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# Tribal Consequences of Urban Indian Relocation: Case Examination of the Existing Indian Family Exception & Adoptive Placement Under the Indian Child Welfare Act

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## TRIBAL CONSEQUENCES OF URBAN INDIAN RELOCATION: CASE EXAMINATION OF THE EXISTING INDIAN FAMILY EXCEPTION & ADOPTIVE PLACEMENT UNDER THE INDIAN CHILD WELFARE ACT

By Novaline D. Wilson

### INTRODUCTION

U.S. assimilation policies, lack of Tribal economic infrastructure and individual necessity are some of the factors that contribute to Indian urban relocation. According to the 2000 U.S. Census, approximately 70% of those that identified themselves as American Indian or Alaska Native live in urban centers.[1] It is estimated that at least half of this Indian urban relocation is a direct result of federal initiatives like the Urban Indian Relocation Program that was initiated during the 1950s.[2]

The consequences of these Termination Era programs have major legal implications for today's relocated Indians and their urban decedents. Urban centers with the highest populations of Indians include New York City (all 5 boroughs), Los Angeles, Phoenix, Tulsa, Oklahoma City, Anchorage, Albuquerque, Chicago, San Diego, Houston, Tucson, and San Antonio.[3] The Indians living in New York City and Los Angeles combined constitute 3.4% of the total Indian and Alaska Native populations.[4]

Relocated Indians residing in these urban centers face unique challenges when accessing social services and health care that stem from federal obligations that were made in exchange for

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[1] U.S. Census. American Indian and Alaska Native Population: Census Brief (2000), http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf. (The 2000 Census revised the race question to include in addition to one race, a category to for those of one or more racial heritage and describes Indians as either part of "race alone population" or "race in combination population," which is inclusive of those who identified as themselves as one race American Indian or Alaska Native. For the purposes of this paper all "race in combination population" data are examined. The race alone population consisted of 2.5 million people (0.9% of the population), and race in combination populations contributed an additional 1.6 million people (0.6%)).

[2] Kenneth R. Philp, *Stride toward Freedom: The Relocation of Indians to Cities, 1952-1960.*, THE 16 WESTERN HISTORICAL QUARTERLY, 175-190, No. 2. (1985); Larry W. Burt, *Roots of the Native American Urban Experience: Relocation Policy in the 1950s*, 10 AMERICAN INDIAN QUARTERLY, 85-99, No. 2. (1986).

[3] 2000 U.S. Census. *See* The American Indian and Alaska Native Population: Census Brief, at 6.

[4] *Id.* at 8, referencing U.S. Census Bureau, Census 2000 Summary File 1.

Tribal lands. Additionally, urban Indians that reside far from their reservations are more susceptible to inconsistent rules concerning these federal policies. Often, these federal policies concerning Tribes are too complex for state judicial interpretation, and are misinterpreted at the expense of Tribes, Congressional policy, and Indian law jurisprudence.[5]

One such inconsistency is the manner in which some state courts employ the judicially constructed "existing Indian family" (EIF) exception to application of the Indian Child Welfare Act (ICWA).[6] The rationale for this exception takes a narrow perspective of Congressional intent, by asserting that the policy of preserving Indian families and Tribal culture are not furthered when the child is not part of an existing Indian family because the child's parents failed to maintain cultural and familial ties with their respective Tribes.[7]

This exception permits a judge to determine that a child, who by all other means meets the only two ICWA statutory requirements of being an "Indian child"[8] in a "child custody proceeding,"[9] to be exempt based that judge's determination of what constitutes membership in an existing Indian family. As a result, this judicially constructed exception is often based on little more than an arbitrary examination of the Indian parents' "Indianness," which can be as subjective as mere quantification of the number visits to a reservation during that past year, or the number of ceremonies completed during childhood.[10]

More often, state courts that adopt the EIF exception are from jurisdictions with few Indians, which have growing implications for the increasing number of urban Indians around the country.[11] States with the highest populations of Indians and Alaska Natives in 2000, in order,

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[5] *See* Lincoln v. Vigil, 508 U.S. 182 (1993).
[6] Matter of Baby Boy L., 643 P.2d 168 (Kan. 1982).
[7] *Id.*; In re Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005).
[8] 25 U.S.C. § 1903 and §1911 (1978).
[9] 25 U.S.C. § 1903(1)(i)-(iv) (1978).
[10] Lorie Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine.* 23 AM. INDIAN L. REV. 1, 35 (1998).
[11] In re Baby C., 27 A.D.3d at 48, *see* footnote 4 (14 jurisdictions rejected the EIF exception, contrasted with 7 jurisdictions that accept it. In CA, the EIF exception has been eliminated by statute, yet CA courts remained split on EIF exception use.)

