

THE CONTINUED PROTECTION OF INDIAN CHILDREN AND FAMILIES AFTER *ADOPTIVE COUPLE v. BABY GIRL*: WHAT THE CASE MEANS AND HOW TO RESPOND

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On September 23, 2013, Dusten Brown hugged his four-year-old daughter, Veronica, and said goodbye.¹ Both Dusten and his daughter are Cherokee Nation citizens. Veronica was turned over to a Cherokee County (Oklahoma) sheriff's deputy, and a Cherokee Nation marshal escorted her to a neutral location, and gave her to Melanie and Matt Capobianco, a non-Native couple living in South Carolina.² The Capobiancos' attempted adoption of Veronica had been denied two years earlier.³ However, that decision had been reversed, and an adoption decree entered by a South Carolina family court, as required by a highly

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¹ Gabe Gutierrez & M. Alex Johnson, "Baby Veronica" Taken to Adoptive Parents after High Court Lifts Order, U.S. NEWS ON NBC NEWS (Sept. 24, 2013), <http://www.nbcnews.com/news/us-news/baby-veronica-returned-adoptive-parents-after-oklahoma-high-court-lifts-v20665873> (last visited Apr. 22, 2014).

² *Id.*

³ *Adoptive Couple v. Baby Girl*, 398 S.C. 625(2012), reh'g denied (Aug. 22, 2012), cert. granted, 133 S. Ct. 831 (U.S.S.C. 2013) and rev'd, 133 S. Ct. 2552 (U.S.S.C. 2013).

criticized South Carolina Supreme Court decision issued after remand of the case from the United States Supreme Court. That decision prohibited the family court from holding a hearing on Veronica's best interests.⁴

This was not just a devastating loss of a child for Dusten and his family; this was the loss of a child for the Cherokee Nation and all of Indian Country. In tribal communities, children are not seen as a possession of their legal parents—a construction many authors posit in their analysis of Western laws⁵—but rather as the collective responsibility of the tribe.⁶ Veronica, however, is just one of hundreds of American Indian and Alaska Native children each year who are lost to their families, their tribes, and their cultures⁷—in spite of the Indian Child Welfare Act

⁴ *Adoptive Couple v. Baby Girl*, 404 S.C. 483, *order vacated on reh'g*, 404 S.C. 490 (2013).

⁵ *E.g.*, Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CDZ L. R. 225 (2010); Justin Witkin, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113 (1995); Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

⁶ TERRY L. CROSS, NAT'L INDIAN CHILD WELFARE ASSOC., *CROSS CULTURAL SKILLS IN INDIAN CHILD WELFARE: A GUIDE FOR THE NON-NATIVE PRACTITIONER* 4, 17-18 (2004).

⁷ Although progress has been made as a result of ICWA, recent analyses of national child welfare data indicate that the out-of-home placement of American Indian and Alaska Native children remains significantly higher than the out-of-home placement of non-Native children and is disproportionate to the percentage of Native youth in the general population. *See, e.g.*, Robert B. Hill, , *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels, 2007*, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, at 11-12, *available at* <http://www.cssp.org/publications/child-welfare/alliance/an-analysis-of-racial-ethnic-disproportionality-and-disparity-at-the-national-state-and-county-levels.pdf> (last visited Apr. 22, 2014) (finding that nationally Native children are over four times more likely to be placed in foster care than similarly situated white children in the child welfare system); Alicia Summers, Steve Woods, & Jesse Russell, *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care*, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 7, 14, 35, 38 (2012), *available at* <http://my.ncjfcj.org/resource/pdfdownload.ashx?qCode=YceaHAXmEAtA> (last visited Apr. 22, 2014).(finding that although Native children make up .9 percent of the United States population they make up 1.9 percent of all children in foster care. This report's state by state assessment further illuminates the severity of the continued problem: for example, although Native children make up 1.4 percent of the children in Minnesota, they are 15.2 percent of the children in Minnesota's foster care system; although they are 17.7 percent of the children in Alaska, they are 51.4 percent of the children in Alaska's foster care system; and although they are 9.4 percent of the children in Montana, they are 37.3 percent of all children in Montana's foster care system). Recent national adoption data

(ICWA), a law whose purpose is to keep Indian children with their families and tribes whenever possible.⁸

This article seeks to correct the most common misperceptions of the facts of the case, the decision of the Court, and the implications of this decision. The article first provides a broad overview of the ICWA and the decision in *Baby Girl*. Part one will review the facts and procedural history of this case, with particular attention being paid to those facts misrepresented by the media. Part two of this article will review the *Baby Girl* decision and discuss the potential consequences of the case for the future interpretation of ICWA. Parts three and four assess how current and future state laws and tribal-state agreements may affect the impact of the *Baby Girl* decision on future child custody proceedings

I. OVERVIEW

In large part, Congress enacted ICWA in response to studies by the Association on American Indian Affairs (AAIA).⁹ These studies documented that Indian children were being placed in foster care and for adoption far more frequently than non-Native children.¹⁰ Indian foster care placement rates ranged by state from 2.4 to 22.4 times the non-Native rate, with the percentage of Indian children placed in non-Native foster homes ranging from 53 percent to 97 percent.¹¹ Nationwide, “[t]he adoption rate of . . .

analyses also indicate that the adoption of Native youth into non-Native homes remains commonplace. See, e.g., Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008 in ADOPTION FACTBOOK V*, 109 (2011), available at <https://www.adoptioncouncil.org/publications/adoption-factbook.html> (last visited Apr. 22, 2014) (reporting that in 2008 more Native children in adoptive placements lived in non-Native adoptive homes than Native adoptive homes).

⁸ 25 U.S.C. § 902 (2006) (stating, “it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families”); see also, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 60, (1989) (stating, ICWA is “based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected.”).

⁹ Marc Mannes, *Factors and Events leading to the Passage of the Indian Child Welfare Act*, in *A HISTORY OF CHILD WELFARE*, 257, 259 (1996).

¹⁰ *Id.*; *Holyfield*, 490 U.S. at 32.

¹¹ *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong., 539, available at <http://www.narf.org/icwa/federal/lh/hear080477/hear080477.pdf> (last visited May 15, 2014) [hereinafter 1977 Senate Hearing].

Indian . . . children was eight times that of non-Native children [and] [a]pproximately 90% of the . . . Indian placements were in non-Native homes.”¹² In Washington State, the most extreme case, the Indian *adoption* rate was 18.8 times the non-Native rate.¹³ Overall, the evidence revealed that “25–35% of . . . Indian . . . children had been separated from their families and placed in foster homes, adoptive homes, or institutions.”¹⁴ Congress found that this extraordinary and unwarranted rate of placement, in out-of-home non-Native households, was not in the best interests of Indian children, families, and tribes.¹⁵

¹² *Holyfield*, 490 U.S. at 33.

¹³ 1977 Senate Hearing, *supra* note 11, at 539.

¹⁴ *Holyfield*, 490 U.S. at 32.

¹⁵ *Id.* at 49–50; 25 U.S.C. § 1901(3) (2006). Although concerns about involuntary removals by state agencies were a major impetus for ICWA, it is clear, based upon the evidence it considered, that “voluntary” adoptions of Indian children were also of great concern to Congress. As Senator Abourezk observed, a major problem ICWA was designed to correct was that: “[p]artly because of the decreasing numbers of Anglo children available for adoption and changing attitudes about interracial adoptions, the demand for Indian children has increased dramatically.” 123 Cong. Rec. 21043 (1977). Senator Abourezk’s statement was an accurate reflection of the hearings, which were replete with testimony about both public and private agencies and private attorneys and their overzealous pursuit of Indian children for adoption by non-Natives. See, e.g., Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 61 [hereinafter 1974 Senate Hearing](referring to the adoption system as a “grey market” because “there’s tremendous pressure to adopt Indian children, or have Indian children adopted out”) (testimony of Bertram Hirsch for AAIA), *Id.* at 161 (calling for “an investigation of agencies who deal with the Indian adoptions and make them accountable for the methods they use for transporting Indian children across the state lines and the Canadian borders”) (testimony of Esther Mays, Native American Child Protection Council); 1977 Senate Hearing, *supra* note 11, at 359, *viz.*,

Private adoption . . . process involves doctors and private attorneys who arrange for adoptions of their Indian client’s children to a non-Native through their attorney directly through a court . . . All of us are aware of the adoption black market that has blossomed due to the effects of modern family planning efforts. Some people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption. (statement of Don Milligan, State of Washington, Department of Social and Health Services)

Particular concerns were expressed about the failure of adoption agencies to utilize Indian families for placement. 1974 Senate Hearing, at 61. (“[W]elfare agencies tend to think of adoption too quickly without having other options available . . . Once you’re at the point of thinking about adoption . . . welfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes.”) (testimony of Dr. Carl Mindell, a child psychiatrist at Albany Medical College); *Id.* at 116.

Dusten's relinquishment of Veronica to the Capobiancos took place after lengthy litigation. The child was initially placed with the family by the birth mother, Christine Maldonado, in September 2009.¹⁶ In hearings before the South Carolina Family Court, the court applied ICWA and transferred physical and legal custody of Veronica to her father in December 2011.¹⁷ The South Carolina Supreme Court affirmed in July 2012.¹⁸

By a 5-4 vote, the United States Supreme Court reversed the South Carolina Supreme Court decision and remanded the case for further proceedings.¹⁹ Upon remand, the South Carolina Supreme Court ordered the Family Court to issue an adoption order in favor of the non-Native adoptive family without any further hearings.²⁰ The litigation finally ended on September 23, 2013, with the Oklahoma Supreme Court lifting a stay on an Oklahoma circuit court's order recognizing the orders of the South Carolina family court.²¹

("The standards that have been established by adoption agencies have created an additional burden . . . as they are white status quo oriented . . . As you well know, this automatically leaves the Indian out.") (statement of Mel Sampson, Northwest Affiliated Tribes); 1977 Senate Hearing, *supra* note 11, at 271 ("Through various ways, the State of Washington public assistance and private placing agencies can completely go around the issue and place without contact to that child's tribe, until the action is completed and irreversible", noting that of 136 Colville adoptions in the last 10 years, only 20 went to Indian families and 31 were out-of-state.) (testimony of Virgil Gunn, Colville Business Council).*Id.* at 147 (testimony of Leon Cook).

¹⁶ *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 633 (2012), reh'g denied (Aug. 22, 2012), *cert. granted*, 133 S. Ct. 831 (U.S.S.C. 2013) and *rev'd*, 133 S. Ct. 2552 (U.S.S.C. 2013).

¹⁷ Michael Overall, *Baby Veronica Case: Father to End Custody Fight*. TULSA WORLD (Oct. 11, 2013 at 12:00 AM), http://www.tulsaworld.com/news/baby-veronica-case-father-to-end-custody-fight/article_13efd122-a083-5e76-9533-a2aa601ad100.html (last visited Apr. 22, 2014).

¹⁸ *Baby Girl*, 398 S.C. at 625.

¹⁹ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557, 186 L. Ed. 2d 729 (U.S.S.C. 2013).

²⁰ *Adoptive Couple v. Baby Girl*, 404 S.C. 483, *order vacated on reh'g*, 404 S.C. 490 (2013).

²¹ Overall, *supra* note 17. (last visited Apr. 2014) (providing a complete timeline of case events).

As this case proceeded up and then down the court system, it attracted national attention from media outlets such as the Dr. Phil show²² and Anderson Cooper 360.²³ Unfortunately, most of the media coverage was misleading, presenting an inaccurate and one-sided perspective on the facts of the case and ICWA—limited largely to the perspective of the prospective adoptive parents.²⁴ Many of the descriptions of the Supreme

²² *The Dr. Phil Show: Adoption Controversy: Battle Over Baby Veronica* (CBS television broadcast, June 13, 2013); *The Dr. Phil Show: Reunion/Aftermath: Baby Veronica* (CBS television broadcast, Oct. 29, 2013).

²³ *Anderson Cooper 360: The Baby Veronica Story* (CNN television broadcast Feb. 21, 2012); *Anderson Cooper 360: Court Gives Baby Veronica to Biological Father* (CNN television broadcast, July 27, 2012).

