Loyola University Chicago Law Journal

Volume 28
Issue 4 *Summer 1997 Judicial Conference Symposium Anniversary Issue*
Article 8

1997

The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in *In re S.S. and R.S.*

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Note

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I. INTRODUCTION

> The life of man is a circle from childhood to childhood, and so it is in everything where power moves. Our teepees were round like the nests of birds, and these were always set in a circle, the nation's hoop, a nest of many nests, where the Great Spirit meant for us to hatch our children.[1]

This Native American[2] children's poem indicates a philosophy of community shared by Native American tribes that is expressed in their social culture, particularly in the familial context. Native American culture differs in several ways from the predominant American culture of Judeo-Christian values.[3] Because families and children comprise a fundamental building block of any society, two cultures may find themselves at odds when forced to interact or coexist on the domestic level.[4]

The Native Americans tribal culture and the predominant American culture meet head-to-head in familial legal struggles. One such conflict was at issue in the Illinois Supreme Court decision in *In re Adoption of S.S. and R.S.*[5] In *In re S.S.*, the Illinois Supreme Court sought to resolve the jurisdictional issue of whether the Native American tribal court or the state court provided the proper forum for a decision regarding the termination of parental rights of a Native American

1. John G. Neihardt, *The Life of a Man Is a Circle*, in BLACK ELK SPEAKS (Simon & Schuster Pocket Books and the University of Nebraska Press 1961) (1932), reprinted in VIRGINIA DRIVING HAWK SNEVE, DANCING TEEPEES 8 (Holiday House 1989).

2. The terms "Native American" and "Indian" will be used interchangeably throughout this Note in order to maintain continuity with statutory language and the language of various authors and judges.

3. B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK 6 (1995); Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 7-10 (1990).

4. Goldsmith, *supra* note 3, at 7-10.

5. *In re* Adoption of S.S. & R.S., 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

woman and the subsequent adoption of her Native American children.[6] The Native American woman and her tribe contended that the state court was without jurisdiction to hear the termination and adoption proceedings.[7] Although Congress, under the Indian Child Welfare Act,[8] conferred exclusive jurisdiction to tribal courts over "any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe,"[9] the Illinois Supreme Court held that the children were not necessarily domiciliaries of the tribe.[10] The Court circuitously rejected the tribe's claim of exclusive jurisdiction over the proceedings and distinguished it from United States Supreme Court precedent.[11]

This Note first summarizes the history, development, and enactment of federal legislation known as the Indian Child Welfare Act of 1978 ("ICWA" or "the Act"), along with the United States Supreme Court interpretation of that legislation, to demonstrate the context in which the Illinois Supreme Court decided *In re S.S.*[12] This Note then discusses the majority, concurring, and dissenting opinions in *In re S.S.*[13] Next, this Note criticizes the majority and concurring decisions of *In re S.S.* for their contrived attempt to distinguish United States Supreme Court precedent and for their direct contravention of congressional intent.[14] Finally, this Note predicts that the *In re S.S.* holding will result in confusion and inefficiency when future ICWA issues arise in Illinois courts.[15]

II. BACKGROUND

A. Tribal Community

Although the particular customs and practices of Native Americans vary from tribe to tribe, there are some general cultural traditions which are common to most tribes.[16] "Continuing tribal traditions result in a world view and a concept of group identity which create a

6. *Id.* at 937.
7. *Id.* at 938-39.
8. 25 U.S.C. §§ 1901-1963 (1994).
9. *Id.* § 1911(a).
10. *In re S.S.*, 657 N.E.2d at 943.
11. *Id.* at 941. The court distinguished the case from Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
12. *See infra* Part II.
13. *See infra* Part III.
14. *See infra* Part IV.
15. *See infra* Part V.
16. JONES, *supra* note 3, at 5.

culture within a culture, the values of which generally are unknown, unnoticed, or unrecognized by those who are unacquainted with tribal customs."[17] The premise of Native American culture and mores is the concept that individual existence is dependent upon the survival of the "whole."[18] Native American tribes pass this "holistic thinking" from generation to generation both through tribal social structure and the tradition of oral storytelling.[19]

An essential component of this holistic tribal culture is that Native American children traditionally are raised not only within the context of their immediate family, but also within the context of the larger tribe.[20] Grandparents, great-aunts or great-uncles, aunts or uncles, or cousins frequently raised children not because of the neglect or inability of the children's parents, but because of familial obligation to the extended family.[21] Tribal members with child rearing responsibilities direct their efforts not only toward their biological children, but also toward all tribal children.[22] Consequently, many Native Americans identify themselves as "part of the larger cultural group, not as completely autonomous individuals."[23] Federal law acknowledged the emphasis that Native Americans place on tribal identity by providing for an independent tribal interest in the welfare of Native American children in adoption proceedings.[24]

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17. Edward L. Thompson, *Protecting Abused Children: A Judge's Perspective on Public Law, Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 AM. INDIAN L. REV. 1, 10 (1990) (quoting *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1074 (Okla. 1985) (Kauger, J., concurring in part and dissenting in part)).

18. JONES, *supra* note 3, at 5.

19. *Id.*

20. *Id.*

21. *Id.* at 6. A noteworthy example of this cultural and historical phenomenon is reflected in the widely spoken Choctaw language in which the words for "mother" and "father" are also used to refer to the father's sisters and mother's brothers respectively, as well as to other relatives. *Proposed Bill to Amend the Indian Child Welfare Act: Hearings on S. 1448 before the Subcomm. On Native American and Insular Affairs of the House Resources Comm.*, 104th Cong. (1995) (statement on behalf of the Association on American Indian Affairs, Inc., by Jack F. Trope, Counsel to the Association on American Indian Affairs, Inc.) (citing John R. Swanton, *Source Material for the Social and Ceremonial Life of the Choctaw Indians*, SMITHSONIAN BULLETIN NO. 103, at 87 (1931)).

22. JONES, *supra* note 3, at 5; Goldsmith, *supra* note 3, at 8. "[I]n Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35 n.4 (1989) (quoting *Hearings on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 473 (1977)).

23. Goldsmith, *supra* note 3, at 7.

24. 25 U.S.C. §§ 1901-1963 (1994). *See also* Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U.

B. Legal Relationship Between United States and Native American Tribes

Originally, the United States government recognized the Indian tribes as culturally distinct, autonomous groups having the same status as foreign nations.[25] In 1832, the United States Supreme Court affirmed Indian tribes' rights to govern themselves through grants of tribal sovereignty in treaties between tribes and the United States government.[26] The Court's ruling reminded the states that all congressional treaties considered the Indian nations as "distinct political communities."[27] In 1871, Congress eliminated the practice of treaty negotiations with Native American tribes and ceased to consider the tribes as equivalent to separate nations.[28] Instead, Congress began to interact legally with Indian tribes solely by passing legislation.[29]

Although Congress passed laws early on meant to protect Native Americans, those laws were rarely enforced.[30] This disregard for rights of Native Americans developed into what was at first an informal, and later a formal, relocation policy of Native Americans by the United States government.[31] In 1830, Congress passed the Indian Removal Act[32] in order to relocate eastern tribes to the West.[33] Congressional control over the Native American tribes expanded with the enactment of laws emphasizing the "education and civilization" of

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L. REV. 81 (1994) (noting that Congress has introduced the Indian tribe as a third party into cases of adoption involving Native American children).

25. STEPHEN L. PEVAR, THE RIGHTS OF INDIAN TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 3 (2d ed. 1992).

26. Worcester v. Georgia, 31 U.S. 515 (1832). In *Worcester*, the Court voided a piece of Georgia legislation that contravened the Cherokee nation's right of tribal sovereignty. *Id.* The Court interpreted treaty language stating that the United States would be "managing all [the tribes'] affairs," to refer primarily to managing trade with Indians and to exclude Indian self-government. *Id.* at 553. The Court further explained that because the Cherokee nation was under the "protection of the United States," the tribe was receiving the protection of one more powerful but not abandoning their national character and submitting as subjects to the laws of a master. *Id.* at 552. The Court reasoned that to have "divested themselves of the right of self-government on subjects not concerned with trade . . . could not be for the benefit and comfort" of the Indian tribes. *Id.* at 554.

27. *Id.* at 556.

28. PEVAR, *supra* note 25, at 5.

29. *Id.*

30. *Id.* at 3.

31. *Id.* at 4.

32. 4 Stat. 411 (1830).

33. PEVAR, *supra* note 25, at 5.

Indian children in order to assimilate Native American culture into that of the majority culture.[34]

Increased congressional control diminished the importance and scope of tribal sovereignty.[35] Starting in the late nineteenth century and continuing into the first quarter of the twentieth century, Congress passed legislation with the goals of eradicating tribal governments and Indian communities.[36] Consequently, Indians were forcibly assimilated into the majority society as farmers.[37]

These assimilation policies had devastating effects on tribal culture and power.[38] In response to this negative impact on Indian tribes, Congress made an about-face in the early 1930s when it enacted legislation[39] to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[40]

Although the legislation of the 1930s encouraged Indians to assert their rights of self-government, Congress' subsequent adoption of a termination policy made any assertion of self-government nearly impossible by the 1950s and 1960s.[41] The termination policy resulted in the revocation of federal funds and grants of land for many Native American tribes.[42] By 1966, Congress had eradicated over 100 tribes through its termination policy.[43] One consequence of termination was that Native Americans whose tribes disintegrated became subject to state law because their own tribal power of self-government no longer existed.[44] Some commentators have characterized the termination policy as a form of genocide.[45]

The last major shift in congressional policy regarding the relationship with Native American tribes occurred in 1968, when

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34. *Id.* at 4.

35. *See infra* text accompanying notes 36-38.

36. PEVAR, *supra* note 25, at 5 (citing 24 Stat. 388, *as amended by* 25 U.S.C. §§ 331-358 (1994)).

37. *Id.* at 5.

38. *Id.*

39. *Id.* at 6 (citing 48 Stat. 984 (codified as 25 U.S.C. §§ 461-494 (1994))).

40. *Id.* (quoting H.R. REP. NO. 1804, at 6 (1934)).

41. *Id.* at 57.

42. *Id.* at 7.

43. *Id.* at 57 (citing AMERICAN INDIAN POLICY REVIEW COMM., FINAL REPORT 232 (1977)).

44. *Id.*

45. *Id. See* Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986); *see also* Goldsmith, *supra* note 3, at 3 (calling ICWA "an effort to halt what had become a genocidal phenomenon").

Congress passed laws that were consistent with President Nixon's desire "to strengthen the Indian sense of autonomy without threatening his sense of community."[46] Congress enacted laws to assist economic growth of the tribes and to strengthen self-reliance and self-government.[47] This policy has withstood the test of time and remains to this day; however, it recently met challenges from Congress.[48]

C. The Indian Child Welfare Act of 1978

1. The Need for Legislation

Congress may have finally recognized its responsibility to make restitution to Indian tribes for causing them grave political, economic, and cultural damage over the course of the past 100 years; however, societal views and practices were slow to follow this recognition.[49] One particular arena in which society at large did not recognize tribal

46. PEVAR, *supra* note 25, at 8 (citing Richard Nixon, Message from the President of the United States, Recommendations for Indian Policy (1970)).

47. *Id.* (citing 25 U.S.C. §§ 1521-1524 (1994) (creating an Indian business development fund), 25 U.S.C. §§ 1451-1494 (1994) (establishing a loan fund for Native Americans), and Pub. L. No. 93-638 (codified in scattered sections of 5 U.S.C., 25 U.S.C., 42 U.S.C., and 50 U.S.C.) (allowing Indian tribes to administer federal government Indian programs)). The ability of Native Americans to administer federal programs helped to diminish federal control over them. *Id.*

48. The American Indian Policy Review Commission reported as follows:

> [T]he long-term objective of Federal-Indian policy [should] be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other local governments. This objective should be pursued in a flexible manner which will respect and accommodate the unique cultural and social attributes of the individual Indian tribes.

Id. at 9 (quoting AMERICAN INDIAN POLICY REVIEW COMM., FINAL REPORT 89-90 (1977)). President Reagan reaffirmed this congressional policy: "[T]his administration intends to restore tribal governments to their rightful place among governments of this nation and to enable tribal governments, along with State and local governments, to resume control over their own affairs." *Id.* (quoting *President's Statement on Indian Policy*, 96 PUB. PAPERS 99 (1984)). In June of 1996, the committee on Indian Affairs struck from a proposed bill provisions that "had great potential for harm . . . to fundamental principles of Federal-tribal relations and tribal sovereignty." S. REP. No. 104-335, at 14 (1996).

49. For example, even though the Indian Religions Freedom Act of 1978 afforded protection of Indian religions, the Department of Agriculture "bureaucrats hesitated to write implementing regulations to clarify the meaning of the act, and courts tended to find the act too vague to enforce." WILCOMB B. WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW 253 (2d ed. 1995). Also, legal disputes between Indian tribes and states that began to arise in the 1970's over water rights have persisted well into the early 1990's, even though partnerships which would have resolved those disputes were possible. *Id.* at 275. *See infra* notes 51-59 and accompanying text.

culture and autonomy was child welfare.[50] Although tribes possessed the "inherent" right to regulate domestic relations,[51] Indian families faced greater risks of involuntary separation than did the average American family.[52]

Cultural differences and biases existed with members of the judiciary and with many social workers,[53] making it difficult for these decision makers to accept the Native American cultural philosophy of the holistic tribe.[54] Because of such differences, these state actors contributed to the widespread removal of Native American children from their homes to foster and adoptive placements in non-Native American homes.[55] Chief Calvin Isaac of the Mississippi Band of Choctaw Indians commented:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.[56]

In the 1970s, when this most recent version of congressional restitution policy was fairly new, the removal of children from their Native American families and tribes for the reason of physical abuse

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50. *See infra* notes 51-59 and accompanying text.

51. JONES, *supra* note 3, at 7; PEVAR, *supra* note 25, at 100.

52. H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530-32.

53. "Judicial bias may be unintentional, even unconscious: 'For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe.'" Erik W. Aamot-Snapp, Note, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1170 n.12 (1995) (quoting McGowan v. Maryland, 366 U.S. 420, 565 (1961) (Douglas J., dissenting) (citing FELIX S. COHEN, LEGAL CONSCIENCE 169 (1960))). "The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of child abuse and neglect." H.R. REP. No. 95-1386, at 11, *reprinted in* 1978 U.S.C.C.A.N. (92 Stat. 3069) 7530, 7533.

54. *See* Goldsmith, *supra* note 3, at 10.

55. H.R. REP. No. 95-1386, at 10. In 1969 and again in 1974, the Association of American Indian Affairs (AAIA) conducted surveys of states with large Indian populations and found that twenty-five to thirty-five percent of all Indian children became "separated from their families and placed in foster homes, adoptive homes, or institutions." *Id.* at 9.

56. H.R. REP. No. 104-808 at 16-17 (1996) (quoting *Hearings on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 152, 155-56 (1977)) .

was infrequent.[57] Instead, social workers cited "neglect" or "social deprivation," along with vague allegations that children suffered psychological damage as a result of living with their parents, as grounds for placing Indian children outside of their family and tribe.[58] In fact, tribal communities were sometimes astounded to learn that courts deemed to be "unfit" the parents and caregivers who the communities considered adequate or even excellent.[59] Cultural clash is the main reason for this disparity of opinion in the ability or adequacy of Native American caregivers.[60]

2. The Purpose of ICWA

Aside from personal upheaval for families and children,[61] this widespread removal of Native American children from their families had detrimental effects[62] on Native American tribes, which depended

57. Two studies of two separate tribes in different areas of the country showed that physical abuse was the reason for removing Indian children from the family and tribe in only one percent of the cases. H.R. REP. No. 95-1386, at 10.