are California, Oklahoma, Arizona, Texas, New Mexico, New York, Washington, North Carolina, Michigan and Alaska.[12] Most of these states have rejected application of the EIF exception. The Oklahoma Supreme Court rejected it in 2004,[13] and the state legislature codified ICWA.[14] The Arizona Court of Appeals rejected the EIF exception in 2000.[15] The New York Court of Appeals declined to accept EIF as law in 2005.[16] The Washington legislature set state ICWA statutory requirements.[17] Michigan courts decided in 1996 not to apply the EIF exception.[18] The Alaska Supreme Court ruled the EIF exception as invalid in 1989.[19]

In addition to these jurisdictions, the following states have greater than the national rate of 1.5% of Indian residents: Idaho, Montana, North Dakota, Oregon, South Dakota and Utah.[20] Like many of states with Indian populations, the Idaho court ruled in 1993 to overrule the application of the EIF exception.[21] The Montana Supreme Court followed in 1996.[22] The North Dakota Supreme Court rejected the EIF exception in 2003,[23] the Oregon courts decided similarly in 1993. [24] The South Dakota Supreme Court declined in 1990,[25] and Utah courts shut down the EIF exception in 1997.[26] Finally, states with smaller Indian populations of less than 1%, that have also refused to adopt the judicially constructed EIF exception include Illinois (1995),[27] Iowa (2003),[28] and New Jersey (1988).[29] Despite statutory elimination of the EIF exception to ICWA, California courts remain split on EIF use.[30]

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[12] 2000 U.S. Census Brief at 6.
[13] Matter of Baby Boy L., 103 P.3d 1099 (Okla. 2004).
[14] Ok. St. Ann. § 40.1 and § 40.3 (1982).
[15] Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000).
[16] In re Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005).
[17] Rev. Code Wash. § 13.34.040(3) (2004), § 26.10.034(1) (2004), and § 26.33.040 (2004).
[18] In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996).
[19] In the Matter of Adoption of T.N.F., 781 P.2d 973 (Alaska 1989).
[20] 2000 U.S. Census Brief at 6.
[21] Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993).
[22] Matter of the Adoption of Riffle, 922 P.2d 510 (Mont. 1996).
[23] In re A.B., 663 N.W.2d 625 (N.D. 2003).
[24] Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993), *revd. on other grounds* 881 P.2d 795 (Or. 1994).
[25] In re Adoption of Baade, 462 N.W.2d 485 (S.D. 1990).
[26] State ex rel. D.A.C., 933 P.2d 993 (Utah Ct. App. 1997).
[27] In re Adoption of S.S., 657 N.E.2d 935 (Ill. 1995).
[28] In re R.E.K.F., 698 N.W.2d 147 (Iowa 2005); Iowa Code § 232B.5 (2003).

All of the jurisdictions utilizing the EIF exception have Indian populations of less than 1%,[31] with exception of Kansas, which is the jurisdiction where this exception was initially constructed.[32] State judges accept the EIF exception as law in Alabama (1990),[33] Indiana (1988),[34] Kansas (1982),[35] Kentucky (1996),[36] Louisiana (1995),[37] Missouri (1986),[38] and Tennessee (1997).[39] More recent cases in Alabama[40] and Indiana[41] indicate these jurisdictions may be shifting away from use of the EIF exception.

Arguably, these judges in jurisdictions lacking significant Indian Country do not understand Indian law and may blindly favor fundamentally flawed constitutional arguments, but that does not explain why these state courts purposefully choose to disregard the plain language of ICWA and twist Congressional intent.