²⁴ One of the biggest media misperceptions of this case is that Veronica was torn from her adoptive home. See, e.g. Jenny Kane, *American Indian Children's Welfare in Question with Adoptions*. THE DAILY TIMES, (Jan. 13, 2013), available at http://www.daily-times.com/ci_22367955/american-indian-childrens-welfare-question-adoptions (last visited Apr. 22, 2014) ("In the current Supreme Court case, Matt and Melanie Capobianco are fighting to get back custody of a little girl they legally adopted even before she was born. The biological mother had agreed to the adoption, and the father signed away his rights."); Andrea Poe, *South Carolina Supreme Court Permits Biological Father to Take Two Year-Old Daughter from Her Adoptive Parents*, HUFFINGTON POST (Aug. 23, 2012, 10:20 PM), http://www.huffingtonpost.com/andrea-poe/veronica-capobianco-case_b_1826591.html (last visited Apr. 2014) ("The state of South Carolina finalized the adoption and terminated Brown's rights as a father for lack of action on his daughter's behalf . . . At that time, Veronica, then an infant, legally became the daughter of the Capobiancos.") In fact, the Capobiancos were a prospective adoptive couple. When Dusten was awarded custody of Veronica in December 2011, no adoption had been finalized. Another misperception was that the father waived his parental rights. See, e.g. *Id.* ("Ordinarily such a case would be thrown out since it's widely believed that once a parent's rights are waived they stay waived"); *Anderson Cooper 360: The Baby Veronica Story* (CNN television broadcast Feb. 21, 2012) (Anderson Cooper: "The biological father did waive his rights, apparently early on"). Father did exchange text message with the mother and sign an "Acceptance of Service and Answer of Defendant" but not a waiver of his parental rights; immediately after signing he filed paperwork to challenge the adoption and establish custody of his daughter. Finally, the media inaccurately portrayed the purpose and effect of ICWA. See, e.g., Daily Mail Reporter, *The Couple Fighting to See Native American Girl, 3, Who They Adopted at Birth But Were Ordered to HAND BACK to Biological Father Because of 'Tribal Rights'*, MAIL ONLINE (Dec. 25, 2012, 10:37 PM) <http://www.dailymail.co.uk/news/article-2253065/Couple-adopted-Native-American-girl-3-birth-ordered-hand-biological-father-tribal-rights.html> (last visited Apr. 14, 2014) ("While family courts usually base their decision on the best interest of the child, the 1978 law notes other factors should be considered and the tribes interest in the child is equal to that of the parents."); Andrea Poe, *South Carolina Supreme Court Permits Biological Father to Take Two Year-Old Daughter from Her Adoptive Parents*, HUFFINGTON POST (Aug. 23, 2012, 10:20 PM), http://www.huffingtonpost.com/andrea-poe/veronica-capobianco-case_b_1826591.html (last visited May 15, 2014) ("Native American children

Court's decision have also been inaccurate and failed to take into account important nuances in the decision.²⁵ The subsequent misreading of the

who need permanent homes and families are at highest risk if South Carolina's interpretation of the Indian Child Welfare Act stands.”).

²⁵ A press release from the American Academy of Adoption Attorneys states: “Adoption professionals across the country have wrestled for years over the question of whether ICWA applies to voluntary adoption proceedings where the unwed father is Indian and the mother is not. The Court's decision today clears up much of that confusion.”, Press Release, AM. ACAD. OF ADOPTION ATTORNEYS, *Statement of the American Academy of Adoption Attorney Regarding Adoptive Couple v. Baby Girl Decision from United States Supreme Court*, (June 25, 2013), http://www.adoptionattorneys.org/system/resources/W1siZiIsIjIwMTMvMDYvMjUvMTdfMTZfMTVfMjkxX0FBQUFfUHJlc3NfUmVsZWZzZV9JQ1dBXzZfMjVfMTNfLnBkZiJdXQAA_AA_Press_Release_ICWA_6-25-13%20.pdf (last visited Apr. 22, 2014). This implies that this decision invoked the Existing Indian Family Exception and that all children with Indian fathers and non-Indian mothers are affected by this decision, both of which are untrue. See *infra* Part II(d) (1) & (3). The National Council for Adoption provided a press release the day of the decision which characterized the decision this way:

“The Court chose to prioritize and protect the best interests of children, preserving culture as a priority, but promising a balanced interpretation that allows a child's broader best interests be considered” Press Release, NAT'L COUNCIL FOR ADOPTION, *Adoptive Couple v. Baby Girl Opinion: A Victory for Children and Families* (June 25, 2013), https://www.adoptioncouncil.org/images/stories/062513_Adoptive_Couple_v_Baby_Girl_Opinion_A_Victory_for_Children_and_Families.pdf (last visited Apr. 22, 2014). The decision however, does not discuss the best interest of children and by narrowing the application of one of the most culturally important provisions of ICWA—the placement preferences provision – it did little to prioritize culture. See *Infra* Part II(c).

The National Conference on State Legislatures describes the holding in the case this way:

In a 5-4 decision, the court sent the case back to the South Carolina court, ruling that ICWA did not apply in this case. They reasoned that because the father had relinquished his rights before the child's birth and before the adoption agreement between the mother and adoptive couple had been struck, there was no violation of ICWA. The justices were presented with two different interpretations of the law. The biological father's attorneys argued that the law applies whenever the court is considering the termination of parental rights for a Native American parent. The couple who wanted to adopt the baby contended the law was originally passed to prevent Indian children from being removed from their homes by government officials against the will of the biological parents. The majority went with the second interpretation.

The U.S. Supreme Court and the Indian Child Welfare Act, NAT'L CONG. OF STATE LEG. (Aug. 5, 2013), <http://www.ncsl.org/research/state-tribal-institute/the-supreme-court-and-the-indian-child-welfare-act.aspx> (last visited Apr. 22, 2014). This misstates the actions of the father who never legally relinquished his rights. See *infra* Part I. It also misstates the holding of the court which found that ICWA remains relevant in private adoption cases, but held that two provisions do not

decision by the South Carolina Supreme Court on remand, where it mandated the adoption of Veronica without a hearing on her best interests, is a particularly tragic example of the potential for the United States Supreme Court decision in this case to be misinterpreted.²⁶

As Veronica is an “Indian child” defined by ICWA,²⁷ this case and particularly the Supreme Court decision, *Adoptive Couple v. Baby Girl*,²⁸ has major implications for future interpretations of ICWA and the treatment of American Indian and Alaska Native children in both the private adoption and public child welfare system. Any extension of the Court’s decision beyond its facts and the context of private adoption will have a substantial impact upon the rights of fathers and extended families of Indian children and tribes.

This case not only impacts this Indian child, family, and tribe, but also raises fundamental questions about the adoption system in this country and the rights of birth fathers and their families, vis-à-vis those of prospective adoptive parents. Although this case specifically deals with the attempted adoption of an Indian child covered by ICWA, the circumstances of this adoption are not unique to Indian children, fathers, and families, and raise larger issues of adoption policy. One critical issue is whether state law should promote “stranger” adoptions when birth fathers and families are available, fit, and willing to raise the child who is the subject of the proposed adoption. The decision by the Supreme Court, although limited to the application of ICWA, may be indicative of the attitude of the Court toward the rights of fathers generally.²⁹

apply to fathers who do not have physical or legal custody at the time of the adoption. See *infra* Part II.

²⁶ *Adoptive Couple v. Baby Girl*, 404 S.C. 483, order vacated on reh'g, 404 S.C. 490(2013).

²⁷ *Adoptive Couple v. Baby Girl*, 133 S.Ct. at 2557 n1. ICWA defines “Indian child” [to] mean[] any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1902(4) (2006).

²⁸ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558, 186 L. Ed. 2d 729 (U.S.S.C. 2013).

²⁹ See *id.* at 2572 (Scalia, J., dissenting).

I. THE FACTS AND PROCEDURAL HISTORY OF *ADOPTIVE COUPLE V. BABY GIRL*

Adoptive Couple v. Baby Girl involved the attempted adoption of a young Cherokee girl, Veronica, by a couple in South Carolina, the Capobiancos.³⁰ At the time of Veronica's conception, her mother Christine Maldonado, who is not a citizen of an Indian nation, and her father Dusten Brown, a Cherokee Nation citizen, were engaged to be married.³¹ Upon learning of the pregnancy, Dusten sought to move up the date of the marriage.³² The mother refused, at which point the relationship *deteriorated*, and the engagement was broken off.³³ Shortly thereafter, the mother sent Dusten a text message asking if he would relinquish his parental rights, and he sent her a text message agreeing to do so.³⁴ Dusten testified, however, that during this exchange he believed that he was relinquishing his rights to the *mother*.³⁵

During the pregnancy, the birth mother decided to put her child up for adoption without informing Dusten.³⁶ She arranged for a private adoption with a South Carolina couple.³⁷ Dusten did not know that she was planning to place the child for adoption.³⁸ If he had known, he testified that he would have never sent the text relinquishing his rights.³⁹

The mother informed her attorney of Dusten's Cherokee heritage.⁴⁰ As required by the Oklahoma state ICWA statute,⁴¹ her attorney contacted

³⁰ 133 S.Ct. at 2557.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2558. "Father explained: 'In my mind I thought that if I would do that I'd be able to give her the time to think about this and possibly maybe we would get back together and continue what we started.'" *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at n. 5.

⁴⁰ *Id.* at 2558.

⁴¹ OKLA. STAT. tit. 10 § 4.40 (2012) states:

In all Indian child custody proceedings of the Oklahoma Indian Child Welfare Act, *including voluntary court proceedings* and review hearings, the court shall ensure that the district attorney or other person initiating

the Cherokee Nation to determine if Dusten was a citizen and if the infant was eligible for membership in the Tribe,⁴² but the attorney misspelled Dusten's name and provided the wrong date of birth for Dusten—information essential to determine citizenship—and therefore the application of ICWA.⁴³ Based upon this misinformation, the Cherokee Nation responded that it could not verify the father's membership.⁴⁴

Without consideration of ICWA or notice to Dusten, Veronica was placed at birth in a *pre-adoptive* placement with the Capobiancos, a non-Native South Carolina couple.⁴⁵ An adoption petition was filed in South Carolina a few days later.⁴⁶

Because the child was born in Oklahoma, it was necessary for the child to be placed in South Carolina through the Interstate Compact on the Placement of Children (ICPC).⁴⁷ On the ICPC form, it was not revealed

the proceeding shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by certified mail return receipt requested.”

Id. (emphasis added).

One of the largest flaws in the federal ICWA is the notice provision, which excludes voluntary adoption proceedings. 25 U.S.C. § 1912(a)(2006). Of note, although tribes are not guaranteed notice under ICWA in voluntary proceedings, they do retain the right to intervene in voluntary Termination of Parental Rights proceedings. 25 U.S.C. § 1911 (c) (2006) (stating: “[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.”) At least one court has questioned whether the purposes of the federal act can be met without notice to the tribe in voluntary proceedings. *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007). A number of other states have enacted laws to close this “loophole.” See, e.g., IOWA CODE § 232B.5(8) (2003); MINN. STAT. § 260.761(3) (1999).

⁴² *Baby Girl*, 133 S. Ct. at 2558.

⁴³ *Id.*

⁴⁴ *Id.* Cherokee Nation's response also stated “[a]ny incorrect or omitted family documentation could invalidate this determination.” *Baby Girl*, 133 S.C. at 631. In addition, Mother testified that she told her attorney that the letter was incorrect because she knew Dusten to be an enrolled member. *Id.* Once the Nation received accurate information, it later affirmed that the father was a member of the tribe and that Veronica, his newborn daughter, was eligible for membership. *Baby Girl*, 133 S. Ct. at 2559.

⁴⁵ *Id.* at 2559.

⁴⁶ *Id.*

⁴⁷ *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 631(2012), reh'g denied (Aug. 22, 2012), *cert. granted*, 133 S. Ct. 831 (U.S.S.C. 2013) and *rev'd*, 133 S. Ct. 2552 (U.S.S.C. 2013).

that Veronica was “Native American.”⁴⁸ If that document had been accurate, and the Cherokee Nation properly alerted to the child’s status as an Indian child, the South Carolina couple would never have received permission to remove the child from Oklahoma and transport her to South Carolina.⁴⁹

Based upon these facts, the South Carolina Court found that the “Mother reported Father’s Indian heritage on the . . . adoption form and testified that she made Father’s Indian heritage known to the [Capobiancos] and every agency involved However, it appears that there were some efforts to conceal his Indian status.”⁵⁰ In fact, the pre-placement form at the adoption agency included the note: “Initially the birth mother did not wish to identify father, said she wanted to keep things low-key as possible for [the Capobiancos], because he’s registered in the Cherokee tribe. *It was determined that naming him would be detrimental to the adoption.*”⁵¹ This was undoubtedly because if Dusten were identified as a citizen of an Indian nation (which he was) and Veronica was eligible for membership in that nation (which she was), the heightened standards of ICWA would be applied to the termination of parental rights and the adoption proceedings.⁵² The heightened protections include stringent

The Interstate Compact on the Placement of Children (ICPC) was written in the late 1950s and adopted in the early 1960s. In the United States (50 states, the District of Columbia, and the U.S. Virgin Islands), the ICPC not only serves as the primary conduit for interstate placements—it is also the main legal mechanism outlining the mandatory legal process that must be followed before a child can be placed from one state to another for purposes of foster care and adoption. The ICPC was created to ensure that children who are placed interstate are guaranteed the same protections, services, and financial and jurisdictional safeguards as children placed intrastate.

