A Guide to the Supreme Court Decision in *Adoptive Couple v. Baby Girl*

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OVERVIEW

The United States Supreme Court recently issued its opinion in the case of *Adoptive Couple v. Baby Girl*. This document is designed to:

- Summarize the decision—what the case held about the Indian Child Welfare Act (ICWA), what it did not hold, and what it implied.

- Provide advocates for tribes, birth parents (particularly unwed fathers) and Indian children with possible responses to the decision, including:

  - Legal arguments to address issues raised by the Court's legal holding.
  - Analysis of the potential for state law (primarily through state ICWAs or the equivalent) to address the issues raised by the United States Supreme Court decision, and minimize its negative impact upon tribes and Indian families and children.
  - Information about tribal-state ICWA agreements and the role of such agreements in mitigating the effects of the Court's decision

I. THE DECISION IN *ADOPTIVE COUPLE v. BABY GIRL*[i]

SUMMARY

Adoptive Couple v. Baby Girl is a case involving a non-Native couple in South Carolina seeking to adopt a young Cherokee girl (Veronica) over the objections of her Cherokee father who asserted the primacy of his own parental rights. The child was initially placed with the family by the birth mother. Hearings were held before the South Carolina Family Court, the Court applied the Indian Child Welfare Act, and transferred physical and legal custody of the child to her father. The South Carolina Supreme Court affirmed.

By a 5-4 vote, the Supreme Court, in a decision written by Justice Alito, reversed the South Carolina Supreme Court decision and remanded the case for further hearings to determine who should have custody of Veronica. In so doing, it held that ICWA provisions on active efforts to prevent the breakup on an Indian family [25 U.S.C. § 1912(d)] and heightened burden of proof for termination of parental rights [25 U.S.C. § 1912(f)] did not apply to this private adoption proceeding.[ii] It also held that the section of the Act that deals with adoptive placement preferences [25 U.S.C. § 1915(a)] did not preclude adoption by prospective non-Indian adoptive parents where no individuals within the Act's placement preferences had "formally sought" to adopt the child.[iii] Aside from finding that these sections were not applicable to this adoption, it did not otherwise specify the law to be applied on remand. This paper will discuss the legal ramifications of this holding for future cases.

FACTUAL BACKGROUND

As presented in the United States Supreme Court opinion

The case involved the attempted adoption of a young Cherokee girl (Veronica) by a couple in South Carolina. The child's non-Indian mother and her father (Dusten Brown), a member of the Cherokee Nation, were engaged to be married. When he learned of the pregnancy, the father sought to move up the date of the marriage. The mother refused, at which point the relationship deteriorated, and the engagement was broken off. Shortly thereafter, the mother sent father a text message asking if he would relinquish his parental rights, and he sent her a text message agreeing to do so.

During the pregnancy, the birth mother decided to put her infant up for adoption without informing the father. She arranged for a private adoption with a South Carolina couple. Because the mother knew of the father's Cherokee heritage, her attorney contacted the Cherokee Nation to determine if the infant was eligible for membership in the tribe, but misspelled the father's name and had the wrong birth date for the father. Based upon that information, the Cherokee Nation responded that it could not verify the father's membership. (Once it received accurate information, it later affirmed that the father was a member of the tribe and that Veronica, his newborn daughter, was eligible for membership.) The infant was placed with a South Carolina couple at birth, and an adoption petition was filed a few days later. The father was served with the adoption papers four months after the petition was filed. During those four months, he had no contact with the birth mother or child. When he was served, he signed for papers presented to him by a process server believing he was relinquishing his rights to the birth mother. Almost immediately he determined that was not the case and the next day he consulted an attorney, challenged the adoption and sought a stay of the proceedings. He also had a paternity test done which confirmed that he was Veronica's father.[iv]

Almost two years later, the South Carolina Family Court applied the Indian Child Welfare Act, denied the adoption and returned the child to her father. The South Carolina Supreme Court affirmed.

Additional facts included in the initial South Carolina Supreme Court decision

When the father texted that he would relinquish his rights, he did so believing that he was relinquishing them to the mother and did not know that she was planning to place the child for adoption. If he had known, he testified that he would have never relinquished his rights.

Because the child was born in Oklahoma, it was necessary for the child to be placed in South Carolina through the Interstate Compact on the Placement of Children (ICPC). On the ICPC form, it was not revealed that Veronica was Native American. If that document had been accurate and the Cherokee Nation properly alerted to the child's status as an Indian child, the South Carolina couple would never have received permission to remove the child from Oklahoma and transport her to South Carolina.

The father was a soldier in the United States Army, and the delayed notification of the adoption to him (four months after the case was filed) took place only days before he was scheduled to deploy to Iraq. Father also testified that he was misled by the process server, which is the reason he initially signed adoption papers he was presented. The reason for the delay in the court proceedings and decision on the adoption petition, and Father's objection to the adoption, was his year of service in Iraq that commenced almost immediately after he was given notice of the adoption.

When the father returned from Iraq, the South Carolina Family Court held a hearing to resolve whether the proposed adoption should proceed. While the Court did utilize the Indian Child Welfare Act (ICWA) in making its decision, it also found that, "Father, despite some early indications of possible lack of interest...not only reversed course at an early point but has maintained that course despite...active opposition [from the prospective adoptive parents]. The Court also found that Dusten "was a good father who enjoyed a close relationship with his other daughter" and that "he and his family have created a safe, loving and appropriate home for [Veronica]." The Court also found "no conflict" between recognizing the father's parental rights and the best interests of Veronica.[v]

None of these facts were included in the United States Supreme Court's decision.[1]

LEGAL ANALYSIS

Overview

As noted, the Supreme Court's decision was a 5-4 decision, which narrowed the application of 25 U.S.C. §§ 1912(d) and (f) in certain situations and 25 U.S.C. § 1915(a) when there are no competing adoption petitions filed. One of the five justices in the majority was Justice Breyer who filed a concurring opinion further explaining his view of the opinion. The overall thrust of his concurrence was the statement that "we should decide here no more than is necessary" which he further explained by providing different factual situations where he believed the sections at question might apply to an adoption notwithstanding the Court's opinion.[vi] This suggests that a narrow interpretation of the decision in *Adoptive Couple v. Baby Girl* is appropriate since Breyer's vote was necessary to constitute a majority. However, some of the majority opinion's holdings are stated in broad terms that some parties will likely reference in attempts to apply the Court's limitations upon the application of ICWA more broadly. Of note, the Court did not adopt arguments challenging the constitutionality of ICWA[2], although it did suggest (without any explanation) that a contrary result here could "raise equal protection concerns". [vii]

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[1] The majority opinion also did not reference the Family Court finding, cited in the dissent, 133 S.Ct. at 2580, that the Birth Father was a fit and proper person to have custody of his child who has demonstrated his ability to parent effectively and who possesses unwavering love for the child.