Congress intended for ICWA to be applied to Tribal Nations as a whole, not to individual parental interests, which are arguably diminished because parents are in the process of terminating rights to their Indian children. In the 1989, the U.S. Supreme Court set forth fundamental criteria to frame Congressional intent by stating,

> "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

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[29] Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J 1988).
30 Cal. Welf. & Inst. Code § 360.6. (1999), Cal. Rules of Court, Rule 1430 (1990). Compare jurisdictions accepting the EIF: In re Junious M., 144 Cal App 3d 786 (Cal. Ct. App 1983) [1st Dist], and In re Alicia S., 65 Cal App 4th 79 (Cal. Ct. App 1989) [5th Dist], with those CA courts that adopt the EIF exception: In re Bridget R., 41 Cal App 4th 1483 (Cal. Ct. App 1996), In re Alexandria Y., 45 Cal App 4th 1483 (Cal. Ct. App 1996) [4th Dist], and Crystal R. v Superior Ct., 59 Cal App 4th 703 (Cal. Ct. App 1997) [6th Dist].
[31] 2000 U.S. Census at 6.
[32] Matter of Baby Boy L., 643 P.2d 168 (Kan. 1982).
[33] S.A. v. E.J.P., 571 So.2d 1187 (Ala. Civ. App. 1990).
[34] Matter of Adoption or T.R.M., 525 N.E.2d 298 (Ind. 1988).
[35] Matter of Baby Boy L., 643 P.2d at 168.
[36] Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996).
[37] Hampton v. J.A.L., 658 So.2d 331 (La. App. 2d Cir.1995).
[38] In the Interest of S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986).
[39] In re Morgan, 1997 WL 716880, 1997 Tenn. App. LEXIS 818 (Tenn. Ct. App. 1997).
[40] *See* S.H. v. Calhoun County Dept. of Human Resources, 798 So.2d 684 (Ala. Civ. App. 2001).
[41] *See* Matter of D.S., 577 N.E.2d 572 (Ind. 1991).

> demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct."[42]

The Supreme Court established that ICWA's purposes ought to be broadly construed because "Congress was not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large number of Indian children adopted by non-Indians."[43] Thus, narrow interpretations of ICWA policies rationalizing the EIF exception are illogical and directly contravene Congressional purpose and Supreme Court precedent.

Arguably, the effects of past federal assimilation initiatives have not only displaced a generation of Indians and their children, these former policies have now set the stage for the heart-breaking facts associated with many of today's ICWA cases. Urban Indian populations face complex issues of acculturation and displacement, in addition to the other economic and social challenges of daily life in urban America. In the light of these circumstances, ICWA ought to be employed as Congress intended; that is, to enable Tribes governments to protect Tribal interests in their Indian children.

CASE FACTS & HOLDINGS

In 2005, New York examined the ICWA EIF exception in the case of *In re Baby Boy C.*[44] Baby Boy C was born in California to Rita C., who is an enrolled member of the Tohono O'odham Nation, and Justin W., who is not Indian.[45] Both parents consented before a judge of the Cocino County Superior Court of Arizona to terminate their parental rights.[46] Rita C. had no desire for the child to be raised in her tribal culture.[47] An affidavit was submitted to the New York Family Court detailing Rita's approval for the Indian child to be raised in accordance with

[42] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).
[43] *Id.;* In re Baby C., 27 A.D.3d at 45.
[44] In re Baby Boy C., 27 A.D.3d at 36.
[45] *Id.*
[46] *Id.* at 37, In re Adoption of Baby Boy C. 784 N.Y.S.2d 334, 336 (N.Y. Fam. Ct. 2004).
[47] *Id.* at 39.

the adoptive parent's Jewish faith.[48] The adoptive parents, Jeffery A. and Joshua A., took immediate possession of the child and returned to New York.[49] During the New York adoption proceeding, the Tohono O'odham Nation exercised their ICWA right to intervene in this uncontested adoption.[50]

The New York Family Court permitted, under authority of state civil procedure, New York Civil Practice Law and Rules (N.Y. C.P.L.R.) 1013,[51] the Tribe's intervention for the purposes of showing that the child was part of an existing Indian family.[52] The Family Court applied the EIF exception based on the mother's lack of social and cultural connection to her Tribe and the Tohono O'odham Nation's inability to meet the court's mandated burden of showing how the child belonged to an existing Indian family.[53] Although, the Family Court did not ultimately apply ICWA, the court conceded that if the EIF did not apply, this proceeding would have been subject to ICWA and invalidated the extrajudicial parental consents to adopt Baby Boy C.[54] The Family Court further held that ICWA without the EIF exception would be unconstitutional and volatile of the Indian child's fundamental rights to equal protection and due process.[55] After rejecting ICWA, the Family Court determined at a final hearing that in the best interests of the child that the adoption process should continue.[56]