A Pathways Policy Brief: Interstate Compact on the Placement of Children, AM. PUB. HUMAN SERV.’S ADMIN., (2013), available at <http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/Home%20page/ICPC-Policy-Brief.pdf> (last visited Apr. 22, 2014).

⁴⁸ *Baby Girl*, 398 S.C. at 631.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 25 U.S.C. § 1903(4) (2006). The heightened protections included stringent voluntary consent requirements, 25 U.S.C. § 1913 (2006), and in the instance where a parent is unwilling to voluntarily relinquish rights in a voluntary adoption, heightened involuntary

voluntary consent requirements, and, at least in some instances where a parent is unwilling to voluntarily relinquish rights in a voluntary adoption, heightened involuntary protections.⁵³

Dusten was not served with the adoption papers until four months after the petition was filed—this was the first he heard of his daughter’s adoptive placement.⁵⁴ Dusten was a soldier in the United States Army, and the delayed notification of the adoption occurred days before he was scheduled to be deployed to Iraq.⁵⁵ When served, he signed the papers presented to him by a process server, again believing he was relinquishing his rights to the birth mother.⁵⁶ Almost immediately he determined that was not the case.⁵⁷ The very next day he consulted an attorney, and shortly thereafter challenged the adoption, and sought a stay of the proceedings.⁵⁸ In addition, Dusten also completed a paternity test confirming that he was Veronica’s biological father.⁵⁹

It was not until almost two years later that the South Carolina Family Court case ended when the court applied the Indian Child Welfare Act, denied the adoption, and awarded custody of Veronica to Dusten.⁶⁰

protections, 25 U.S.C. §§ 1911-1912 (2006), some of which remain intact after the Supreme Court’s decision in *Baby Girl* and others that continue to apply, but not to fathers “like Dusten”. See *infra* Part II.

⁵³ 25 U.S.C. §§ 1911-1913 (2006). As explained elsewhere in this article, the application of the protections in the involuntary context has been partially limited by the decision in this case.

⁵⁴ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559, 186 L. Ed. 2d 729 (U.S.S.C. 2013).

⁵⁴ *Id.*

⁵⁵ *Baby Girl*, 398 S.C. at 634.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Baby Girl*, 133 S. Ct. at 2559.

⁶⁰ *Baby Girl*, 398 S.C. at 636.

On November 25, 2011, the family court judge issued a Final Order, finding that: (1) the ICWA applied and it was not unconstitutional; (2) the “Existing Indian Family” doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) [Adoptive Parents] failed to prove by clear and convincing evidence that Father’s parental rights should be terminated or that granting custody of Baby Girl to Father would likely

In so doing, the Court found “no conflict” between recognizing the father’s parental rights and the best interests of Veronica.⁶¹ The Court also found that the “[f]ather, despite some early indications of possible lack of interest . . . not only reversed course at an early point but has maintained that course despite . . . active opposition [from the prospective adoptive parents],” that Dusten “was a good father who enjoyed a close relationship with his other daughter,” and that “he and his family have created a safe, loving and appropriate home for [Veronica].”⁶²

The reason for the delay in the South Carolina court proceedings and decision on the adoption petition was Dusten’s year of service in Iraq that commenced almost immediately after he was given notice of the adoption.⁶³ Dusten requested a stay, postponing the proceedings under the Servicemember’s Civil Relief Act, just before he was placed on active duty.⁶⁴ The South Carolina Supreme Court subsequently affirmed the lower court’s decision after the Capobiancos appealed the Family Court decision.⁶⁵

By a 5-4 vote, the United States Supreme Court reversed the South Carolina Supreme Court decision and remanded the case for further hearings to determine who should have custody of Veronica.⁶⁶ The decision narrowed the application of three provisions of ICWA. The Court found that Dusten never had physical or legal custody of Veronica and had “abandoned” Veronica prior to birth.⁶⁷ The Court then held that the heightened burden of proof standard required by ICWA in termination of parental rights proceedings⁶⁸ and ICWA’s requirement that active efforts

result in serious or physical emotional or physical damage to Baby Girl. Therefore, the family court denied [Adoptive Couple’s] petition for adoption and ordered the transfer of Baby Girl to Father on December 28, 2011.

Id.

⁶¹ *Id.* at 654.

⁶² *Id.*

⁶³ *Id.* at 634.

⁶⁴ *Id.*

⁶⁵ *Id.* at 629.

⁶⁶ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557, 186 L. Ed. 2d 729 (U.S.S.C. 2013).

⁶⁷ *Id.* at 2560-64.

⁶⁸ *Id.*; 25 U.S.C. § 1912(f) (2006) reads as follows:

be provided to prevent the breakup of an Indian family did not apply to fathers “like Dusten.”⁶⁹ The Court also held that the section of the Act that deals with adoptive placement preferences⁷⁰ did not preclude the adoption by the prospective non-Native adoptive parents because no individuals with a higher priority, according to the Act’s placement preferences, had “formally sought” to adopt the child.⁷¹ Aside from finding that these sections were not applicable to this adoption, it did not otherwise specify how the law was to be applied on remand.⁷²

Upon remand, the South Carolina Supreme Court ordered the Family Court to issue an adoption order in favor of the non-Native adoptive family.⁷³ In so doing, it held that the father’s consent was not required based upon state law.⁷⁴ Without any explanation and over the objection of a dissent, it also did not require a hearing on the best interests of the child.⁷⁵ Following some additional proceedings before the Oklahoma and Cherokee Nation courts involving jurisdictional and enforcement issues, the litigation finally ended when the Oklahoma Supreme Court lifted a stay of an Oklahoma circuit court’s order recognizing the orders of the South Carolina family court.⁷⁶

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

⁶⁹ *Baby Girl*, 133 S.Ct at 2560-64; 25 U.S.C § 1912(d) (2006), in pertinent part, reads as follows:

Any party seeking to effect a...termination of parental rights to an Indian child under State law 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 and that these efforts have proved unsuccessful. (emphasis added).

⁷⁰ 25 U.S.C. § 1915(a) (2006).

⁷¹ *Baby Girl*, 133 S. Ct. at 2556.

⁷² *Id.*

⁷³ *Adoptive Couple v. Baby Girl*, 404 S.C. 563 (2013).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Overall, *supra* note 17.

II. IMPLICATIONS OF THE DECISION IN *ADOPTIVE COUPLE V. BABY GIRL*

The United States Supreme Court granted *certiorari* to address two questions: (1) the rights of a non-custodial parent under ICWA in the context of a voluntary adoption; and (2) whether the term “parent” in ICWA requires an unwed father to comply with state law rules to attain legal status as a parent.⁷⁷ In a 5-4 decision written by Justice Alito, the Supreme Court ruled in favor of the prospective adoptive parents based upon an interpretation of ICWA that narrowed the application of 25 U.S.C. §§1912(d) and (f) in circumstances where a parent never had prior legal or physical custody of a child, and 25 U.S.C. §1915(a) when there were no competing adoption petitions filed.⁷⁸ The decision’s holdings are stated in broad terms that some parties will likely reference in an attempt to expand the application of the Court’s limitations upon the application of ICWA. One of the five justices in the majority, however, was Justice Breyer, who filed a concurring opinion explaining his view of the opinion as a very narrow decision deciding “no more than is necessary.”⁷⁹ In his concurrence, Breyer provided different factual situations that he believed to be distinguishable from the case before the court and where the sections of ICWA in question might apply notwithstanding the Court’s opinion.⁸⁰ This tension between the majority decision and Breyer’s concurrence, especially given that Breyer’s vote was necessary to constitute a majority, will be further explored later in this article. Of note, the Court did not entertain arguments challenging the constitutionality of ICWA based upon an argument that the statute’s application here was race-based, although it did suggest (without any explanation) that if it had interpreted the sections in question differently it could have raised “equal protection concerns.”⁸¹

⁷⁷ *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 635 (S.C. 2012), cert. granted 81 U.S.L.W. 3198 (U.S. Jan. 4, 2013) (No. 12-399); Brief of Petitioner-Appellants at (i), *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, No.12-399 (S. Ct. June 25, 2013)

⁷⁸ *Baby Girl*, 133 S. Ct. at 2560-64.

⁷⁹ *Id.* at 2571 (Breyer, J., concurring).

⁸⁰ *Id.*

⁸¹ *Baby Girl*, 133 S.Ct. at 2565. The opinion specifically states:

As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the

A. *The Interpretation of ICWA's Termination of Parental Rights Provision*

Although this was a private adoption, it was one where the father was unwilling to voluntarily relinquish his parental rights. Thus, the Capobiancos sought to involuntarily terminate Dusten's rights in order to proceed with the adoption, implicating 25 U.S.C. §1912(f) of ICWA. Section 1912(f) mandates the standard of proof for involuntary terminations of parental rights when an "Indian child" is involved.⁸²

birth mother—perhaps contributing to the mother's decision put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context.

In the dissenting opinion, Justice Sotomayor opined that it is "difficult to make sense" of the Court's suggestion regarding equal protection in view of Supreme Court precedents recognizing that classifications based on Indian tribal membership are not racial classifications. *Baby Girl*, 133 S.Ct. at 2584-2585 (Sotomayor, J., dissenting); see also, *Morton v. Mancari*, 417 U.S. 535, (1974) (providing a complete explanation of the distinction between an unconstitutional racial classification and the constitutional classification of political status that allows for differential treatment of enrolled tribal members via legislation like ICWA). In addition, the Majority opinion contains several statements noting the percentage of the child's Indian blood quantum. These statements seem to reflect a misunderstanding of the political nature of tribal membership, and a tribe's inherent sovereign right to determine its own citizenship and membership. See, e.g., *Baby Girl*, 133 S. Ct. at 2556 ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2 percent (3/256) Cherokee"); *Id.* at 2559 (It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law); *Id.* at 2565 ("under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."). In his concurring opinion, Justice Thomas indicated that he would find the ICWA unconstitutional under a different theory, holding that the Indian Commerce Clause in the United States Constitution is not broad enough to allow Congress to enact legislation like ICWA. *Id.* at 2565-2571 (Thomas, J., concurring).

⁸² *Baby Girl*, 133 S.Ct. at 2559. Arguments were made that father was not a father within the meaning of the law and therefore had no right to consent to this adoption under state law or ICWA. The court, however, did not reach the merits of this argument. See *infra* Part II(d)(i).

Section 1912(f) provides that termination of parental rights cannot be ordered unless there is a finding “beyond a reasonable doubt, including testimony of qualified expert witnesses that *continued custody* of the [Indian] child by a parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”⁸³ This is a stricter standard of proof than is found in most state statutes⁸⁴ and more stringent than constitutionally required by the due process clause of the Fourteenth Amendment.⁸⁵ This heightened standard was originally included in ICWA to ensure that the due process rights of parents and children were met, to counter-balance systemic bias, and to ensure that Indian children remained safely with their parents whenever possible.⁸⁶

In its decision, the majority focused on the specific language of “continued custody” used in this statutory provision,⁸⁷ interpreting this language using the Oxford English Dictionary and the American Heritage Dictionary definitions of “continued” to conclude that a parent must have had either prior physical or legal custody of the child at some point before the termination of parental rights proceeding in order to invoke the protections of this section.⁸⁸ In other words, the Court found that this provision should not apply “when the Indian parent *never* had custody of

⁸³ 25 U.S.C § 1912(f) (2006) (emphasis added).

⁸⁴ CHILD WELFARE INFO. GATEWAY, STATE STATUTES: GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013) available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf (last visited Apr. 22, 2014). See, e.g., MO. REV. STAT. § 211.447.2 (2010) (requiring clear, cogent and convincing evidence that the specified ground for termination of parental rights exists), FLA. STAT. ANN. § 39.809 (2010) (requiring clear and convincing evidence in termination of parental rights proceedings), ALA. CODE § 12-15-319 (2010) (same).