[2] In the dissenting opinion, Justice Sotomayor opined that it is "difficult to make sense" of the Court's suggestion regarding equal protection in view of Supreme Court precedents recognizing that classifications based on Indian tribal membership are not racial classifications. 133 S.Ct. at 2584-2585. In his concurring opinion, Justice Thomas indicated that he would find the ICWA unconstitutional, holding that the Indian Commerce Clause in the United States Constitution is not broad enough to allow Congress to enact legislation like ICWA. *Id.* at 2565-2571.

What the Court held

As noted, the Court interpreted three sections of ICWA: 25 U.S.C. § 1912(f) [termination of parental rights standards], 25 U.S.C. § 1912(d) [active efforts to prevent the breakup of Indian families], and 25 U.S.C. § 1915(a) [adoptive placements].

Termination of Parental Rights

25 U.S.C. § 1912(f) provides that termination of parental rights cannot be ordered unless there is a finding beyond a reasonable doubt, supported by the testimony of qualified expert witnesses, that *continued custody* of an Indian child by a parent or Indian custodian is likely to result in serious emotional or physical harm to the child. This is a stricter standard of proof than is found in most state statutes.

In its decision, the majority focused upon the language "continued custody" in the statutory provision. It interpreted that language as meaning that a parent must have had either physical or legal custody of the child at some point in order to invoke the protections of this section, or in other words, that it does not apply "when the Indian parent *never* had custody of the Indian child."[3] The Court referenced state law in determining whether the unwed father had legal custody of the Indian child. It supported this reading of the statute by emphasizing that primary purpose of the Act was to address the unwarranted "removal" of Indian children from Indian families, and that this purpose was not advanced, in the context of a voluntary adoptive placement, by applying this section to a parent who never had a physical or legal custodial relationship with the child.[viii]

In his concurrence, Justice Breyer limited his joinder with these statements (and his joinder was necessary to achieving the five vote majority). He stated that this case does not involve a father with visitation rights or who has paid his child support obligation, been misled about the existence of the child, or was prevented from supporting the child. He asserted that the court "need not, and in my view does not" now decide how this section applies where those circumstances are present.[ix] He did not attempt to explain how this view is consistent with the majority opinion's language about § 1912(f) not applying when a father has never had custody.

Thus, at a minimum, it is clear that in a case that involves an attempted voluntary adoption by a birth mother where a birth father has not had prior legal or physical custody and has not made (in the court's view) an effort to establish a relationship with the child by a certain point in time (and what point in time is not exactly clear), the protections of § 1912(f) will not apply.[4] Whether these limitations will apply in full force in the context of a totally involuntary

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[3] While the majority opinion focused on Indian parents, and made references to a "biological Indian father" using his "ICWA trump card at the eleventh hour" near the end of the decision when it suggested that a contrary result here could raise equal protection concerns, 133 S.Ct. at 2563, 2564, it should be noted that the ICWA in general and § 1912(f) in particular apply to both the Indian and non-Indian parents of an Indian child. In addition, Justice Alito's opinion contains several statements noting the percentage of the child's Indian blood quantum. These statements seem to reflect a misunderstanding of the political nature of tribal membership.

[4] What is clear is that the Court was looking at State law as a reference point on these issues, which means that fathers' rights will differ by State. As discussed in the dissent, there are a wide variety of approaches in State law with some state laws focused more on protecting unwed biological fathers' rights, while other laws (such as South

proceeding will depend upon whether courts focus upon the Supreme Court's theory of statutory construction in regard to § 1912(f) or Justice Breyer's concurrence where he attempted to limit the scope of the Court's holding to the factual circumstances presented in the case by indicating that the Court "decided no more than is necessary" to resolve the case before it. (Further support for a narrow reading of the Court's ruling as suggested by Justice Breyer - one that would limit its application to termination petitions that are filed in the context of contested private adoption proceedings – might also be derived from the Court's overall analysis in the case which was based almost entirely upon the factual circumstances of this case, i.e., a dispute that arose in the context of an attempted prior adoption as opposed to a "removal" of a child by a non-Indian governmental authority.) Similarly, whether § 1912(f) will still apply to some sub-segment of non-custodial parents (as Justice Breyer suggested when he enumerated certain circumstances where the Act may apply that would not necessarily involve prior custody), or exclude all parents who have not had prior custody based upon language in Justice Alito's opinion, will be a question for courts who will be interpreting this decision in the future.

Of note, if under state law an unwed father obtains presumptive legal custody at birth, then 25 U.S.C. § 1912(f) [and 25 U.S.C. § 1912(d) – see below] should still apply.

Active Efforts to Prevent the Breakup of the Indian Family

25 U.S.C. § 1912(d) provides that any party seeking a foster care placement or termination of parental rights must make active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, a stricter standard that the "reasonable efforts" standard generally applicable under federal and state laws.

In its decision, the Court held based upon the language in 25 U.S.C. § 1912(d) emphasizing the "breakup of the Indian family" that this section does not apply when an Indian parent abandons a child prior to birth, and the parent has never had prior physical or legal custody.[5] It suggested that applying this requirement in these circumstances would "place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home…" because of the obligation that it would place upon prospective adoptive parents.[x;6] In reaching this holding, the Court clearly characterized the actions of the father here as "abandonment" of the child, although the Court never defined that term exactly.[xi] It will undoubtedly be the subject of future cases and, as the dissent pointed out[xii], the definition of abandonment varies greatly from state to state. The majority also supported its holding by emphasizing that the purpose of

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Carolina) are reflective of pro-adoption policies that "hew to the constitutional baseline" and make it much easier to terminate a father's rights. 133 S.Ct. at 2581-2583.

