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The Indian Child Welfare Act: A Case Update (August 2008-August 2009)

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Indigenous Law & Policy Center Working Paper 2009-05

September 17, 2009

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MICHIGAN CASES

Active Efforts

In re J.L., 438 Mich. 300 (2009)

> From the opinion:
>
> Respondent Cheryl Lee challenges the judgment of the Court of Appeals affirming the termination of her parental rights to her son, JL. *In re Lee*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008, 2008 WL 4603740 (Docket No. 283038). Respondent specifically claims error in the interpretation and application of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et seq. She urges us to adopt the interpretation of the ICWA offered by the dissenting Court of Appeals judge. We affirm the judgment of the *305 Court of Appeals because petitioner the Department of Human Services (DHS), provided timely, affirmative efforts that satisfied the ICWA's "active efforts" requirement, 25 U.S.C. 1912(d). We hold that the ICWA requires the DHS to undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services. The ICWA does not, however, categorically require the DHS to provide services each time a new termination proceeding is commenced against a parent. We further reject respondent's claim that the lower courts applied a conclusive presumption of unfitness based on her past conduct in determining that respondent's continued custody was "likely to result in serious emotional or

physical damage to the child." 25 U.S.C. 1912(f). Finally, we conclude that this determination was supported by evidence beyond a reasonable doubt, as required by 25 U.S.C. 1912(f).

Notice

In re Toia, No. 289465, 2009 WL 2477780 (Mich. App., Aug. 13, 2009)

From the opinion:

Circumstances that give a court reason to believe that a child is an Indian child include (1) any party, tribe, or agency informs the court that the child is an Indian child; (2) any public or state licensed agency involved in child protective services or family support has information suggesting the child is an Indian child; or (3) an officer of the court has knowledge that the child may be an Indian child. *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999). Indian tribes are in a better position to determine questions involving the membership of children who may have some relationship to the tribe, and courts should defer to the tribe's expertise. *Id*. at 447. Once proper notice is provided to the tribe, or to the Secretary of the Interior if the identity of the tribe is unknown, and if the tribe fails to intervene in the proceeding, the burden shifts to the parent to show that the ICWA applies. *See In re TM* (After Remand), 245 Mich App 181, 187; 628 NW2d 570 (2001).

In this case, respondent Hinton informed the trial court at a pretrial hearing that Kayla was of Indian Heritage. The trial court instructed petitioner to make inquiries to the Cherokee and Iroquois nations. However, the record does not disclose whether the appropriate notification was provided or, if so, whether there was any determination by a tribe that Kayla or the other children were Indian children or were eligible for membership in an Indian tribe. Petitioner contends that it received documentation regarding Kayla's Indian heritage, but concedes that it never presented that documentation to the trial court. Despite respondent Hinton's earlier representation that Kayla was of Indian heritage, the trial court never made any findings on the record regarding this matter.

In re Mayberry, No. 284690, 2009 WL 839848 (Mich. App., March 31, 2009)

From the opinion:

In this case, the trial court record shows that notice was given to the Grand Traverse Band of Ottawa and Chippewa Indians, the Muscogee (Creek) Nation, and the Midwest Bureau of Indian Affairs, requesting written verification of the tribal status of the minor child. Responses to these notices were received from the tribes. The Grand Traverse Band of Ottawa and Chippewa Indians noted that the minor child was a non-member and ineligible for Ottawa-Chippewa Indian status. The Muscogee (Creek) Nation stated that the tribal records were examined and the minor child was not considered an Indian child in relationship to the Muscogee (Creek) Nation as defined in the ICWA. These determinations were conclusive. *See In re Fried*, *supra* at 540, *In re TM*, *supra* 191-192, and 44 Fed Reg 67584 (1979).

In re Coyle, No. 286788, 2009 WL 325322 (Mich. App., Feb. 10, 2009)

From the opinion:

Finally, respondent argues that petitioner should have notified the Cherokee tribe, and there was insufficient evidence that any tribe was notified. ***

In the present case, respondent stated during the preliminary hearing that her grandparents were Cherokee Indians. However, she never mentioned the Cherokee tribe again and never objected to references to the Chippewa Tribe of Sault Ste. Marie in several later hearings. Her statement that her father tried to get her grandparents' tribe involved in 2003, followed by references to the Chippewa tribe trying to get involved in 2003, strongly indicated that her grandparents' tribe was actually the Chippewa and she was mistaken when she called it Cherokee. Respondent did not give the trial court reason to believe her children might actually be members of a Cherokee tribe, in light of her repeated failure to object to references to the Chippewa and failure to request that another tribe or the Bureau of Indian Affairs be notified. Respondent also did not question petitioner's assertions that the Chippewa tribe was contacted. Petitioner's unchallenged assertions constitute sufficient evidence that notice occurred. The trial court did not commit any error requiring reversal.

Other Jurisdictions

Active Efforts

In re Interest of Louis S., 17 Neb. App. 867 (2009)

From the court's syllabus:

Although the State should make active efforts in a termination of parental rights proceeding under the Indian Child Welfare Act, if further efforts would be futile, the requirement of active efforts is satisfied.