⁸⁵ *Stantosky v. Kramer*, 455 U.S. 745 (1981) (finding that the fourteenth amendment due process clause mandates a clear and convincing evidence standard to protect the rights of parents in termination of parental rights proceedings).

⁸⁶ “ICWA was designed to counteract . . . the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts.” *Baby Girl*, 133 S. Ct. at 2560. See, generally, *Establishing Standards for the Placement of Indian Children In Foster or Adoptive Homes, To Prevent the Breakup of Indian Families*, Committee on Interior and Insular Affairs. House, Report, H. RPT. 95-1386, July 24, 1978 [hereinafter, House Report of 1978].

⁸⁷ *Baby Girl*, 133 S.Ct. at 2560-62.

⁸⁸ *Id.* at 2560.

the Indian child.”⁸⁹ The Court found it undisputed that Dusten never had physical custody of Veronica prior to the adoption proceeding. It then referenced South Carolina and Oklahoma state law to determine that Dusten also did not have legal custody of Veronica prior to the adoption proceeding. For these reasons, it held that this provision did not apply to Dusten, in this case.⁹⁰

The Court further supported this interpretation by noting that other places in the statutory text, the legislative history, and the Court’s prior statement of the purpose of ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*⁹¹ focus on the unwarranted “removal” of Native children.⁹² Emphasizing this word, the Court found that in the factual circumstances of this case no child was removed from an Indian family. Rather, the Indian family had never formed; thus, “the dissolution of Indian families is not implicated.”⁹³

In his concurrence, Justice Breyer limited his agreement (and, as noted, his joinder was necessary to achieve the five vote majority). In agreeing, he stated that this case does not involve “a father with visitation rights or who has paid ‘all of his child support obligation,’”⁹⁴ “special circumstances such as a father who was deceived about the existence of the child,”⁹⁵ or “a father who was prevented from supporting his child.”⁹⁶ He then asserted that the Court “need not, and in my view does not” now decide how this section applies where such circumstances are present.⁹⁷ Justice Breyer did not attempt to explain how this view is consistent with

⁸⁹ *Id.* While the majority opinion focused on Indian parents, and made references to a “biological Indian father” using his “ICWA trump card at the eleventh hour” near the end of the decision when it suggested that a contrary result here could raise equal protection concerns, 133 S.Ct. at 2563, 2564, it should be noted that the ICWA in general and § 1912(f) in particular apply to both the Indian and non-Native parents of an Indian child.

⁹⁰ *Baby Girl*, 133 S.Ct. at 2562.

⁹¹ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 31 (1989).

⁹² *Adoptive Couple v. Baby Girl*, 133 S.Ct. at 2561.

⁹³ *Id.* at 2560.

⁹⁴ *Id.* at 2571. (Breyer, J., concurring)

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 2571.

the majority opinion's language about §1912(f) not applying when a father has never had custody.

Thus, at a minimum, it is clear that in most cases that involve an attempted *voluntary* adoption by a birth mother where a birth father has not had prior legal or physical custody, as defined by state statute, the protections of §1912(f) will not apply. It is also clear that the Court looked at state law as a reference point in terms of defining the meaning of custody. Because of the Court's approach, fathers' rights under ICWA will now differ by state depending on the state's definitions of legal and physical custody. For example, in some states an unwed father may obtain presumptive legal custody at birth.⁹⁸ In other states, the process to establish a father's legal rights is much more complex.⁹⁹ As discussed in the dissent, there are a wide variety of approaches in state law. In some states laws focused more on protecting unwed biological fathers' rights, while other laws (such as South Carolina) are reflective of pro-adoption policies that "hew to the constitutional baseline" and make it much easier to terminate a father's rights.¹⁰⁰ Of note, if under state law an unwed father obtains presumptive legal custody at birth, then 25 U.S.C. §§1912(d) and (f), as explained below, should still apply. This is because the court acknowledged, as mentioned above, that either legal or physical custody was sufficient to trigger this section of ICWA.

⁹⁸ This is most frequently seen in jurisdictions that create a presumption of joint custody when determining children's placement and parenting plans. See, e.g., D.C. CODE § 16-914(a)(2) (2010) ("There shall be a rebuttable presumption that joint custody is in the best interest of the child or children . . ."); MINN. STAT. § 518.17(13)(d) (2010) ("The court shall use a rebuttable presumption that upon the request of either or both parties, joint legal custody is in the best interests of the child.").

⁹⁹ William Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 690 (1989). See, e.g., S.C.CODE ANN. § 63-17-20(B) (2014) ("Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother"); OKLA. STAT. tit 10 § 7800 (2014) (Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction).

¹⁰⁰ *Baby Girl*, 133 S.Ct. at 2581-2583 (Sotomayor, J., dissenting). See also, CHILD WELFARE INFO. GATEWAY, STATE STATUTES: THE RIGHTS OF UNMARRIED FATHERS (2010), https://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.pdf (last visited Apr. 22, 2014).

Whether the Court's limitations on the application of §1912(f) will apply in full force in the context of traditional involuntary termination of parental rights proceedings (those involving the state and the child welfare system) will depend upon whether courts focus upon the Supreme Court's theory of statutory construction in regard to §1912(f) or Justice Breyer's concurrence. Breyer's concurrence attempted to limit the scope of the Court's holding to the factual circumstances in the case, insisting that the decision "decided no more than is necessary."¹⁰¹ Of note, further support for a narrow reading of the Court's ruling as suggested by Justice Breyer—one that would limit its application to termination petitions that are filed in the context of contested private adoption proceedings—might also be derived from the Court's overall analysis. The Court based its analysis almost entirely upon the factual circumstances of this case, i.e., a dispute that arose in the context of an attempted prior adoption as opposed to a "removal" of a child by a non-Native governmental authority.

Justice Breyer's concurrence enumerated certain circumstances where the Act may apply that would not necessarily involve prior custody.¹⁰² Thus, whether §1912(f) will still apply to some sub-segment of non-custodial parents even in a private adoption context or exclude all parents who have not had prior custody based upon language in Justice Alito's opinion, will also be a question for courts interpreting this decision in the future.

B. *The Interpretation of ICWA's Active Efforts Provision*

The South Carolina courts also rested their decision in favor of the birth father on 25 U.S.C. §1912(d), ICWA's "active efforts" provision.¹⁰³ It provides that any "party seeking to effect a . . . termination of parental rights to, an Indian child, under State law, 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* and that these efforts have proved unsuccessful."¹⁰⁴ This is a stricter standard

¹⁰¹ *Baby Girl*, 133 S.Ct. at 2571 (Breyer, J., concurring).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 25 U.S.C § 1912(d) (2006) (emphasis added).

than the “reasonable efforts” standard generally applicable under federal and state laws.¹⁰⁵ It is intended to ensure vigorous attempts to keep Indian families together to counterbalance the potential bias and culturally insensitive practices of social workers and the child welfare and private adoption systems when working with Indian families.¹⁰⁶ Because the Capobiancos sought to involuntarily terminate the rights of Dusten due to his unwillingness to relinquish his rights voluntarily, this provision was implicated in *Adoptive Couple v. Baby Girl*.¹⁰⁷

In an analysis parallel to its analysis of ICWA’s §1912(f), the Court in *Baby Girl* relied upon the definition of “breakup” in the American Heritage and Webster’s Dictionaries to hold that §1912(d) of ICWA does not apply when an Indian parent “abandons” a child prior to birth and the parent has never had prior physical or legal custody.¹⁰⁸ Stated differently, the Court found that the breakup of an Indian family only referred to the “discontinuance of a relationship,” and when a father “abandons” a child and has had no legal or physical custody, there is no relationship to discontinue.¹⁰⁹ Similar to its analysis of §1912(f), the Court found that the focus of §1912(d) is on the “removal” of Indian children from their families and does not include “*transfer* of the child to an Indian parent.”¹¹⁰ In making this holding, it referenced the purpose of ICWA, the Court’s previous ICWA decision in *Holyfield*, and the Bureau of Indian Affairs ICWA guidelines.¹¹¹ The majority also supported its holding by emphasizing that the purpose of §1912(d) was to prevent the breakup of Indian families and not to create parental rights where none would otherwise exist.¹¹²

¹⁰⁵ The Social Security Act, Title IV-E, 42 U.S.C. 671(a)(15) (2006). See also CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.pdf (last visited Apr. 22, 2014).

¹⁰⁶ S. REP. NO. 95-597, at 117-18 (1977).

¹⁰⁷ *Baby Girl*, 133 S.Ct. at 2559.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing American Heritage Dictionary 235 (3d. 1992)).

¹¹⁰ *Id.* at 2559.

¹¹¹ *Id.* at 2563.

¹¹² *Id.*

The Court found a further basis for its “parallel analysis” of §§1912(d) and (f) by utilizing an interesting and somewhat novel theory of statutory construction—namely that “adjacent” provisions should be read in “harmony with each other.”¹¹³ Noting that §1912(d) is “next to” §§1912(e) and (f), the Court found that the concept of “continued custody” in §1912(f) should be imputed into its interpretation of §1912(d), further verifying the Court’s opinion that for the “breakup” of a family to occur a father must first have some form of prior custody.¹¹⁴

Based upon this interpretation, the Court found that §1912(d) did not apply to the circumstances in this case.¹¹⁵ In reaching this holding, the Court clearly characterized the actions of the father here as “abandonment” of the child,¹¹⁶ although the Court never defined the term.¹¹⁷ It will undoubtedly be the subject of future cases and, as the dissent pointed out, the term “abandonment” is a term of art in child and family law and one which varies greatly from state to state.¹¹⁸ Of note, while the dissent disagreed with the analysis of the Court, it “welcomed”

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2564.

¹¹⁶ *Id.* at 2562.

¹¹⁷ *Id.* at 2562-63.

¹¹⁸ *Id.* at 2576 n.3 (Sotomayor, J., dissenting); see also CHILD WELFARE INFORMATION GATEWAY, STATE STATUTES: DEFINITIONS OF CHILD ABUSE AND NEGLECT (2011), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf (last visited Apr. 22, 2014).

Approximately 17 States and the District of Columbia include abandonment in their definitions of abuse or neglect, generally as a type of neglect. Approximately 18 States, Guam, Puerto Rico, and the Virgin Islands provide definitions for abandonment that are separate from the definition of neglect.

Id. at 4; CHILD WELFARE INFO. GATEWAY, STATE STATUTES: GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013).

The grounds for involuntary termination of parental rights are specific circumstances under which the child cannot safely be returned home because of risk of harm by the parent or the inability of the parent to provide for the child’s basic needs. Each state is responsible for establishing its own statutory grounds, and these vary by State. The most common statutory grounds for determining parental unfitness include...Abandonment of the child.

Id. at 2.

the “limitation” on the Court’s holding reflected by its inclusion of the abandonment requirement in its holding on this section.¹¹⁹

The Court suggested that applying the active efforts requirement in private adoptions, such as this one, would “place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home” because of the obligation that it would place upon prospective adoptive parents.¹²⁰ In her dissent, Justice Sotomayor noted that this observation, among others, illustrated that the Court’s holding was actually based on a policy disagreement with Congress’ decision in ICWA to “avert the necessity for adoptive placement and [make] ... the adoption of Indian children by non-Native families less likely.”¹²¹

As with §1912(f), much of the Court’s analysis of §1912(d) was based on the specific facts of this case, in particular the voluntary adoption context from which it arose.¹²² In fact, the Court stated “[s]ection 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families.”¹²³ This statement may indicate that the Court’s interpretation in this case has no application in traditional involuntary state child welfare proceedings.¹²⁴ A limited interpretation of the Court’s holding here would also be consistent with other federal laws (and the statutes of all fifty states that implement that federal law), which have a similar requirement that reasonable efforts must be made to preserve and reunify families before a foster care placement or removal of a child from the home.¹²⁵ The Court did not address this point in its opinion nor attempt to explain

¹¹⁹ *Baby Girl*, 133 S. Ct. at 2563.n.3.

¹²⁰ *Id.* at 2563-64.

¹²¹ *Id.* at 2583 (Sotomayor, dissenting). It should also be noted that the majority seemed particularly bothered by the idea of requiring the adoptive couple to make the active efforts. This is a misreading of the statute as it is the state that has the obligation to make active efforts before an involuntary termination of parental rights can be granted under 25 U.S.C. § 1912(f) (2006), not a prospective adoptive couple.

