

THE ONCOMING STORM: STATE INDIAN CHILD WELFARE ACT LAWS AND THE CLASH OF TRIBAL, PARENTAL, AND CHILD RIGHTS

Philip (Jay) McCarthy, Jr.*

INTRODUCTION

An increasing trend has been the enactment of state laws that supplement the federal Indian Child Welfare Act of 1978 (ICWA).¹ These state laws grant Indian tribes significant statutory rights that jeopardize the constitutional rights of both children and parents. Two particular examples where such state legislation infringes upon the constitutional rights of parents and children are: (1) mandating that notice be provided to Indian tribes in *voluntary* adoptions that do not involve state agencies, and (2) restricting the good-cause exception of the ICWA (regarding the grounds to deviate from the placement preferences or to deny a request to transfer jurisdiction from state court to tribal court).² Indian tribes have increased their lobbying efforts for passage of state Indian child welfare (ICW) laws due, in part, to their increased political clout in many states, which the author believes is a result of Indian gaming revenue. In the past several years, state ICW legislation has been fast-tracked through many state legislatures.³

One of the reasons Indian tribes are actively attempting to pass state ICW laws is their inability to amend the ICWA. Since the ICWA's enactment in 1978, numerous attempts have been made to amend it—all of which have failed.⁴

* © 2013 Philip (Jay) McCarthy, Jr., McCarthyWeston, PLLC, Flagstaff, Arizona. This paper would not have been possible without the research assistance of Emily Ann Tomek-McCarthy, a second-year law student at Creighton University School of Law.

¹ Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (2006). The following states have enacted state Indian child welfare laws: California, Colorado, Iowa, Michigan, Minnesota, Nebraska, New Mexico, Oklahoma, Washington, and Wisconsin. CAL. FAM. CODE § 8620 (West 2012); COLO. REV. STAT. § 19-1-103 (2012); IOWA CODE § 232B.1 (2012 Supp.); MICH. COMP. LAWS SERV. § 712B.1 (LexisNexis 2013); MINN. STAT. § 260.751 (2012); NEB. REV. STAT. § 43-1501 (2012); N.M. STAT. ANN. § 32A-5-5 (2012) (Conway Greene); OKLA. STAT. TIT. 10, § 40.4 (West 2006); WASH. REV. CODE § 13.38.010 (West 2011); WIS. STAT. § 48.028 (2011).

² See, e.g., OKLA. STAT. TIT. 10, § 40.4 (West 2006); IOWA CODE ANN. § 232B.5(13) (West 2006).

³ See, e.g., Washington State Indian Child Welfare Act, S.B. 5656, 62nd Leg. (Wa. 2011); WASH. REV. CODE ANN. § 13.38.010 (West 2011).

⁴ B.J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 8 (2d ed. 2008); Pauline Turner Strong, *What is an Indian Family? The Indian Child Welfare Act and the Resurgence of Tribal Sovereignty*, 46 AM. STUD. 205, 220–23 (2005).

I. THE CONSTITUTIONAL AUTHORITY
PERMITTING THE ENACTMENT OF THE FEDERAL ICWA

In enacting the ICWA, Congress set forth the following Congressional findings:

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.⁵

The ICWA was enacted pursuant to Congress’s power to regulate commerce and based upon its trustee relationship with Indian tribes.⁶ The constitutionality of

⁵ 25 U.S.C. § 1901 (2006) (emphases added).

⁶ See *United States v. Kagama*, 118 U.S. 375, 378–84 (1886) (stating that Congress’s power over Indian affairs derived from the Commerce Clause and from Indian Tribes’ dependence on the United States); *Bd. of Cnty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943) (stating that “federal power to regulate and protect the Indians and their property against interference even by a state has been recognized” not only because the Constitution mentioned this power with respect to commerce, but also because of Congress’s duty “to

the ICWA has been upheld by lower courts, which often cite a 1974 United States Supreme Court decision, *Morton v. Mancari*,⁷ upholding a law that granted a hiring preference for Native Americans by the Bureau of Indian Affairs. In this oft-cited opinion, the Court, stated, “The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities”⁸