Jon S. v. State of Alaska Dept. of Health and Social Services, 212 P.3d 756 (Alaska 2009)

From the opinion:

A father challenges a superior court order finding his daughter, an Indian child under the Indian Child Welfare Act (ICWA), to be a child in need of aid and terminating his parental rights. We conclude that the record contains sufficient evidence to support the superior court's findings that: (1) the daughter was a child in need of aid; (2) the father failed to remedy the conduct or conditions placing her at harm; (3) the state met its active efforts burden; (4) returning the daughter to the father would beyond a reasonable doubt be likely to cause her serious emotional harm; and (5) termination of parental rights was in the best interests of the child. We therefore affirm.

And here is the court's conclusion in relation to the ICWA "active efforts" requirement:

We analyze the state's active efforts based on its "overall handling of the case," including efforts by Jon's parole officers. Because the record and testimony show that OCS and Jon's parole officers made active efforts throughout 2005 and 2006, actively continued trying to locate Jon between October 2006 and April 2007, provided visitation with Melissa once Jon was located again, and actively pursued placement with Jon's family from October 2006 through November 2007, we hold that the superior court did not clearly err in finding that the state made active efforts.

In re Nicole B., 976 A.2d 1039 (Md. 2009)

From the dissent:

I disagree with the majority's decision to avoid answering the certiorari question in this case, *i.e.*, whether "reasonable efforts" as used in the Federal statute, differ from "active efforts" as used in the Family Law Article. Second, I do not believe it is appropriate for this Court to usurp the role of the trial court and to make first level findings of fact. The trial court used the wrong standard when it concluded that the Department made reasonable efforts to achieve reunification with the children's parents. Accordingly, I would hold that the ICWA requirement that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have proved unsuccessful is a different standard than that set out in § 5-525 of the Family Law Article of the Maryland Code which requires that reasonable efforts have been made.

In re Vaughn R., 770 N.W.2d 795 (Wis. App. 2009)

From the opinion:

We conclude that 25 U.S.C. § 1912(f) applies even though the child has been placed outside the parental home before the TPR proceeding is filed. Thus, in this case it applies even though Vaughn has been living with foster parents for several years. Because § 1912(f) applies, the County was required to prove beyond a reasonable doubt, by evidence that includes testimony of "qualified expert witnesses," that returning Vaughn to Luis "is likely to result in serious emotional or physical damage" to Vaughn. We conclude the record does not provide a reasonable basis for deciding that the county social worker is a "qualified expert witness" within the meaning of § 1912(f). Accordingly, we reverse and remand for a new trial.

Because the correct burden of proof for the showing required by 25 U.S.C. § 1912(d) will arise on remand, we address the issue. We conclude that, unlike § 1912(f), § 1912(d) does not impose a burden of proof on the states, and, in particular, does not require proof beyond a reasonable doubt for the § 1912(d) showing relating to efforts by the County to provide the prescribed services. Therefore, the instruction to the jury that this showing has to be proved by clear and convincing evidence is a proper statement of the law.

In re K.B., 173 Cal. App. 4th 1275 (2009)

From the opinion:

Nevertheless, his history clearly demonstrates the futility of offering reunification services: He is a registered sex offender with a prior conviction for lewd and lascivious acts on a child under the age of 14. . . . The parents do not suggest any services which might have been offered to the father under the circumstances and we cannot conceive of any services which could usefully be offered to a registered sex offender with a prior conviction for molesting a child and a current finding of molesting a different child. For these reasons, requiring the court to provide services to the father would be at best an idle act which would not further the legislative purposes of ICWA.

State ex rel. C.D., 200 P.3d 194 (Utah App. 2008)

From the opinion:

The juvenile court's December 5, 2007 Findings of Fact, Conclusions of Law, and Adjudication Order is affirmed in part, reversed in part, and the case is remanded for further proceedings. We affirm the juvenile court's ruling that further efforts with Grandfather would be futile. However, we reverse on the placement issue and remand to the juvenile court so that the State can immediately either place the children in accordance with the ICWA's preferences or create a record demonstrating its attempts to comply and good cause for deviating from those preferences.

In re Interest of Shayla H., 764 N.W.2d 119 (Neb. App. 2009)

From the syllabus:

Indian Child Welfare Act: Pleadings. The Indian Child Welfare Act's requirement of "active efforts" is separate and distinct from the "reasonable efforts" provision of Neb. Rev. Stat. § 43-292(6) (Reissue 2008) and therefore requires the State to plead active efforts by the State to prevent the breakup of the family.

Application of ICWA

State ex rel. Juv. Dept. of Jackson County v. J.F.B., 230 Or. App. 106 (2009)

From the opinion:

The issue then is whether, under the circumstances of this case, the juvenile court was required at the August hearing to make the assessments required by ORS 419B.476(2)(a). Mother, for her part, sought reunification at both the June and August hearings. The juvenile court, apparently relying on its earlier findings in the June hearing, did not undertake to reconsider mother's circumstances for purposes of reunification at the time of the August hearing, even though that opportunity through mother's advocacy presented itself. We conclude, in light of the policies of the ICWA to afford an opportunity for reunification at every dispositional step that could result in contributing to the permanent removal of children subject to its protections, that it was incumbent on the juvenile court at the August hearing to either make new findings under ORS 419B.476(2)(a) or to find that the circumstances regarding reunification had not changed since the last hearing held under ORS 419.476(2)(a). Otherwise, the policies articulated in 25 USC sections 1901 and 1902 could be frustrated in a hearing held pursuant to ORS 419.476(2)(b) and (c) by a court's reliance to deny reunification on circumstances that no longer exist at the time of the instant hearing. For that reason, we conclude that the August 2008 judgments are also defective and must also be reversed so that the juvenile court can make the determinations that ICWA contempates.