¹²² *Id.* at 2563 (stating, for example, “It would, however be unusual to apply § 1912 in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point”).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 2580 (Sotomayor, dissenting); see 42 U.S.C. 671(a)(15)(B) (2006).

whether and how the “reasonable efforts” requirement might be applicable to the birth father in this case or in similar cases. This lack of consideration may be a reflection of the Court’s inexperience with family law cases, which are generally the prerogative of states and tribes.

Moreover, it is important to emphasize that there is nothing in the opinion that would *preclude* active efforts in any case. The Court’s holding was only that it is not *required* in certain circumstances.

The Court’s outcome in regard to §§1912(f) and (d) of ICWA is similar to some of its constitutionally-based cases that protect, but at the same time limit the scope of father’s rights.¹²⁶ Given the Court’s analysis in these decisions, fathers of Indian children who want to be sure to protect their rights under ICWA should remain actively engaged throughout pregnancy and after the birth of their child. Furthermore, they should seek to formally establish legal or physical custody before or immediately after the birth of a child by utilizing any legal mechanisms that are available or required. Indeed, all fathers should be aware of the Supreme Court’s willingness to limit the rights of unwed putative fathers, particularly when their rights are threatened vis-à-vis adoptive parents. In his dissent, Justice Scalia specifically described the majority opinion as one that “needlessly demeans the rights of parenthood,” emphasizing that it had the effect of “diluting” the right of the father here to raise his child.¹²⁷

C. The Interpretation of ICWA’s Adoptive Placement Preferences Provision

Section 1915(a) of ICWA provides for a series of preferences for the placement of Indian children.¹²⁸ It mandates that, in the absence of

¹²⁶ See, e.g., *Lehr v. Robertson* 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). See generally MARTIN GUGGENEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 63-74 (2005). Margaret Ryznar, *Two to Tango, One in Limbo: A Comparative Analysis of Fathers Rights in Infant Adoptions*, 47 DUQ. L. REV. 89 (2009) (describing the current state of father’s rights generally); Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363 (1996).

¹²⁷ *Baby Girl*, 133 S.Ct, at 2572 (Scalia, J., dissenting).

¹²⁸ 25 U.S.C. § 1915(a)(2006).

good cause to the contrary, adoptive placements of Indian children must be made in the following order of preference: “(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.”¹²⁹ This provision is implicated in *Adoptive Couple v. Baby Girl* because the prospective adoptive parents in this case did not fall within any of the placement preferences.¹³⁰ However, the Supreme Court held that this did not prevent the adoption of Veronica by the prospective adoptive parents.¹³¹ Specifically, the Court stated that this provision is inapplicable because “there is simply no ‘preference’ to apply if no alternative party that is eligible to be preferred under §1915(a) has come forward” and formally filed a petition.¹³²

It is unclear to what extent the Court's analysis of §1915(a) will apply outside the private adoption context. While the Court's holding is stated in general terms such that it could be argued that it has a broader application to all adoptions, the Court seemed particularly focused on the private adoption context throughout the decision. Further, as with the other provisions, Justice Breyer's limiting comments about deciding “no more than is necessary” may strengthen arguments that the Court's holding be construed narrowly.¹³³

¹²⁹ *Id.*

¹³⁰ *Baby Girl*, 133 S.Ct. at 2564.

¹³¹ *Id.*

¹³² *Id.* In her dissent, Justice Sotomayor specifically stated that “the majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation” may petition for her adoption and that they would be entitled to consideration under the placement preferences in § 1915(a), *Id.* at 2585 (Sotomayor, J., Dissenting), and Justice Breyer in his concurrence also noted that 25 U.S.C. § 1915(a) may be relevant in cases of this kind. *Id.* at 2571 (Breyer, J., concurring). Nonetheless, when the case was remanded, the South Carolina Supreme Court refused to allow any other petitions for adoption to be filed. *Adoptive Couple v. Baby Girl*, 404 S.C. 483, 488-89, *order vacated on reh'g*, 404 S.C. 490 (2013).

¹³³ *Baby Girl*, 133 S. Ct. at 2571, (Breyer, J., concurring) In addition, the Court suggested in a footnote that a “reformed” biological father whose rights have been terminated might re-enter the pool of preferential placement options and therefore be able to adopt his own child. *Id.* at 2564 n.11. In his concurrence, Justice Breyer makes a similar point but uses the term “absentee father.” *Id.* at 2571 (Breyer, J., concurring). This could occur under a tribal placement preference order adopted pursuant to 25 U.S.C. § 1915(c)(2006) that would supplant the statutory placement preference order. The Court also noted that good cause might still be a factor in determining the application of this tribal placement

Interestingly, although the Court did cite the Bureau of Indian Affairs' ICWA Guidelines with approval elsewhere in its opinion,¹³⁴ the Court did not address the provision of the Guidelines that requires a diligent national search of potential adoptive families within the placement preference order.¹³⁵ Indeed, nothing in the Court's opinion would preclude anyone, including a state agency or private adoption agency, from making a diligent search for families within the placement preferences. Further, federal laws require state agencies to "diligently recruit" foster and adoptive families "that reflect the racial diversity of children in the State for whom foster and adoptive homes are needed."¹³⁶

It should also be noted that state child welfare statutes of general applicability are moving social work and court practice in the direction of ICWA's placement preferences. The Fostering Connections to Success and Increasing Adoptions Act of 2008¹³⁷ created a federal funding requirement that notice be sent to extended family of children in the child welfare system to inform them of the opportunity to serve as a placement for a child,¹³⁸ and that states consider giving preference to an adult relative over a non-related caregiver.¹³⁹ Similarly, there is some existing case law under ICWA that has required notice in involuntary cases to be extended to family members who might be a placement resource for an Indian child.¹⁴⁰ However, the Court did not consider any of this legal and policy background.

At a minimum, then, the Court's holding is a clear signal to individuals that fall within the placement preferences who may want to

preference. *Id.* at 2564 n. 11. Although the Court raised the possibility that such a scenario could happen, the Court left open the question of how it would decide such a case if it were presented to the Court. *Id.* It should be noted that even in the absence of any tribal action under §1915(c), it may be that a previously terminated biological parent could still receive preferential consideration under 25 U.S.C. § 1915(a)(1) or (2) (2006).

¹³⁴ *Baby Girl*, 133 S. Ct. at 2561.

¹³⁵ Bureau of Indian Affairs, Guidelines for State Courts, 44 Fed. Reg. 67595 (1979).

¹³⁶ The Multi-Ethnic Placement Act, 42 U.S.C. § 622(b)(7) (2006).

¹³⁷ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat 3949 (2008).

¹³⁸ State plan for foster care and adoption assistance, 42 U.S.C. § 671(a)(19) (2006).

¹³⁹ State plan for foster care and adoption assistance, 42 U.S.C. § 671(a)(29) (2006).

¹⁴⁰ *In re the Matter of M.E.M., Jr.*, 223 Mont. 234, 238 (1986).

adopt (even if that intent is contingent upon whether parents' rights are terminated) to formally file for adoption immediately, particularly if there are other pending petitions for adoption by individuals who are not preferred placements. In terms of agency activities, however, there are still many requirements with regard to diligent searches for families that fall within ICWA's preferred placements—particularly relative placements—in federal and state laws, regulations, and tribal-state agreements.¹⁴¹ Thus, the impact of the decision outside of the private adoption context may be limited in practice.

D. The Decision's Potential Impact on Other Provisions of ICWA

1. Definition of Parent

ICWA protects parents of Indian children, as defined by 25 U.S.C. §1903(9). That definition covers “any biological parent or parents of an Indian child . . . [but i]t does not include the unwed father where paternity has not been acknowledged or established.”¹⁴² In the Petition for Certiorari, the Capobiancos argued that Dusten, although a biological father, had neither “acknowledged” or “established” paternity under South Carolina state law, and therefore was not protected by any of the provisions of ICWA.¹⁴³ Although the Court granted certiorari on this issue, it did not decide the issue in its opinion. Instead it found that the sections of ICWA that the South Carolina court found protected the father did not

¹⁴¹ For federal law, see The Multi-Ethnic Placement Act, 42 U.S.C. § 622(b)(7) (2006) (requiring “diligent recruitment” for a foster and adoptive parent pools); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110–351, 122 Stat 3949 (2008) (requiring notice be sent to extended family for potential placement); for state law and policy see, CHILD WELFARE INFO. GATEWAY, STATE STATUTES: THE PLACEMENT OF CHILDREN WITH RELATIVES (2013), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/placement.pdf (last visited Apr. 22, 2014). (describing each states statutory scheme pertaining to kinship placements); for tribal-state agreements); for tribal agreements *see infra* Part IV.

¹⁴² 25 U.S.C. § 1903(9) (2006).

¹⁴³ Brief of Petitioner-Appellants at 19-22, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (No.12-399).

apply for other reasons, rendering unnecessary a determination on this issue.¹⁴⁴

Dusten acknowledged his paternity in the family court proceedings and established paternity through a DNA test.¹⁴⁵ The decision in *Baby Girl*, however, did not explicitly address whether these actions constituted “acknowledgment or establishment” of paternity for purposes of ICWA. The dissent considered the issue and opined that the terms should be defined by federal law in accordance with the precedent set in the *Holyfield* decision.¹⁴⁶ *Holyfield* had found that there was “no reason to believe” that Congress intended to rely upon state law for the definition of a “critical term” in the statute.¹⁴⁷ The dissent noted that it is “unsurprising,

¹⁴⁴ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559-60 (2013); see *supra* Part II (a)-(c). The Court said the following:

“We need not—and therefore do not—decide whether Biological Father is a “parent” [under ICWA]. Rather, assuming for the sake of argument that he is a “parent,” we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights.”

Id. at 2560. In short, even an unwed father who has been determined to be a putative father under ICWA, or under state law, may still not receive the protections of certain sections of ICWA if he has not also established legal custody or had physical custody.

¹⁴⁵ *Baby Girl*, 133 S. Ct. at 2552, 2559 (Sotomayor, J., dissenting).

¹⁴⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45 (1989).

¹⁴⁷ *Id.* In full, the Court in *Holyfield* stated the following:

First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. See 25 U.S.C. § 1901(5) (state “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”). Under these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.

Id.

although far from unimportant” that the majority opinion assumed that the father was a parent under ICWA.¹⁴⁸

2. Foster care provisions

Under ICWA, the removal of Indian children for placement in foster homes is subject to the clear and convincing evidentiary standard, 25 U.S.C. §1912(e), a standard higher than that found in most states.¹⁴⁹ Unfortunately, this provision uses the same “continued custody” language as in §1912(f), the provision limited by the Court in *Baby Girl*. Section 1912(e) states:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹⁵⁰

For this reason, of all of the provisions not directly at issue in this case, this is the section whose interpretation is most likely to be affected by the Court’s analysis. Nonetheless, Justice Breyer’s limiting comments may be particularly relevant to an argument that the Court’s holding should not be interpreted to apply outside of the specific private adoption context of this case and that §1912(e) should still apply to all foster care placements.

Section 1915(b) provides for placement preferences in the context of foster care placements.¹⁵¹ There are strong arguments that this Court’s

¹⁴⁸ *Baby Girl*, 133 S. Ct. at 2574 (2013) (Sotomayor, J., dissenting)

¹⁴⁹ S.C. CODE ANN. §§ 20-7-6 (G)(1)&(L), 20-7-738(D) (2014) (requiring a preponderance of the evidence for removal of a child); MONT. CODE § 41-3-422 (2014) (requiring the same).

¹⁵⁰ 25 U.S.C. § 1912(f) (2006) (emphasis added).

¹⁵¹ Specifically it states:

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive

interpretation of §1915(a) should not affect the implementation of §1915(b) given the different practical and legal context of foster care. A foster care placement by definition is temporary,¹⁵² and foster families generally do not “file” for placement or even come forward. Rather children are placed with families by the child welfare agency, and theoretically the entire universe of qualified families would be included in the potential placement pool; the idea of a particular foster family needing to “trigger” the placement preference by taking a certain action makes little sense in the foster care context. Further, as noted previously, the Court’s holding on §1915(a) seems to be largely based upon the private adoption context of this case, and the Court provided little explanation for its holding that the section is inapplicable until a preferred placement files a petition for adoption. For all of these reasons, it does not seem likely that the Court’s §1915(a) holding will be extended to §1915(b).

3. Existing Indian Family Exception

Although presented with the opportunity,¹⁵³ the Court did not adopt the Existing Indian Family doctrine (EIF) in the *Baby Girl* decision.¹⁵⁴ The

placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) Indian foster home licensed or approved by an authorized non-Native licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b) (2006).