58. *Id.*

59. *Id.*

60. *Id.* Because of the importance of extended families in Indian culture, an Indian child might have several relatives as caregivers who have a close relationship with the child. *Id.* Non-Indian social workers who are unfamiliar with this custom would assume that the birth parents were irresponsible and neglectful for leaving a child with people other than members of the nuclear family and would use this occurrence as the basis for termination of parental rights. *Id.* In addition, social workers frequently cited alcohol abuse as the grounds for terminating Indian parental rights; however, in areas where Indian and non-Indian alcoholism rates were equivalent, children were more often removed from the Indian parents. *Id.*

61. Goldsmith, *supra* note 3, at 3 n.9 (citing Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Compilation of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCHOL. 134 (1979) (explaining that society does not grant a white cultural identity to Indian children raised in non-Indian homes, but instead imposes upon these children an Indian identity which no longer belongs to them, resulting in feelings of isolation and a lack of tribal identity during adolescence)).

62. *Id.* at 5 n.21. One commentator describes detrimental effects on Indian families and children as follows:

> After decades of being told that there is no value in their language, religion, and culture, of suffering the indignities of forced relocation, and of having their children forcibly removed from their homes because of cultural ethnocentrism, low self-esteem, self-hate, and a sense of alienation and desperation are not uncommon phenomena among Indian people.

Id. (citing Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 363 (1986)). "Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem - these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government." H.R. REP. NO. 95-1386, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7534.

upon the unity of their communities and traditions for their survival.[63] In order to address the devastating effects which Native American culture suffered at the hands of non-Indians,[64] Congress enacted ICWA in 1978.[65] The congressional declaration of policy contained within the Act clearly reflects the reasons for enacting ICWA:[66]

> 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.[67]

This national policy declaration sets forth two goals of ICWA: (1) protection of the best interests of Indian children, and (2) promotion of the stability and security of Indian tribes and families.[68] The Act

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63. Goldsmith, *supra* note 3, at 1. *See supra* text accompanying notes 16-24.

64. *See supra* text accompanying notes 51-59.

65. 25 U.S.C. §§ 1901-1963 (1994).

66. *Id.* § 1902; H.R. REP. No. 95-1386, at 8 (quoting the purpose of the bill H.R. 12533, 95th Cong. (1978)).

67. 25 U.S.C. § 1902.

68. *Id.* Importantly, the policy seems to equate the two goals, and, in fact, one might argue that the goal of tribal security overshadows that of the individual child because the policy implies that placing Indian children with tribal members *is* in the best interest of those children. *Id. See also* Goldsmith, *supra* note 3, at 4 (stating that ICWA's premise is that it is in the best interest of an Indian child that the role of the tribal community in the child's life be protected; thus, "the dual purposes promoted by the Act—the 'best interests of Indian children' and the promotion of 'stability and security of Indian tribes and families'—are intertwined"). *See also* JONES, *supra* note 3, at 5-6, commenting on the relationship between the best interest of the child and ICWA:

> This policy objective may well clash with the commonly accepted theory of "best interest of the child" [which is] propagated by many in the non-native social work community and . . . emphasizes the importance of a child's psychological bonding with at least one adult who is perceived by that child as his or her psychological parent. . . .
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> . . . .
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> . . . Congress did not adopt [this standard of the best interest of the child] when it enacted ICWA. Instead, as the legislative history professes, Congress concluded that proper implementation of the act itself would serve the best interest of the Native American child.

Id. See generally Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353 (1991/92) (depicting the dichotomy between the Anglo best interest of the child standard and ICWA best interest of the child standard, with the latter encompassing ties to one's own culture). "The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *In re* Appeal

specifically sets out congressional findings as support for its legislative action and declaration of policy.[69]

3. Jurisdiction

ICWA's jurisdictional provisions are the core provisions of the Act.[70] These provisions give more power and control to tribal courts[71] through the use of the tribal governing systems and Native American judges.[72] Tribal judges are generally more knowledgeable than state judges about Native American customs and traditions that affect Indian

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in Pima County Juvenile Action, 635 P.2d 187, 189 (Ariz. Ct. App. 1981).

69. 25 U.S.C. § 1901 (1994). Section 1901 states in part:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Id. (footnotes ommitted)

70. JONES, *supra* note 3, at 29 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989)).

71. *Id.*

72. Most tribal courts are similar to those of the American court system of state and federal courts. PEVAR, *supra* note 25, at 97. While tribes have flexibility in creating their court systems, they still must comply with the Indian Civil Rights Act, which confers certain United States constitutional rights upon those subject to tribal court jurisdiction. *Id.* at 98, 240. This flexibility results in differences in structure and procedure of tribal courts among tribes. *Id.* at 98. "Tribal courts . . . have been centrally concerned with the overall concept of *justice* and have oftentimes managed to be free of the obsession with technicalities that has so often plagued non-tribal court systems." *Id.* (quoting Sage v. Lodge Grass Sch. Dist. No. 27, 13 Indian L. Rep. 6035, 6040 (Crow Ct. App.) (1986)). The flexibility of tribal courts and their emphasis on justice allow for tribal courts to be more creative or experimental with configuring dispute resolutions. *Id.*

children.[73] Thus, the Act gives tribal courts and judges a wide range of jurisdiction over important decisions affecting Native American children, families, and tribal social structure.[74]

ICWA delegates two types of jurisdiction to Native American tribal courts: exclusive jurisdiction and concurrent jurisdiction.[75] Tribal jurisdiction is exclusive over "any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."[76] The exclusive jurisdiction provision further requires that the tribe retain exclusive jurisdiction over wards of the tribal court, regardless of the residence or domicile of the child.[77]

If, however, an Indian child is the subject of either a foster care placement proceeding or a termination of parental rights proceeding, then ICWA's jurisdictional grant to tribes is concurrent with state court jurisdiction.[78] In either of those proceedings, even if an Indian child is not domiciled or residing on the Native American reservation, the Act expresses a preference that the court "shall" transfer the proceeding to the tribal court upon the petition of either a parent or the tribe as long as (1) there is no showing of good cause that the state court retain jurisdiction over the case, and (2) as long as neither parent objects to the transfer.[79] This provision is meaningful to Native American tribes because geographical limits of words like "domicile" and "residence" are not as important to them as is the child's membership in the tribe.[80]

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73. *Id.* at 98.

74. *Id.*

75. 25 U.S.C. § 1911(a), (b) (1994). The United States Supreme Court has also termed concurrent jurisdiction "presumptive jurisdiction." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

76. 25 U.S.C. § 1911(a). The definition of reservation includes "Indian country" and "any lands . . . title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." *Id.* § 1903(10). "Indian country" is defined in a criminal statute, the Major Crimes Act, as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (1994).

77. 25 U.S.C. § 1911(a). Domicile is a place where a person has a settled connection for certain legal purposes, either because his home is there or because it is assigned by law to him and a place from which a person has no intention of moving or to which a person has the intention of returning. 25 AM. JUR. 2D *Domicil* § 1 (1996).

78. 25 U.S.C. § 1911(b).

79. *Id.*

80. Patrice Kunesh-Hartman, Comment, *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 151 (1989). "Tribal members share responsibility for all their fellow members." *Id.*

The state court, however, must allow the tribal court the opportunity to decline jurisdiction over a particular case.[81]

The Act defines child custody proceedings to include foster care placements, terminations of parental rights, pre-adoptive placements, and adoptive placements.[82] A child custody proceeding excludes cases of delinquency or of child custody placements ensuing from a divorce of the parents.[83] By definition, an Indian child is any unmarried person who is less than eighteen years of age and who is a member of an Indian tribe or is both (1) eligible to be a member in an Indian tribe and (2) is the biological child of a member of an Indian tribe.[84] The legislative history of ICWA notes that although Native American adults have the right to exile themselves from their tribe, this right has no meaning for children who generally lack the capacity to make a fully informed decision about tribal enrollment.[85]

One source of confusion for state courts is ICWA's requirement that only absent good cause to the contrary should the state court transfer a foster care or termination of parental rights proceeding to the tribal court.[86] This confusion occurs because ICWA does not explain what factors the state court should consider when determining "good cause."[87]

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81. *Id.* Legislative history indicates that the intent of section 1911(b) (the concurrent jurisdiction provision) was to permit a state court to use a modified form of *forum non conveniens* to insure that the "rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected" in appropriate cases. H.R. REP. No. 95-1386, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7544.

82. 25 U.S.C. § 1903(1).

83. *Id.*

84. *Id.* § 1903(4).

85. H.R. REP. No. 95-1386, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533. The house report explains that "[b]lood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." *Id.* Indian tribes have inherent authority to determine their membership and enrollment. PEVAR, *supra* note 25, at 85. "As the Supreme Court has noted, '[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.'" *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978)).

86. 25 U.S.C. § 1911(b). *See infra* note 87.

87. There are a number of ways that a court can use "good cause" to achieve the purpose of ICWA. Kunesh-Hartman, *supra* note 80, at 56. For guidance on the determination of "good cause," the courts may look to case law, the Bureau of Indian Affairs guidelines, or both. *Id.* The case law is undecided as to whether the best interest of the child is an appropriate factor to consider in a determination of "good cause" transfer of presumptive jurisdiction. *See, e.g., In re* T.R.M. 525 N.E.2d 298 (Ind. 1988); *In re* T.S. 801 P.2d 77 (Mont. 1990). *But see, e.g., Ex rel* Eleanor Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990) (holding that state law and the idea of the best interest of the child may not be considered in a decision of whether to transfer a case to the tribal court pursuant to concurrent jurisdiction under ICWA). The Bureau of Indian Affairs

A second source of confusion for state courts is that the Act does not provide a definition of "domicile."[88] As a result, much litigation has focused on what constitutes the domicile of an Indian child.[89] Moreover, the interpretation of a child's domicile is of crucial importance to the children and their tribe because the determination of jurisdiction depends upon the children's domicile.[90]

4. Adoption

In addition to the important jurisdictional provisions, ICWA provides several forms of protection for Native American individuals and tribes involved in foster care, termination of parental rights proceedings, and adoptions, regardless of whether the tribal or state court holds the proceeding.[91] ICWA expressly protects not only the individual parties in a child custody proceeding, but also the tribe by granting it a separate interest in the proceeding.[92] The ICWA protection of the tribal unit in order to foster tribal survival embodies the congressional finding that "there is no resource that is more vital to

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guidelines state that "good cause" not to transfer the proceeding may exist if any of the following exists: (1) the proceeding was at an advanced stage when the state court received the petition to transfer, (2) the Indian child is over twelve and objects to the transfer, (3) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses, (4) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe. 44 Fed. Reg. 67,591 § C.3 (1979) (not codified).

88. *See infra* text accompanying notes 89-90. The congressional findings and policy provisions of ICWA lend guidance to the interpretation of "domicile." *See* 25 U.S.C. §§ 1901, 1902. Additionally, section 1921 of ICWA may be helpful in defining "domicile" under the Act, and it provides, "[i]n 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.* § 1921. Further instruction as to the interpretation of "domicile" may be found in the Bureau of Indian Affairs Guidelines; however, these are not binding on state courts. 44 Fed. Reg. 67,591 § C.3 (1979) (not codified).

89. Kunesh-Hartman, *supra* note 80, at 151. The issue of what constitutes a child's domicile is the dispositive one in *In re S.S. In re* Adoption of S.S. & R.S., 657 N.E.2d 935, 935-53 (Ill. 1995), *cert. denied,* 116 S. Ct. 1320 (1996).

90. 25 U.S.C. § 1911(a), (b); *see* PEVAR, *supra* note 25, at 300.

91. 25 U.S.C. §§ 1901-1963. *See infra* notes 92-109 and accompanying text.

92. 25 U.S.C. §§ 1901-1963. These protections represent an attempt by Congress to recognize and give life to the holistic cultural identity of Native Americans as part of the larger unit of the tribe. *See supra* text accompanying notes 16-24 (discussing the group identity Native Americans typically develop as part of their cultural heritage). Generally speaking, "Indian cultures focus on the collective rights of the community, permitting individual rights to bow more readily to the needs of the community." Goldsmith, *supra* note 3, at 1.

the continued existence and integrity of Indian tribes than their children."[93]

First, the Act grants to the tribe the right to intervene at any point in proceedings terminating the parental rights over an Indian child.[94] Second, ICWA requires the moving party in a child custody proceeding to give notice[95] both to the subject child's tribe and her parent or Indian custodian.[96] In addition to notice, the Act affords Indian parents the right to court-appointed counsel in any removal, placement, or termination proceeding,[97] as well as the right to examine reports and documents filed with the court in furtherance of the termination of parental rights.[98] Indian parents' rights are also protected by ICWA's requirement that a party bringing a petition to terminate parental rights must satisfy the court that active yet unsuccessful efforts have been made to prevent "the breakup" of the Indian family.[99] Moreover, in proceedings to terminate the parental rights of Indian parents, petitioners must prove their case "beyond a reasonable doubt,"[100] which is a high standard to meet. Lastly, ICWA authorizes parents to withdraw consent to an adoptive placement at any time prior to the final decree of termination of parental rights or

93. 25 U.S.C. § 1901(3).

94. *Id.* § 1911(c).

95. *Id.* § 1912(a). Subsection (a) "was amended to provide that the court would require such notice where it had actual or constructive knowledge of the Indian affiliation of the child." H.R. REP. NO. 95-1386, at 21 (1978) *reprinted in* 1978 U.S.C.C.A.N. 7530, 7544.

96. "'Indian custodian' means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. § 1903(6). Non-Indian custodians of Indian children do not qualify as Indian custodians under ICWA even if the person is a biological relative of one of the birth parents. JONES, *supra* note 3, at 37. In contrast, the non-Indian custodian does qualify as a preferred relative care giver for a foster care situation. *Id.* at 37, 86; *see* 25 U.S.C. § 1903(2) (defining "extended family member" to mean one "defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, . . . a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent).

97. 25 U.S.C. § 1912(b).

98. *Id.* § 1912(c).

99. *Id.* § 1912(d).

100. *Id.* § 1912(f). Evidence must show beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. *Id.*

adoption.[101] If this withdrawal of consent occurs, the child subsequently returns to the birth parent.[102]

Importantly, in any termination of a parental rights proceeding held in the state court, the Indian child, parent, or tribe may petition to invalidate the action upon a showing that the proceeding violated any of the above rights or protections of ICWA.[103] ICWA also provides that if state or federal law affords a higher degree of protection to the parent, then that state or federal standard should apply in lieu of the related ICWA provision.[104]

In addition to protections for the parties, ICWA sets forth preferences for adoptive placements of Indian children.[105] The adoptive preferences apply to placements "under State law."[106] Absent good cause to the contrary, adoptive placement goes first to a member of the child's extended family;[107] second, to other members of the Indian tribe; and third, to other Indian families.[108] ICWA further requires that in meeting the preference requirements, the standards to consider are those social and cultural standards of the tribe in which the parent or extended family resides, or with which they maintain social and cultural ties.[109]

5. Exceptions

In addition to statutorily excepted delinquency proceedings and custody proceedings arising from a divorce, ICWA also does not apply in some states which have adopted a judicially created doctrine called the existing Indian family exception.[110] Although this doctrine opposes the language of ICWA and the only United States Supreme

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101. *Id.* § 1913(b), (c).

102. *Id.* This reflects the Native American culture's tendency to place a greater emphasis on the tribal community rather than on the individual child who might temporarily suffer from this type of withdrawal. *See* Goldsmith, *supra* note 3, at 7-8.

103. 25 U.S.C. § 1914.

104. *Id.* § 1921.

105. *See Id.* § 1915(a).

106. *Id.*

107. *See id.* § 1903(2) (for definition of extended family).

108. *Id.* § 1915(a).