In re B.R., 176 Cal. App. 4th 773 (2009)

From the opinion:

This appeal presents the issue of whether the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA), applies when the minors' presumed father in a juvenile dependency proceeding alleges that his *adoptive* father has one-quarter ancestry in a federally recognized Indian tribe. We hold that the ICWA notice provisions do apply in these circumstances, and conditionally reverse the juvenile court's order terminating parental rights so that notice of the proceedings may be given to the tribe in question.

In re Adoption of C.D.K., 629 F. Supp. 2d 1258 (D. Utah 2009)

This matter is before the Court on Petitioner's Motion for Summary Judgment, joined by Intervenor Cherokee Nation, on her Petition to invalidate an adoption, and on Respondents' Motion for Partial Summary Judgment. The underlying case

arises out of a relinquishment hearing which occurred in November 2007 (the "Relinquishment Hearing"), at which Petitioner relinquished her parental rights to her biological child, C.D.K., in the Second Judicial District Court of Davis County.

In her Motion, Petitioner claims that, as a matter of law, C.D.K. is an Indian Child, as defined by the Indian Child Welfare Act ("ICWA"), and that the Relinquishment Hearing did not comply with the requirements of the ICWA. Respondents, the adoptive parents, argue in their Motion that Petitioner has failed to establish that C.D.K. is an Indian Child. Because the Court finds that Petitioner has provided sufficient evidence to establish that C.D.K. is an Indian Child pursuant to the ICWA and that the Relinquishment Hearing did not comply with the procedural requirements of the ICWA, the Court will grant Petitioner's Motion for Summary Judgment and deny Respondents' Motion for Partial Summary Judgment.

In re K.P., 175 Cal. App. 4th 1 (2009)

From the opinion:

We decline to extend the ICWA to cover an allegation of membership in a tribe not recognized by the federal government. Neither HHS nor the juvenile court was under a duty to comply with the notice provisions of the ICWA.

In re Trever I., 973 A.2d 752 (Me. 2009)

From the opinion:

The father of Trever I. appeals from a judgment of the District Court (Lewiston, Beliveau, J.) terminating his parental rights. The father argues that the court (1) erred when it terminated his parental rights following the Department of Health and Human Services's (Department) alleged failure to sufficiently investigate the father's claim of Indian heritage and the applicability of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C.S. §§ 1901-1963 (2004), and (2) abused its discretion when it denied his motion to continue the termination hearing. We affirm the judgment.

In re Custody of C.C.M., 202 P.3d 971 (Wash. App. 2009)

From the opinion:

The Mecums also claim both that ICWA requires C.C.M. to be placed according to her "best interests," and that the standards set forth in ICWA, rather than state law, govern this dispute. The Mecums contend that because Mr. Mecum is C.C.M.'s Indian custodian, he has an equal right to custody of C.C.M. under ICWA as does Pomiak. We disagree. …

***

However, ICWA itself provides a solution to this problem. The Act mandates that when either a state or a federal law affords greater protection for either a parent or a custodian, the more protective law shall apply. 25 U.S.C. § 1921. Here, Washington law accords a clear preference for parental custody. Accordingly, we hold that state law, not ICWA, supplies the substantive legal standards governing this nonparental custody dispute between an Indian custodian and a parent. In addition, because a parent's interests in the custody and care of his or her children at stake in a nonparental custody action under chapter 26.10 RCW are equivalent to those implicated in termination and dependency proceedings, we hold that the Mecums must make their case by clear and convincing evidence.

People ex rel. L.O.L., 197 P.3d 291 (Colo. App. 2008)

From the opinion:

Mother asserts the court used the correct standard of proof because she had provided a copy of her grandfather's death certificate to the department, which we infer to be an argument under section 19-1-126(1)(a), C.R.S.2008, that the department did not make statutorily required continuing efforts to determine whether the child is an Indian child. However, although the department has such an obligation, the fact nonetheless remains that no tribe responded within the statutory time stating the child was an Indian child within the meaning of the ICWA. Therefore, as of the date of the termination hearing, the court could not conclude that the child was an Indian child. *See* 25 U.S.C. §§ 1903(4),1912(f); *A.G.-G.*, 899 P.2d at 321. Accordingly, if the department did not make continuing efforts to determine whether L.O.L. was an Indian child based on the grandfather's death certificate, mother should have sought a continuance to require the department to send proper notice with the information in its possession. Because mother did not do so, the trial court was required to apply the clear and convincing burden of proof at the termination hearing. *See A.M.D.*, 648 P.2d at 631.

Based on these errors, we reverse the court's order to the extent it determined the ICWA burden of proof should apply. However, we do not direct the court to hold a new termination hearing based on the facts as they existed. As discussed, should any party believe a motion to terminate is warranted, such motion must be based on current circumstances. *See Francis*, 919 P.2d at 786; *Vincent M.*, 74 Cal.Rptr.3d at 768.