¹⁵² “Foster care (also known as out-of-home care) is a temporary service provided by States for children who cannot live with their families.” Child Welfare Information Gateway: Foster Care, *available at* https://www.childwelfare.gov/outofhome/foster_care/; see also, 25 U.S. C. § 1903(1)(i) (2006) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for *temporary placement* in a foster home . . . where parental rights have not been terminated.”

¹⁵³ Petitioner for Writ of Certiorari at 11-15, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (No. 12-399).

¹⁵⁴ For a more thorough analysis of the *Baby Girl* decision and the EIF see Marcia Yablon-Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine Is Not Affirmed but the Future of ICWA's Placement Preferences Is Jeopardized*, CAP. U. L. REV. (forthcoming), *available at*

EIF, which is followed by a small minority of states (seven),¹⁵⁵ provides generally that the entirety of ICWA does not apply when a Court concludes that an Indian child has not been the part of an “existing Indian family unit.”¹⁵⁶

In *Baby Girl*, the United States Supreme Court held that two specific sections of ICWA do not apply in a voluntary adoption proceeding when the father has not had previous legal or physical custody of the child.¹⁵⁷ This holding is much narrower than in the EIF cases which have precluded application of ICWA in its entirety when there was no *Indian* family in existence at the time of the proceeding.¹⁵⁸ In fact, the majority

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333797## (last visited Apr. 22, 2014).

¹⁵⁵ S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995); *In the Interest of* S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re* N.J., 221 P.3d 1255 (Nev. 2009); *In re* Morgan, 1997 WL 716880 (Tenn. Ct. App. 1997). 19 states affirmatively oppose application of this doctrine. *In re* Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000); *In re* N.B., 199 P.3d 16 (Colo. App. 2007); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993), *rev'd on other grounds*, 657 N.E.2d 935 (111. 1995); *In re* A.J.S., 204 P.3d 543 (Kan. 2009); *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re* Adoption of Riffle, 922 P.2d 510, 514 (Mont. 1996); *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925, 932 (N.J. 1988); *In re* Baby Boy C., 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re* A.B., 663 N.W.2d 625 (N.D. 2003); Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *In re* Adoption of Baade, 462 N.W.2d 485 (S.D. 1990); *In the Interest of* D.A.C., 933 P.2d 993 (Utah Ct. App. 1997); See CAL. WELF. & INST. CODE § 224(c) (2014); IOWA CODE § 232B.5 (1999); MINN. STAT. § 260.771 (2010); OKLA. STAT. tit. 10, § 40.1 (2010); WASH. REV. CODE § 13.34.040(3) (2011); WIS. STAT. § 938.028(3)(a) (2011).

¹⁵⁶ *In re* the Matter of Baby Boy L., 643 P.2d 168, 176-77 (Kan. 1982), *overturned by* *In re* A.J.S., 204 P.3d 543 (Kan. 2009); (the case originally creating the EIF doctrine); see also Yablon-Zug *supra* note 146 (EIF is a doctrine which limits application of The Indian Child Welfare Act (ICWA) “solely to children previously in the care or custody of an Indian relative”); see also Dan Lewerenz and Padraic McCoy, *The End of “Existing Indian Family” Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WILLIAM MITCHELL L.REV. 684 (2010).

¹⁵⁷ See *supra* Part II, and *infra* Part III for a complete discussion of which sections were limited by the decision.

¹⁵⁸ In finding that there is no “existing Indian family,” some courts have asked the question of whether there was “continued custody” at the time of the proceeding. *In re* Baby Boy L., 643 P.2d 168, 176-77 (Kan. 1982). Further, some courts have used the language of “continued custody” in § 1912(f) and “break up of Indian family” from section § 1912(d) to justify the larger EIF doctrine. See *In re* Adoption of Baby Boy D. 742 P.2d

opinion noted the dissent's observation that "'numerous' ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody."¹⁵⁹ The provisions of the Act that the dissent indicated would continue to apply to fathers similarly situated to Dusten are 25 U.S.C. §1911(b) (right to request transfer to tribal court); 25 U.S.C. §§1913(a) and (c) (heightened protection and procedures for voluntary consent to adoption); 25 U.S.C. §1912(a) (right to notice); 25 U.S.C. §1912(b) (right to counsel); and 25 U.S.C. §1912(c) (access to court documents).¹⁶⁰ The fact that the majority referenced the dissent's analysis, without rejecting it or even suggesting that the application of these sections was an open question, is an indication of the majority's acquiescence with the dissent's position that these protections continue to apply to biological fathers, even in the absence of a "previously existing Indian family."¹⁶¹

This reading of the *Baby Girl* decision is also supported by the Court's apparent confirmation of the holding in the *Holyfield* case as to when ICWA applies. In *Holyfield*, the Court held that the statute as a whole is triggered when an "Indian child," as defined by ICWA, is the subject of "a child custody proceeding."¹⁶² The Court in *Baby Girl* referenced this holding and noted that it was "undisputed" that both elements were present in this case.¹⁶³ In doing so, the Court at least implicitly rejected the idea that there are circumstances where ICWA would not apply to a "child custody proceeding" involving an "Indian child"—which would mean the remaining rights of the father, and all of the rights accorded to Indian children and tribes, would still apply. If ICWA is triggered anytime an Indian child is involved in a child custody proceeding (even if a father without custody is denied certain rights under two of its provisions), this would be the antithesis of the EIF. The EIF precludes the application of all provisions of ICWA where a court has determined that

1059 (Okla. 1985). It is for this reason that it is important to clarify that *Baby Girl* does not adopt the EIF. Yablon-Zug, *supra* note 146, at 12-22.

¹⁵⁹ *Adoptive Couple v. Baby Girl*, 133 S.Ct. at 2561, 2573-2575 (2013).

¹⁶⁰ *Id.* at 2574-75 (Sotomayor, J., dissenting) (listing these same rights).

¹⁶¹ *Id.* at n.6.

¹⁶² *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989).

¹⁶³ *Baby Girl*, 133 S. Ct. at 2556 n.1.

there was not a prior Indian family, even if the child is an “Indian child” according to the statute.

Nonetheless, it must also be recognized that the Court in *Baby Girl* supported its reading of the language of §1912(f) by using a rationale (albeit in dicta) similar to that in some of the state court EIF cases in support of its ruling that some ICWA sections did not apply in this case.¹⁶⁴ Specifically, the Court noted that the attempted adoption initiated by a non-Native parent where the Indian parent never had legal or physical custody of the child did not impede “the ICWA’s primary goal of protecting the unwarranted removal of Indian children and the dissolution of Indian families.”¹⁶⁵ This was a different emphasis than the *Holyfield* decision, which discussed at length the importance of the tribal interests protected in ICWA and acknowledged the importance of the extended family to an Indian child—an analysis that the dissent in this case also embraced.¹⁶⁶

This is undoubtedly an area that will be the subject of future litigation, including whether the Court’s analysis extends beyond the context of voluntary adoptions and how the sections of the Act that do apply fit in with those that do not.¹⁶⁷

III. INTERACTION OF THE DECISION IN *BABY GIRL* WITH STATE ICWA LAWS AND OTHER LAWS PROVIDING HEIGHTENED PROTECTIONS FOR PARENTS

A. *Legal Background*

There are a number of State laws, often referred to as “State ICWAs,” which create a complete statutory scheme for Indian children in

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2560-62.

¹⁶⁶ Compare *Id.* at 2561 with 490 U.S. at 34, 35 n.4, 52-53; see also *Adoptive Couple v. Baby Girl*, 133 S.Ct. at 2583 (Sotomayor, J., dissenting).

¹⁶⁷ For example, 25 U.S.C. § 1913 (2006) requires that certain procedures be followed for any consent to relinquish an Indian child for adoption to be valid. Assuming that this section still applies, this would seem to preempt state law that might remove the need for consent. Yet, a hearing pursuant to 25 U.S.C. § 1912(f) might not be available to the parent as a remedy, and a Court will need to decide how to proceed—whether the remedy would be a “fitness” hearing under state law or something else.

child custody proceedings in state court and state codes.¹⁶⁸ There are also specific individual legislative provisions in state law meant to augment or compliment ICWA practice and proceedings within a jurisdiction.¹⁶⁹ The Court's analysis in *Baby Girl* did not comment on these laws, parts of which are specifically given preemptive force through ICWA. Specifically 25 U.S.C. §1921 requires that any "State or Federal law that provides a higher standard of protection [than ICWA] to the rights of the parent or Indian custodian of an Indian child . . . shall apply" instead of ICWA.¹⁷⁰

The Court's decision in *Baby Girl*, therefore, did not prevent the enforcement of state ICWAs or other state laws, particularly those providing heightened protections to non-custodial parents. Moreover, as discussed *infra*, it is likely in most cases that these state law provisions will not be preempted by ICWA as interpreted in *Baby Girl* even if outside the scope of §1921.

Of course, how state courts will interpret such laws will be critical. This will depend in large part on whether a different state intent can be ascertained because the wording of the State statute differs from the federal law or there is legislative history, a regulatory interpretation, or other evidence that demonstrates that the intent of the State law was different than the interpretation of the federal ICWA by the United States Supreme Court.

ICWA was passed pursuant to Congress' plenary power over issues that involve Indian tribes and its trust responsibility to protect and preserve tribes and their resources.¹⁷¹ After taking into consideration the

¹⁶⁸ See, e.g., Michigan Indian Family Preservation Act, 2012 Mich. Pub. Acts 565 (2012); Iowa Indian Child Welfare Act, Iowa Code §§ 232B.1 (2005); Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751 (1999); Washington Indian Child Welfare Act, 2011 Wash. Laws, S.B. 5656, 2001, Reg. Sess. (Wash. 2011) Chap. 309; Wisconsin Indian Child Welfare Wis. Stat. § 48.028 et seq. (2013); California Senate Bill 678 of 2006; Oklahoma Indian Child Welfare Act, OKLA. STAT. § 10-40.1 et seq. (1994).

¹⁶⁹ See *infra* notes 166-70 and accompanying text. For a summary of all state laws that augment ICWA, see *State Statutes Related to the Indian Child Welfare Act*, NAT'L CONFERENCE OF STATE LEG.'S, (July 9, 2013), available at <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx> (last visited Apr. 22, 2014).

¹⁷⁰ 25 U.S.C. § 1921 (2006).

¹⁷¹ 25 U.S.C. §§ 1901(1)-(2) (2006); see also H. R. REP. NO. 95-1386, at 13-18 (1978).

fact that family law is an area typically reserved to the states, Congress found that the abusive practices of state courts and social service providers working with Indian children and families nonetheless required federal intervention via ICWA.¹⁷²

ICWA establishes the “*minimum* Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” which must be followed by state courts.¹⁷³ As noted, §1921 of ICWA states that any state or federal law that provides “*higher standards* of protection to the rights of the parent or Indian custodian” (emphasis added) shall instead be followed by state courts.¹⁷⁴

Based upon this provision, courts have applied state laws to ICWA proceedings that have increased the requirements for qualified expert witnesses,¹⁷⁵ provided higher standards for inquiry into the Indian status of a child,¹⁷⁶ heightened the notification requirements,¹⁷⁷ required children whose tribe has indicated that they will be eligible for enrollment after taking certain steps to be immediately treated as “Indian children” under the Act,¹⁷⁸ and incorporated additional state standards for termination of parental rights into proceedings involving Indian children.¹⁷⁹ States have also used this provision to create unique legislative schemes or state

¹⁷² *Id.* 19. (Stating “While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.”).

¹⁷³ 25 U.S.C. § 1902 (2006) (emphasis added).

¹⁷⁴ *Id.* § 1921.

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

Id.

¹⁷⁵ *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992).

¹⁷⁶ *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996).

¹⁷⁷ *Id.*

¹⁷⁸ *In re Jack C.*, 192 Cal.App.4th 967 (2011).

¹⁷⁹ *Matter of JRB*, 715 P. 2d 1170 (Alaska 1986).

ICWA laws to reiterate the importance of ICWA and to strengthen its provisions.¹⁸⁰

Furthermore, although §1921 does not explicitly include a statement on state provisions that legislate heightened protections for tribes as opposed to parents or Indian custodians of an Indian child, at least one court has held that where higher standards are present in state statutes these protections extend to tribes.¹⁸¹ Additionally, one state has extended the protection of §1921 to protect the rights of tribes via statute.¹⁸² It remains unclear, however, to what extent state courts can expand core federal Indian law related provisions (for example, the definition of an “Indian child” to include those children who are not members of federally recognized tribes),¹⁸³ or those provisions not directly related to enhanced parental protections using the authority of §1921.¹⁸⁴

Nonetheless, §1921 offers some unique opportunities for state ICWA laws and provisions to provide heightened protections to parents that would supersede the Supreme Court’s interpretation of the federal law in *Baby Girl*.