[5] The Court's interpretation also rested on a somewhat novel theory of statutory construction – namely that "adjacent" provisions should be read in "harmony with each other", noting that § 1912(d) is "next to" §§ 1912(e) and (f) and that therefore the concept of "continued custody" should be imputed into its interpretation of § 1912(d). 133 S.Ct. at 2562-2563.

[6] In her dissent, Justice Sotomayor noted that this observation, among others, illustrated that the Court's holding was really based upon a policy disagreement with Congress' decision in ICWA to make the adoption of Indian children by non-Indian families less likely. 133 S.Ct. at 2572, 2583. It should also be noted that the majority seemed particularly bothered by the idea of requiring the adoptive couple to make the active efforts. This is a misreading of the statute as it is the state that has the obligation to make active efforts before an involuntary termination of parental rights can be granted under 25 U.S.C. 1912(f), not a prospective adoptive couple.

§1912(d) was to prevent the breakup of Indian families, and not create parental rights where none would otherwise exist.[xiii]

Much of the analysis of § 1912(d) seems to be based upon the particular facts of this case, especially the voluntary adoption context from which it arose. In this regard, Justice Breyer's questions about the appropriateness of applying the Court's holding to a litany of other circumstances (father with visitation rights or who has paid his child support obligation, been misled about the existence of the child or was prevented from supporting the child) support an interpretation that the scope of the holding in terms of § 1912(d) should be viewed narrowly, especially since his observations are consistent with the Court's inclusion of "abandonment" as one of the elements that must be shown before a court can waive the application of § 1912(d).[xiv] Of note, while the dissent disagreed with the analysis of the Court, it "welcomed" the "limitation" on the court's holding reflected by its inclusion of the abandonment requirement in its holding on this section.[xv]

In addition, as the dissent pointed out[xvi], other federal laws (and the statutes of all 50 states that implement that law) have a similar requirement that reasonable efforts must be made to preserve and reunify families before a foster care placement or removal of a child from the home.[xvii] The Court did not address this point in its opinion.

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

Adoptive Placement

25 U.S.C. § 1915(a) provides that in the absence of good cause to the contrary, adoptive placements of Indian children must be made in the following order of preference: (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families. The Supreme Court held that this did not prevent adoption of Veronica by the prospective adoptive parents because no alternative party had formally sought to adopt the child—that in such cases 25 U.S.C. § 1915(a) is inapplicable.[xviii;7] In a footnote, however, the Court suggested that a "reformed" biological father whose rights have been terminated might re-enter the pool of preferential placement options. (In his concurrence, Justice Breyer makes a similar point but uses the term "absentee father".) This could occur under a tribal placement preference order adopted pursuant to 25 U.S.C. § 1915(c) that would supplant the statutory placement preference order.[8] The Court noted, however, that good cause might still be a factor in determining the application of this tribal placement preference. Although the Court raised the

[7] In her dissent, Justice Sotomayor specifically stated that "the majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation" may petition for her adoption and that they would be entitled to consideration under the placement preferences in section 1915(a), 133 S.Ct. at 2585, and Justice Breyer in his concurrence also noted that 25 U.S.C. § 1915(a) may be relevant in cases of this kind, *id.* at 2571. It is likely that the Tribe did not bring forward a proposed alternative adoptive placement when it intervened in the proceeding because it was focused on obtaining custody for the father. Nonetheless, when the case was remanded, the South Carolina Supreme Court refused to allow any other petitions for adoption to be filed. *Adoptive Couple v. Baby Girl*, No. 2011-205166 (S.C. July 17, 2013).

[8] It should be noted that even in the absence of any tribal action under §1915(c), it may be that a previously terminated biological parent could still receive preferential consideration under 25 U.S.C. § 1915(a)(1) or (2).

possibility that such a scenario could happen, the Court left open the question of how it would decide such a case if it were presented to the Court.[xix]

It is unclear to what extent the Court's analysis of § 1915(a) will apply outside the private adoption context. While the Court's holding is stated in general terms such that it could be argued that it has a broader application to all adoptions, the Court seemed particularly focused upon the private adoption context, and Justice Breyer's limiting comments may be particularly relevant here to an argument that the Court's holding should not be interpreted to apply more broadly.

Of note, the decision did not address the provision of the Bureau of Indian Affairs' ICWA Guidelines that requires a diligent national search of potential adoptive families within the preference placement order, nor how that requirement would apply in any other case (although the Court did cite the Guidelines with approval elsewhere in its opinion).[xx] Indeed, nothing in the Court's opinion would preclude anyone, including a state agency or adoption agency, from making a diligent search for families within the placement preferences. In fact, other federal laws require state agencies to "diligently recruit" foster and adoptive families "that reflect the racial diversity of children in the State for whom foster and adoptive homes are needed".[xxi]

It should also be noted that general child welfare statutes applying to all children are moving in the direction of the ICWA placement preferences, requiring notice to extended family to inform them of the opportunity to serve as a placement for a child that will be placed in foster care, and providing that the State must consider giving preference to an adult relative over a non-related caregiver.[xxii] Similarly, there is some existing case law that has required notice under ICWA in involuntary cases to extended family members who might be a placement resource for an Indian child.[xxiii] None of this was addressed by the Court.

At a minimum, then, the Court's holding is a clear signal to individuals within the placement preferences who may want to adopt (even if that intent is contingent upon whether parents' rights are terminated) to formally file for adoption if there are other pending petitions for adoption by individuals who are not preferred placements. In terms of agency activities, however, there are still many requirements in place in regard to diligent searches for preferred placements, particularly relative placements, in federal and state laws, regulations, tribal-state agreements, and other documents. Thus, the impact of the decision outside of the private adoption context may be limited in practice.