In re Shane G., 166 Cal. App. 4th 1532 (2008)

From the opinion:

Here, Agency's inquiry produced no information Shane was an Indian child. The social worker interviewed the maternal grandmother who indicated Shane's great-great-great-grandmother was a Comanche princess. However, no one in the family ever lived on a reservation, attended an Indian school, participated in Indian ceremonies or received services from an Indian health clinic. Most significantly, the evidence before the court showed the Comanche tribe requires a minimum blood quantum for membership that excludes Shane. Thus, notice to the Comanche tribe was not required. (§ 224.3, subd. (d).)

Burden of Proof

People ex rel. J.I.H., 768 N.W.2d 168 (S.D. 2009)

From the opinion:

The trial court's finding that termination of Father's rights was the least restrictive alternative and in the children's best interests hinged on Father's incarceration. We recognize that "when assessing what options are available to prepare the parent for the return of a child, incarceration narrows the available options." *D.G.*, 2004 SD 54, ¶ 17, 679 NW2d at 502. Nonetheless, "[t]he decision to terminate requires evidence of sufficient magnitude to convince the trial court that the best interests of the children require the breakup of the family unit." *In re S.S.*, 334 NW2d 59, 61 (SD 1983) (emphasis added). "If, on a review of the record, it appears that the state's compelling interest in the well-being and welfare of the children can reasonably be [e]nsured by less intrusive means, we must order that those alternatives first be implemented." *S.R.*, 323 NW2d at 888.

The record indicates that Grandmother was willing to be a long-term placement option for these children. Her home study had been approved, and only one final requirement remained for her to become a registered foster care provider. Grandmother's sister also showed interest in being a placement option. Neither of these two possibilities was explored. Father was scheduled for release from jail in December 2008, which was seven months away from the date of the dispositional hearing. Due to his limited incarceration period, legal guardianship would have been a less restrictive alternative until Father was able to care for his children.

Notably, the children's attorney did not advocate for termination of Father's rights, and it cannot be ignored that the ICWA expert testified that termination of Father's parental rights, at that time, was premature. We agree. Based on the circumstances of this case, the trial court erred in terminating Father's parental rights.

Valerie M. v. Arizona Dept. of Econ. Security, 198 P.3d 1203 (Ariz. 2009)

From the opinion:

In this termination case governed by ICWA, the juvenile court did not err by instructing the jury that the state-law grounds for termination must be proved by clear and convincing evidence and that the Indian child's best interests must be proved by a preponderance of the evidence. We affirm the opinion of the court of appeals.

Existing Indian Family Exception

In re A.J.S., 204 P.3d 543 (Kan. 2009)

From the opinion:

From this point in ICWA interpretation and the development of common law, we are persuaded that abandonment of the existing Indian family doctrine is the wisest future course. Although we do not lightly overrule precedent, neither are we inextricably bound by it. *See Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004). *Baby Boy L.* is ready to be retired.

First, the existing family doctrine appears to be at odds with the clear language of ICWA, which makes no exception for children such as A.J.S. *See* 25 U.S.C. §

1903(4); Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L.REV. 733, 745-51 (2006).

Further, as recognized by the *Holyfield* decision, 490 U.S. at 36-37, 109 S.Ct. 1597 tribal interests in preservation of their most precious resource, their children, drove passage of ICWA; and its expressly declared policy is

> "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of 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, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902.

As counsel for the Cherokee Nation emphasized at oral argument before us, a child removed now from the tribe cannot later be a voice for the tribe.

We also detect illogic in the *Baby Boy L.* opinion's secondary justification for its result, also invoked by the district judge here, that the non-Indian mother's refusal to consent to adoption of her infant by anyone other than the proposed non-Indian adoptive parents inevitably means a non-Indian upbringing for the child. In *Baby Boy L.*, as here, the mother's testimony was evidence of her intention only. That intention extends only as far as the mother's unilateral control. If ICWA applies, a father's fitness to parent and the child's placement will not be governed solely by the mother's expressed desires. The father and the tribe also will be heard, and ICWA's preferences will apply in the absence of "good cause to the contrary." 25 U.S.C. § 1915(a). Although the result reached may be the same as that dictated by the existing Indian family doctrine, it may not be. *See Baby Boy C.*, 27 A.D.3d at 52-53, 805 N.Y.S.2d 313; *In re Alicia S.*, 65 Cal.App.4th 79, 88-89, 76 Cal.Rptr.2d 121 (1998). A.J.S.'s unmarried mother's status as a non-Indian or another factor or set of factors may militate in favor of or against a certain ICWA preference or constitute "good cause" to ignore all of the preferences. We cannot know and neither could the members of this court who decided *Baby Boy L.* Simply put, an Indian family may yet be recognized or created if ICWA is not avoided through the existing Indian family doctrine.