109. *Id.* § 1915(d). Congress' House Report on ICWA explains that, "All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle class standard which, in many cases, forecloses placement with the Indian family." H.R. REP. NO. 95-1386, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

110. Gallagher, *supra* note 24, at 81 (citing Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 469-70 (1993)).

Court interpretation of ICWA, some courts follow the doctrine and hold that proceedings are covered by ICWA only when children are "removed from an existing Indian family, home, or culture."[111]

The first case to employ this "exception" was *Baby Boy L.*[112] In this state adoption proceeding, an infant's non-Indian mother voluntarily consented to the infant's adoption by petitioners.[113] Although the baby's unmarried father was an Indian enrolled in the Kiowa tribe and the baby was an "Indian child"[114] as defined by ICWA, the Supreme Court of Kansas held that ICWA did not apply because the Act's only concern is protection against the removal of Indian children from *existing* Indian families and, therefore, from their Native American experiences and upbringing.[115] In arriving at this interpretation of the Act, the court partly relied on ICWA's policy that one of ICWA's goals is to provide federal standards for the "removal of Indian children from their families."[116] The court also relied on the legislative history of the Act,[117] interpreting it to mean that the Act's overriding concern was maintaining family and tribal relationships existing in Indian homes.[118] The opinion supported its reasoning by quoting a professor's law journal article, "'Under the Act . . . the common element is the parents' loss of control over the child . . . . *The Act principally applies to cases where a state court attempts to remove an Indian child from his or her home on grounds of the alleged incompetence or brutality of the parents.*'"[119]

In the only case in which the United States Supreme Court has dealt with any interpretation of ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,[120] the Court indicated that the existing Indian family exception was not a sound interpretation of ICWA because the

111. Gallagher, *supra* note 24, at 96. *See also* PEVAR, *supra* note 25, at 304; JONES, *supra* note 3, at 15-17.

112. *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982).

113. *Id.* at 172.

114. *See* 25 U.S.C. § 1903(4). Baby Boy L. became enrolled as a tribal member during the year-long court proceedings. *Baby Boy L.*, 643 P.2d at 173.

115. *Baby Boy L.*, 643 P.2d at 175.

116. *Id.* (quoting 25 U.S.C. § 1901).

117. *Id. See supra* notes 49-69 and accompanying text.

118. *Baby Boy L.*, 643 P.2d at 175.

119. *Id.* at 176 (quoting Russell Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1305 (1980)). Mr. Barsh's analysis, however, ignores the stated purpose of the Act to benefit and protect a tribe's interest in the welfare of its children. *See supra* notes 61-69 and accompanying text.

120. 490 U.S. 30, 51 (1989).

tribe had rights under ICWA that could not be frustrated by parents' actions.[121] The Court stated:

> Tribal jurisdiction under [section] 1911(a) [of ICWA] was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.[122]

In other words, *Holyfield* implied that ICWA covered Indian children's proceedings even though the subject children of the proceeding had not lived on the tribe's reservation or with their biological Indian parents.[123] Despite *Holyfield*'s strong suggestion that the existing Indian family exception is an inappropriate interpretation of ICWA, several states have since either instituted or continued to employ the existing Indian family exception in order to circumvent ICWA.[124] Most courts, however, have held that ICWA applies to any child custody proceeding in which the child involved is Native American.[125]

6. Interpretation of ICWA

Mississippi Band of Choctaw Indians v. Holyfield[126] provides the only United States Supreme Court interpretation of ICWA. The *Holyfield* Court directly addressed the issue of children's domicile[127] under ICWA pursuant to its jurisdictional provisions.[128] The Court held that the lower court's reliance on its state law definition of

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121. *Id.* "These congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended." *Id.* at 51. *See also supra* text accompanying notes 75-81, 94, 96 (explaining the rights of a tribe under ICWA).

122. *Holyfield*, 490 U.S. at 49.

123. *Id.* at 51.

124. Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995), *cert. denied*, 116 S. Ct. 1549 (1996); *In re* S.C., 833 P.2d 1249 (Okla. 1992); *In re* Adoption of Crews, 825 P.2d 305 (Wash. 1992); S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990).

125. *In re* Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); *In re* Coconino County, 736 P.2d 829 (Ariz. Ct. App. 1987); *In re* Adoption of Lindsay C., 280 Cal. Rptr. 194 (Ct. App. 1991); *In re* C.A.J., 709 P.2d 604 (Colo. Ct. App. 1985); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* T.J.J. & G.L.J., 366 N.W.2d 651 (Minn. Ct. App. 1985); *In re* M.E.M., 679 P.2d 1241 (Mont. 1984); *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Oscar C., 559 N.Y.S.2d 431 (Fam. Ct. 1990).

126. 490 U.S. at 30.

127. *Id* at 30-54. See also *supra* text accompanying notes 75-79 discussing jurisdiction and domicile under ICWA.

128. 25 U.S.C. § 1911(a)(b) (1994).

domicile controverted congressional intent.[129] The Court explained that the state should look to generally accepted federal and common law definitions of domicile in order to comply with the congressional intent that courts implement ICWA according to a uniform federal law of domicile.[130]

In *Holyfield*, unmarried parents who were enrolled members of the Choctaw Indian tribe and who resided on and were domiciliaries of the reservation consented to the adoption of their children by the Holyfields.[131] The adoption decree, however, omitted any reference to ICWA or the infants' Native American heritage.[132] Two months later, the tribe moved to vacate the adoption because under the application of ICWA, the tribal court had exclusive jurisdiction over the adoption proceeding.[133] The trial court ruled in a one-page opinion that the tribe never had exclusive jurisdiction over the proceeding for two reasons: (1) the birth mother took steps to ensure that the babies were born outside the reservation, and (2) the children had never resided or been physically present on the Choctaw Indian reservation.[134] Recognizing that the issue of jurisdiction depended upon the children's domicile, the Supreme Court of Mississippi affirmed the lower court's decision deciding that the twins were not domiciled on the reservation according to Mississippi state law.[135] Ultimately, the Supreme Court reversed this state court decision.[136]

The Court's analysis of the appeal from the state court decision began with an overview of ICWA.[137] The discussion focused on three areas: (1) ICWA's congressional hearings, anecdotal testimony, and statistical reports; (2) its legislative history and the House Report on ICWA; and (3) the Act's language, congressional findings, and several other provisions.[138] The Court noted that the hearings on ICWA

129. *Holyfield*, 490 U.S. at 49.
130. *Id.* at 47.
131. *Id.* at 37.
132. *Id.* at 38.
133. *Id.*
134. *Id.* at 39.
135. *Id.* The lower court stated:

> At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Appellant's argument that living within the womb of their mother qualifies the children's residency on the reservation may be lauded for its creativity; however, apparently it is unsupported by any law within this state . . . .

Id. (quoting *In re* B.B. & G.B., 511 So. 2d 918 (Miss. 1987)).
136. *Id.* at 41.
137. *Id.* at 32-37.
138. *Id.*

emphasized the negative impact that the removal of Native American children had on the tribes as separate entities.[139] The Court further credited non-tribal government actors' lack of knowledge of Native American culture as the principal reason for the high rates of removal of Indian children.[140] Significantly, the Court reasoned that the congressional findings included as part of ICWA[141] reflected the impact of this removal of children caused largely by non-Indian government actions.[142] From its overview, the Court determined that ICWA supplies a federal policy that "mak[es] sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[143]

The Court's analysis, more specifically, included an evaluation of congressional intent in order to determine the meaning of "domicile" under ICWA, as the Act does not include a definition of "domicile."[144] The Court stated that, in general, and unless it plainly indicates otherwise, Congress does not make the application of the federal legislation dependent upon state law.[145] According to the Court, there are two reasons for this: (1) Congress intends federal statutes to be

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139. *Id.* at 34. Interestingly, the court does not state from where the children were removed. *But see supra* notes 117-18 and accompanying text (explaining the reasoning of cases, seemingly contradictory to *Holyfield*, that have interpreted legislative history to support the existing Indian family exception). The Court quotes Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association's testimony:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these 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.

Holyfield, 490 U.S. at 34 (quoting *Hearing on S. 1214 Before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong. 193 (1978)). *See also supra* notes 54-59 and accompanying text (discussing negative impact on children caused by broken ties between them and their tribes).

140. *Holyfield*, 490 U.S. at 35 n.4. *See supra* notes 54-60 and accompanying text.

141. 25 U.S.C. § 1901 (1994).

142. *Holyfield*, 490 U.S. at 35.

143. *Id.* at 37 (quoting H.R. REP. No. 95-1386, at 24 (1978), *reprinted in* 178 U.S.C.C.A.N. 7530).

144. *Id.* at 43. The narrow issue in *Holyfield* became "whether there is any reason to believe that Congress intended the ICWA definition of 'domicile' to be a matter of state law." *Id.*

145. *Id.* (citing Jerome v. United States, 318 U.S. 101, 104 (1943); NLRB v. Natural Gas Utility Dist., 402 U.S. 600, 603 (1971); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 119 (1983)).

applied uniformly nationwide,[146] and (2) federal programs would face impairment if state law controlled.[147]

Applying these general rules of statutory interpretation, the Court reasoned that because Congress enacted ICWA to combat problematic state actions, it was "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."[148] The Court also concluded that Congress "could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile" because state-law definitions of domicile might allow for a state to render inapplicable the exclusive jurisdiction provision of ICWA.[149] Finally, the Court determined that if Congress intended for states to define "domicile," it expressly would have stated so in ICWA.[150]

Lastly, the *Holyfield* Court's analysis set out to define "domicile." The Court looked to the generally accepted meaning of the term domicile to the extent that it is consistent with the purpose of ICWA and with congressional intent.[151] The Court arrived at a number of principles for inclusion in the meaning of "domicile" under ICWA. First, domicile is not necessarily the same as residence.[152] In other words, people may live in places where they are not domiciliaries.[153] Second, adults obtain their domiciles, which stay the same until the establishment of a new one, according to physical presence in a place and an intent to remain there.[154] Finally, children are generally incapable of forming the intent necessary to establish their domiciles; therefore, their parents' domiciles typically determine children's domicile.[155] The Court summarized, "Under these principles, it is entirely logical that '[o]n occasion, a child's domicile of origin will be

146. *Id.* at 43 (citing *Jerome*, 318 U.S. at 104; *Dickerson*, 460 U.S. at 119-20; United States v. Pelzer, 312 U.S. 399, 402-03 (1941)).

147. *Id.* at 44.

148. *Id.* at 45.

149. *Id.* at 45-46. "[A] State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) [exclusive jurisdiction provision] *even to* a child who had lived several years on the reservation but was removed from it for the purpose of adoption. *Even in the less extreme case*, . . . Indian children . . . could be transported for adoption to States . . . where the law of domicile permitted the proceedings to take place in state court." (emphasis added). *Id.* at 46 n.20.

150. *Id.* at 47.

151. *Id.*

152. *Id.* at 48.

153. *Id.*

154. *Id.*

155. *Id.*

in a place where the child has never been.'"[156] The *Holyfield* Court ultimately held that the children were domiciled on the reservation. Thus, the tribal court had exclusive jurisdiction of their case under ICWA.[157]

In sum, according to *Holyfield*, children's domiciles do not alter because of actions of their parents.[158] Such an alteration via the application of state law would contravene Congress' intent to protect not only the interests of individual Indian children and families, but also the independent interest of the tribe, and would also contravene Congress' intent to minimize the detrimental effects on Indian children who grow up isolated from their Indian community and culture.[159] To illustrate its conclusion that its federal definition of domicile applies under the Act, the Court incorporated a prior explanation of this concept provided by the Supreme Court of Utah:

> To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by [the jurisdictional] subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian

156. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 cmt. b (1971)).

157. *Id.* at 53. *See also* 25 U.S.C. § 1911(a) (1994).

158. *Holyfield*, 490 U.S. at 49. The Court rejected the argument that the interpretation of domicile should differ and depend upon state law because the birth mother made efforts to give birth outside of the reservation in order to allow for the adoption of the children by the non-Indian Holyfields because "that was precisely part of Congress' concern." *Id.* at 51-52.

159. *Id.* at 52. The Court described these detrimental effects with the following quote:

> I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him.

Id. at 50 n.24 (quoting S. REP. No. 95-597, at 43 (1977)). In general, the Court concludes that, "'[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" *Id.* (quoting *In re* Appeal in Pima County Juvenile Action, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)).

> children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.[160]

Finally, in its reversal, the Supreme Court admonished the tribal court to consider that the children had spent their three years of life, since birth, with their adoptive parents and that a separation from these parents would doubtless cause the children pain.[161] Significantly, the Court underscored that the disputed issue was not where the children should live, but instead, whether the tribal or state court should make the custody determination about the children.[162] Without jurisdiction, the Court could not determine whether the interest of the tribe should outweigh the difficulty in separating the children from their adoptive family, but instead it "defer[red] to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."[163]

Although many cases have dealt with interpretation of ICWA's jurisdictional provisions, only two cases since the *Holyfield* decision have looked precisely at the issue of domicile in relation to jurisdiction

160. *Id.* at 52-53 (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969-70 (1986)). The Court also mentioned in a footnote that, "[t]here is some authority for the proposition that abandonment can effectuate a change in the child's domicile, *In re* Adoption of Halloway, 732 P.2d at 967, although this may not be the majority rule." *Id.* at 51 n.26 (citing to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22, cmt. e (1971) (explaining that an abandoned child generally retains the domicile of the last-abandoning parent)). The Court, however, implicitly dismissed this minority authority by emphasizing that, "[i]n any case, . . . the Supreme Court of Utah declined in the *Halloway* case to apply Utah abandonment law to defeat the purpose of ICWA. Similarly, the conclusive statement of the Supreme Court of Mississippi [the court below] that the twin babies had been 'legally abandoned,' 511 So. 2d at 921, cannot be determinative of ICWA jurisdiction." *Id.*

161. *Id.* at 53.

162. *Id.*

163. *Id.* at 54 (quoting *Halloway*, 732 P.2d at 972).

under ICWA: *In re W.L.*[164] and *In re S.S.*[165] In *In re W.L.*, the Supreme Court of Montana explained that, "[t]he guiding light in determining domicile for the purpose of jurisdiction is *Mississippi Band of Choctaw Indians v. Holyfield* . . . ."[166] In *W.L.*, the parents and the children were enrolled members of their Indian tribe.[167] The birth mother contended that although the state court had properly obtained jurisdiction under ICWA after consideration of a transfer to the family's tribal court, the state court lost its jurisdiction when an extended temporary custody order lapsed during a time when the mother was domiciled on the Indian reservation.[168] The court held, however, that because the mother was not domiciled on the reservation at the commencement of the proceedings, jurisdiction remained with the state court.[169] In other words, once a court obtains jurisdiction, it retains it until the final disposition of the case.[170] The opinion, however, leaves some questions unanswered because it does not clarify whether the children were living with their mother and it does not specify whether the tribal court would have exclusive jurisdiction had the mother been domiciled on the reservation at the beginning of the proceedings or if the state court had lost its jurisdiction.[171]

D. Illinois Parental Rights Termination and Adoption Law

Jurisdiction over child custody proceedings is important partly because one possible outcome of such proceedings is the termination of parents' rights over their children.[172] The right of parents to raise their children is a liberty interest protected by the Fourteenth Amendment of the United States Constitution.[173] This right, however,

164. *In re* W.L., C.L. & B.L., 859 P.2d 1019 (Mont. 1993).

165. *In re* Adoption of S.S. & R.S., 657 N.E.2d 935 (Ill. 1995); *see infra* Part III (discussing *In re S.S.* and the issue of domicile in that case).

166. *In re W.L.*, 859 P.2d at 1021 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)).

167. *Id.* at 1020.

168. *Id.* at 1021.