Potential impact on other sections of ICWA

Existing Indian Family Exception

Contrary to some media reports, the Court did not adopt the Existing Indian Family doctrine (EIF) in the *Baby Girl* decision. The EIF, which has been followed by a small minority of states, provides that the Act does not apply when, in the view of the Court, there has not been a prior Indian family.[xxiv] The Court held that specific sections of the Act do not apply in a voluntary adoption proceeding under ICWA, including the involuntary termination of the non-

custodial father's parental rights, when the father has not had previous legal or physical custody. However, it also noted the dissent's observation that "'numerous' ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody".[xxv] The provisions of the Act mentioned in the dissent were 25 U.S.C. § 1911(b) (transfer to tribal court); 25 U.S.C. § 1913(a) and (c) (governing procedures for a parent of an Indian child to consent to adoption); 25 U.S.C. § 1912(a) (notice), 25 U.S.C. § 1912(b) (right to counsel), and 25 U.S.C. § 1912(c) (access to court documents).[xxvi] The fact that the majority referenced the dissent's analysis, without rejecting it, is an indication of majority acquiescence with the notion that these protections continue to apply to biological fathers even in the absence of a previously existing Indian family.

This reading of the *Adoptive Couple v. Baby Girl* decision is also supported by the Court's apparent confirmation of the holding in *Mississippi Band of Choctaw Indians v. Holyfield*[xxvii] that the statute as a whole is triggered when an Indian child is the subject of a child custody proceeding, both of which it conceded were present in this case.[xxviii] Thus, at a minimum, it would appear that the Indian child and tribe can invoke the protections of the Act even if (in some circumstances) a father cannot. If at least part of ICWA is triggered anytime an Indian child is involved in a child custody proceeding, this is the antithesis of the EIF which would preclude the application of any part of ICWA in a circumstance where a court has determined that there was a prior Indian family.

Nonetheless, it must also be recognized that the Court in *Adoptive Couple v. Baby Girl* supported its reading of the language of § 1912(f) by asserting that an adoption initiated by a non-Indian parent with sole custodial rights where the non-custodial Indian parent has never had legal or physical custody of the child does not impede "the ICWA's primary goal of protecting the unwarranted removal of Indian children and the dissolution of Indian families"[xxix] —a rationale similar to some of the EIF cases and a different emphasis than the *Holyfield* court which discussed at length the important tribal interests protected in ICWA and acknowledged the importance of the extended family[xxx].

This is undoubtedly an area that will be the subject of future litigation, including whether the Court's analysis extends beyond the context of voluntary adoptions and how the sections of the Act that do apply fit in with those that do not. For example, if §1913 applies, this would seem to preempt state law that might remove the need for consent.[9] Yet, a hearing pursuant to § 1912(f) might not be available to the parent as a remedy and a Court will need to decide how to proceed—whether the remedy would be a "fitness" hearing under state law or something else.

Definition of parent

25 U.S.C. § 1903(9) is the definition of parent which includes the limitation that the term does not apply to an unwed father who has not acknowledged or established paternity. It was argued by the prospective adoptive parents that the key terms "acknowledgment" and "establishment" should be defined by state law. The Court did not decide the issue, but simply

[9] On remand, the South Carolina Supreme Court held that the father's consent was not required. *Adoptive Couple v. Baby Girl*, No. 2011-205166 (S.C. July 17, 2013). This result was strongly criticized and a highly questionable interpretation of the United States Supreme Court decision.

assumed, for the purposes of the case, that the father was a parent under the Act.[xxxi] The dissent asserted that the terms should be defined by federal law in accordance with the precedent set in the *Mississippi Band of Choctaw Indians v. Holyfield*[xxxii] case, and noted that it is "unsurprising, although far from unimportant" that the majority opinion assumed that the father was a parent under ICWA.[xxxiii] Of note, the father did acknowledge his paternity in the family court proceedings and establish paternity through a DNA test. The majority opinion did not explicitly address whether these actions constituted "acknowledgment or establishment" of paternity for purposes of ICWA.

Foster care provisions

25 U.S.C. § 1912(e) applies to the foster care placement of Indian children. Unfortunately, it uses the same "continued custody" language in 25 U.S.C. § 1912(f). Of all of the provisions not at issue in this case, this is the section whose interpretation is most likely to be affected by the Court's analysis due to the similarities in language between this section and 25 U.S.C. § 1912(d). Nonetheless, Justice Breyer's limiting comments may be particularly relevant here to an argument that the Court's holding should not be interpreted to apply outside of the specific private adoption context of this case and that § 1912(e) should still apply to all foster care placements.

25 U.S.C. § 1915(b) provides for placement preferences in the context of foster care placements. There are strong arguments that this Court's interpretation of § 1915(a) should not affect the implementation of § 1915(b) given the different practical and legal context of foster care. A foster care placement by definition is temporary, and foster families generally do not "file" for placement or even come forward. Rather children are placed with families by the child custody agency, and theoretically the entire universe of qualified families would be included in the potential placement pool; the idea of a particular foster family needing to "trigger" the placement preference by taking a certain action makes little sense in the foster care context. Further, as noted previously, the Court's holding on 25 U.S.C. § 1915(a) seems to be largely based upon the private adoption context of this case, and the Court provided little explanation for its holding that the section is inapplicable until a preferred placement files a petition for adoption. For all of these reasons, it does not seem likely that the Court's § 1915(a) holding will be extended to § 1915(b).

It is worth noting again that non-ICWA federal law and case law contain placement preference and notice provisions for extended family, and require diligent recruitment of ethnically-diverse foster homes.[xxxiv] These provisions can be reinforced in the context of Indian children through state law, policy, and tribal-state agreements. For these reasons also, the application of 25 U.S.C. § 1915(b) should generally be unaffected by the Court's decision.

Application of state ICWAs and tribal-state agreements:

The Court's decision did not involve or affect either 25 U.S.C. § 1921 or 25 U.S.C. § 1919. 25 U.S.C. § 1921 requires that where any federal or state law provides greater protection to the rights of a parent or Indian custodian, that law shall apply. Thus, the Court's decision did not overturn state Indian Child Welfare Acts (or their equivalent), which provide greater

protections to non-custodial parents. Of course, how such laws will be interpreted by state courts will be critical. This will depend in large part whether a different state intent can be ascertained because the wording of the State statute differs from the federal law or there is legislative history, a regulatory interpretation or other evidence that demonstrate that the intent of the State law was different than the interpretation of the federal ICWA by the United States Supreme Court. This is discussed in more detail in Section II of this analysis.