We are also influenced by our sister states' and commentators' widespread and well-reasoned criticism of the doctrine. For example, in *Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313, in which an unmarried Indian mother and non-Indian father attempted to relinquish their parental rights to facilitate their infant's

adoption by non-Indian parents, the court convincingly detailed inconsistencies between the existing Indian family doctrine and the plain language of ICWA, as well as the doctrine's deviation from ICWA's core purpose of "preserving and protecting the interests of Indian tribes in their children."27 A.D.3d at 47, 805 N.Y.S.2d 313. The court said:

> "Because Congress has clearly delineated the nature of the relationship between an Indian child and tribe necessary to trigger application of the Act, judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress and must be rejected....
>
> "Another problem with the [doctrine] is that its acceptance would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*. The Supreme Court made it clear in *Holyfield* that Indian tribes have an interest in applying ICWA that is distinct from that of the child's parents, and that such parents may not unilaterally defeat its application by deliberately avoiding any contact with the tribe or reservation (490 U.S. at 51-52 [109 S.Ct. 1597]). In many respects, that is what occurred in this case. By divorcing herself from tribal life and by putting her child up for adoption away from the reservation immediately after birth, [the mother] singlehandedly destroyed the notion of an "existing Indian family." If the [doctrine] were applied in this instance, [the mother] would have succeeded in nullifying ICWA's purpose at the expense of the interests of the Tribe. However, as *Holyfield* recognized, Congress intended otherwise by specifically mandating that tribal interests be considered ['protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents']; *see also Matter of Baby Boy Doe*, 123 Idaho [464, 470-71, 849 P.2d 925, 931-32 (1993)]; *In re A.B.*,663 N.W.2d [625, 636 (N.D.2003)].
>
> "Nor can we agree ... that 'relinquishing control over a child born to parents uninvolved in Indian life costs the tribe nothing.' [Citation omitted.] Where, as here, [the mother] has rejected Indian life and culture and then, voluntarily relinquished her newborn Indian child to be adopted by a non-Indian couple, the detriment to the Tribe is quite significant-the loss of two generations of Indian children instead of just one.
>
> "The [doctrine] also conflicts with the Congressional policy underlying ICWA that certain child custody determinations be made in accordance with Indian cultural or community standards (*see Holyfield*, 490 U.S. at 34-35 [109 S.Ct. 1597] [one of the most serious failings of the present

> system is that Indian children are removed from natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing]; 25 U.S.C. § 1915(d) [applicable standards 'shall be the prevailing social and cultural standards of the Indian community']).
>
> "The [doctrine] is clearly at odds with this policy because it requires state subjective factual determination as to the 'Indianness' of a particular Indian child or parent, a determination that state courts 'are ill-equipped to make' (*In re Alicia S*., 65 Cal.App.4th at 90, 76 Cal.Rptr.2d at 128). Since ICWA was passed, in part, to curtail state authorities from making child custody determinations based on misconceptions of Indian family life, the [doctrine], which necessitates such an inquiry, clearly frustrates this purpose (*Holyfield* [,490 U.S. at 34-35, 109 S.Ct. 1597]; *Quinn*,[*v. Walters*, 117 Or.App. 579, 584 n. 2, 845 P.2d 206 (1993)]; [*State in Interest of D.A.C*., 933 P.2d 993, 999 (Utah App.1997)])." *Baby Boy C*., 27 A.D.3d at 48-49, 805 N.Y.S.2d 313.

See also Jaffke, 66 LA. L.REV. at 745-58; Atwood, 51 EMORY L.J. at 625-42; Prim, 24 LAW & PYSCHOL. REV. at 118-24; Graham, *" The Past Never Vanishes ": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN. L.REV. 1, 34-43 (1998); Cross, *The Existing Indian Family Exception: Is it Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?* 26 CAP. U.L.REV. 847, 864-90 (1998); Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L.REV. 381, 397-401, 408-28 (1997); Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L.REV. 465, 475-96 (1993); Lehmann, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Child?* 38 CATH. U.L.REV. 511, 533-37 (1989).

Given all of the foregoing, we hereby overrule *Baby Boy L*., 231 Kan. 199, 643 P.2d 168, and abandon its existing Indian family doctrine. Indian heritage and the treatment of it has a unique history in United States law. A.J.S. has both Indian and non-Indian heritage, and courts are right to resist essentializing any ethnic or racial group. However, ICWA's overall design, including its "good cause" threshold in 25 U.S.C. § 1915, ensures that all interests-those of both natural parents, the tribe, the child, and the prospective adoptive parents-are appropriately considered and safeguarded. ICWA applies to this state court child custody proceeding involving A.J.S., and the Cherokee Nation must be permitted to intervene. The contrary rulings of the district judge are reversed, and the case remanded for further proceedings consistent with this opinion.

Expert Witnesses

In re Tamika R., 973 A.2d 547 (R.I. 2009)

From the opinion:

The respondent, Jackie Robinson, appeals from a Family Court decree finding his daughter Tameka to be dependent and committing her to the care, custody, and control of the Department of Children, Youth and Families (DCYF) with discretion as to placement. He argues that DCYF failed to present expert testimony in compliance with the federal Indian Child Welfare Act (ICWA). Mr. Robinson further argues that the trial justice's finding of dependency was not supported by clear and convincing evidence. Finally, he submits that the trial justice's "prosecutorial manner of questioning" deprived him of a fair and impartial trial. After examining the written and oral submissions of the parties, we are of the opinion that the appeal may be resolved without further briefing or argument. For the reasons hereinafter set forth, we vacate the decree of the Family Court.