169. *Id.*

170. *Id.* The decision was bolstered by the birth father's objection to transferring jurisdiction to the tribe as well as the tribe's decision not to accept jurisdiction of the case. *Id.*

171. *Id.* at 1019-22.

172. 25 U.S.C. § 1903(1)(ii) (1994); 705 ILL. COMP. STAT. ANN. 405/2-29 (West 1993); 750 ILL. COMP. STAT. ANN. 50/1(F) (West Supp. 1996).

173. U.S. CONST. amend. XIV, § 1 ("[no] State [shall] deprive any person of life, liberty, or property, without due process of law . . . ."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

is not without limits.[174] The state may intervene in the parent-child relationship under its *parens patriæ* interest in the welfare of children.[175] Sometimes, this state interest and the parent interest are aligned.[176]

At other times, however, the interests of the state and parent are at odds with one another.[177] For example, the state will intervene against the parent in suspected cases of abuse and neglect by the parent.[178] After investigating this possibly abusive or neglectful situation, the state actors decide what intervention is necessary.[179] State intervention ranges from no further action following the investigation to the irrevocable[180] termination of parental rights, with many options in between.[181] Every state authorizes by statute involuntary termination of parental rights as its most drastic form of family intervention.[182]

One reason that parents' rights over children are terminated, either voluntarily or involuntarily, is to allow for the adoption of the children either by caretakers chosen by the birth parents or by caretakers assigned via state intervention.[183] In Illinois, involuntary parental rights termination occurs only when a court finds that a parent is unfit[184] *and* that the termination of parental rights is in the best interest

174. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *See also* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64 (1995) (quoting *Prince*, 321 U.S. at 167). "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting . . . child[] welfare." *Id.*

175. *Prince*, 321 U.S. at 166.

176. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

177. *See Prince*, 321 U.S. at 166-67.

178. Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 786 (1994).

179. *Id.*

180. "A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development." Lassiter v. Department of Soc. Servs., 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting).

181. *See* Cressler, *supra* note 178, at 786 n.7.

182. *Id.* at 787. Additionally, parents may also voluntarily consent to the termination of their parental rights. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/2-29 (West 1993).

183. 705 ILL. COMP. STAT. ANN. 405/2-29; 750 ILL. COMP. STAT. ANN. 50/1(F) (West Supp. 1996).

184. 750 ILL. COMP. STAT. ANN. 50/1(D). There are seventeen bases for a finding of parental unfitness in Illinois, including : abandonment of the child; failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare; substantial neglect of the child if continuous or repeated; extreme or repeated cruelty to the child; failure to protect the child from conditions within his environment injurious to the child's welfare; depravity; open and notorious adultery or fornication, habitual

of the child.[185] Illinois law provides for bifurcated hearings. First, a court must find that a parent is unfit according to clear and convincing evidence.[186] Second, only after the court finds the parent unfit may it consider the question of whether the termination of parental rights is in the children's best interests.[187]

Illinois law differs significantly, then, from ICWA in the area of parental rights termination and adoption. Illinois law involves the balancing of the possibly competing interests of maintaining the family and protecting children.[188] ICWA, however, interjects another interest into the analysis: the tribe's interest.[189] Because of the emphasis of Native American culture on the larger cultural group, cultures weigh these competing interests differently depending upon which culture holds the scale.[190]

Moreover, the required standard of proof for the termination of parental rights differs under Illinois law and ICWA.[191] Under ICWA, evidence must show beyond a reasonable doubt that serious damage will result to the child if termination of the parent's rights over the child does not occur.[192] This standard is a higher, more difficult standard to meet than the one under the Illinois Juvenile Court Act.[193] The evidentiary standard in Illinois for parental rights termination is only that clear and convincing evidence show that the parent is unfit according to one of seventeen statutory standards.[194]

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drunkenness or addiction to drugs (other than those prescribed) for at least one year prior to proceeding; and a finding of physical abuse under specified provisions of the Juvenile Court Act of Illinois. *Id.*

185. 705 ILL. COMP. STAT. ANN. 405/2-29(2).

186. *Id.*

187. 750 ILL. COMP. STAT. ANN. 50/1. *See also In re* Doe, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 115 S. Ct. 499 (1994); *In re* Taylor, 334 N.E.2d 194 (Ill. App. Ct. 1975).

188. *See* Appell & Boyer, *supra* note 174, at 64. Presumably the interest of family integrity includes both the individual interest of the child and the individual interest of the parent; and, presumably the interest of the protection of children includes both the individual interest of the child and the *parens patriæ* interest of the state. *Id.*

189. *See* Gallagher, *supra* note 24, at 81; Goldsmith, *supra* note 3, at 4.

190. *See* Goldsmith, *supra* note 3, at 7. Goldsmith argues that "[t]he ever elusive line delineating what constitutes a right or interest can be drawn only after considering the particular situation's cultural circumstances." *Id.* at 8. Applying this theory, then, the best interest of the child standard required by the Illinois statutes may fairly be termed an Anglo, or non-Indian, cultural delineation. *Cf.* Dale, *supra* note 68, at 365-70 (differentiating between the Anglo-American and Native American best interests standards).

191. *See infra* text accompanying notes 190-92.

192. 25 U.S.C. § 1912(f) (1994).

193. *See supra* notes 183-86 and accompanying text.

194. *See supra* notes 183-86.

III. DISCUSSION

A. *Facts of the Case*

In *In re Adoption of S.S. and R.S.*, children S.S. and R.S. were the subjects of a petition by their paternal aunt to terminate the parental rights of the children's birth mother and to adopt them.[195] S.S. and R.S. were born to unmarried parents.[196] Their mother, Betty Jo Iron Bear, was a Fort Peck Indian and their father, Richard S., was non-Indian.[197] Although the parents originally cared for the children under a joint custody and parenting agreement,[198] the Circuit Court of Kane County granted the father's petition to eliminate Iron Bear's physical right to custody of two months each year.[199] Iron Bear claimed that the court terminated her visitation with the children because she defaulted, although the record on this is unclear.[200]

Iron Bear lived on the Fort Peck reservation in Montana and maintained only sporadic contact with the children.[201] The children, however, lived in Elgin, Illinois, with their father. When Richard S. could no longer care for the children due to illness, he and the children moved to live with his sister, Shelly S., in Carpentersville, Illinois.[202] Richard S. died shortly after and the children continued to reside with their aunt.[203]

A second paternal aunt and her husband, the Tubridys, filed a petition to terminate the parental rights of Iron Bear and to adopt the children.[204] They alleged that Iron Bear was an unfit parent because

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195. 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

196. *Id.* at 938.

197. *Id.*

198. *In re* Adoption of S.S. & R.S., 622 N.E.2d 832, 834 (Ill. App. Ct. 1993), *rev'd*, 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996). According to the appellate court the significant facts were not in dispute. *Id.* at 833-34. Richard S. established paternity in 1990 in the Circuit Court of Kane County and "[a]pparently, in connection with these proceedings a joint parenting agreement was approved pursuant to which (according to Ironbear[sic]) the father was awarded physical care of the children for 10 months of the year and Ironbear[sic] was awarded physical care for the summer months." *Id.* at 834.

199. *Id.* The appellate court further explained that in April 1992, the circuit court granted the father's petition to terminate Iron Bear's summer visitation, but that the circuit court orders were not in the record on appeal. *Id.*

200. *In re S.S.*, 657 N.E.2d at 938.

201. *Id.*

202. *Id.*

203. *Id.* The Supreme Court of Illinois noted that "Richard S. died on November 18, 1992, of a disease he contracted from Iron Bear." *Id.*

204. *Id.*

she had abandoned the children and neglected them.[205] Iron Bear claimed that since the death of Richard S., the Tubridys refused, on at least one occasion, to allow her to see the children when she tried to visit them.[206]

Iron Bear filed a motion to transfer the jurisdiction of the adoption proceeding to the tribal court of Fort Peck.[207] The Fort Peck tribe also filed a motion for the same transfer.[208] Both motions claimed that ICWA granted the tribe exclusive jurisdiction over the proceeding.[209] The circuit court denied the motions to transfer, holding the following: (1) that ICWA did not apply to the case because the children were not in jeopardy of being removed from an Indian family[210] and (2) that the children were not domiciled on their mother's reservation.[211] In other words, the lower court applied the existing Indian family exception to avoid the standards and requirements of protection to Indian parents and tribes afforded by ICWA.[212] Based on *Holyfield*, the appellate court, with one concurring judge and one dissenting judge, reversed, holding that ICWA did apply and that the children were domiciliaries of the reservation; thus, the tribal court had exclusive jurisdiction over the case.[213] The Tubridys filed an interlocutory appeal with the Supreme Court of Illinois.[214]

B. The Majority Opinion

The Supreme Court of Illinois reversed and remanded the case of S.S and R.S. to the trial court with directions for it to hold hearings on whether Iron Bear had abandoned her children.[215] The court held that if Iron Bear had not abandoned the children, then the children's

205. *Id.* The petition alleged that "Iron Bear had abandoned the children during the two years prior to the adoption proceedings [and before that time] had engaged in open and notorious fornication, habitually abused alcohol, and failed to provide the children with adequate food, clothing and shelter . . . ." *Id.*

206. *Id.* Iron Bear also claimed that the Tubridys had fled with the children out of state to their home in Ohio. *Id.* Consequently, the court entered an order requiring the return of the children to Illinois, and the Tubridys complied with that order. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* *See supra* notes 70-77 and accompanying text.

210. *In re* S.S., 622 N.E.2d at 834.

211. *In re* S.S., 657 N.E.2d at 939.

212. *See supra* notes 110-11 and accompanying text.

213. *In re S.S.*, 622 N.E.2d at 842. The concurring judge did not include a separate opinion. *Id.* at 843. *See supra* text accompanying notes 70-74.

214. *In re S.S.*, 657 N.E.2d at 938.

215. *Id.* at 943. Justice Harrison wrote the opinion for the majority court. *Id.* at 937-43.

domicile was their mother's, the reservation, and the tribe would have exclusive jurisdiction over the case.[216] If, however, the trial court found that Iron Bear had abandoned the children, then the children's domicile was not the reservation and the state court would have jurisdiction over the case because the children neither resided nor were domiciliaries of the reservation.[217]

In this case, the Illinois Supreme Court proceeded under the assumption that ICWA was applicable.[218] The court began its analysis with an overview of ICWA, including its legislative history as explained in *Holyfield*.[219] In addition to presenting the relevant defining and jurisdictional provisions of ICWA, the court also quoted extensively the congressional policy and findings included in ICWA.[220]

Next, by distinguishing *Holyfield*, the court concluded that *Holyfield* did not compel the finding that S.S. and R.S. were domiciliaries of the Fort Peck reservation.[221] After fully explaining *Holyfield*'s reasoning that ICWA forbids reliance on state law for a definition of domicile, the court distinguished the case at hand from *Holyfield*.[222] In *Holyfield*, both parents were domiciled on the Indian reservation, whereas in the case at hand, Richard S. had sole custody of the children off of the reservation.[223] The court reasoned that the children were Illinois domiciliaries prior to their father's death, because their father was an Illinois domiciliary.[224] Although the majority acknowledged the general rule that the domicile of the children normally shifted to that of their surviving mother after their father's death,[225] the court relied on an exception to this general rule

216. *Id.* at 942. *But see infra* Part IV.D (criticizing this holding for its consideration of good cause not to transfer pursuant to concurrent tribal jurisdiction under ICWA).

217. *In re* S.S., 657 N.E.2d at 942. The court does not explain clearly why the children's domicile would be Illinois in this situation, although one may infer that it would be derived from their current caretakers who stand *in loco parentis* to them. *See id.*. *See infra* text accompanying note 367.

218. *In re* S.S., 657 N.E.2d at 939.

219. *Id.* at 939-41 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37, 43-49 (1989)).

220. *Id.* at 939-40 (quoting 25 U.S.C. §§ 1901-02 (1988)).

221. *Id.* at 940-42.

222. *Id.* at 941-42.

223. *Id.* at 941.

224. *Id.*

225. *Id.* at 942 (citing People *ex rel.* Noonan v. Wingate, 33 N.E.2d 467 (Ill. 1941) (holding that at common law upon the death of the father an infant took the domicile of its mother). *See also* 25 AM. JUR. 2D *Domicil* § 46 (1996) (stating that upon the death of the parent to whom custody of a child has been awarded the domicile of the child becomes that of the surviving parent)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §

which applies in a situation in which the surviving parent has abandoned the child.[226]

The exception to the general rule of domicile states that if children are "left parentless as a result of death and/or abandonment," and no legal guardian is appointed for the children, then the children's domicile follows that of the person who stood *in loco parentis* and with whom they lived.[227] However, Native Americans may not use this doctrine of abandonment in order to avoid the jurisdictional provisions of ICWA and facilitate the adoption of their children by non-Indians.[228] Because Iron Bear did not scheme to have non-Indians adopt her children,[229] the court reasoned that the application of the exception could "do no possible violence to the purposes of the Act."[230] The court explained, moreover, that to determine whether Iron Bear had abandoned her children, the rules of the forum applied and the allegations of the Tubridys were sufficient under Illinois law to find abandonment by Iron Bear.[231]

Consequently, the court remanded the issue to the circuit court for a hearing on abandonment.[232] The court mandated that if the lower court found that Iron Bear had not abandoned the children, then the children's domiciles were the reservation and the tribal court would have exclusive jurisdiction of the termination of parental rights and adoption proceedings under ICWA.[233] If, however, the lower court found that Iron Bear had abandoned the children, then their domiciles were Illinois and ICWA granted concurrent jurisdiction over the proceedings to the state and the tribal courts.[234] Although this concurrent jurisdiction carries with it the presumption that the tribal

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22 cmt. d (1971) (stating that upon the death of the parent who has been awarded legal custody of the child or with whom the child has been living, the child's domicile shifts to that of the other parent even if the other parent is domiciled in another state).

226. *In re S.S.*, 657 N.E.2d at 942 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 cmts. e, i (1971)).

227. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 cmt. i (1971) and Donlon v. Miller, 355 N.E.2d 195 (Ill. App. Ct. 1976)).

228. *Id.* at 942 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989)). "Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish." *Holyfield*, 490 U.S. at 52.

229. In fact, the opposite was true—Iron Bear was trying to prevent the adoption of her children by non-Indians.

230. *In re S.S.*, 657 N.E.2d at 942.

231. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 cmt. e (1971)).

232. *Id.*

233. *Id. See* 25 U.S.C. § 1911(a) (1994).

234. *In re S.S.*, 657 N.E.2d at 942; 25 U.S.C. § 1911(b).

court should hear the case "in the absence of good cause to the contrary,"[235] the court reasoned that good cause *should* exist in this case to allow the state circuit court to retain jurisdiction over the Tubridys' "custody petition."[236] In a meaningfully worded and directive summary paragraph, the majority court stated its opinion as follows:

> [T]he judgment of the appellate court is reversed, and the cause is remanded to the circuit court for a hearing on whether Iron Bear abandoned R.S. and S.S. If the court finds that there was no abandonment, it shall enter an order transferring this cause to the Fort Peck tribal court. If it determines by clear and convincing evidence that abandonment did occur, it shall reinstate its prior orders denying transfer to the tribal court and retain jurisdiction over the Tubridys' cause of action.[237]

C. The Concurring Opinion

Justice Heiple's detailed concurring opinion was joined by two other justices.[238] The opinion delves into the congressional intent and legislative purpose of ICWA and distinguishes the *Holyfield* case.[239] Justice Heiple addressed the issue of the existing Indian family exception[240] and the dissent's opposition to that exception.[241] The concurring opinion argued that Illinois should implement the existing Indian family exception and that *Holyfield* does not preclude such an implementation.[242]

Justice Heiple supported his argument by first noting that several courts have employed the existing Indian family exception since *Holyfield*;[243] second, by reasoning that the exception does not ignore

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235. 25 U.S.C. § 1911(b).

