upon sections 1901(4), 1911(a), 1912(d)-(f) and 1914 of the ICWA. Granted, each of these sections do imply that an Indian family must exist before the ICWA applies. These courts, however, fail to acknowledge that these sections only deal with a part of the problem Congress addressed by enacting the ICWA.

First, the Kansas, Oklahoma, and Indiana courts rely upon section 1901(4), which states “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them . . . .” These courts infer from this language that the ICWA applies only to a preexisting Indian family. This reading ignores the fact that “the removal” of children referred to in this same finding includes the high rate of voluntary placement of newborns within their first year of life. Therefore, section 1901(4) fails to support the existing Indian family theory.

The Kansas, Oklahoma, and Indiana courts also cite section 1911(a), which provides exclusive jurisdiction to tribal courts for child custody proceedings involving Indian children residing or domiciled on the reserv-
This section implies an existing Indian tribal relationship with the Indian child. Similar to section 1911(a), section 1911(b) provides concurrent jurisdiction to tribal courts for child custody proceedings involving Indian children not residing or domiciled on a reservation. Section 1911(b) thus allows jurisdiction in the tribal court without requiring an existing Indian relationship. The only requirements for section 1911(b) to operate are a child custody proceeding, involving an Indian child, and a petition to transfer by either parent, the Indian custodian or the Indian child’s tribe. Furthermore, the lack of a requirement for parental custody in section 1911(b) implies that the ICWA does not require an existing Indian family. Nor does this section require that the Indian child be a ward of the Indian Tribe. By requiring an “existing Indian family,” the Kansas, Oklahoma and Indiana courts render this section ineffective by disallowing a non-custodial parent or the Indian child’s tribe to petition to transfer the child custody proceeding to the tribal court.

The Kansas, Oklahoma, and Indiana courts also cite sections 1912(d)-(f). While these sections imply that the existence of an Indian family is required before the ICWA applies, the courts’ reliance on them is misplaced. These sections deal specifically with involuntary proceedings. Those seeking the involuntary separation of the parent and child must prove that certain requirements are met before the involuntary separation occurs.

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208. See Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; Adoption of Baby Boy D., 742 P.2d at 1063; Adoption of T.R.M., 525 N.E.2d at 303; 25 U.S.C. § 1911(a); see also supra notes 59-60 and accompanying text (discussing § 1911(a)).

209. 25 U.S.C. § 1911(b); see supra notes 61, 65-66 and accompanying text (discussing § 1911(b)).

210. 25 U.S.C. § 1911(b); see supra notes 48-57 and accompanying text.

211. Adoption of Baby Boy L., 231 Kan. at 206, 643 P.2d at 175; Adoption of Baby Boy D., 742 P.2d at 1063; Adoption of T.R.M., 525 N.E.2d at 303.

212. Section 1912(d): “Any party seeking . . . foster care . . . or termination of parental rights . . . shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . .” 25 U.S.C. § 1912(d) (emphasis added).

Section 1912(e): “No foster care placement may be ordered . . . in the absence of a determination, supported by 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.” Id. § 1912(e) (emphasis added). This section establishes the burden of proof in a foster care placement proceeding.

Section 1912(f): “No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.” Id. § 1912(f) (emphasis added). This section establishes the burden of proof in a proceeding involving the termination of parental rights.

213. 25 U.S.C. § 1912(d)-(f); see supra note 212 (text of § 1912 (d)-(f)).
These sections do not require an existing Indian family before the ICWA applies.

Congress expressed its concerns regarding voluntary consent to adoption at birth or shortly thereafter in section 1913 of the ICWA. In particular, the last sentence of section 1913(a) declares that "[a]ny consent given prior to, or within ten days after, birth of the Indian child shall not be valid." This language contains no indication that Congress intended the provisions of the ICWA to apply only to those adoptions involving the removal of Indian children from an "existing Indian family." In fact, by invalidating consent prior to or shortly after birth, this language demands a contrary interpretation. By failing to consider this language, the Kansas, Oklahoma, and Indiana courts once again fail to recognize a section of the ICWA that is contrary to the existing Indian family theory.

In addition, the Kansas and Oklahoma courts cite section 1914 as further support for the existing Indian family theory. Section 1914 provides that a parent or Indian custodian from whose custody the child has been removed has standing to challenge the validity of a state action where the ICWA is applicable. This section does not specify the period of time that custody is required before it confers standing on the parent or Indian custodian. Nonetheless, the Indiana court found that no Indian family existed even though the Indian child lived with the Indian mother for five days prior to being given up for adoption. The ICWA also provides that this same right to challenge the validity of a state action be conferred to the Indian child's tribe. Again, the right is not conditioned on an "existing relationship" between the child and the tribe.

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214. In all of the above cases, the mother voluntarily consented to the adoption. However, the adoptions are all contested by the Indian father who did not consent, except for the case of In re Adoption of T.R.M. in which the Indian mother contested the adoption. 525 N.E.2d at 302.