In re T.W.F., 210 P.3d 174 (Mont. 2009)

From the opinion:

The evidence submitted at the November 3, 2008, termination hearing was summarized above. The District Court received evidence from alcohol counselor Callee Nolden who described M.G.'s failure to meaningfully participate in outpatient treatment, and the serious likelihood that M.G. would continue her pattern of substance abuse. Patsy Oberweiser, who had testified as an Indian cultural expert in several previous hearings involving M.G. and her children, testified that in her opinion returning the children to M.G.'s care would likely result in serious emotional or physical damage. Oberweiser was qualified to present this testimony based upon her own upbringing by her own Indian mother in an Indian community and her affiliation with the Chippewa Tribe that claimed M.G.'s children as members. Christa Anderson, a child protection specialist with DPHHS had worked with M.G. for several years and testified in detail about M.G.'s failure to complete any of the requirements of her treatment plan.

* * *

There was no substantial evidence of any kind to contradict the evidence presented by DPHHS. A reasonable person would have concluded, as the District Court concluded, that beyond a reasonable doubt the children were in need of care and that M.G.'s parental rights should be terminated. Termination of parental rights is a non-jury matter, and it is the responsibility of the district court to weigh the evidence and assess the credibility of the witnesses. *Matter of K.S.*, ¶ 20. After reviewing the evidence, we conclude that the District Court's findings are not clearly erroneous. By the time of the termination hearing, the children had been in foster care for several years, and foster care was the only home the younger boy had known. There is a presumption in Montana law that termination is in the best interests of the child when the child has remained in foster care for fifteen of the most recent twenty-two months. Section 41-3-604, MCA. The children here far exceeded the threshold for triggering that presumption.

Marcia V. v. State, 201 P.3d 496 (Alaska 2009)

From the opinion:

Marcia argues that there are "glaring deficiencies in the qualifications" of the expert witness Tricia Tank with respect to the expert witness requirement of ICWA § 1912(f) because: (1) Tank lacked expertise in Native culture; and (2) Tank lacked sufficient education, training, and experience. We conclude that the first of these claims lacks any merit, because expertise in Native culture is not required in a termination case of this kind. The second claim has some support in ICWA guidelines and legislative history, but Marcia made no objection to the expert's qualifications at trial, and the argument for error is not strong enough to reverse or remand under a plain error standard of review.

Full Faith and Credit

Kaltag Tribal Council v. Jackson, No. 08-35343, 2009 WL 2736172 (9th Cir., Aug. 28, 2009)

From the opinion:

Plaintiffs-Appellees Kaltag Tribal Council ("Kaltag"), Selina Sam and Hudson Sam (collectively, "Kaltag plaintiffs") filed this case in district court against Karleen Jackson, Bill Hogan, and Phillip Mitchell, employees of the State of Alaska, Department of Health and Human Services. The Kaltag plaintiffs alleged

that an adoption judgment issued by the Kaltag court is entitled to full faith and credit under § 1911(d) of the Indian Child Welfare Act ("ICWA"), and that the Alaska employees were required to grant the request for a new birth certificate. The district court granted the Kaltag plaintiffs' motion for summary judgment and denied the Alaska employees' summary judgment motion. The Alaska employees appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The district court's decision that full faith and credit be given to the Kaltag court's adoption judgment is compelled by this circuit's binding precedent. *See Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir.1991). The district court correctly found that neither the ICWA nor Public Law 280 prevented the Kaltag court from exercising jurisdiction. Reservation status is not a requirement of jurisdiction because "[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members." *Venetie*, 944 F.2d at 559 n. 12 (citations omitted).

<u>Indian Custodians</u>

In re Ted W., 204 P.3d 333 (Alaska 2009)

From the opinion:

This appeal arises from the superior court's decision to allow a mother to revoke the Indian custodian status for her child's father, whose own parental rights to the child had already been terminated. The father's status as the child's Indian custodian under the Indian Child Welfare Act was based solely on the mother's temporary transfer of physical care and custody of the child to the father after termination of his parental rights. After the Office of Children's Services (OCS) removed the child from the father and became the child's temporary legal custodian, the mother joined in OCS's motion to terminate the father's status as the child's Indian custodian. The superior court correctly reasoned that because the Indian custodianship was created solely by the mother's temporary placement of the child with the father, that custodianship could be revoked by the mother who acted in concert with OCS as the child's legal custodian. We therefore affirm the superior court's decision.

Intervention

In re A.P., 760 N.W.2d 210 (Iowa App. 2008)

> From the opinion:
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> The Sac and Fox Tribe of the Mississippi in Iowa (Tribe) appeals from the juvenile court's denial of its motion to intervene in children in need of assistance (CINA) proceedings that involve two children it alleges are Indian children within the meaning of Iowa's Indian Child Welfare Act (Iowa ICWA), Iowa Code chapter 232B (2007). Upon our review, we affirm the judgment of the juvenile court.

Jurisdiction

In re C.D.K., No. 08-490, 2009 WL 1743765 (D. Utah, June 18, 2009)

> From the opinion:
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> This matter is before the Court on Petitioner's Motion for Writ of Execution and Motion to Expedite a Hearing on the Return of Custody, and on Respondents' Motion for Stay of Execution Pending Appeal and Approval of Supersedeas Bond. Petitioner, in her Motion for Writ, requests that her biological child, C.D.K., be returned to her immediately, pursuant to her reading of the Court's June 4, 2009 Order granting Summary Judgment. Petitioner also requests, in her Motion to Expedite, that the Court hold a hearing to determine return of custody. Respondents request a stay of execution pending their appeal to the Tenth Circuit. Because the Court finds that it has no further jurisdiction in this case, and because the Court's previous orders do not provide sufficient grounds for immediate return of C.D.K. to Petitioner, the Court will deny Petitioner's Motions. Because the Court does not believe that Respondents are entitled to an injunction of state court proceedings pending appeal, the Court will deny Respondents' Motion, as well.