236. *In re S.S.*, 657 N.E.2d at 943.

237. *Id.*

238. *Id.* at 943-46 (Heiple, J., concurring). Justice Bilandic and Justice Miller joined in the concurring opinion. *Id.* at 946.

239. *Id.* at 944-45 (Heiple, J., concurring).

240. *See supra* text accompanying notes 110-11.

241. *In re S.S.*, 657 N.E.2d at 944-46 (Heiple, J., concurring).

242. *Id.* at 943-44 (Heiple, J., concurring). Justice Heiple argued that the sole issue in *Holyfield* was one of domicile because *Holyfield* did not specifically refer to the existing Indian family exception; moreover, he argued that the facts of *Holyfield* are not analogous to the case of *In re S.S. Id.* (Heiple, J., concurring).

243. *Id.* at 944 (Heiple, J., concurring) (citing *In re* Termination of Parental Rights of D.S., 577 N.E.2d 572 (Ind. 1991); *In re* C.E.H., 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re* T.S., 801 P.2d 77 (Mont. 1990); *In re* S.C., 833 P.2d 1249 (Okla. 1992); *In re* Adoption of Infant Boy Crews, 825 P.2d 305 (Wash. 1992)). The concurring opinion also implies that because the Supreme Court has not granted certiorari in any of the post-*Holyfield* decisions, the Court acknowledges and accepts the existing Indian family

the interest of the tribe; and, third, by concluding that the exception does not contravene Congress' intent.[244] This conclusion that congressional intent would receive respect even if the exception were applied was supported in the concurring opinion by the fact that Congress refused to abolish the existing Indian family exception by failing to pass certain amendments. These amendments proposed to make application of ICWA compulsory regardless of whether the child had "'previously lived in Indian Country, in an Indian cultural environment or with an Indian parent.'"[245]

The only reference that the concurring opinion made to the issue of domicile, the sole issue that the majority addressed, was an assurance that the requirement of a hearing on abandonment by Iron Bear does not reveal any prejudice or distrust by the state court toward the tribal court.[246] Although the concurring justice argued that abandonment hearings in this case are unnecessary because ICWA's inapplicability removes the issue of domicile from the case, Justice Heiple nevertheless agreed with the majority opinion that the appellate decision should be reversed.[247]

D. The Dissenting Opinion

Justice McMorrow, joined by two other justices,[248] was the author of the lengthy dissent in this case.[249] The dissent clearly and strongly disapproved of several aspects of the majority opinion.[250] Justice McMorrow criticized the majority's scope, its recitation of facts, its failure to adhere to congressional intent and policy, its attempt to

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exception. *See id.* (Heiple, J., concurring). The opinion states, "[i]ndeed, the Supreme Court has never granted *certiorari* in any of the numerous cases where our sister State courts have employed the exception, including several cases decided after the Supreme Court's 1988 decision in *Holyfield*." *Id.* (Heiple, J., concurring). This statement ignores the possibility that the Supreme Court did not grant certiorari in these cases since the Court already decided the issue in *Holyfield*. The statement also contains a factual error: *Holyfield* was decided on April 3, *1989*. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

244. *In re S.S.*, 657 N.E.2d at 945 (Heiple, J., concurring). The concurring opinion argued, "[s]pecifically, the dissent opines that *Holyfield* stands for the proposition that the ICWA grants the tribes an interest in children separate from that of the children's parents and thus that the existing Indian family exception is improper because it ignores the tribe's interest. This, however, overstates the case." *Id.* (Heiple, J., concurring).

245. *Id.* (Heiple, J., concurring) (quoting S. 1976, 100th Cong. (1987)).

246. *Id.* (Heiple, J., concurring).

247. *Id.* (Heiple, J., concurring).

248. *Id.* at 953 (McMorrow, J., dissenting). Justices Freeman and Nickels joined in Justice McMorrow's dissent.

249. *Id.* at 946-53 (McMorrow, J., dissenting).

250. *In re S.S.*, 657 N.E.2d at 946-953 (McMorrow, J., dissenting).

distinguish *Holyfield*, and its holding.[251] Further, the dissent rejected the existing Indian family exception advocated by the concurring justice.[252] In sum, the dissent argued that, "[u]nfortunately, the majority has devised a strategy, albeit legally unsupportable, to circumvent the requirements of the ICWA."[253]

The dissent first chastised the majority for failing to "address, consider, or resolve" the primary issue raised by the parties and ruled upon by the appellate court:[254] whether Illinois should adopt the existing Indian family doctrine.[255] Second, the dissent criticized the majority opinion for raising *sua sponte*, without argument or briefing by the parties, the issue of whether ICWA could be circumvented by state domicile law because of an allegation of parental abandonment.[256] This would avoid the true, underlying possible reality of the case "that there can be significant and possibly irreparable harm that is inflicted on Indian children, Indian families, and Indian tribes when Indian tribes are wrongfully deprived of their rightful jurisdiction to determine custody disputes involving Indian children."[257]

The dissent indicated that although parts of the majority opinion were accurate, the opinion "improperly supplement[ed] the record with matters that [were] unproved."[258] For example, the dissent accused the majority of "indulging in unsubstantiated attacks upon the character and morality of Betty Jo [Iron Bear], the children's surviving Indian parent"[259] when the majority stated that Richard S. died "of a disease that he contracted from" Iron Bear.[260] The dissent explained that the briefs by the parties alleged that Richard S. suffered from acquired immune deficiency syndrome (AIDS), a disease from which Iron Bear also suffered; however, nothing in the record verified either the claim that Richard S. died from AIDS or that he contracted the disease from Iron Bear.[261] Additionally, the dissent maintained that the record did not show how many times the children had visited the Fort Peck

251. *Id.* (McMorrow, J., dissenting).
252. *Id.* at 952-53 (McMorrow, J., dissenting). *See supra* notes 239-44 and accompanying text.
253. *In re S.S.*, 657 N.E.2d at 947 (McMorrow, J., dissenting).
254. *Id.* at 946 (McMorrow, J., dissenting).
255. *Id.* (McMorrow, J., dissenting).
256. *Id.* at 946, 948 (McMorrow, J., dissenting).
257. *Id.* at 948 (McMorrow, J., dissenting).
258. *Id.* at 946 (McMorrow, J., dissenting).
259. *Id.* (McMorrow, J., dissenting).
260. *Id.* (McMorrow, J., dissenting); *see id.* at 938.
261. *Id.* at 946-47 (McMorrow, J., dissenting).

Indian reservation.[262] Furthermore, although the majority did not acknowledge this fact, it was Iron Bear who alleged that she had continuing contact with the children[263] and the Tubridys did not dispute that she had repeated telephone conversations with them.[264]

Another criticism by the dissent is that the majority "misapprehend[ed] the central focus of ICWA and ignore[d] Congress' plenary powers to give superior authority to a tribal court to assert jurisdiction over custody cases involving Native American Indian children."[265] The dissent discussed the reasons for the enactment of ICWA.[266] It relied on the house report drafted about ICWA in 1978 to show the lack of cultural understanding on the part of state social workers.[267] The dissent emphasized the special duty that the United States has to preserve Indian tribes' autonomy,[268] quoting Chief Calvin Isaac, who testified before Congress at ICWA hearings that "'[c]ulturally, the chances of Indian survival [and the transmission of tribal heritage] are significantly reduced [when Indian children are raised] . . . in non-Indian homes and denied exposure to the ways of their People.'"[269] The dissenting opinion further relied on the statement of policy and congressional findings included in ICWA to show that it was Congress' intent to "greatly reduce State involvement in Indian child custody disputes . . . ."[270] The dissent argued that the majority's decision to apply Illinois state domicile law thus contravened ICWA's and Congress' intent to provide consistent

262. *Id.* at 947 (McMorrow, J., dissenting).

263. *Id.* (McMorrow, J., dissenting). The dissent notes that if it were true that Iron Bear had maintained continuing contact with S.S. and R.S., then their ties to their tribe were being maintained through these contacts. *Id.* (McMorrow, J., dissenting).

264. *Id.* (McMorrow, J., dissenting).

265. *Id.* at 946 (McMorrow, J., dissenting).

266. *Id.* at 947-48 (McMorrow, J., dissenting). *See generally supra* Part II.C.1-2 (explaining the reason for the enactment of ICWA and its purpose).

267. *In re S.S.*, 657 N.E.2d at 947 (McMorrow, J., dissenting). The dissent included a quote from Representative Udall, explaining that information provided at the congressional hearings indicated that children were "'removed from their parents and families by State agencies for the most specious of reasons in proceedings foreign to the Indian parents.'" *Id.* (McMorrow, J., dissenting) (quoting 124 CONG. REC. 12,532 (1978) (statement of Rep. Udall)). *See supra* notes 53-57 and accompanying text.

268. *See* 25 U.S.C. § 1901 (1994).

269. *In re S.S.*, 657 N.E.2d at 948 (McMorrow, J., dissenting) (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989), which quoted from the transcripts of hearings on ICWA before the Senate Select Committee on Indian Affairs, 95th Cong. 193 (1978)).

270. *Id.* at 948 (McMorrow, J., dissenting) (citing 25 U.S.C. § 1901).

and uniform Federal standards for this important issue of jurisdiction concerning its special relationship with Native American tribes.[271]

According to the dissent, the legislative history of ICWA illustrated that Congress intended the concept of domicile to be a "'well-defined operating system for effectuating tribal jurisdiction' even in instances where the Indian children lived a substantial distance from the tribal reservation and in all likelihood could not have either close, on-going physical contacts with their tribal relatives, or consistent, in-depth exposure to and education about their tribal heritage."[272] The dissent bolstered its conclusion about Congress' intent concerning domicile by noting that Congress rejected an earlier version of ICWA which would have required significant contacts between the tribe and a child not living on the reservation before the tribal court could obtain jurisdiction over a proceeding in which the child was a subject.[273] The dissent reasoned that because Congress had considered and rejected this concept of a significant contacts doctrine, then it did not intend to limit ICWA by a doctrine that would require an Indian child, in order to take the domicile of his surviving parent, to have these significant contacts; yet, this is quite similar to the result of the majority's decision.[274]

According to the dissenting opinion, the majority's use of Illinois state law to determine the domiciles of S.S. and R.S. based upon whether their mother had abandoned them conflicted with the United States Supreme Court decision in *Holyfield*.[275] The dissent in *In re S.S.* characterized *Holyfield* as standing for the idea that a parent's actions cannot alter tribal court power to assert jurisdiction over a custody proceeding involving an Indian child; thus, parental actions amounting to abandonment do not and cannot divest a tribal court of jurisdiction.[276] Consequently, in a determination of domicile under ICWA, "courts must look to uniform, Federal jurisprudence with respect to this term, and . . . courts cannot apply an inconsistent

271. *Id.* (McMorrow, J., dissenting). *See generally supra* text accompanying notes 25-48, 61-69 (discussing the historical and legislative relationships between the United States and Native American tribes).

272. *In re S.S.*, 657 N.E.2d. at 951 (McMorrow, J., dissenting) (quoting 1976 REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *reprinted in* S. REP. No. 95-597, at 51-52 (1977)).

273. *Id.* (McMorrow, J., dissenting) (citing S. 1214, 95th Cong. § 102(c) (1977), *reprinted in* S. REP. No. 95-597, at 4 (1977)).

274. *Id.* at 952 (McMorrow, J., dissenting).

275. *Id.* at 949-50 (McMorrow, J., dissenting). *See supra* notes 148-50 and accompanying text.

276. *In re S.S.*, 657 N.E.2d at 949 (McMorrow, J., dissenting); *see supra* notes 158-60 and accompanying text.

interpretation of domicile that might vary from State to State."[277] Basically, the dissent noted that the majority recognized that the holding of *Holyfield* and the rules of domicile under established common law could mean that the legal domicile of the children was that of their surviving parent, their mother, and the reservation;[278] but, the court declined to act upon this rule.[279] Further discussion by the dissent noted that, although the United States Supreme Court in *Holyfield* reversed the Mississippi state court because that state court applied state abandonment law in order to prevent tribal jurisdiction of a child custody proceeding, the Illinois majority court in *In re S.S.* reasoned and ruled in the same way as the Mississippi state court.[280]

The *In re S.S.* dissent also attacked the majority's holding on technical grounds.[281] Primarily, the majority decision troubled the dissenting judge because it allowed for two decisions of whether Iron Bear had abandoned her children.[282] First, the domicile hearing would consider the issue of abandonment, and, second, a parental fitness hearing as part of a termination of parental rights proceeding would consider the issue of abandonment.[283] As a result, standard of proof questions would remain for the domicile-abandonment hearing because the standard in a parental rights termination is beyond reasonable doubt under ICWA, while the standard is by clear and convincing evidence under Illinois law.[284]

The dissent argued that the majority favored state court jurisdiction as the outcome of the abandonment proceeding by holding that there was good cause not to transfer the case to the tribal court under the

277. *In re S.S.*, 657 N.E.2d at 949 (McMorrow, J., dissenting).

278. *Id.* (McMorrow, J., dissenting). Moreover, the majority recognized that according to these established rules of common law, when Richard S. died, the domicile of the children followed that of their mother. *Id.* (McMorrow, J., dissenting).

279. *Id.* at 949. (McMorrow, J., dissenting) (citing People *ex rel.* Noonan v. Wingate, 33 N.E.2d 467 (Ill. 1941) (holding that at common law an infant took the domicile of its mother upon the death of the father)). *See also* 25 AM. JUR. 2D *Domicil* § 46 (1996) (stating that upon the death of the parent to whom custody of a child has been awarded, the domicile of the child becomes that of the surviving parent); 25 AM. JUR. 2D *Domicil* § 49 (1996) (stating that upon the death of the father, the domicile of the minor becomes the domicile of the mother); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22, cmt. d (1971) (stating that upon the death of the parent who has been awarded legal custody of the child or with whom the child has been living, the child's domicile shifts to that of the other parent even though the latter is domiciled in another state).

280. *In re S.S.*, 657 N.E.2d at 950 (McMorrow, J., dissenting).

281. *Id.* at 951 (McMorrow, J., dissenting).

282. *Id.* (McMorrow, J., dissenting).

283. *Id.* (McMorrow, J., dissenting).

284. *Id.* (McMorrow, J., dissenting). *See supra* text accompanying notes 100, 191-94.

concurrent but presumptive jurisdiction provision of ICWA.[285] The dissent opined that "[t]he majority's ruling in this regard is particularly inappropriate and disturbing"[286] because the parties have not had the opportunity to argue this issue.[287] The majority determined that there is good cause not to transfer the proceeding to the tribal court without any hearing or evidence with respect to that issue.[288] The question of good cause, the dissent emphasized, does not arise until after the court decides the issue of the children's domiciles.[289] The dissent characterized the majority's finding of good cause as "premature."[290]

Lastly, the dissent addressed the issue that was the concern of the concurring opinion but which was omitted from the majority opinion: the existing Indian family exception.[291] The dissent rejected any application of the exception because the exception is a judicially created doctrine founded on the belief that references in ICWA to the removal of Indian children from their families ignores the underlying purpose of ICWA unless there is an existing Indian family from which a child custody proceeding might remove an Indian child.[292] The dissent rejected the application of this doctrine because no provision in ICWA requires its implementation, regardless of whether one believes such a provision should have been included,[293] and because the doctrine contains the potential for abuse in situations in which a state court distrusts "the tribal court's ability to properly consider the 'best interests' of the child."[294] The dissent explained that the belief that a tribal court would be more likely to ignore a child's best interests is grounded merely in suspicion.[295]

> The notion that Native American tribal courts are more likely than state courts to neglect or inflict suffering on Native American children is grounded in suspicion, not in objective evidence. [With regard to the twin children whose adoption was at issue in *Holyfield*], the tribal court confirmed the placement

285. *In re S.S.*, 657 N.E.2d at 952 (McMorrow, J., dissenting).
286. *Id.* (McMorrow, J., dissenting).
287. *Id.* (McMorrow, J., dissenting).
288. *Id.* (McMorrow, J., dissenting).
289. *Id.* (McMorrow, J., dissenting).
290. *Id.* (McMorrow, J., dissenting).
291. *Id.* (McMorrow, J., dissenting).
292. *Id.* at 952 (McMorrow, J., dissenting).
293. *Id.* at 953 (McMorrow, J., dissenting). "'No amount of probing into what Congress 'intended' can alter what Congress said.'" *Id.* (McMorrow, J., dissenting) (quoting *In re* N.S., 474 N.W.2d 96, 100 (S.D. 1991) (Sabers, J., specially concurring) (emphasis omitted)).
294. *Id.* (McMorrow, J., dissenting).
295. *Id.* (McMorrow, J., dissenting).