25 U.S.C. § 1919 provides that states and tribes may enter into agreements pertaining to the care and custody of Indian children, including the orderly transfer of jurisdiction on a case-by-case basis. These agreements have often been accompanied by the adoption of state regulations, policies and procedures and may be a mechanism that can be used to mitigate some of the impacts of this case. The Court's decision did not address or affect the application of § 1919. This is discussed in greater detail in Section III.

II. AUTHORITY OF STATE ICWA LAWS IN CHILD WELFARE CASES

ICWA: The Minimum Federal Standard

The Indian Child Welfare Act (ICWA) was passed pursuant to Congress' plenary power over issues that involve Indian tribes and its trust responsibility to protect and preserve tribes and their resources.[xxxv] After taking into consideration the fact that family law is an area typically reserved to the states, Congress found that the abusive practices of state courts and social service providers working with Indian children and families nonetheless required federal intervention via ICWA.[xxxvi]

ICWA establishes the "*minimum* Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes"[xxxvii] which must be followed by state courts. As the minimum federal standard in this area of law, ICWA specifically provides in 25 U.S.C. § 1921 that any state or federal law which provides "*higher standards* of protection to the rights of the parent or Indian custodian" (emphasis added) shall instead be followed by state courts.[10]

Based upon this section, courts have applied state laws to ICWA proceedings that have increased the requirements for qualified expert witnesses,[xxxviii] provided heightened standards for inquiry into the Indian status of a child,[xxxix] heightened the notification requirements,[xl] required children whose tribe has indicated that they will be eligible for enrollment after taking certain steps to be immediately treated as "Indian children" under the act,[xli] and incorporated additional state standards for termination of parental rights into proceedings involving Indian children.[xlii] States have also used this provision to create unique legislative schemes or state ICWA laws to reiterate the importance of ICWA and to strengthen its provisions.[xliii]

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[10] 25 U.S.C. § 1921 Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child states

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

Furthermore, although this section does not explicitly include state provisions which heighten protections for tribes as opposed to parents or Indian custodians of an Indian child, at least one court has held that where higher standards are present in state statutes, these protections extend to tribes.[xliv] Additionally, one state has extended the protection of §1921 to protect the rights of tribes via statute.[xlv] It remains unclear, however, to what extent state courts can expand core federal Indian law related provisions (for example the definition of an "Indian child" to include those children not members of federally recognized tribes)[xlvi], or those provisions not directly related to enhanced parental protections.[xlvii]

Nonetheless, §1921 offers some unique solutions to issues raised in the *Adoptive Couple v. Baby Girl* case. This is because where state ICWA laws provide heightened protections to parents, they will supersede the Supreme Court's interpretation of the federal law.

Thus, in considering how the impact of the *Adoptive Couple v. Baby Girl* might be ameliorated, it is essential to look to state ICWA laws. There are two possible paradigms. One is where the language of the state ICWA diverges from that of the federal ICWA. In such case, interpretation of the State law should proceed independently from the Supreme Court's interpretation of federal law. In the second case, the provisions of state law and federal law are the same. In that instance, some indication of a different state intent will likely be necessary in order for a state court to consider an interpretation at variance from that of the Supreme Court. This might be shown though legislative history or through implementing state regulations or policies at variance from the Supreme Court's interpretation of ICWA.

Examples of State ICWA provisions that may limit the impact of *Adoptive Couple v. Baby Girl*

25 U.S.C. § 1912(d)

One example of how a state ICWA might ameliorate the holding of the United States Supreme Court in *Adoptive Couple v. Baby Girl* as it pertains to 25 U.S.C. § 1912(d) can be found in Michigan state law.

The "Michigan Indian Family Preservation Act (MIFPA)" defines active efforts as, "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *and to reunify the child with the Indian family*."[xlviii] The language in this definition makes it clear that active efforts are to be made not just to prevent the breakup of a family but also to reunify the child with the Indian family. Given this broader language, a strong argument can be made that the Supreme Court's interpretation of 25 U.S.C. § 1912(f) would not be persuasive to a Michigan court interpreting the MIFPA provision on active efforts. Pursuant to 25 U.S.C. § 1921, the MIFPA provision would govern this issue in the case of an Indian child in a child custody proceeding in Michigan.

25 U.S.C. § 1915(a)

Prior to the holding in *Adoptive Couple v. Baby Girl* that § 1915(a) was not triggered in that case because no alternative party has sought to adopt the child, § 1915(a) had universally

been interpreted to apply in every adoption proceeding and to require state and private adoption agencies or parties to actively seek adoptive placements for Indian children based upon the placement preferences it prescribes. Accordingly, a number of states have codified ICWA laws that have mandated how state and private agencies will actively ensure compliance with this provision. The language of some of those provisions may provide heightened protections for Indian children, extended family members and tribal members.

It should be noted, however, that these state provisions may not explicitly fall under 25 U.S.C. § 1921. As discussed above, § 1921 provides that states must follow any "higher standard of protection to the rights of the parent or Indian custodian of an Indian child." The rights protected by the federal ICWA's placement provision and state ICWA's improvements on the placement provisions are those of the Indian child and the tribe—not the parent or Indian custodian. Although some states have interpreted or expanded § 1921 to include tribes, not all states will automatically adopt this principle.

Nonetheless, even without considering § 1921, rules of federal preemption do not preclude application of state laws providing alternative placement preference schemes. Where, as in ICWA,[xlix] there is no express pre-emption clause, a state law is preempted only where the federal regulatory scheme is so pervasive as to "occupy the field" for a particular area of law[l] or where a state law conflicts with a federal law.[li]

Arguments that ICWA "occupies the field" of child welfare law, or even child welfare law as it pertains to Indian children, are unlikely to find favor in the courts. To date, courts have found that ICWA supplements state's children's codes.[lii] For this reason, state laws that require active efforts on behalf of the state and private adoption agencies to find placements in line with ICWA's preferences are unlikely to be preempted because ICWA "occupies the field" of child welfare law.