The Tohono O'odham Nation appealed, arguing the statutory requirements for ICWA application had been met, use of the EIF exception contradicted the language and purpose of ICWA, and the Family Court's constitutionality arguments were flawed, since Indian legislation is based on the unique political relationship that Tribes have with the federal government and

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[48] In re Adoption of Baby Boy C. 784 N.Y.S.2d at 336.
[49] *Id.*
[50] In re Baby Boy C., 27 A.D.3d at 36.
[51] N.YC.P.L.R.1013 (1997).
[52] In re Baby Boy C., 27 A.D.3d at 37.
[53] *Id.* at 37.
[54] *Id.* at 56, 25 U.S.C. § 1903, In re Adoption of Baby Boy C.,N.Y.S.2d at 338.
[55] *Id.*
[56] *Id.* at 37.

need not meet the traditional strict scrutiny tests for suspect classification based on race.[57] This case was a matter of first impression for the appellate courts of New York.[58]

The New York Appellate Division held: 1) the EIF exception to ICWA is inapplicable in this jurisdiction, 2) ICWA does not require the EIF exception to pass constitutional muster, 3) the Tohono O'odham Nation cannot intervene as a matter of right under ICWA, but 4) the Tribe would be permitted to intervene in this case based on the court's discretion and use of the state's civil procedure statute, N.Y.C.P.L.R. § 1013.[59] Ultimately, the case was reversed and remanded back to Family Court for further proceedings.[60]

The New York Appellate Division reversed the Family Court and held the EIF exception to ICWA does not apply in New York because it "directly conflicts with the express language and purpose of ICWA," contravenes Congressional intent, legislative history, and ignores the U.S. Supreme Court's policy analysis in *Mississippi Band of Choctaw Indians v. Holyfield*, which emphasized "the role of the extended family in Indian society."[61] In *Holyfield* the Tribe sought jurisdiction regarding adoption proceedings of Choctaw Indian twins pursuant to ICWA.[62] The Supreme Court's rationale focused on Congressional intent that favored Tribal Nations, because use of adoption practices, "seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."[63]

The New York Appellate Division first examined the plain meaning of statute to find the language in ICWA, "clearly and unambiguously provide only two threshold requirements for applicability – the proceeding must be a 'child custody proceeding' involving an 'Indian

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[57] *Id.* at 39 (*quoting* Holyfield, 490 U.S. at 35.)
[58] *Id.* at 35.
[59] *Id.* at 34.
[60] *Id.* at 56.
[61] *Id.* at 34, 35; *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[62] Holyfield, 490 U.S. 30 (U.S. 1989).
[63] Holyfield *quoting* 1978 Congressional Hearings, at 193.

child.'"[64] The statutory definition of an "Indian child" depends exclusively on, "tribal membership or eligibility for membership – not on the degree of connection with tribal culture."[65] There is no statutory requirement that the child be a member of an "existing Indian family."[66] Moreover, Congress had the opportunity to codify the EIF exception in the 1987 ICWA amendments, but purposefully declined the opportunity to accept this exception.[67]

Additionally, the New York Appellate Division ruled that ICWA's application without the EIF exception does not violate an Indian child's constitutional right to 14th Amendment equal protection or due process.[68] The Family Court had accepted the rationale in *Bridget R.*, out of the California Court of Appeals, and its progeny that rationalize the constitutionality of ICWA hinges on the EIF exception application, because Indian legislation is based on race, therefore subject to strict scrutiny as a suspect classification. [69]

The *Bridget R.* court's analysis, that several jurisdictions, including the Family Court, have come to rely on, holds that the EIF exception is required to keep ICWA constitutional.[70] The *Bridget R.* court rationalized that a child has a fundamental right to be placed in a stable and permanent home, and ICWA alone does not meet fundamental rights strict scrutiny. [71] Although the *Bridget R.* court found the interest to be compelling, application of ICWA when the child has "formed familial bonds" with a non-Indian family would violate the child's due process rights to a stable environment.[72] The rationale that a child has a fundamental right to be placed in a stable domestic environment, taken to its logical conclusion, would create a huge affirmative duty on the government to not only locate such homes, but also to regulate and enforce familial stability.