Notice

In re S.B., 174 Cal. App. 4th 808 (2009)

From the opinion:

This is the third appeal in this matter raising the issue of compliance with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. §1901 et seq.). After the second remand based on inadequate notice, the trial court expressly asked parents‟ counsel to review the notices and voice any objections. Counsel raised no objection, and even after a lengthy continuance to permit careful review of the record, mother‟s attorney asserted she was not an expert on ICWA notices and did not feel competent to assess whether the notices were sufficient. Yet after the delay of another appeal, the parents, through appellate counsel, again argue deficient ICWA notice.

We conclude notice was adequate in this case and affirm the order terminating parental rights. We also state our view that counsel for the parents share responsibility with the Department of Children and Family Services (DCFS) and minor's counsel to advise the trial court of any infirmities in these notices in order to allow for prompt correction and avoid unnecessary delay in the progress of the dependency case.

People ex rel. N.D.C., 210 P.3d 494 (Colo. App. 2009)

From the opinion:

P.R.D. (mother) appeals from the judgment terminating her parent-child legal relationship with her daughter, N.D.C. She asserts the judgment should be reversed because (1) the Denver Department of Human Services (the department) did not send notice to her tribe, the Oglala Sioux (the tribe), in compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2001); and (2) the juvenile court did not comply with several substantive provisions of the ICWA. We conclude (1) the department erred by not filing the notices or the return receipt cards with the court and such errors were not harmless because there was no evidence in the record that the tribe knew mother was an enrolled tribal member or had lived on the reservation; and (2) the subsequent notices sent by the department did not comply with the ICWA.

In re Jeremiah G., 172 Cal. App. 4th 1514 (2009)

From the opinion:

We publish this opinion to emphasize, again, what we thought that our court made clear in *In re O.K.* (2003) 106 Cal.App.4th 152. In a juvenile dependency proceeding, a claim that a parent, and thus the child, "may" have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information that would reasonably suggest the minor has Indian ancestry. Here, the assertion that there was a "possibility" the great-grandfather of the minor's father "was Indian," without more, was too vague and speculative to require ICWA notice to the Bureau of Indian Affairs. (*Id.* at p. 157.) This is particularly so in this case because the minor's father, who made the assertion, later retracted it, telling the juvenile court that he "didn't actually have [Indian ancestry]." Thus, mother's appellate claim of ICWA error lacks merit.

In re R.R., Jr., __ S.W.3d __, 2009 WL 736761 (Tex. App. 2009)

From the opinion:

Mother and Father appeal from a judgment terminating their parental rights to R.R. and V.R. Mother asserts as her sole issue, "Does the Indian Child Welfare Act ['ICWA' or 'the Act'] apply to this case?" Father raises two issues: in his first issue, he challenges the factual sufficiency of the evidence to support the finding that termination of his parental rights was in the best interest of R.R. and V.R., and in his second issue, he argues that the trial court erred by not granting a new trial in light of evidence that the ICWA may apply. We will overrule Father's first issue. Because, according to published guidelines that we are to give great weight to, the trial court here had reason to know that Indian children were involved, specific statutory notices containing specific statutorily defined information were required to be sent to specific individuals. Although the Texas Department of Family and Protective Services ("TDFPS") sent out notices, those notices did not comply with the statutory requisites. Accordingly, we will abate this appeal and remand this case to the trial court so that proper notice may be provided to the proper individuals and so that, after such notice, the trial court may conduct a hearing and make a determination as to whether R.R. and V.R. are Indian children under the ICWA.

In re K.M., 172 Cal. App. 4th 115 (2009)

From the opinion:

The Agency gave notice to the tribes identified by K.M.'s grandmother and provided the names of K.M.'s grandfather and grandmother and great-grandmother and great-grandfather and all other information the Agency was able to obtain from mother and grandmother. The record shows the Agency attempted on several occasions to elicit further information from the child's family, but was unsuccessful due to the family's hostility toward the Agency. In sum, the Agency did all that can or should be reasonably expected of it to meet its obligation to the child, to the family, to the tribes and to the court.

We have not been cited to and we have not found any case that requires the Agency to make further inquiry in these circumstances. Based on the information provided by the child's maternal grandmother, the Agency notified several Cherokee and Choctaw tribes. Implicit in appellant's argument is that the maternal great-grandmother might have provided information about possible heritage in some other Indian tribe. However, the Agency's request for information needed to contact the great-grandmother was refused. ICWA does not require further inquiry based on mere supposition. (*See, e.g., In re Levi U.*(2000) 78 Cal.App.4th 191, 199, 92 Cal.Rptr.2d 648 [the agency is not required to conduct an extensive independent investigation or to "cast about, attempting to learn the names of possible tribal units to which to send notices"].) The Agency was not required to make further inquiries.