In addition, state legislation which requires that states actively seek adoptive placements in accordance with the federal ICWA is unlikely to be seen as "in conflict with" and therefore pre-empted by the federal ICWA. Conflict occurs when (1) it is impossible to comply simultaneously with the state and federal regulation[liii] or (2) where the state regulation obstructs the execution of the purpose and objectives of Congress.[liv] In the area of Indian child welfare, courts have generally read state law and federal law as complementary and have allowed for simultaneous compliance to avoid preemption.[lv] Where states and private adoption agencies are legislatively required to actively seek placements in line with ICWA's preferences, it is possible to simultaneously comply with both the federal and state law. Further, such state laws are likely to be found consistent with the overall purpose and objectives of Congress presented in ICWA via the Congressional declaration of policy which states:

> "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."[lvi]

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

For all of these reasons, it is difficult to see why such state requirements would be preempted. In fact, nothing in the Supreme Court decision would preclude states from requiring [by law or through rules and regulations] that a diligent search must be done to ensure active compliance with the placement preferences. Indeed, as previously noted, the ICWA guidelines for state courts require that states diligently recruit homes that fit the ICWA placement preferences and other federal law requires states to actively recruit adoptive families that are reflective of the diversity of their foster care and adoptive populations.

Some examples of state statutes that may lessen the impact of the placement preferences holding in *Adoptive Couple v. Baby Girl* include the Oklahoma ICWA, which states:

> The placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act.[lix]

A key part of the Supreme Court's rationale for its holding was that it did not want to deprive Indian children from finding permanent families. A more diligent search for adoptive homes within the placement preferences is consistent with the goal of finding homes for Indian children and helps to further ICWA's legislative intent to promote "placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture…"[lx] Under these circumstances, it is difficult to see how ICWA could be interpreted to preempt such efforts.

The fact that the Oklahoma Legislature mandated that a vigorous effort be made to place children in preferred placements might also be the grounds for an argument that an Oklahoma court should interpret the placement preferences section in the Oklahoma statute as not including the Supreme Court's limitation on the application of the federal ICWA placement preferences provision [25 U.S.C. § 1915(a)]. Of note, Oklahoma has interpreted 25 U.S.C. § 1921 to include heightened protections of not only the parents of an Indian child but also the tribe of an Indian child, making this interpretation more feasible.[lxi]

California's state ICWA is similar. California law states "In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian... the child's placement shall comply with this section"[lxii] where the section requires that "the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section"[lxiii] and that "[a]ny person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe...to secure placement within the order of placement preference established in this section."[lxiv] Again, this language is counter to the passive interpretation of the federal placement preferences provision by the Supreme Court, as it requires those agencies and persons placing a child to actively engage to ensuring compliance with the placement preferences. Moreover, California has also codified that the language of § 1921 of ICWA includes heightened protections for tribes, which may give the provisions on placement preferences discussed above additional force in courts.[lxv]

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

What if a state ICWA mirrors the federal ICWA sections 1912(f) and 1912(d)

In contrast to the state ICWA provisions described above, the majority of states that have passed laws to strengthen the application of ICWA in their jurisdiction have either 1) inserted a provision in their code that requires under state law that the federal ICWA be followed;[lxvii] or 2) codified language that exactly mirrors ICWA's active effort language,[lxviii] termination of parental rights standards,[lxix] and placement preference language.[lxx] Clearly, those states that have added provisions requiring the integration of the federal ICWA with state child welfare and adoption laws will be required to interpret the federal ICWA in their courts according to the decision of the Court in *Adoptive Couple v. Baby Girl* (see Section I above for suggestions on how to interpret this decision). However, under some circumstances described below, those states that have codified the *language* of the federal ICWA may be able to argue that state ICWA language identical to the federal ICWA need not be interpreted as the federal ICWA was interpreted by the Court in *Adoptive Couple* v. *Baby Girl.* Thus, state decisions based in whole or in part on a state ICWA with language identical to the federal ICWA language may not automatically be overturned by the decision in *Adoptive Couple v. Baby Girl.*

Where there is state legislative history or implementing regulations, or perhaps a tribal-state agreement, to support a state interpretation of state ICWA language that is at variance with the Supreme Court's interpretation of identical language, the argument for a differing interpretation may find approval in the court. For example, California made the following legislative finding:

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

Statements such as this one offer room to argue that the unique interests of California as stated by this finding require a different interpretation of the applicable provisions in California law.

In addition to unique legislative findings, the policy statements and regulations of a state offer insight into how a state ICWA with identical language to the federal ICWA is intended to be interpreted. For example, the Washington ICWA policy and procedure manual states the following as it pertains to active efforts:

A. "Before filing a dependency, guardianship, or involuntary termination of parental rights petition in state court, the CA social worker must make **active efforts** to provide social services to the family for protection of an Indian child.

   1. The social worker must make **active efforts** only when the circumstances of the family, viewed in light of the prevailing social and cultural conditions and the way of life of the Indian community:

      a. Require the provision of social services for the protection of the child; and
      b. To support the relationship between the child and the parent(s)/Indian custodian.

   2. **Active efforts** include those services the social worker actively provides to rehabilitate and/or prevent the breakup of the family. **Active efforts** require more direct involvement by the social worker with the family than reasonable efforts.

B. The CA social worker will jointly develop and, whenever possible, provide the services in consultation with the social services program of the child's Tribe.[lxxi]

Provisions such as this one may support an argument that although the language of the state ICWA provision in Washington mirrors the federal ICWA, the state provision has been interpreted more broadly by the state and a Washington state court should defer to the administrative interpretation of the statute. Federal rules of statutory interpretation require great deference be given to an administrative agencies reasonable interpretation of an ambiguous statute.[lxxii] This principle, however, has uneven application throughout state courts.[lxxiii]

Interpretation of state ICWAs that mirror the federal ICWA language will take place on a case-by-case basis. In many cases, a state court will likely adopt the federal analysis. Arguments that a state's legislative purpose or administrative interpretation of their own statutory language should influence these interpretations, however, may convince a court to take an independent look at the state statute in some cases.