215. 25 U.S.C. § 1913. Section 1913(a) states:

Where any parent . . . voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge . . . and accompanied by . . . judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . . Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

Id. § 1913(a) (emphasis added); see supra notes 71-76 and accompanying text (discussing § 1913(a)).


Finally, the Kansas, Oklahoma, and Indiana courts fail to cite section 1903(1). This section defines child custody proceedings to include voluntary proceedings by using the language "any action," in lieu of the language "any involuntary action," in the definition of termination of parental rights and of adoptive placement. Therefore, section 1903(1) supports the New Jersey approach that the ICWA applies to voluntary adoption proceedings of illegitimate Indian children.

Equally important is Congress' concern that an Indian child maintain a relationship with his Indian tribe. The declared purpose of the ICWA expresses such concern by the use of the language, "placement . . . which will reflect the unique values of Indian culture." The maintenance of an Indian child-tribal relationship becomes more evident when the provisions for placement preferences are considered. Section 1915(a) provides placement preferences specifically for adoption proceedings. Further support for maintaining a tribal relationship can be found in various other provisions that give Indian tribes rights in child custody proceedings.

C. Proper Construction of the ICWA: Including Illegitimate Children

Justice Kauger and the New Jersey Supreme Court properly followed the general rules of construction for federal statutes dealing with Indians. The Bureau of Indian Affairs' Guidelines to State Courts stated that the ICWA be liberally construed in a manner consistent with Congress' preferences to keep Indian families together, to defer to tribal judgment on Indian child custody matters and to place Indian children with their extended fam-

221. Id. § 1903(1).
222. See 25 U.S.C. § 1903(1)(ii); see also supra note 51 (defining termination of parental rights).
223. See 25 U.S.C. § 1903(1)(iv); see also supra note 53 (defining adoptive placement).
226. Id. § 1915.
227. Id. § 1915(a); see also supra note 80 and accompanying text (discussing placement preferences of adoptions).
228. See generally 25 U.S.C. § 1911 (requiring transfer of jurisdiction from state court to tribal court upon petition of Indian child's tribe); id. § 1912 (requiring notice of involuntary proceeding be given to Indian child's tribe); id. § 1914 (allowing Indian child's tribe to petition court to invalidate the child custody proceeding); id. § 1915 (allowing Indian child's tribe to establish different order of preferences for placement); id. § 1919 (allowing Indian tribes to enter with states into agreements regarding child custody proceedings).
ily or Indian tribe when it is necessary to remove them from their homes." The Guidelines further stated that the courts should resolve any ambiguities in the ICWA consistent with the placement preferences.

The United States Supreme Court has addressed the issue of construction of treaties and statutes dealing with Indians. In Choctaw Nation v. United States, the Court determined that treaties with the Indians should be liberally construed as the Indians would have understood them. More recently, the Court stated that doubts concerning the meaning of a treaty with Indian tribes should be resolved in favor of Indians. Furthermore, the Court applied these same canons of construction to legislation passed for the benefit of Indians. The Court reasoned that treaties and legislation dealing with Indians must be considered in light of "the broad policies that underlie them" and the traditional notions of tribal sovereignty. Congress enacted the ICWA as remedial legislation to strengthen the Indian family and tribe. As a result, the statute should be construed so as to fulfill those purposes. The Supreme Court precedent required state courts to follow these canons of construction when construing the ICWA. Therefore, the Kansas, Oklahoma, and Indiana courts clearly failed to construe the ICWA properly.

IV. THE 1987 AMENDMENTS: CLARIFYING THE INTENT OF CONGRESS

Since the enactment of the ICWA, amendments have been introduced. In introducing the 1987 amendments to the ICWA, Senator Evans stated that those who believed the ICWA emphasized the interest of the Indian tribe over the Indian child resisted implementation of the ICWA. Senator Evans further acknowledged that ambiguities inherent within the ICWA contributed to the many judicial disputes over jurisdiction. As a result, among their several stated purposes, the 1987 amendments attempt to clarify

231. Id.
232. 318 U.S. 423 (1943).
233. Id. at 431-32.
236. Id.; see also Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918) (stating that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians").
238. Amendments, supra note 14, at S18,532.
239. See supra note 14 and accompanying text.
240. Amendments, supra note 14, at S18,532 (statement of Sen. Evans).
241. Id.
the original intent of Congress in enacting the ICWA.242

Several provisions would clarify the applicability of the ICWA,243 particularly on the issue of whether the ICWA applies to adoptions of illegitimate Indian children. Section 4(1),244 which defines a child custody proceeding, is directly on point. This section would expressly provide that the ICWA applies to any child custody proceeding involving an Indian child "regardless of whether the child has previously lived in Indian Country, in an Indian cultural environment or with an Indian parent."245 Thus, this section directly opposes the existing Indian family theory. As a consequence, it would require courts following that theory to abandon it.