In re E.W., 170 Cal. App. 4th 396 (2009)

From the opinion:

Appellant V.P. (Mother) is the mother of E.W. and P.W. Mother appeals from the juvenile court's order terminating her parental rights at a hearing held under Welfare and Institutions Code section 366.26 held on May 13, 2008.1 Mother makes a three-fold challenge under the Indian Child Welfare Act (ICWA): 1) DPSS did not provide proper notice to the Indian tribes; 2) DPSS did not receive responses from all of the noticed tribes or from the BIA; and 3) the juvenile court did not make a finding that ICWA did not apply. As discussed below, we find that any error was not prejudicial and so affirm the court's orders.

<u>Placement Preferences</u>

In re G.L., No. D054257, __ Cal. Rptr. 3d __, 2009 WL 2871877 (Cal. App. 4th Dist. 2009)

From the opinion:

Michael L. appeals a judgment declaring his minor daughter, G.L., a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) and (b), and removing G.L. from parental custody. Michael, an enrolled member of the Viejas Band of Mission Indians (Viejas tribe), contends the jurisdictional findings and dispositional order must be reversed because the court and the San Diego County Health and Human Services Agency (Agency) did not comply with the notice provisions of the Indian Child Welfare Act of 1978 (25 U.S.C., § 1901 et seq.) (ICWA) affecting the rights of the paternal grandmother, Mary W., who was G.L.'s Indian custodian. Michael further contends the court erred by declining to place G.L. with Mary under ICWA's placement preferences.

We conclude ICWA's notice requirements for an Indian custodian were not violated, and to the limited extent Mary's rights as G.L.'s Indian custodian were implicated, any error was harmless. We further conclude substantial evidence supports the court's finding that good cause existed to deviate from ICWA's statutory placement preferences. Accordingly, we affirm the judgment.

In re M.B., 204 P.3d 1242 (Mont. 2009)

From the opinion:

The District Court did not abuse its discretion in determining good cause did not exist to deviate from the placement preferences in ICWA and in placing the children with the Nesbitts. The District Court's findings and conclusions were supported by substantial credible evidence that there was not good cause to deviate from ICWA's placement preferences or to conclude the Nesbitts did not fit into the definition of "extended family member" as contemplated by ICWA.

Tribal Court Transfer

In re Welfare of R.L.Z., No. A09-0509, 2009 WL 2853281 (Minn. App., Sept. 8, 2009)

From the opinion:

On appeal from the district court's denial of a tribe's motion to transfer this proceeding to terminate parental rights to tribal court, appellant Leech Lake Band of Ojibwe (the Band) argues that good cause to deny its motion did not exist because: (a) the Band filed its motion promptly after receiving notice of the proceedings, which were not at an advanced stage at that time; (b) the record before the district court did not indicate that transfer would create undue hardship on the parties or the witnesses; and (c) the district court improperly based its denial of the Band's motion on the child's best interests. We reverse.

In re Interest of Leslie S., 17 Neb. App. 828 (2009)

From the opinion:

Upon our de novo review, we are unable to say that the juvenile court abused its discretion in denying the motion to transfer. One of the stated circumstances set forth in the nonbinding regulations noted above is clearly present in this case; namely, the advanced stage of the proceeding. Francis did not file the motion to transfer until well after 2 years following the filing of the juvenile petition, during which time Francis did very little to participate in the case. At the time of the hearing on this motion to transfer, proceedings had begun to terminate both parents' parental rights. In addition, the fact that other cases involving some of the children were to remain in the juvenile court is essentially a forum non conveniens matter, which is a valid basis for good cause to deny transfer. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005).

In re Welfare of Children of R.A.J., 769 N.W.2d 297 (Minn. App. 2009)

The court's syllabus:

The district court had jurisdiction to vacate its order transferring a child-welfare proceeding to tribal court before tribal court proceedings commenced, when the district court found that "misrepresentations were intentionally and wrongfully advanced [to the district court] to gain [its] agreement to transfer" the proceeding.

And an excerpt detailing the "misrepresentations" leading to the vacature of the court's transfer:

Leading up to the TPR trial, the band, the GAL, and the district court discussed the possibility of transferring the proceeding to tribal court. An agreement was reached and the district court filed an order transferring the proceeding to tribal

court on December 2, 2008 (the transfer order). The transfer order set forth, as the basis for the agreement, the GAL's withdrawal of her objections to transfer based on the band's agreement to: (1) immediately file a permanency petition in tribal court; (2) immediately pursue permanent placement of the children; (3) oppose placement with V.J. and any other member of R.A.J.'s immediate family; (4) maintain Naomi Paulson as the case manager; and (5) maintain Courtney Haskins as the GAL until permanent placement of the children has occurred. The transfer order also specifically stated that "[u]pon acceptance of jurisdiction by the Tribal Court, jurisdiction in this case shall be terminated."

Three days later, on December 5, 2008, the GAL moved to stay the transfer order on the ground that the band breached the conditions for transfer. Specifically, the GAL affidavit claimed that the band had terminated Naomi Paulson as the case manager and that tribal family services intended to remove the children from their Native American foster home. Based on the GAL's motion, on December 8, 2008, the district court concluded there was cause to find that fraud was committed on the court, and the court temporarily vacated its transfer order pending a hearing to show cause on December 18, 2008.