III. TRIBAL-STATE AGREEMENTS

25 U.S.C. § 1919 provides statutory authority for tribes and states to enter into agreements regarding "(1) care and custody of Indian children and (2) jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.[lxxiv] Generally, § 1919(a) tribal-state agreements are not required to be formally written and executed agreements, such as a Memorandum of Understanding.[lxxv] Rather, tribal-state agreements may consist of a series of agreements and through operational collaboration between state and tribal agencies and courts.[lxxvi]

While § 1919 tribal-state agreements cannot directly overturn the decision in *Adoptive Couple v. Baby Girl*, they can provide mechanisms to establish Indian child welfare procedures that go beyond the "minimum Federal standards for removal of Indian children from their families" and which in a practical sense can require agencies to operate in a manner that would ameliorate some of the impact of the limitations handed down by the Supreme Court.

Generally, absent an explicit prohibition or limitation in ICWA, the two parties can agree to take assumed responsibilities and take actions regarding the "care and custody of Indian children" even if not explicitly required by ICWA.

For example, in Oregon, the tribal-state agreement requires consultation with the tribe of the parent before the state will advocate to any state court a permanency plan involving termination of parental rights.[lxxvii] If the Supreme Court's holding is given a broad interpretation and is applied to involuntary proceedings, this provision and any other similarly crafted provisions can eliminate the need for the filing of a Termination of Parental Rights (TPR) action and provide additional protection of parental rights. By coordinating efforts with tribes before termination of parental rights is even considered, additional protections for the rights of non-custodial parents can be provided, and some of the issues raised by the Supreme Court decision resolved.

In the Washington tribal-state agreement, there are also limitations on the filing of TPRs. The child welfare agency is to petition the state court for an involuntary foster care placement or termination of parental rights only after it has undertaken active efforts to prevent the breakup of the family.[lxxviii] This provision does not require a determination of prior legal or physical custody to be made. Also, the state agrees to not seek termination of parental rights when specific circumstances exist as the only grounds for a petition.[lxxix] For example, evidence of community or familial poverty, crowded or inadequate house, or alleged alcohol abuse by itself cannot trigger a petition for termination of parental rights.

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

In terms of placement preferences, the Oregon tribal-state agreement includes the three preferential placement categories and adds a fourth preference, "Other adoptive families approved by the Tribe."[lxxxii] Section VII of the Oregon template agreement also provides that the Tribe shall provide the state welfare agency with names and home studies of prospective adoptive homes in order to assist the state in complying with the placement preferences. If it works as intended, it could serve to lessen the impact of the Supreme Court decision.

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

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

CONCLUSION

In the end, it seems safe to conclude that the Court was (as Justice Breyer confirmed in his concurrence), very focused upon the facts of this case and consequently the guidance that it has provided on key issues such as the EIF and how the different sections of the statute now fit together is still not completely clear. While some of the uncertainty can be dealt with through

proactive efforts at the state level—state ICWAs, tribal-state agreements, policies and procedures—it is also safe to assume that much litigation will arise as a result of the uncertainties in the decision. This paper is designed to provide tribal leaders, advocates, attorneys and others interested in Indian child welfare with an understanding of the decision and some possible tools to respond to the decision.

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[i] 133 S.Ct. 2552 (2013).
[ii] *Id.* at 2560-2564.
[iii] *Id.* at 2564-2565.
[iv] *Id.* at 2559.
[v] 731 S.E.2d 550, 566 (S.C. Sup. Ct. 2012).
[vi] 133 S.Ct. at 2571.
[vii] *Id.* at 2565.
[viii] *Id.* at 2560-2562.
[ix] *Id.* at 2571.
[x] *Id.* at 2563-2564.
[xi] *Id.* at 2562-2563.
[xii] *Id.* at 2576, n.3.
[xiii] *Id.* at 2563,
[xiv] *Id.* at 2571.
[xv] *Id.* at 2576, n.3.
[xvi] *Id.* at 2580.
[xvii] *See, e.g.,* 42 U.S.C. 671(a)(15)(B).
[xviii] 133 S.Ct. at 2564.
[xix] *Id.*, at 2564 n. 11; [need to fix this citation].
[xx] *Id.* at 2561-2562.
[xxi] 42 U.S.C. § 622(b)(7).
[xxii] 42 U.S.C. §§ 671(a)(19), (29).
[xxiii] *In re M.E.M.*, 725 P.2d 212 (Mont. 1986).
[xxiv] *See, e.g.,* Lewerenz and McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 William Mitchell L.Rev. 684 (2010).
[xxv] 133 S.Ct. at 2561, n.6.
[xxvi] *Id.* at 2573-2575.
[xxvii] 490 U.S. 30 (1989).
[xxviii] 133 S.Ct. at 2557, n.1.
[xxix] *Id.* at 2561.
[xxx] 490 U.S. at 34, 35 n.4, 52-53.
[xxxi] 133 S.Ct.at 2559.
[xxxii] 490 U.S. 30.
[xxxiii] 133 S.Ct. at 2574.
[xxxiv] 42 U.S.C. § 622(b)(7).
[xxxv] 25 U.S.C. §§ 1901(1)-(2); *see also* Establishing Standards for the Placement of Indian Children In Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, Committee on Interior and Insular Affairs. H.R. Rep. No. 95-1368, at 13-18 (1978) (Hereinafter House Report).
[xxxvi] House Report at 19. (Stating "While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within then' geographic limits, it does feel the need to establish minimum Federal standards and procedural safes guards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.").
[xxxvii] 25 U.S.C. § 1902 (emphasis added).
[xxxviii] *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992).
[xxxix] *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996).
[xl] *Id.*
[xli] *In re Jack C.,* 192 Cal.App.4th 967 (2011).