Even without considering §1921, rules of federal preemption do not preclude application of state laws providing alternative placement preference schemes or heightened placement protections for Indian children and tribes as defined by the federal statute. Where, as in ICWA, there is no express pre-emption clause,¹⁸⁵ a state law is preempted only where the federal regulatory scheme is so pervasive as to “occupy the

¹⁸⁰ Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

¹⁸¹ Cherokee Nation v. Nomura, 160 P.3d 967 (Okla. 2007).

¹⁸² CAL. FAM. CODE § 175(d) (2008); CAL. PROB. CODE § 1459(d) (2008); CAL. WELF. & INST. CODE § 224(d) (2008).

¹⁸³ See *In re AW*, 741 N.W. 2d 793 (Iowa 2007); *State ex rel. SOSCF v. Klamath Tribe*, 11 P.3d 701 (Or. Ct. App. 2000).

¹⁸⁴ *In re NNE*, 752 N.W. 2d 1 (Iowa 2008) (finding that Sec. 1921 does not provide justification for the provision of extra rights to a tribe, when those rights “come at the expense” of the rights of the parent or child).

¹⁸⁵ See *In re Adoption of A.B. and D.T.*, 245 P.3d 711 (Utah 2010).

field” for a particular area of law¹⁸⁶ or where a state law conflicts with a federal law.¹⁸⁷

Arguments that ICWA “occupies the field” of child welfare law, or even child welfare law as it pertains to Indian children, have not generally found favor in the courts. To date, courts have found that ICWA supplements state’s children’s codes.¹⁸⁸ For this reason, state laws that require active efforts on behalf of the state and private adoption agencies to find placements in line with ICWA’s preferences are unlikely to be preempted because ICWA “occupies the field” of child welfare law.

In addition, state legislation which requires that states actively seek adoptive placements in accordance with the federal ICWA is unlikely to be seen as “in conflict with,” and therefore pre-empted by the federal ICWA. Conflict occurs (1) when it is impossible to comply simultaneously with the state and federal regulation;¹⁸⁹ or (2) where the state regulation obstructs the execution of the purpose and objectives of Congress.¹⁹⁰ In the area of Indian child welfare, courts have read state law and federal law as complementary and have allowed for simultaneous compliance to avoid preemption.¹⁹¹

For example, where states and private adoption agencies are legislatively required to actively seek placements in line with the ICWA’s preferences, it is possible to simultaneously comply with both the federal and state law. Further, such state laws are likely to be found consistent

¹⁸⁶ Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

¹⁸⁷ Gibbons v. Ogden, 22 U.S. 1. (1824).

¹⁸⁸ See, *In re* Brandon M., 54 Cal.App.4th 1387 (1997) (“it simply cannot be maintained that the ICWA in any way, manner, shape or form ‘occupies the field’ of child custody or adoption, even as to Indian children. As respondent points out, the ICWA is totally devoid of any provisions dealing with, e.g., the bases on which a child may be removed from a parent’s custody, when and how often hearings must be held to review a child’s status, who is entitled to what reunification services and for how long, or many, many other similar issues”).

¹⁸⁹ Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

¹⁹⁰ Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372-73 (2000).

¹⁹¹ See, e.g., *In re* of JRB, 715 P. 2d 1170 (Alaska 1986) (Finding that state termination of parental rights standards supplement the termination of parental rights standards provided by ICWA and applying both to Termination of Parental Rights proceedings involving Indian children).

with the overall purpose and objectives of Congress presented in ICWA via the Congressional declaration of policy:

The Congress hereby declares that it is the policy of this Nation 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.¹⁹²

A more diligent search for adoptive homes within the placement preferences is consistent with the goal of finding homes for Indian children and helps to further ICWA's legislative intent to promote "placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture" ¹⁹³ Under these circumstances, it is difficult to see how ICWA could be interpreted to preempt such efforts and nothing in the *Baby Girl* case prohibits such efforts.

Further, the Supreme Court principles on preemption emphasize that "the proper approach [to questions of preemption] is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted."¹⁹⁴ Moreover, where questions of preemption arise involving *Indian law*, the standard is even more difficult: "the nature of the competing interests at stake" must be balanced rather than "narrow[ly] focus[ing] on congressional intent to preempt state law as the sole touchstone."¹⁹⁵ Here, the interests are not so much competing as complementary given ICWA's strong interest in protecting children's connections with their families and tribes.

Thus, most state law requirements that provide enhanced protections are unlikely to be preempted by ICWA. Accordingly, state law

¹⁹² 25 U.S.C. § 1902 (2006).

¹⁹³ 25 U.S.C. § 1902 (2006).

¹⁹⁴ *Merrill Lynch, Pierce Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973).

¹⁹⁵ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

has great potential for ameliorating potential negative impacts upon Indian children and families from the Supreme Court's decision.

B. Interpretation of State ICWAs

In analyzing State ICWAs, there are two possible paradigms. One is where the language of the state ICWA diverges from that of the federal ICWA. In such a case, interpretation of the State law should proceed independently from the Supreme Court's interpretation of federal law. In the second case, the provisions of state law and federal law are the same. In that instance, some indication of a different state intent will likely be necessary in order for a state court to consider an interpretation at variance from that of the Supreme Court in *Baby Girl*. This differing intent might be shown through legislative history or implementation via state regulations or policies that illustrate variance or varying intent from the Supreme Court's interpretation of the federal ICWA.

1. Where State Law Language Differs from the Federal ICWA

Examples of how a state ICWA might be interpreted in a way that would ameliorate the impact of the Supreme Court decision in *Baby Girl* can be found in Michigan, Oklahoma, California, and Minnesota state law. Each will be discussed in turn below.

The Michigan Indian Family Preservation Act (MIFPA) defines active efforts as "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *and to reunify the child with the Indian family.*"¹⁹⁶ The language in this definition makes it clear that active efforts are to be made not just to prevent the breakup of a family but also to reunify the child with the Indian family. Given this broader language, a strong argument can be made that the Supreme Court's interpretation of §1912(d) based on the federal language "to prevent the breakup" of an Indian family should not be applied to the MIFPA provision even though the language of the active

¹⁹⁶ 2012 MICH. PUB. ACT 225 (2012) (emphasis added); 2012 MICH. PUB. ACT, 231.

efforts provision itself in the MIFPA mirrors the federal language.¹⁹⁷ Should a Michigan court agree with this proposition, the MIFPA provision would govern this issue in the case of an Indian child in a child custody proceeding in Michigan because of §1921.

Another example of state laws that might lessen the impact of the *Baby Girl* decision are laws that mandate how state and private agencies will actively ensure compliance with §1915(a), which provides that children be placed according to placement preferences.¹⁹⁸ Although not directly in opposition to the Supreme Court's interpretation of §1915(a), the language of some of those provisions may provide heightened protections for Indian children, extended family members, and tribal members.

For example, the Oklahoma ICWA states:

In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency *shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act.*¹⁹⁹

The fact that the Oklahoma Legislature mandated that a vigorous effort be made to place children in preferred placements may lessen the number of cases where there is a placement preference dispute. It may also provide a basis to argue that an Oklahoma court should interpret the placement preferences section in the Oklahoma ICWA statute more expansively. This could lead to a rejection of the Supreme Court's limitation on the application of the federal ICWA placement preferences provision in §1915(a) when it interprets the Oklahoma law. Of note, Oklahoma has interpreted §1921 to include heightened protections not only for the parents of an Indian child, but also for the tribe of an Indian child, making this interpretation more feasible.²⁰⁰

¹⁹⁷ *Supra* Part II(a).

¹⁹⁸ 25 U.S.C. § 1915(a) (2006).

¹⁹⁹ OKLA. STAT. tit. 10 § 40.6.

²⁰⁰ *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007).

California's state ICWA is similar to Oklahoma's. California law states "[i]n any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian... the child's placement shall comply with this section."²⁰¹ It requires that "the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section."²⁰² California also requires that "[a]ny person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe . . . to secure placement within the order of placement preference established in this section."²⁰³ Again, this language is counter to the passive interpretation of the federal placement preferences provision by *Baby Girl*, as it requires those agencies and persons placing a child to actively engage to ensure compliance with the placement preferences. This may require a different interpretation and application of the preferences from that in the *Baby Girl* case. California has also codified that the language of §1921 of ICWA includes heightened protections for tribes, which may give the provisions on placement preferences discussed above additional force in courts.²⁰⁴

Minnesota's state ICWA offers another example of a state law that may provide some practical protection against the consequences of the placement preferences portion of the decision in *Baby Girl*. Under its notice provisions, the Minnesota Indian Family Preservation Act states that "[a]ny agency considering placement of an Indian child shall make active efforts to identify and locate extended family members."²⁰⁵ Although this provision does not directly contradict the Court's holding concerning the placement preferences provision of ICWA, it does require that both private and public agencies actively engage extended family at the time of placement. That process should maximize the possibility that a preferred party will file an adoption petition.²⁰⁶

²⁰¹ WELF. & INST.CODE § 361.31(a) (2008).

²⁰² *Id.* at § 361.31(f).

²⁰³ *Id.* at § 361.31(g).

²⁰⁴ Cal. FAM. CODE § 175(d) (2008); Cal PROB. CODE § 1459(d) (2008); Cal WELF. & INST. CODE § 224(d) (2008).

²⁰⁵ MINN. STAT. § 260.761 (2007).

²⁰⁶ Oklahoma and California state laws provide added authority for their expanded protections which is important because § 1921 may not be adequate to cover some

While these provisions only partially or indirectly address the issues raised by the Supreme Court decision, there is the opportunity for states to amend their laws to more directly address the *Baby Girl* decision and provide greater protections to Indian children, families, and tribes.

2. Where State Law Restates the Federal ICWA Sections 1912(f) and 1912(d)

In contrast to the state ICWA provisions described above, the majority of states that have passed laws to strengthen the application of ICWA in their jurisdiction have either (1) inserted a provision in their code that requires, under state law, that the federal ICWA be followed;²⁰⁷ or (2) codified language that exactly mirrors the language in ICWA interpreted by the Supreme Court in *Baby Girl* active effort language,²⁰⁸ termination of parental rights standards,²⁰⁹ and placement preference language.²¹⁰

Clearly, those states that have added provisions requiring the integration of the federal ICWA with state child welfare and adoption laws

changes that states might want to make. Arguably, the rights protected by the Federal ICWA's placement provision and State ICWA's improvements on the placement provisions are those of the Indian child and the tribe—not the parent or Indian custodian. Nonetheless, as discussed in the text, such provisions may not be preempted by the federal law even where state law has not explicitly provided added authority.

²⁰⁷ See, e.g., MONT. CODE ANN. § 41-3-109 (1997) ("If a proceeding under this chapter involves an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 (2006) *et seq.*, the proceeding is subject to the Indian Child Welfare Act."); VT. STAT. ANN. tit. 33, § 5120 (2009) ("The federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*, governs any proceeding under this title that pertains to an Indian child, as defined by the Indian Child Welfare Act, and prevails over any inconsistent provision of this title."); S.D. CODIFIED LAWS § 26-8A-32 (2010) (stating in its chapter on Protection of Children from Abuse or Neglect "Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963 (2006)) . . . if that Act is applicable."); OR. REV. STAT. § 419B.500 (2003) (stating "The parental rights of the parents of a ward may be terminated as provided in this section and ORS § 419B.502 to 419B.524, only upon a petition filed by the state or the ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward. If an Indian child is involved, the termination of parental rights must be in compliance with the Indian Child Welfare Act.").

²⁰⁸ See, e.g., IOWA CODE § 232B.5 (2005); NEB. REV. STAT. § 43-1505 (2008); WIS. STAT. § 48.028(4)(e)(2) (2013).

²⁰⁹ See, e.g., Cal. WELF. & INST. CODE § 366.26 (c)(2)(B)(ii) (2008); IOWA CODE § 232B.6(6) (2005); NEB. REV. STAT. § 43-1505 (2008).