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[64] In re Baby Boy C., 27 A.D.3d at 48.
[65] *Id.*
[66] *Id.*; *see* In re Alicia S., 65 Cal. App. 4th at 89-90; In re A.B., 663 N.W.2d 625 (N.D. 2003).
[67] *Id.*; *see* footnote 5; *see* Michael J. Jr., 7 P.3d 960, 964 (Ariz. Ct. App. 2000).
[68] *Id.* at 30.
[69] In re Bridget R., 41 Cal.App.4th 1483. (Cal. Ct. App. 1996).
[70] *Id.*; In re Adoption of Baby Boy C. 784 N.Y.S.2d at 334; In re Baby Boy C., 27 A.D.3d at 44.
[71] *Id.*
[72] *Id.* at 1506 –1510; In re Baby Boy C., 27 A.D.3d at 44.

It is unlikely that government would be required to accept this administratively unenforceable duty.[73] Additionally, there is no recognized fundamental right for a child to be adopted.[74]

Congress intended for there to be exceptions to ICWA based on "good cause" in 25 U.S.C. § 1915.[75] Under the good cause exception, judges examine the facts to show Tribes should not have jurisdiction.[76] The New York Appellate Division argues the Family Court should have used the good cause exception rather than relying on the judicially created EIF exception.[77]

The immediate impact of the New York Appellate Division's holding not only established this jurisdiction's rejection of the EIF exception, but also overruled a previous EIF exception application in the case of *Baby Girl S.* decided by the New York Family Court in favor of narrow ICWA policy interpretation that rationalized the EIF exception.[78]

<u>REJECTING THE EXISTING INDIAN FAMILY EXCEPTION, BUT…</u>

The New York Appellate Division's rejection of the EIF exception coincides with the previously discussed trend that jurisdictions with Indian populations are less likely to adopt the EIF exception, which could be arguably applicable here because New York City has the highest urban Indian population.[79] Although this Court's rationale for rejecting the EIF exception is based on the U.S. Supreme Court interpretation of Congressional intent in *Holyfield*, case law from Indian jurisdictions, and examination of the legislative history, the New York Appellate Division still failed to apply ICWA in this case. The New York Appellate Division's plain language analysis deemed Baby Boy C. to be an "Indian child," but the Court failed to find this

[73] *See* DeShaney v. Winnebago County Dept of Social Services 489 U.S. 189 (1989). (State knew about child abuse but did not intervene, the child was beat so badly and sustained permanent brain damage. Supreme Court held no violation of child's due process.0
[74] In re Baby Boy C., 27 A.D.3d at 50; Mullins v. State of Oregon, 57 F.3d 789, 794 (9th Cir 1995).
[75] *Id.* at 51.
[76] *Id.*
[77] *Id.*, 44 Fed. Reg. 67, 487 (1979).
[78] *Id.,* In Matter of the Adoption of Baby Girl S., 690 N.Y.S.2d 907 (N.Y. Fam. Ct. 1999).
[79] 2000 Census Brief at 6.

action was a "custody proceeding," under the ICWA transfer provision, which applies only to foster care placement and termination of parental rights proceedings.[80]

According to *The Indian Child Welfare Handbook*, there are no statutory explanations that justify exemption of transfer of preadoptive and adoptive proceedings.[81] Currently, the case law is split on this issue and "many states do transfer preadoptive proceedings to tribal courts, primarily because tribes may be in a better position to find an adoptive placement." [82] Arguably, the New York Appellate Division is not transferring the case to a Tribal jurisdiction, rather they are only examining Tribal intervention. Additionally, the Court examined whether the facts of this case made it a "termination of parental rights" proceeding.[83] The Court found Rita and Justin's submission of extra-judicial termination of parental rights before the adoption proceeding also made Tribal intervention as a matter of right inapplicable.[84]

This Court concedes that this result "creates statutory inconsistency in ICWA itself."[85] In order to address this inconsistency, the New York Appellate Division looked to a state statutory provision to fill in the gaps. Unfortunately, this approach resulted in a temporary remedy in this case, but overall does not contribute to this jurisdiction's ICWA jurisprudence because N.Y. C.P.L.R. 1013 leaves intervention of a party up to judicial discretion.