> of [the] . . . twins with a nontribal family [as did the tribal court which decided the adoption petition with respect to the Indian child in *In re Adoption of Halloway*, (Utah 1986), 732 P.2d 962]. Moreover, the assumption that tragic outcomes will more likely occur when jurisdiction lies with tribal courts rather than with state courts bespeaks a blindness both to the values and to the level of efficiency attained by the Euro-American child welfare system.[296]

In conclusion, the dissent reminded the majority that the Supreme Court of Illinois was called upon to decide the question of legal jurisdiction—whether the tribal court or the state court is the proper jurisdiction[297] for a decision on the adoption issues at stake—and *not* the ultimate issues of placement, parental rights termination, and adoption.[298] The dissent ultimately stated it would have affirmed the appellate court ruling,[299] finding the tribal court to have exclusive jurisdiction under ICWA because the children were domiciliaries of the Native American tribal reservation.[300]

IV. ANALYSIS

The majority in *In re S.S.* narrowly analyzed the issue, which stripped the Fort Peck Indian tribe of its power and autonomy to decide this case through its tribal court and its system of law.[301] Consequently, the majority refused to grant the tribe federally required exclusive jurisdiction over the case and improperly prevented the possibility of transfer to the tribal court according to presumptive jurisdiction.[302] As such, the Illinois Supreme Court invalidated the

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296. *Id.* (McMorrow, J., dissenting) (quoting Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 629 (1994)).

297. Even this slightly misstates the issue, however, because the more precise question was whether the tribal court had exclusive or concurrent but presumptive jurisdiction. *Id.* at 953 (McMorrow, J., dissenting). Even if the court found the latter to be true, it was not called upon to decide whether to transfer the case pursuant to such concurrent but presumptive jurisdiction. *Id.* (McMorrow, J., dissenting).

298. *Id.* (McMorrow, J., dissenting).

299. *In re S.S.*, 622 N.E.2d 832 (Ill. App. Ct. 1993), *rev'd*, 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

300. *In re S.S.*, 657 N.E.2d at 953 (McMorrow, J., dissenting); *see* 25 U.S.C. § 1911(a) (1994).

301. *See In re S.S.*, 657 N.E.2d at 946 (McMorrow, J., dissenting). *See generally supra* note 139 and accompanying text (explaining that autonomous power is necessary for the survival of an Indian tribe).

302. *See In re S.S.*, 657 N.E.2d at 952 (McMorrow, J., dissenting). *But see supra* notes 275-80 and accompanying text (discussing the Illinois Supreme Court approach as contrary to that of the United States Supreme Court).

tribe's interest in the welfare of its children members, S.S. and R.S.; the fundamental rights of its member and reservation resident, Betty Jo Iron Bear; the survival of the tribal community as a whole; and any power or autonomy that the tribe perhaps had over these interests.[303] The court accomplished this by proffering an unpersuasive rationale for circumventing United States Supreme Court precedent,[304] supporting flawed reasoning in an analysis of the general principles of the law of domicile,[305] and improperly considering the issue of whether there existed good cause to transfer the case from state court to tribal court.[306]

A. An Unconvincing Attempt to Distinguish United States Supreme Court Precedent

At a basic level, the *Holyfield* Court already considered the issue of *In re S.S.*—the issue of whether the court may apply state law to define domicile under ICWA. The Court unequivocally rejected such an application of state law.[307] The Illinois court provides no new support or reasoning on this issue, and thus, offers an unconvincing argument that deviates from United States Supreme Court precedent.

The *In re S.S.* court's attempt to distinguish *Holyfield* was not convincing because the two cases are neither distinguishable according to their facts nor distinguishable according to their reasoning. In both cases, ICWA applied to two siblings who were subject children of adoption petitions and were Indian children as defined by the Act.[308] The children in *Holyfield* were Native American children, and both of their parents were enrolled members of the tribe.[309] The children in *S.S.* were also enrolled members of the tribe.[310] Additionally, neither the children in *Holyfield* nor the children in *S.S.* lived on the reservation of their tribes, although in both cases the children's Indian parents did.[311] Finally, neither set of parents was married.[312] In both

303. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989); *see supra* notes 66, 139, 159, 173.

304. *See* discussion *infra* Part IV.A.

305. *See infra* text accompanying notes 357-69.

306. *See supra* Part III.B.

307. *Holyfield*, 490 U.S. at 45-47, 54.

308. *See* 25 U.S.C. § 1903(4) (1994).

309. *Holyfield*, 490 U.S. at 37.

310. *In re* Adoption of S.S. & R.S., 657 N.E.2d 935, 938 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

311. *Id.* at 938. *Holyfield*, 490 U.S. at 131.

312. *Holyfield*, 490 U.S. at 131. *In re S.S.*, 657 N.E.2d at 938. See *supra* Part III.A. for a discussion of the facts of *In re SS*, and *supra* text accompanying notes 131-36 for a

cases, the issue addressed by the court was whether the children's Native American parents' actions were determinative of the children's domicile, which, in turn, was determinative of jurisdiction of the case.[313]

The factual differences asserted by the Illinois court were few. Primarily, the Illinois court focused on the fact that, in *Holyfield,* the parents schemed to "abandon" their children by signing voluntary consents to the termination of their parental rights for the adoption of the children by non-Indians and thus avoided tribal court jurisdiction over the adoption.[314] In *In re S.S.*, however, the children's mother had not schemed to "facilitate adoption of [her] children by non-Indians while they remain domiciliaries of the reservation."[315] Only if this "scheme" were present, the court reasoned, would the use of state abandonment law contravene any purpose of ICWA because of the resultant weakening of the tribe's ability to assert its interest in its children.[316]

The court's reasoning is faulty, because the existence of the parents' "scheme" was not the only factor in the *Holyfield* decision.[317] A crucial element of *Holyfield* was the fact that the application of state abandonment law, whether due to voluntary parental consent, parental scheming, or otherwise, did not consider the interest of the tribe itself; thus, state law undermined Congress' intent in enacting ICWA.[318] In other words, a tribe's opportunity to obtain jurisdiction was weaker because of the application of state abandonment law whether or not the parents or the state "schemed" to avoid the tribal jurisdiction.[319] For example, there could be a situation in which Native American parents acted in a way that they did not perceive as abandonment of their child, e.g., placement of the child with relatives in another state and subsequent financial setbacks or illness precluding visits with the child for an extended period of time; yet, the state court could apply state law and rule that the parents had abandoned the child, perhaps divesting the tribe of its jurisdiction.[320] The outcome of this

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discussion of the facts of *Holyfield.*

313. *Holyfield*, 490 U.S. at 30-54; *In re S.S.*, 657 N.E.2d at 935-43.

314. *In re S.S.*, 657 N.E.2d at 942 (citing *Holyfield*, 490 U.S. at 40).

315. *See id.*

316. *Id.*

317. *See id.* at 950 (McMorrow, J., dissenting).

318. *Holyfield*, 490 U.S. at 49.

319. *See generally supra* Part II.C.3 (discussing the importance of the core jurisdiction provisions of ICWA in the context of ICWA's general purpose).

320. *See generally supra* notes 21-22 (explaining Native American cultural identity as one of tribal unity in which extended families play an important role).

hypothetical situation would be exactly the same as in the *Holyfield* situation in which the parents similarly consented to the "abandonment" of their child. In *In re S.S.*, Iron Bear, to whom that hypothetical situation might apply, tried not to avoid tribal jurisdiction, but to safeguard it.[321]

Any action by parents, then, if it triggers state law application, necessarily results in a weakening of the tribe's interest, and the Court considered this consequence when it decided *Holyfield*.[322] After explaining that the lower court state definition of domicile was not what Congress intended in ICWA, the *Holyfield* Court stated, "[n]or can the result be any different simply because the twins were 'voluntarily surrendered' by their mother. Tribal jurisdiction under § 1911(a) [exclusive jurisdiction provision of ICWA] was not meant to be defeated by the actions of individual members of the tribe."[323] The first sentence indicates that, regardless of the existence of a parental scheme, the *Holyfield* analysis applies and holds true.[324]

The second factual distinction emphasized by the Illinois court was that, while both parents in *Holyfield* resided on the reservation, in *In re S.S.*, only Iron Bear resided on the reservation, and the children's father never resided there.[325] The court explained that this difference was crucial because it made Illinois the domiciles of S.S. and R.S. inasmuch as this was the domicile of their father.[326] While this was true during the time the children lived with Richard S., upon his death, and at the time of the filing of the termination and adoption petitions, he was not "residing" at all—either on or off the reservation. Consequently, this factual difference is of little meaning or effect, except to show that the domiciles of S.S. and R.S. had once been Illinois.

In addition to the court's unconvincing distinction of facts, there are some factual nuances in the analysis by the *Holyfield* Court which, if properly applied to *In re S.S.*, likely would require that the domicile of the children follow that of their mother, Iron Bear. Consideration of the same factual difference on which the Illinois court relied to

321. *See In re S.S.*, 657 N.E.2d at 938 (Iron Bear attempted to safeguard tribal jurisdiction by filing a motion to transfer the case to tribal court).

322. *See Holyfield*, 490 U.S. at 49.

323. *Id.*

324. Thus, the *In re S.S.* court's emphasis on the existence of a parental scheme to avoid tribal jurisdiction was a weak argument by which to distinguish *Holyfield*. *See supra* text accompanying notes 310, 312.

325. *In re S.S.*, 657 N.E.2d at 941.

326. *Id.*

distinguish its case, could have reached a contrary result.[327] In *Holyfield*, even though the parents tried to avoid tribal jurisdiction, the Court still validated the tribe's jurisdictional interest.[328] In *In re S.S.*, in contrast, Iron Bear did not want to avoid tribal jurisdiction; she filed a motion to transfer the case to the tribal court.[329] Her interest was thus stronger than that of the birth parents in *Holyfield*. Even though she was working toward the goal of tribal jurisdiction like the tribe and ICWA, the Illinois court virtually denied the Native American Iron Bear, S.S. and R.S., their extended Indian family members, and the tribe access to that goal. It is not evident or likely that Iron Bear intended or wanted to "abandon" her children. In fact, she claimed that her revocation of visitation rights with them was obtained by Richard S. by default.[330] Furthermore, Iron Bear was contesting, or at least not consenting to, the termination of her parental rights.[331]

An additional fact supporting tribal jurisdiction in *In re S.S.* is that in *Holyfield*, the children lived for three years with their adoptive parents; yet, the Court mandated exclusive tribal jurisdiction and risked that the tribe would remove the children to place them with Native Americans.[332] The Court, therefore, trusted and respected the tribe's autonomy to decide the situation justly and fairly.[333] *In re S.S.* was an ideal case in which Illinois had the opportunity to trust and respect a tribe's ability to act justly and fairly. Because Iron Bear's rights were at stake, her interest in tribal jurisdiction was much stronger than that of the parents in *Holyfield*.[334] ICWA was, in part, enacted for the protection of Native American parents and families, with whom Iron Bear, as the mother of S.S. and R.S, is included.[335] Just as parents are entitled to the assistance and support of state laws in order to

327. The difference is the voluntariness of the "abandonment" and resulting avoidance of tribal jurisdiction.

328. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).

329. *In re S.S.*, 657 N.E.2d at 938.

330. *Id.*

331. Telephone Interview with Kathryn McGowan Bettcher, Attorney, Prairie State Legal Services (Nov. 1, 1996). Ms. Bettcher was the attorney for Iron Bear in this case. *In re S.S.*, 657 N.E.2d at 937. Also, the fact that these issues are in court shows Iron Bear's resistance to the termination of her parental rights.

332. *Holyfield*, 490 U.S. at 53-54.

333. *Id.* at 54 (explaining that the Court will defer to the experience, wisdom and compassion of the tribal court).

334. *In re S.S.* concerns an attempt to involuntarily terminate Iron Bear's parental rights over her children, whereas *Holyfield* concerns parents' voluntarily surrender of their parental rights over their children.

335. *See* 25 U.S.C. § 1902 (1994).

safeguard their parental rights, Iron Bear should similarly have had the opportunity to receive the support of her tribe's system of justice.[336]

In addition to trying to distinguish *Holyfield* according to its facts, the *In re S.S.* majority tried to distinguish *Holyfield* according to its reasoning.[337] The Illinois majority reasoned that its decision did not undermine the purpose of ICWA or the tribe's ability to assert its interest in its children.[338] The court, however, was incorrect. Not only was the tribe's ability to assert its interest in its children weakened by the application of state abandonment law, it was all but crippled.[339]

The use of state abandonment law contravenes not only the language of ICWA, but also its purpose. First, ICWA does not anywhere express that a state should use abandonment law to determine domicile.[340] As the Supreme Court notes, there is a "general assumption that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'"[341] Congress could have included such a requirement in ICWA had it intended that interpretation of domicile, but instead Congress remained silent on the definition of domicile.[342]

A federal perspective on the definition of domicile provided by the Bureau of Indian Affairs (BIA) guidelines explained that Congress intentionally did not include definitions of residence or domicile because these "terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in

336. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968); *supra* notes 71-73 and accompanying text.

337. *In re S.S.*, 657 N.E.2d at 942.

338. *Id.*

339. The decision cripples the tribe's interest because it interjects a second possibility (with good cause not to transfer pursuant to presumptive jurisdiction as the first possibility) that the state will retain jurisdiction *even if* the tribe would have had *exclusive* jurisdiction but for the "abandonment." *See supra* Part II.C.3.

340. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 n.22 (1989).

341. *Id.* at 43 (quoting Jerome v. United States, 318 U.S. 101, 104 (1943)).