²¹⁰ See, e.g., 2013 MICH. PUB. ACT 231; WIS. STAT. § 48.028(7)(a) (2013); IOWA CODE § 232B.9 (2005).

will be required to interpret the federal ICWA in their courts according to the decision of the Court in *Baby Girl*. However, under some circumstances, those states that have codified the language of the federal ICWA may be able to argue that state ICWA language identical to the federal ICWA need not be interpreted as the Court in *Baby Girl* interpreted the federal ICWA. Further, state decisions, based in whole or in part on a state ICWA with language identical to the federal ICWA language, may not automatically be overturned by the decision in *Baby Girl*.

State legislative history, implementing regulations or procedures, or even a tribal-state agreement may support an interpretation of state ICWA language that is at variance with the Supreme Court's interpretation of identical language. For example, California made the following legislative finding:

There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. §1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.²¹¹

Statements such as this one offer room to argue that the unique interests of California, as stated by this finding, require a different interpretation of

²¹¹ Cal. FAM. CODE § 175 (2008).

the applicable provisions in California law even though the language of the operative provisions themselves are similar to the federal ICWA.

The policy statements and regulations of a state may also offer insight into how a state ICWA with identical language to the federal ICWA is intended to be interpreted. For example, the Washington state policy and procedures manual states that “active efforts” must be provided for the “protection of the Indian child” and to “rehabilitate” the Indian family, not only to “prevent the break-up of the Indian family,” the Court focused on and interpreted in *Baby Girl*.²¹²

This may support an argument that although the language of the state ICWA provision in Washington mirrors the federal ICWA, the state provision has been interpreted more broadly by the State, and a Washington state court should defer to the administrative interpretation of the statute in its interpretation. Federal rules of statutory interpretation require great deference be given to an administrative agency’s reasonable

²¹² The Washington ICWA policy and procedure manual states the following as it pertains to active efforts:

- A. Before filing a dependency, guardianship, or involuntary termination of parental rights petition in state court, the [Children’s Administration] social worker must make active efforts to provide social services to the family for protection of an Indian child.
 1. The social worker must make active efforts only when the circumstances of the family, viewed in light of the prevailing social and cultural conditions and the way of life of the Indian community:
 - a. Require the provision of social services for the protection of the child; and
 - b. To support the relationship between the child and the parent(s)/Indian custodian.
 2. Active efforts include those services the social worker actively provides to rehabilitate and/or prevent the breakup of the family. Active efforts require more direct involvement by the social worker with the family than reasonable efforts.

The [Children’s Administration] social worker will jointly develop and, whenever possible, provide the services in consultation with the social services program of the child’s Tribe.

DSHS, WASHINGTON MANUAL § 05.20 (2012), *available at* http://www.dshs.wa.gov/ca/pubs/mnl_icw/chapter5.asp. (last visited Mar. 17, 2014)

interpretation of an ambiguous statute.²¹³ It should be noted that this principle has uneven application throughout state courts, however.²¹⁴

Interpretation of state ICWA's that mirror the federal ICWA language will take place on a case-by-case basis. In many cases, a state court will likely adopt the federal analysis. Where a state's legislative purpose or administrative interpretation of its own statutory language is at variance from the Supreme Court's interpretation, it is possible that a state court will take an independent look at the state statute.

IV. INTERACTION OF THE DECISION IN *BABY GIRL* WITH TRIBAL-STATE AGREEMENTS

The decision in *Baby Girl* did not involve 25 U.S.C. §1919 of ICWA, which provides that "States and Indian tribes are authorized to enter into agreements with each other respecting the care and custody of Indian children and jurisdiction over child custody proceedings."²¹⁵ Many of these agreements have been negotiated and approved since 1978.²¹⁶ Generally, §1919(a) tribal-state agreements are not required to be formally written or executed agreements, such as a Memorandum of Understanding.²¹⁷ Rather, tribal-state agreements may consist of a series of agreements, or be created through operational collaboration and programming between state and tribal agencies and courts.²¹⁸ Tribal-state

²¹³ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²¹⁴ Ann Graham, *Chevron Lite: How Much Deference Should State Courts Give State Agency Interpretation*, 68 LA. L.REV. 1105, 1109 (2008) (stating "[e]xisting state models range along a continuum from express adoption of the Chevron doctrine to outright rejection of Chevron's applicability.").

²¹⁵ 25 U.S.C. § 1919 (2006).

²¹⁶ Sarah Hicks, *Tribal-State Relationships: Implications for Child Welfare Service Delivery to American Indian/Alaska Native Children and Families in IMPACTS OF CHILD MALTREATMENT IN INDIAN COUNTRY: PRESERVING THE SEVENTH GENERATION THROUGH POLICIES, PROGRAMS, AND FUNDING STREAMS* 64, 87 (2005).

²¹⁷ *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 132 (Nev. 2012).

²¹⁸ *Id.*; for an in-depth analysis of tribal-state relations in the area of child welfare, including the various forms of collaboration, see, Hicks *supra* note 207 at 72-87. For examples of informal agreements and promising collaborations and programming in tribal-state relations. CHILD WELFARE INFO. GATEWAY, ISSUE BRIEF: TRIBAL STATE RELATIONS (2012), available at

agreements are often accompanied by the adoption of state policies and procedures to ensure they are duly followed, or the agreements themselves become state policy once adopted.

The Court's decision did not address or affect the application of §1919. While §1919 tribal-state agreements cannot directly overturn the decision in *Baby Girl*, they can provide mechanisms to establish Indian child welfare procedures that go beyond the "minimum Federal standards for removal of Indian children from their families."²¹⁹ In a practical sense, this may require agencies to operate in a manner that would ameliorate some of the impact of the limitations handed down by the Supreme Court.

Oregon, Washington, and Minnesota offer examples of tribal-state agreements that may limit the practical impact of the decision in *Baby Girl*. Each tribal-state agreement provides language that speaks to the termination of parental rights, active efforts, and placement preferences provisions of ICWA.

For example, in Oregon, the tribal-state agreement requires consultation with the tribe of the parent before the state will advocate to any state court a permanency plan involving termination of parental rights.²²⁰ By coordinating efforts with tribes before termination of parental rights is even considered, additional protections for the rights of non-custodial parents can be provided and some of the issues raised by the Supreme Court may be resolved. In the Washington tribal-state agreement, there are also limitations on the filing of Termination of Parental Right. The child welfare agency is to petition the state court for an involuntary foster care placement or Termination of Parental Rights only after it has undertaken active efforts to prevent the breakup of the family.²²¹ This provision does not require that a determination of prior legal or physical custody to be made. Also, the state agrees to not seek a Termination of Parental Rights when specific circumstances exist as the

https://www.childwelfare.gov/pubs/issue_briefs/tribal_state/tribal_state.pdf (last visited Apr. 22, 2014).

²¹⁹ 25 U.S.C. § 1902 (2006).

²²⁰ See Oregon template tribal-state agreement, p. 4.

²²¹ See Washington template tribal-state agreement, p. 50.

only grounds for a petition.²²² For example, evidence of community or familial poverty, crowded or inadequate house, or alleged alcohol abuse by itself cannot trigger a petition for termination of parental rights.

In terms of the active efforts issue, it should be remembered that while the Court's decision said that active efforts were not required in the case before it, it did not prohibit active efforts from being provided. Thus, tribal-state agreements requiring services to all parents of Indian children would not be precluded by the Supreme Court's decision. Oregon and Minnesota tribal-state agreements include such provisions. The Oregon agreement requires the state child welfare agency and the respective tribe to make active efforts to overcome identified barriers, such as transportation, providing access to and transmittal of documents, and providing access to visits, counseling, and treatment without limitation.²²³ Similarly, a Minnesota tribal-state agreement defines active efforts as "active, thorough, careful, and culturally appropriate efforts" by the local social services agency "to fulfill its obligation under ICWA, [Minnesota Indian Family Preservation Act], and the DHS Social Services Manual to prevent placement of an Indian child and at the earliest possible time to return the child to the child's family once placement has occurred."²²⁴ While these sections do not specifically address the Supreme Court's issues, they suggest a robust interpretation of who should receive active efforts. Of course, now that tribes and states are specifically aware of the Supreme Court's decision, they could also agree to provisions that more directly address the Court's decision in *Baby Girl*.

In terms of placement preferences, the Oregon tribal-state agreement and Washington tribal-state agreement offer language that may narrow the applications of the Court's decision in *Baby Girl*. The Oregon agreement includes the three preferential placement categories and adds a fourth preference, "[o]ther adoptive families approved by the Tribe."²²⁵ Section VII of the Oregon template agreement also provides that the Tribe shall provide the state welfare agency with names and home

²²² *Id.*

²²³ See Oregon template tribal-state agreement, p. 16.

²²⁴ See Minnesota template tribal-state agreement, p. 5.

²²⁵ See Oregon template tribal-state agreement, p. 11.

studies of prospective adoptive homes in order to assist the state in complying with the placement preferences. If this provision works as intended, it could serve to lessen the impact of the Supreme Court's decision. ICWA's adoptive placement preferences are also strongly protected by the Washington tribal-state template agreement. Washington has agreed to place an Indian child outside the ICWA placement preference categories only when certain circumstances exist. Those circumstances include (1) the Tribe concurs that the best interests of the child require placement in a non-Native home; (2) the child has extraordinary physical or emotional needs, attested to by a qualified expert witness, that cannot be addressed by a placement within the preferred categories; or (3) a diligent search for a placement within the preferences categories has been completed and no suitable placement within such categories is available.²²⁶ Again, in a practical sense, provisions such as these can minimize the impact of the Supreme Court's decision.

One limitation on the efficacy of tribal-state agreements should be noted. While these provisions might be included as part of state licensing requirements for adoption agencies which would affect some private adoptions, it would be more difficult to use tribal-state agreements to impact private adoptive placements by birth parents and adoption attorneys that do not utilize state or state-licensed agencies—although state courts might have the authority to issue rules that would impact such placements.

CONCLUSION

The South Carolina Supreme Court's interpretation of the *Baby Girl* case that led to the issuance of an adoption decree without a hearing on Veronica's best interests highlights the dangers of state courts expanding the United States Supreme Court decision in ways that can be detrimental to Indian children and families. Thus, it is critical that the limitations of the *Baby Girl* decision be fully understood and taken into account by courts interpreting the decision.

²²⁶ See Washington template tribal-state agreement, p. 111.

Although the United States Supreme Court used some sweeping language in parts of its decision, the Court's analysis focused to a substantial extent on the facts of this case and the context of private adoptions. Indeed, Justice Breyer in his concurrence described the Court's decision as "deciding no more than is necessary." At a minimum, then, there is a strong argument that the Court did not intend to establish a sweeping and wide-ranging precedent beyond the type of factual circumstances presented in the case. Thus, advocates for Indian children, their parents, tribes, and extended families should emphasize to courts the limitations in the decision. If the Supreme Court decision is fully understood, state courts should hesitate before issuing broad rulings expanding upon the Supreme Court's decision in ways that are contrary to the intent and spirit of the ICWA.²²⁷

In addition, practitioners should be aware that state Indian Child Welfare Acts and other state laws can provide additional protections to birth parents and families above and beyond the federal statute as interpreted by the United States Supreme Court. Moreover, although they cannot alter the applicable law, tribal-state agreements may establish procedures that will lessen the possibility that the issues decided in this case will become the subject of future litigation.

Finally, it is worth considering this case in the broader context of how the adoption system functions in this country. Adoption may often be the best option when neither parent nor the child's extended family is available to provide a suitable home for the child. If a parent, grandparent, aunt, uncle, or other family member is able and willing to provide a permanent home for a child, however, most believe that this should be the preferred option for any child—that indeed this is in the best interest of the

²²⁷ For example, Congress made explicit findings "that there is no resource more valuable to the continued existence and integrity of Indian tribes than their children", 25 U.S.C. 1901(3) (2006) and "that an alarming high percentage of [Indian] children are placed in non-Indian foster and adoptive homes and institutions", 25 U.S.C. 1901(4) (2006). Interpretations of the Court's decision, especially given its limitations and ambiguities, need to consider the findings and intent of Congress as expressed in the overall statute, as well as earlier interpretations of the ICWA by the Court which were not disavowed or overturned in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). See *generally* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

child. In *Baby Girl*, a fit biological father who was willing and able to care for his daughter and made clear his intent to parent his child within four months of her birth and as soon as he was aware of her proposed adoption was denied the right to raise his child. Instead, once the ICWA was found not to apply, his rights were terminated and his daughter was placed in a stranger adoptive home through the application of South Carolina law. It is a legitimate question as to whether some states, like South Carolina, are so eager to promote adoption that they promote bad public policy and outcomes for children by creating unreasonable obstacles for unwed fathers and their families who want to maintain relationships with their children.