Similarly, section 4(1)(iv)246 clarifies the extent of the operation of the ICWA with respect to private placements by providing that the term "adoptive placement" includes placements made by private agencies and individuals as well as state agencies.247 Even though the congressional hearings248 indicated abuses by private agencies and individuals, some courts have concluded that Congress intended to apply the ICWA only to state agencies.249 This section would rectify that misconception.

242. Id. at S18,538. Senator Inouye expressed his belief that the amendments are "necessary to achieve the original intent of the Congress when it adopted the [ICWA] in 1978." Id. at S18,539.

243. Other provisions of the 1987 amendments merit consideration, but such consideration is beyond the scope of this Comment. Such sections include: 4(2)-defining domicile, Amendments, supra note 14, at S18,533; 4(10)-expanding the rights of an unwed father who has not established nor acknowledged paternity in involuntary proceedings, id. at S18,534; 4(13)-defining residence, id.; 101(b)-limiting an objection to transfer only if consistent with the best interest of the child as an Indian, id.; 101(b)-limiting the scope of "good cause to the contrary," id.; 101(b)-stating that "parent whose rights have been terminated or who has consented to an adoption may not object to transfer," id.; 103(a)(2)-providing notice to the Indian child's tribe and the non-consenting parent in voluntary proceedings, id. at S18,535; 103(a)(3)-providing that consent to a child custody proceeding fails to establish abandonment of the child, id.; 104(b)-giving federal courts jurisdiction to review final decrees of state courts alleged to be in violation of the ICWA, id.; 105(a)-affirmatively stating that "all placements of Indian children shall seek to protect the rights of Indian children as Indians and the rights of the Indian community and tribe in having its children in its society," id.; 105(e)-infringing on the parents' rights to place the Indian child in a home they request by stating that:

A placement preference expressed by the Indian child's parent or Indian custodian, or a request that the consenting parent's identity remain confidential shall be considered so long as the placement is made with one of the persons or institutions listed in subsections (b) or (c), or one of the exceptions contained in subsection (d) applies.

Id. at S18,536.

244. Amendments, supra note 14, at S18,533.

245. Id.

246. Id.

247. Id.


249. See generally In re Adoption of Baby Boy L., 231 Kan. 199, 204-06, 643 P.2d 168,
Section 4(5)(c), which defines an Indian child, would add the language that “if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered.” In this section, the amendments would resolve the disagreement between the state courts regarding the existing Indian family theory by imputing an existing Indian relationship with the tribe. Another provision of the amendments, section 102(a), would clarify that an involuntary proceeding can involve a preadoptive or adoptive placement as well as a foster care placement or termination of parental rights.

In addition, section 102(e)-(f) of the amendments would change the language of section 1912(e)-(f) from “continued custody of the child” to “custody of the child by the parent.” Once again, the amendments would clarify the intent of Congress in enacting the ICWA by deleting language that implies a requirement of an existing Indian family.

Finally, section 104(a) of the amendments would similarly clarify section 1914 of the ICWA by utilizing a technical amendment. This amendment would change the language from “any parent or Indian custodian from whose custody such child was removed” to “any parent, any Indian custodian from whose custody such child was removed . . . .” By replacing the “or” with a comma, the phrase “from whose custody such child was removed” no longer modifies “parents.” Thus, the change makes it clear that the custody requirement does not apply to parents, thereby removing any implication that an existing Indian family is required before the ICWA applies.

V. Conclusion

Congress clearly intends that the only prerequisite to the operation of the ICWA be the involvement of an Indian child in a child custody proceeding. The Kansas, Oklahoma, and Indiana courts require another prerequisite: an existing Indian family. These courts support this prerequisite by citing to the legislative history and the language of the ICWA. However, they fail to

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250. Amendments, supra note 14, at S18,534.
251. Id.
252. Id.
253. Id.
254. See supra note 212.
255. Amendments, supra note 14, at S18,535.
256. Id.
258. Amendments, supra note 14, at S18,535.
view the legislative history and the language of the ICWA as a whole, but rather examine only selected pieces that support their position. Viewed as a whole, the ICWA clearly includes the adoption of illegitimate Indian children. Thus, the reasoning behind the assertion that a breakup of an existing Indian family must occur as a result of the child custody proceeding before the ICWA applies, is flawed. The New Jersey Supreme Court's decision in Adoption of a Child of Indian Heritage and Justice Kauger's dissenting opinion in Adoption of Baby Boy D. most closely follow the intent of Congress in holding that the ICWA applies to adoptions of illegitimate Indian children voluntarily relinquished shortly after birth.

To date, however, the majority of the state courts follow the existing Indian family theory. To ensure that other courts follow Adoption of a Child of Indian Heritage, Congress should enact the 1987 amendments that clarify the original intent of Congress at the time of the ICWA enactment in 1978. Because the Supreme Court's decision in Mississippi Band of Choctaw Indians v. Holyfield did not directly address this issue, only enactment of these amendments will resolve the split in the state courts and guarantee full implementation of the original intent behind the ICWA unless the Court grants certiorari to a case presenting this issue.

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