342. *Id.* at 47 n.22. *See In re S.S.*, 657 N.E.2d at 950. The dissent of *In re S.S.* quotes:

> There certainly is nothing in ICWA or its legislative history to suggest that state law controls if, in application, its subtleties bring it into conflict with ICWA in ways that Congress apparently did not foresee. Under general supremacy principles, state law cannot be permitted to operate 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (quoting *In re* Adoption of Halloway, 732 P.2d 962, 967 (Utah 1986) (citation omitted)).

any way the purpose of the Act."[343] The guidelines indicate that if there *were* an indication that state law definitions tended to undermine the purpose of ICWA, then those definitions of domicile would not be acceptable.[344] In *In re S.S.*, the state definition of domicile *does* undermine ICWA and thus should not be applied. While the BIA guidelines are not binding on state courts, *Holyfield* is and held that, indeed, the application of state abandonment law to a decision of domicile thwarted the purpose of ICWA.[345]

Further, Congress intended ICWA to provide federal, and thus uniform, standards for these categories of proceedings.[346] Application of state abandonment laws in order to decide the most fundamental tenets of ICWA, domicile and jurisdiction, results in varying outcomes from state to state.[347] This confusion and lack of fairness to those in similar situations was not what Congress intended under ICWA.[348]

An application of state abandonment law to a determination of domicile under ICWA frustrates the purposes of ICWA in a few ways. First, it significantly weakens the tribal interest. The tribal interest is all but equated with tribal jurisdiction.[349] Although there is more to the tribal interest in child custody proceedings than just jurisdiction, the issue of jurisdiction is at the core.[350] Tribal jurisdiction is representative of the restitution that the United States decided to make to Native American tribes throughout the past twenty-five years.[351] Instead of stripping Native Americans of their power, culture, heritage, children, and thus their future, Congress provided Indians with important tools via ICWA *and* its jurisdictional provisions.[352] Consequently, so drastically lessening the tribe's opportunity to obtain jurisdiction, as the Illinois court did, surely contravenes Congress' intent to increase tribal autonomy.[353] To illustrate its intent, Congress stated within ICWA that there exists the "special relationship between

343. 44 Fed. Reg. at 67,585 (1979) (not codified).

344. *See Holyfield*, 490 U.S. at 51 n.26.

345. *See supra* text accompanying notes 135-47.

346. *See supra* text accompanying notes 147-48, 157-59.

347. *See supra* text accompanying notes 135-47.

348. *See supra* note 149.

349. *Holyfield*, 490 U.S. at 51 (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969-70).

350. *See generally* Part II.C.4 (discussing ICWA protections afforded to parties and tribes in child custody proceedings).

351. *See supra* text accompanying notes 46-48.

352. *See* 25 U.S.C. §§ 1901-1963 (1994).

353. *See supra* text accompanying notes 344-45.

the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . ."[354]

Second, the application of state abandonment law frustrates ICWA's purpose because it creates a loophole to exclusive jurisdiction. The majority decision of *In re S.S.* provides the state with greater control over Indian children and families. Congress, however, had explained clearly, both in ICWA and repeatedly in its legislative history, that it intended to reduce involvement and control of the state in Indian child custody proceedings.[355] Quoting a case, ICWA's legislative history notes that "[b]y using the Indian child's domicile as the State's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of childrearing and maintenance of tribal identity."[356] By reversing the power structure inherent in the jurisdiction provisions, especially the exclusive jurisdiction provision, that ICWA was intended to create, the court has returned to the pre-1978 lack of respect for Indian autonomy and culture that predated the enactment of ICWA.[357]

B. The Flawed Majority Analysis of Domicile Law

When the Tubridys filed their appeal to the Illinois Supreme Court, they did *not* argue that the tribe lacked exclusive jurisdiction because Iron Bear had abandoned S.S. and R.S.[358] The appellate court had not even considered this issue, but only domicile generally.[359] The Tubridys alleged that Iron Bear had abandoned S.S. and R.S. and was

354. 25 U.S.C. § 1901. *See also In re* S.S. & R.S., 657 N.E.2d 935, 948 (Ill. 1995) (McMorrow, J., dissenting), *cert. denied*, 116 S. Ct. 1320 (1996). "The majority refuses to confront and grapple with the reality that there can be significant and possibly irreparable harm that is inflicted on Indian children, Indian families, and Indian tribes when Indian tribes are wrongfully deprived of their rightful jurisdiction to determine custody disputes involving Indian children." *Id.* (McMorrow, J., dissenting).

355. 25 U.S.C. § 1901(5). "[T]hat the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id. See also In re S.S.*, 657 N.E.2d at 948 (recognizing cultural harm where Indian tribes are denied the right to decide custodial issues).

356. H.R. REP. No. 95-1386, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7537 (quoting Wakefield v. Little Light, 347 A.2d 228, 238 (Md. 1975)).

357. *See also In re S.S.*, 657 N.E.2d at 946 (McMorrow, J., dissenting) (criticizing the majority's opinion as having the "unfortunate effect of . . . revert[ing] to and perpetuat[ing] the regressive State policies and practices that led Congress to enact ICWA"). *Id.* (McMorrow, J., dissenting).

358. *Id.* at 938.

359. *In re* Adoption of S.S. & R.S., 622 N.E.2d 832, 841-43 (Ill. App. Ct. 1993), *rev'd*, 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

therefore an unfit parent whose parental rights should be terminated to allow for the adoption of the children, but the two contexts of exclusive jurisdiction and parental fitness are not directly analogous backdrops for the issue of abandonment.[360]

The court incorrectly defined domicile in the context of ICWA. The *Holyfield* rule of interpretation of domicile under the Act is that the court may rely on general principles of domicile to the extent that those principles do not contradict Congress' intent.[361] The *In re S.S.* court ventured past this limit in its decision when it employed an exception to the general rules of domicile. It was this narrow exception, not the general principles of domicile, which thwarted Congress' intent.[362] Had the Illinois court applied the acceptable general principles of domicile, then the mother's domicile would have dictated the children's as the reservation, and the tribal court would have had its rightful exclusive jurisdiction.[363]

Even with the application of the abandonment law exception, however, the outcome of the case was not compulsory.[364] The court, relying upon common law and the *Restatements (Second) of the Conflict of Laws*, defined domicile for the children as "upon the death of the father [a child] took the domicile of its mother."[365] The court further defined domicile as "upon the death of the parent who has been awarded legal custody of the child or with whom the child has been living, the child's domicile shifts to the other parent even though the latter is domiciled in another state."[366] The abandonment exception provides that:

> [I]f the child is abandoned by . . . a surviving parent, and no guardian of the child's person is appointed, the child should acquire a domicil at the home of a grandparent or other person who stands *in loco parentis* to him and with whom he lives. . . . Absent some compelling reason to the contrary, the child's domicil should be in the place to which he is most closely related.[367]

Assuming the court insisted upon applying this exception but had been more willing to give full effect to *Holyfield* and ICWA, it might

360. *See In re S.S.*, 657 N.E.2d at 938.

361. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47-48 (1989).

362. *See supra* Parts II.C.1-3.

363. *See Holyfield*, 490 U.S. at 48-49.

364. *In re S.S.*, 657 N.E.2d at 946 (McMorrow, J., dissenting) (focusing on the majority's misapplication of the principles of ICWA).

365. *Id.* at 942 (citing People *ex rel.* Noonan v. Wingate, 33 N.E.2d 467 (Ill. 1941)).

366. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 cmt. b (1971)).

367. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 cmt. i (1971)).

have found that the purposes of ICWA were compelling reasons for the children's domiciles to follow their mother's.[368] Further, the court also could have considered the fact that the tribal court was considered a separate legal system.[369] Thus, the *Restatement's* suggestion that "[g]enerally speaking . . . [i]n other legal systems, the concept [of domicile] may be given a somewhat different meaning"[370] would allow the court to find that the children had their mother's domicile.

Thus, the court's remand of *In re S.S.* to ascertain whether abandonment had occurred was unnecessary. Further support for this position is that *Holyfield* directly addressed the issue of abandonment in the context of domicile under ICWA, stating, "[t]here is some authority for the proposition that abandonment can effectuate a change in the child's domicile, *In re* Adoption of Halloway, 732 P. 2d, at 967, although this may not be the majority rule."[371] The Court, however, implicitly rejected the possibility that abandonment could change a child's domicile when it refused to apply state abandonment law in *Holyfield* even though the children had clearly been "abandoned."[372]

C. The Creation of Procedural Problems

The majority's decision has a procedurally confusing outcome. "[T]he majority essentially holds that [Iron Bear's] alleged abandonment of the children may be considered twice—once in the context of a domicile hearing, and a second time in the context of a fitness hearing."[373] This outcome creates not only an inefficiency in its redundancy, but also an inconsistency in its standards.[374]

Presumably, the court would first consider Iron Bear's possible abandonment in the context of a hearing in which the children's domicile was at issue in order to determine whether the tribal or state court would have jurisdiction.[375] After that hearing, and regardless of

368. 25 U.S.C. § 1902 (1994).

369. Indian tribes are authorized to establish their own courts and to adopt their own laws, subject to the approval of the Secretary of the Interior. PEVAR, *supra* note 25, at 97.

370. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 13 cmt. a (1971).

371. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51 n.26 (1989).

372. *Id.*

373. *In re* Adoption of S.S. & R.S., 657 N.E.2d 935, 951 (Ill. 1995) (McMorrow, J., dissenting), *cert. denied*, 116 S. Ct. 1320 (1996).

374. *See id.* at 951 (McMorrow, J., dissenting) (characterizing the procedural course as "unwarranted, cumbersome, and illogical . . . .").

375. *Id.* at 943.

the outcome of the jurisdiction question, a termination of parental rights proceeding would again address the issue of Iron Bear's abandonment because the Tubridys argue that Iron Bear is an unfit parent due to her alleged abandonment of her children.[376] In the jurisdictional hearing, the forum is necessarily state court, and the standard of proof would require clear and convincing[377] evidence of abandonment, as understood by non-Indians.[378]

In contrast, the termination of parental rights hearing would proceed under ICWA regardless of jurisdiction,[379] and the standard of proof to terminate parental rights would require proof beyond a reasonable doubt.[380] Of course, one possible resolution of this potential conflict would be to implement the higher standard of proof in the domicile-abandonment hearing. The *In re S.S.* majority is silent on the issue of standard of proof in the hearings and does not specify whether to use the two different standards or to apply a higher one.[381] In addition, upon the transfer of the proceedings to the tribal court, the subsequent determination of the children's best interests, as construed by the tribal court vis-à-vis Native American values, could conflict with the state court's Anglo-American interpretation of the children's best interests.

ICWA does not support this double abandonment hearing outcome.[382] In fact, this double abandonment hearing precisely defies the holding and reasoning of *Holyfield*, in which the United States Supreme Court reiterated Congress' desire for uniformity of application of ICWA, particularly with respect to the concept of domicile.[383]

D. Improper Consideration of Good Cause

The Illinois Supreme Court further held that, if the lower court were to find on remand that Iron Bear had abandoned the children, thereby divesting the tribal court of exclusive jurisdiction, then there was good

376. *Id.* at 951 (McMorrow, J., dissenting).

377. *See id.* (McMorrow, J., dissenting) (explaining that the standard of proof under Illinois law is clear and convincing).

378. *See supra* note 68. "The substantive provisions of the Act also demonstrate that its best interest approach is different." Dale, *supra* note 68, at 372.

379. 25 U.S.C. §§ 1901(1), 1911 (1994).

380. *Id.* § 1912(f).

381. *In re S.S.*, 657 N.E.2d at 951 (McMorrow, J., dissenting).

382. *Id.* (McMorrow, J., dissenting). "There is nothing in the ICWA that demonstrates congressional intent to allow abandonment to be litigated on two separate occasions during the course of the proceeding, or to allow two different burdens of proof to apply to these proceedings." *Id.* (McMorrow, J., dissenting).

383. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989).

cause to reject the presumption that the state court should transfer the case to the tribal court.[384] This decision was inappropriate. This was a "particularly . . . disturbing"[385] and "premature"[386] decision for the Supreme Court of Illinois to make during the interlocutory appeal. Instead, it is a decision that the trial court should make, if and when concurrent jurisdiction is obtained.[387]

The court's willingness to rule on this "good cause" issue *sua sponte* without allowing the parties the opportunity to brief or argue it on the merits demonstrated what may be an underlying motivation of the decision: mistrust.[388] For example, the court may have harbored concerns about the "best interest" dichotomy and feared that *its* definition of a child's best interest would not be applied by a tribal court.[389] In other words, the state court may have feared that the tribal court would automatically preserve the parental rights of Iron Bear if the tribal court obtained jurisdiction over the case.[390] It follows, then, that the court perhaps assumed that the tribal court would place the children with Iron Bear even though the children had only sporadic contact with her.[391]

The majority decision evidenced an intent to retain jurisdiction of this case at all costs.[392] It hinted to the lower court that a finding of abandonment by Iron Bear would be the proper outcome, and it decided the direction of possible concurrent jurisdiction.[393] The Illinois Supreme Court seemed to slant the facts to weigh in favor of an abandonment finding. Some of these facts, the dissent noted, are in

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384. *In re S.S.*, 657 N.E.2d at 943.

385. *Id.* at 952 (McMorrow, J., dissenting).

386. *Id.* (McMorrow, J. dissenting).

387. *See id.* (McMorrow, J., dissenting).

388. *Id.* at 953 (McMorrow, J., dissenting) (rejecting the existing Indian family exception because of abuse by state courts that mistrust tribal courts' abilities to decide a child's best interest) (citing Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction & the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 629 (1994)).

389. *Id. See supra* note 68 and accompanying text, and notes 188-90.

390. *See also In re S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993) (noting that the Tubridys' argument reflected the assumption that if the case were decided by the tribal court, Iron Bear would prevail), *rev'd*, 657 N.E.2d 935 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

391. *Id.* The court reasoned, "we have no reason to doubt that if the case is transferred, the tribal court will decide it fairly." *Id.* The court noted, however, that its purpose was not to predict outcomes, but rather to decide who ultimately should hear the case. *Id.*

392. *See supra* note 383 and accompanying text.

393. These undisguised "hints" are seen in the majority's recitation of facts and in its statement that "good cause" did not exist to transfer decision. *In re S.S.*, 657 N.E.2d at 938, 943. *See supra* notes 258-64, 285-89 and accompanying text.

question, yet the majority stated them as true.[394] Examples are that the children have "visited the Fort Peck reservation only once"[395] and that "neither child has had any significant interaction with an Indian tribe beyond their one visit to the reservation."[396] While these facts may go to the question of abandonment, or even to the existing Indian family doctrine under state law, they should not be relevant to the question of domicile and jurisdiction under ICWA.

The court's mistrust of the tribal role was not blatant, yet no other reason likely exists for the court's eagerness to try so zealously to prevent tribal court jurisdiction over the case.[397] The court was surely well-meaning in its approach and sought to safeguard the best interests of S.S. and R.S. [398] The court neglected to recognize, however, that its state law concept of best interest of the child does not necessarily coincide with the standards under ICWA, including ICWA's "best interest of the child" standard.[399] Because of the important ICWA policies of respect toward the unique political and cultural place of Native Americans in our society, the court should have followed the suggestion of the *Holyfield* court and "'defer[red] to the experience, wisdom and compassion of the . . . tribal courts'"[400] for an appropriate decision.[401]

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394. *See supra* notes 258-64 and accompanying text.

395. *In re S.S.*, 657 N.E.2d at 938.

396. *Id.*

397. In the opinion of one commentator, state courts fear the discretion of tribal courts for the following reasons:

> When refusing jurisdictional transfer under the guise of protecting the Indian child's best interests, state courts seem to be acting out of fear that the tribal courts might decide a case differently than state courts and thus harm the Indian child's best interests. To deal with that fear, state courts simply deny tribal courts of the opportunity to hear the case. Such denials are contrary to ICWA's goals, one of which is to allow tribal courts to adjudicate custody matters involving member children.

Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty?* 23 N.M. L. REV. 479, 495 (Spring 1993) (citing e.g., Lisa Driscoll, *Tribal Courts: New Mexico's Third Judiciary*, 32 N.M. BAR BULL. 7 (Feb. 18, 1993) at 7 ("[T]ribal courts are underused or misused. [State courts and non-Indian practitioners] cannot develop respect for a system they fear . . . .") (quoting Catherine Baker Stetson, Preface to TRIBAL COURT HANDBOOK (1990))).

398. "It was this same well-meaning but debilitating paternalism which ICWA sought to prevent." Connelly, *supra* note 397, at 494.

399. *See supra* notes 187-89.