[xlii] *Matter of JRB,* 715 P. 2d 1170 (Alaska, 1986).
[xliii] *See, e.g.,*Michigan Indian Family Preservation Act, 2012 Mich. Pub. Acts 565; Iowa Indian Child Welfare Act, Iowa Code § 232B.1 et seq. (2005); Minnesota Indian Family Preservation Act, Minn. Stat. 260.751 et seq. (1999); Washington Indian Child Welfare Act, 2011 Wash. Laws, S.B. 5656, 2001, Reg. Sess. (Wash. 2011) Chap. 309; Wisconsin Indian Child Welfare Wis. Stat. § 48.028 et seq. (2013); California Senate Bill 678 of 2006; Oklahoma Indian Child Welfare Act, Okla. Stat. § 10-40.1 et seq. (1994).
[xliv] *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007)
[xlv] Cal. Fam. Code § 175(d) (2008); Cal. Prob. Code § 1459(d) (2008); Cal. Welf. & Inst. Code § 224(d) (2008).
[xlvi] *See In re AW*, 741 N.W. 2d 793 (Iowa 2007); *State ex rel. SOSCF v. Klamath Tribe*, 11 P.3d 701 (Or. Ct. App. 2000).
[xlvii] *In re NNE*, 752 N.W. 2d 1(Iowa 2008) (finding that Sec. 1921 does not provide justification for the provision of extra rights to a tribe, when those rights "come at the expense" of the rights of the parent or child).
[xlviii] 2012 Mich. Pub. Act, 565 § 3(a) (emphasis added). Note the active efforts provision of the MIFPA mirrors the federal language discussed in the opinion *Adoptive Couple v. Baby Girl* stating "(3) A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful." 2012 Mich. Pub. Act, 565 Sec. 15(3). Reading this section in tandem with the statute's definition of active efforts should immunize it from the Court's decision in *Adoptive Couple v. Baby Girl.*
[xlix] See, e.g., *In the matter of the ADOPTION OF A.B. and D.T.,* 245 P.3d 711 (Utah 2010).
[l] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).
[li] *Gibbons v. Ogden*, 22 U.S. 1 (1824).
[lii] *See, e.g., In re Brandon M.* 54 Cal.App.4th 1387 (1997) ("it simply cannot be maintained that the ICWA in any way, manner, shape or form "occupies the field" of child custody or adoption, even as to Indian children. As respondent points out, the ICWA is totally devoid of any provisions dealing with, e.g., the bases on which a child may be removed from a parent's custody, when and how often hearings must be held to review a child's status, who is entitled to what reunification services and for how long, or many, many other similar issues.").
[liii] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).
[liv] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).
[lv] See, e.g., *In the Matter of JRB*, 715 P. 2d 1170 (Alaska 1986) (Finding that state termination of parental rights standards supplement the termination of parental rights standards provided by ICWA and applying both to TPR proceedings involving Indian children).
[lvi] 25 U.S.C. § 1902
[lvii] *Merrill Lynch, Pierce Fenner & Smith v. Ware* 414 U.S. 117, 127 (1973).
[lviii] *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983)
[lix] Okla. Stat. § 40.6 Placement preference.
[lx] 25 U.S.C. § 1902.
[lxi] *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007).
[lxii] Cal.Welf. & Inst.Code § 361.31(a) (2008).
[lxiii] Cal.Welf. & Inst.Code § 361.31(f) (2008).
[lxiv] Cal.Welf. & Inst.Code § 361.31(g) (2008).
[lxv] Fam. Code § 175(d) (Cal.); Prob. Code § 1459(d) (Cal); Welf. & Inst. Code § 224(d) (Cal).
[lxvi] Minn Stat. 260.761.
[lxvii] *See, e.g.,*Mont. Code Ann. § 41-3-109 (1997) ("If a proceeding under this chapter involves an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*, the proceeding is subject to the Indian Child Welfare Act."); VT. Stat. Ann. Tit. 33, § 5120 (2009) ("The federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*, governs any proceeding under this title that pertains to an Indian child, as defined by the Indian Child Welfare Act, and prevails over any inconsistent provision of this title."); S.D. Codified Laws § 26-8A-32 (year) (stating in its chapter on Protection of Children from Abuse or Neglect "Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963)...if that Act is applicable."); Or. Rev. Stat. § 419B.500 (2003) (stating "The parental rights of the parents of a ward may be terminated as provided in this section and ORS § 419B.502 to 419B.524, only upon a petition filed by the state or the ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward. If an Indian child is involved, the termination of parental rights must be in compliance with the Indian Child Welfare Act.").

[lxviii] *See, e.g.*, Iowa Code § 232B.5(19) (2005); Neb. Rev. Stat. § 43-1505 (2008); Wis. Stat. § 48.028(4)(e)(2) (2013).
[lxix] *See, e.g.*, Cal. Welf. & Inst.Code § 366.26 (c)(2)(B)(ii) (2008); Iowa Code § 232B.6(6) (2005); Neb. Rev. Stat. § 43-1505 (2008).
[lxx] *See, e.g.*, 2012 Mich. Pub. Acts 565 Sec. 23(2); Wis. Stat. § 48.028(7)(a) (2013); Iowa Code § 232B.9 (2005).
[lxxi] Washington Manual § 05.20 *Service for Indian Families Prior to Court Action*, http://www.dshs.wa.gov/ca/pubs/mnl_icw/chapter5.asp.
[lxxii] See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[lxxiii] Ann Graham, Chevron Lite: How Much Deference Should State Courts Give State Agency Interpretation, 68 La. L. Rev. 110 5, 1109 (2008) (stating "[e]xisting state models range along a continuum from express adoption of the Chevron doctrine to outright rejection of Chevron's applicability.").
[lxxiv] 25 U.S.C. § 1919(a) (2000).
[lxxv] *In re Parental Rights as to S.M.M.D,* 272 P.3d 126, 132 (Nev. 2012).
[lxxvi] *Id.*
[lxxvii] *See* Oregon template tribal-state agreement, p. 4.
[lxxviii] *See* Washington template tribal-state agreement, p. 50.
[lxxix] *Id.*
[lxxx] *See* Oregon template tribal-state agreement, p. 16.
[lxxxi] *See* Minnesota template tribal-state agreement, p. 5.
[lxxxii] *See* Oregon template tribal-state agreement, p. 11.
[lxxxiii] *See* Washington template tribal-state agreement, p. 111.