The New York Appellate Division opinion made great efforts in its analysis to break down the narrow policy holdings the Family Court relied on, to ultimately reject the EIF exception. Yet, the New York Appellate Division failed to use these same arguments when they did not apply ICWA. Rather the Tribe is permitted to intervene under N.Y. C.P.L.R. 1013, based a party's timely motion and judicial discretion. Both New York courts relied on this state civil

[80] Id., 25 U.S.C. §1912(c) (1978), B.J. Jones, The Indian Child Welfare Act Handbook 35 (American Bar Association 1995).
[81] B.J. Jones, The Indian Child Welfare Act Handbook 36 (American Bar Association 1995).
[82] B.J. Jones, The Indian Child Welfare Act Handbook 36 (American Bar Association 1995).
[83] Id. at 53.
[84] Id. at 53.
[85] Id. at 55.

procedure statutory provision that permits courts to exercise judiciary discretion and permit parties' intervention.[86] The Family Court used this rule to let the Tribe intervene, but only for the purposes of meeting the burden to show that the child was part of an existing Indian family.[87]

Moreover, the Family Court and the New York Appellate Division's use of this state law resulted in two opposite holdings. Arguably, this methodology leaves too much up to judicial discretion.[88] In the absence of consistent ICWA application based on either state common law or a state codification of ICWA, Tribes are subject to the judicial inclinations of state court judges, which may have major implications for the dynamic aspects of Indian law jurisprudence.

Further, this case is listed in the American Law Reports (ALR) as part of ICWA construction and application.[89] The ALR is often used as a general reference to current case law and jurisprudence regarding a given legal subject. If a judge in a non-Indian jurisdiction looks to this resource to examine the ICWA application in adoption proceedings, under §5.5, this is the only case listed and states, "adoption proceeding was not a 'termination of parental rights under ICWA," and that Tribes are not permitted to intervene as a matter of right under ICWA.[90] There are no significant distinctions aside from a general section heading and the note that the case considered application of ICWA proceedings.[91] Judges who rely on this source, who are not familiar with the distinctions in the statute regarding transfer proceedings, may not likely apply ICWA in applicable adoption proceedings. Further, judges who do not investigate the case arguments and policy analysis may not appreciate the New York Appellate Division's resolution of ICWA inconsistencies with Congressional policy, nor the application of this provision as a

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[86] N.Y. C.P.L.R. 1013 (1997). (Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.)

[87] In re Baby Boy C., 27 A.D.3d at 37.

[88] *Id.* at 55. *see* footnote 9.

[89] 89 A.L.R. 5th 195, Construction and Application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. §§ 1901 et seq.) Upon Child Custody Determinations. (2001). § 5.5. Adoption proceedings. (Publication pages are not available for this document).

[90] *Id.*

[91] *Id.*

matter of Tribal intervention rather than transfer. Isolated non-Indian jurisdictions may construe this as yet another judicially constructed exception to ICWA application.

Conceivably, parents who desire to avoid ICWA application need only terminate their parental prior to an adoption proceeding. These individuals will unilaterally be able to avoid the ICWA and nullify Congressional intent. Tribes will have lost the opportunity to protect their interest in their Indian children placed up for adoption in non-Indian homes in direct contravention of ICWA policies.

CONCLUSION:

The consequences of past federal Indian relocation initiatives extend far beyond today's individual urban Indians, their families, or even Indian populations in a given city. The effects of these assimilation programs continue to directly hinder Tribal self-government because it subjects Tribal Nations to some state jurisdictions which are not prepared to interpret federal statutes concerning Tribes, especially ICWA.

Congress did not intend for states judges to create ICWA exceptions, nor does the policy analysis show Congress intended for states courts to bypass ICWA in favor of state law to fill in perceived statutory gaps and inconsistencies. ICWA is among several federal statutes applying to Tribes dependent on state court participation. To counteract these unprincipled results, mechanisms need to be established to provide for more consistent interpretation of ICWA.

Such mechanisms could include a process that permits state judges to defer cases to federal district courts, assuming that federal courts within a given jurisdiction have more experience interpreting federal statutes concerning Indian Tribes. State legislatures also need to codify ICWA provisions with guidelines for implementation. Finally, Congress needs to reexamine the resulting ICWA case law to determine where gaps exist, and amend accordingly.

Urban Indians are highly diverse populations that represent many Tribes, different levels of acculturation, economic status and education. In this context, relocated urban Indian parents subject to ICWA may increase the Tribe's susceptibility to state judicial misinterpretation and erosion of the Tribe's right to self-govern. ICWA ought to be employed as Congress intended, that is to enable Tribes governments to protect Tribal interests in one of their most vulnerable Tribal members because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[92]

[92] 25 U.S.C. § 1901(3) (1978).