400. *In re S.S.*, 657 N.E.2d at 953 (McMorrow, J., dissenting) (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54 (1989) (citing *In re* Adoption of Halloway, 732 P.2d 962, 972 (Utah 1986))).

401. This is an example of an analysis that mixes jurisdictional and substantive issues which "obviate[s] any tribal participation, in clear contravention of the federal

E. Concurring Opinion

The concurring opinion offered little to the analysis of jurisdiction based on domicile under ICWA. Instead, it focused solely on the existing Indian family exception and advocated for its application in Illinois.[402] In concurring, Justice Heiple attempted to distinguish *Holyfield* for the same reasons as the majority in order to show that *Holyfield* does not preclude the existing Indian family exception.[403] The opinion stated, "Specifically, the dissent opines that *Holyfield* stands for the proposition that the ICWA grants the tribes an interest in children separate from that of the children's parents and thus that the existing Indian family exception is improper because it ignores the tribe's interest. This, however, overstates the case."[404] It is unclear which proposition "overstates the case." If Justice Heiple meant that reading *Holyfield* as precluding the existing Indian family exception overstated the case, he has a semantic argument because the case does not expressly deal with that doctrine by name. If, however, Justice Heiple meant that *both* propositions are an overstatement of the case, then he weakens his criticism because *Holyfield* clearly and explicitly grants tribes an interest in Indian children separate from that of Indian parents.[405]

The concurring opinion further argued that the tribe's interest under ICWA is limited to obtaining exclusive jurisdiction in particular cases and to assuring the placement of Indian children with extended family members or other Indian families.[406] Thus, the concurring opinion argued that the existing Indian family exception does not ignore the tribal interest.[407] When applied to concurrent jurisdiction under ICWA, however, this argument fails to encompass both a tribe's separate interest in concurrent presumptive jurisdiction and placement preference because it argues for restraint of application of the Act altogether in many cases involving Indian children.[408]

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policy of tribal preference." *See* Connelly, *supra* note 397, at 493-94 n.110.

402. *In re S.S.*, 657 N.E.2d at 943-45 (Heiple, J., concurring).

403. *Id.* (Heiple, J., concurring). *See supra* text accompanying notes 238-47.

404. *In re S.S.*, 657 N.E.2d at 943-45 (Heiple, J., concurring).

405. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989). *See* 25 U.S.C. §§ 1901(3), 1902.

406. *In re S.S.*, 657 N.E.2d at 945 (Heiple, J., concurring).

407. *Id.* (Heiple, J., concurring).

408. Refusal to apply ICWA of course eliminates its placement preferences for Native American children, thus eliminating one of the forms of ensuring ties between tribe and children and of perpetuating the tribe's culture and survival. *See supra* notes 104-08 and accompanying text.

In his denial of any implication that advocating for the existing Indian family exception or abandonment hearings indicated a distrust of or prejudice against the tribal court, Justice Heiple argued that even if present, such distrust or prejudice would be "beside the point."[409] Distrust of and prejudice against Indian tribes and their autonomous power, however, are precisely what ICWA was intended to safeguard.[410] The presence of this prejudice or distrust is certainly *not* beside the point and any ICWA analysis needs to address their possible presence.

Justice Heiple's transparent statement of denial of prejudice against or distrust of the tribal court implicitly emphasizes the state law's concept of children's best interests:

> Illinois has a complex set of statutes designed to ensure the best interests of its citizens, including children in situations such as S.S. and R.S. This court is familiar with and regularly called upon to interpret these statutes which are rooted in the common law and have withstood the test of time. My desire to apply Illinois law if possible stems from my confidence in these laws, all of which aim to achieve what is in the best interest of S.S. and R.S.[411]

Justice Heiple's emphasis on the best interests of the children is ironic. In *S.S.*, the state concept of the best interest of the child may not coincide with ICWA's idea of the best interest of the child, which presumes that it is in the best interest for the child to maintain ties with the tribe.[412] Consequently, application of the Illinois doctrine could possibly cause harm to S.S. and R.S. because it does not account for cultural ties between the children and their tribe.

As the author of the highly controversial and criticized "Baby Richard" case only one year prior, Justice Heiple had extensive experience with the application of Illinois' "best interest of the child" standard of law.[413] In that case, Justice Heiple refused to apply the "best interest of the child" doctrine to a situation in which a birth parent was not first found unfit.[414] As a result, the court removed the child from his adoptive home after he lived there from infancy to

409. *In re S.S.*, 657 N.E.2d at 945 (Heiple, J., concurring).

410. *See supra* note 68; *see generally* Part II.C.2 (explaining ICWA's purpose).

411. *In re S.S.*, 657 N.E.2d at 945 (Heiple, J., concurring).

412. *See supra* notes 186-90.

413. *In re* Petition of Doe, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 115 S. Ct. 499 (1994).

414. *Id.* at 182.

approximately age three[415] and a public outcry ensued.[416] Here, Justice Heiple takes care to apply and extol the Illinois "best interest of the child" doctrine, even though it may, in fact, have some negative impact on the children in this particular case. Unlike Baby Richard, however, S.S. and R.S., were not living and had not lived with the Tubridys, who were trying to adopt them.[417] Thus, the "Baby Richard" outrage may have prompted the concurring justice to focus on the individual rights of S.S. and R.S. with no consideration of their interest as members of their tribe or as in need of tribal court cultural understanding and protection of their ties to Iron Bear.[418]

V. IMPACT

In re S.S. is representative of a trend in state courts to ignore the "spirit" of ICWA, an act many courts have forgotten or ignored[419] through manipulation and circumvention of ICWA provisions. Although there are several established ways in which state courts have had problems applying the Act's provisions,[420] *In re S.S.* adds a new method to the list, even in the face of Supreme Court precedent indicating disapproval of this addition of the use of state abandonment law in the context of ICWA.[421]

When Illinois and other state courts circumvent the requirements of ICWA, they return to an approach of a bygone era of paternalism and

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415. *Id.*

416. *See* Bob Greene, *Supreme Injustice for a Little Boy*, CHI. TRIB., June 19, 1994, Tempo Section, at 1.

417. *In re S.S.*, 657 N.E.2d at 938.

418. *See also* Ted Gregory, *State Makes History in Custody War*, CHI. TRIB., Metro Northwest, October 20, 1995, *available in* 1995 WL 6257532 (commenting that the court took an unusually long time, seventeen months, to decide *In re S.S.* probably in order to allow for public criticism of the court to die down in the wake of the "Baby Richard" case).

419. Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589, 590 (Summer 1996). Metteer's "spirit" of ICWA is likely synonymous with congressional intent.

420. Examples include: the existing Indian family exception whereby the Act does not apply at all to the child custody proceeding unless the child was living with Native Americans when removed from the home; the finding of good cause not to transfer a child custody proceeding to the tribal court pursuant to the concurrent jurisdiction provisions of ICWA; and refusing to apply the Act's clear child placement preferences because they would not be in the best interest of the child. *See generally* Metteer, *supra* note 419 (discussing the various ways in which state courts have avoided ICWA requirements). *See supra* note 124 (citing cases in which state courts have employed the existing Indian family exception since *Holyfield*); *supra* note 86 (citing cases in which state courts have refused to transfer jurisdiction of a child custody case to the tribe under the concurrent jurisdiction provision of ICWA).

421. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989).

ethnocentric decisions. In other words, by failing to recognize a uniform definition of domicile, the Illinois Supreme Court in *In re S.S.* fails to recognize the special relationship between Congress and Native American tribes in this country.[422] The court in its *In re S.S.* decision joins the proponents of doctrines such as the existing Indian family doctrine because it ignores the "spirit"[423] of the Act. Because the decision makes it more difficult for a tribe to assert its jurisdictional interest in the child custody matters of its members, it harks back to the time of the termination era in the 1950s and 1960s, when most assertions of tribal self-government were nearly impossible.[424]

The *In re S.S.* decision allows state courts to disregard Native American holistic tribal culture in which extended families play an important role in raising children. Illinois courts may now act in a manner similar to other state actors who, prior to ICWA, inappropriately assumed neglect of a child.[425] Consequently, if parents rely on an extended family member to care for their children *off* of the reservation, this decision indicates that the core exclusive jurisdictional provision of ICWA might not apply because the court could hold that the parents abandoned the children. Paradoxically, this may be less likely if the children reside with extended family members on the reservation on which their parents live, because children's chances for contact with the parents increase. Through its application of state abandonment law, then, *In re S.S.* supports the growth of the state court trend to circumvent ICWA provisions.

The decision supports the perpetuation of the problem which ICWA was enacted to resolve. As recently as 1990, the removal of Indian children from tribal communities had not been ameliorated and "continue[d] to threaten the vitality of contemporary Indian nations."[426] For example, in 1989 New Mexico state courts ignored the mandates of ICWA in seventy cases.[427] When Congress enacted ICWA, the

422. *See supra* Part II.B.

423. Metteer *supra* note 419, at 590.

424. *See* PEVAR, *supra* note 25, at 57.

425. *See supra* notes 53-59 and accompanying text.

426. Goldsmith, *supra* note 3, at 4. *See also* note 301 and accompanying text (explaining how the Illinois Supreme Court threatened tribal autonomy with its *In re S.S.* decision).

427. Goldsmith, *supra* note 3, at 4. Goldsmith reports that in 1990 "the rate of placement of Indian children in substitute care was 3.6 times greater than that of their non-Indian counterparts, reflecting a twenty-five percent increase over six years." *Id.* (citing Margaret C. Plantz et al., *Indian Child Welfare: A Status Report, Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980*, at 3-2 (1988)).

problem it addressed was the state's control over Native Americans and their children through child welfare policies and misguided social workers.[428] Now, the problem may resurface in the form of the state's control over Native Americans and their children through court maneuvers and doctrines—which likewise wrests from Indians their autonomy, their culture, and their assured future tribal existence.

More specifically, the *In re S.S.* decision creates confusion for Illinois state courts. For example, the decision does not resolve which standard of proof should be applied in abandonment-domicile hearings, or whether it is acceptable to maintain two different standards of proof on the identical issue for the same person.[429]

Confusion in the Illinois courts is exacerbated because *In re S.S.* was only the fourth case ever in this state concerning ICWA. Two of the Illinois cases add little to an ICWA analysis because they dealt with the issue of whether a particular tribe was eligible for ICWA protections.[430] The other case, however, *In re Armell*, held that a separate ICWA provision must not be "interpreted by individual state law."[431] It is inconsistent that Illinois law now stands as allowing the application of its state law when applying one provision of ICWA (exclusive jurisdiction of tribal court[432]) but not when applying another (good cause to deny transfer to tribal court[433]).

In addition, increased confusion results because *In re S.S.* does not specify when, how, and with which standard of proof abandonment hearings must be held for a determination of domicile pursuant to ICWA.[434] Unanswered questions remain: must the court hold this hearing in every case in which the children do not live with an Indian parent? Must the court hold the abandonment hearing in every case governed by ICWA in which children live off of the reservation? Or would the court hold this abandonment-domicile hearing only in cases in which abandonment is an alleged reason for the termination of parental rights?

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428. *See supra* Part II.B.

429. *See supra* Part IV.C.

430. *In re* Adopt T.I.S., 586 N.E.2d 690 (Ill. App. Ct. 1991); *In re* Stiarwalt, 546 N.E.2d 44 (Ill. App. Ct. 1989).

431. *In re* Armell, 550 N.E.2d 1060, 1066 (Ill. App. Ct. 1990); Metteer, *supra* note 419, at 605 (explaining that the *Armell* decision refused to apply state best interest of the child law in a decision of whether there was good cause not to transfer under ICWA's concurrent jurisdiction provision).

432. 25 U.S.C. § 1911(a) (1994).

433. *Id.* § 1911(b).

434. *See supra* text accompanying notes 280-82, 373-81.

VI. CONCLUSION

Unlike many difficult child placement, custody and adoption disputes which arise in the legal system and challenge one's understanding of morality, modern society, and what is "right" or "best," *In re S.S.* presented an easy issue for the Illinois Supreme Court to decide. The court did not, however, relish this simple task. The Illinois court unnecessarily created issues and difficulties, both legal and emotional, when it applied state abandonment law to its decision of domicile under ICWA in direct contravention of congressional intent and United States Supreme Court precedent. *In re S.S.* was *not* about what was best for S.S. and R.S. or with whom they should live or what developmental influences must be legally allowed or disallowed. Instead, this case was about respect of cultural differences and the need to trust members of different cultures. The Illinois Supreme Court was not willing to respect or trust the Fort Peck tribe to control and wisely use its deserved autonomy. Presumably, in the guise of trying to arrive at an outcome reflective of the "best interests" of S.S. and R.S., the court applied a narrow definition of those interests by refusing to acknowledge that the tribe might be better capable of arriving at the children's best interests. The majority decision in *In re S.S.* threatens the protective nature of ICWA and promises to continue to impede national efforts to support tribal autonomy.

VII. POSTSCRIPT

Unfortunately for S.S., R.S., the rest of their family, and the Fort Peck tribe, Iron Bear died in December 1995.[435] The implications of the outcome of this case for the children involved were accordingly altered. There is, obviously, no longer the chance that if Iron Bear were a fit parent, a court could eventually place the children in her care. While a decision to retain Iron Bear's parental rights would not have required that result, it was at least a possibility or a feasible goal for Iron Bear.[436]

The Tubridys withdrew their petition and Shelly S., the aunt with whom the children currently reside, subsequently filed a petition to adopt them.[437] The tribe continues its fight to obtain jurisdiction over

435. *Tribal Attorneys to Continue Custody Battle Despite Mother's Death*, West's Legal News 446, Jan. 29, 1996, *available in* 1996 WL 258196.

436. Telephone Interview with Kathryn McGowan Bettcher, Esq., Prairie State Legal Services (Nov. 1, 1996).

437. *Id.*

the proceedings and continues to claim exclusive jurisdiction of the case under ICWA.[438] S.S. and R.S. also have relatives living on the reservation who are interested in maintaining family ties with the children.[439] The tribal court might have the flexibility to order continued contact with biological family members even after an adoption.[440] Consequently, if the tribal court had jurisdiction to decide the case, it could resolve the issues in a more flexible way that maintained contacts with both sets of extended family members regardless of who became the adoptive parents.

If the tribal court obtains jurisdiction over the case, no guarantee exists for the outcome. In fact, the outcome is less predictable than if the Illinois court obtained jurisdiction.[441] It is possible that the tribal court would find that it was in the best interests of the children and the tribe that Shelly S., the children's aunt, adopt them.[442] This is particularly likely because they have lived with her for four years.[443] The tribal court, although working under the presumption that it is in the child's best interest to be raised within Native American culture,[444] "carefully consider[s] those instances when a non-Indian couple may be the most appropriate adoptive parents."[445]

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438. *Id.* Presumably, the tribe would argue that the domicile of the children should be determined as of the time the petitions were filed and, thus, would mirror the arguments presented in this case.

439. *Id.*

440. *Supra* notes 70-75 and accompanying text.

441. The majority in *In re S.S.* is not so subtle when it advocates that the children remain with the Tubridys. *In re* Adoption of S.S. & R.S., 657 N.E.2d 935, 937-43 (Ill. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

442. *See infra* text accompanying notes 40-44.

443. *Id.* at 938.

444. *See supra* note 68.

445. Goldsmith, *supra* note 3, at 2 n.7 (citing NATIONAL INDIAN JUSTICE CENTER, INDIAN YOUTH AND FAMILY LAW, ch. 11, at 6. In two Navajo tribal court decisions, for example, the court found that the children involved in the cases would remain in non-Indian placements. Goldsmith, *supra* note 3, at 2 n.7 (citing Telephone Interview with Craig Dorsay, Director, Native American Program, Oregon Legal Services (Feb. 20, 1990)).