Citing *Morton*, the Oregon Court of Appeals upheld the constitutionality of the ICWA and found that it did not violate the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution.⁹ In upholding the constitutionality of the ICWA, the Oregon Court of Appeals applied the *Morton* test stating, “The same is true of the ICWA, which nowhere requires any specific quantum of Indian blood for a person to come under its protection.”¹⁰ The Oregon Court found that the authority for the enactment and constitutionality of the ICWA is in “the fulfillment of Congress’[s] unique obligation toward the Indians”¹¹

The *Morton* test was also at the heart of *Rice v. Cayetano*,¹² the 2000 U.S. Supreme Court decision that invalidated, and found unconstitutional, a Hawaiian state constitutional provision that required members of the Office of Hawaiian Affairs—which administered income earned from land held by the state—to be “Hawaiian” and be elected only by “Hawaiians.”¹³ The state statute defined “Hawaiian” as “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.”¹⁴

In striking down this state constitutional provision, the Supreme Court emphasized that the case differed from cases involving Indian tribes. In the *Rice* decision, the Court cited the *Morton* test with approval and stated that to avoid being an unlawful racial classification, the preference could not be directed to a racial group but rather members of federally recognized tribes.¹⁵

II. THE RIGHTS OF INDIAN TRIBES ARE NOT ON PARITY WITH THE RIGHTS OF PARENTS

In cases involving an Indian child, pursuant to the ICWA or state ICW laws, there is a widespread misconception that Indian tribes have rights equal to those of

prepare the Indians to take their place as independent, qualified members of the modern body politic”).

⁷ 417 U.S. 535 (1974).

⁸ *Id.* at 554.

⁹ *In re Application of Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1983).

¹⁰ *Id.*

¹¹ *Id.* (quoting *Morton*, 417 U.S. at 555).

¹² 528 U.S. 495 (2000).

¹³ *Id.* at 499, 518.

¹⁴ *Id.* at 509 (quoting HAW. REV. STAT. § 10-2 (1993)).

¹⁵ *Id.* at 519–20.

a parent. While the ICWA grants Indian tribes statutory rights, a parent has fundamental constitutional rights in addition to statutory rights.¹⁶ This misconception is in large part due to a U.S. Supreme Court statement that is taken out of context.

In its decision in *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁷ the Supreme Court held that where Indian children were born off the tribal reservation but their unmarried mother's domicile was the Choctaw reservation, the tribal court had exclusive jurisdiction pursuant to the ICWA.¹⁸ The *Holyfield* decision was limited solely to the issue of determining state court versus tribal court jurisdiction.

In addressing the importance of exclusive tribal court jurisdiction in cases involving Indian children that reside or are domiciled on a tribal reservation, the U.S. Supreme Court cited *In re Adoption of Halloway*,¹⁹ a Utah Supreme Court decision.²⁰ The *Halloway* decision likewise addressed jurisdiction involving an Indian child that was a domiciliary of an Indian reservation. The U.S. Supreme Court cited the *Halloway* decision stating "that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents."²¹ This statement is often taken out of context and is cited by those arguing that the rights of Indian tribes are equal to the rights of parents and children. Instead, this statement addresses situations involving Indian children who are domiciled on a reservation and subject to exclusive tribal court jurisdiction. The complete quote, as cited by the U.S. Supreme Court, is as follows:

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 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*

¹⁶ See generally Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543 (1996) (discussing constitutional issues regarding the ICWA); Amanda Tucker, *The Indian Child Welfare Act's Unconstitutional Impact on the Welfare of the Indian Child*, 9 WHITTIER J. CHILD & FAM. ADVOC. 87 (2009) (same).

¹⁷ 490 U.S. 30 (1989).

¹⁸ *Id.* at 32–42.

¹⁹ 732 P.2d 962 (Utah 1986).

²⁰ *Holyfield*, 490 U.S. at 52–53; see also *Halloway*, 732 P.2d at 969–70 (finding the ICWA may designate the tribal court as having proper jurisdiction over these cases because to hold otherwise would frustrate the federal legislative judgment expressed in the ICWA).

²¹ *Id.* at 52 (citing *Halloway*, 732 P.2d at 969).

interest of the parents. This relationship between Indian tribes and Indian 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 non-domiciliary 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.²²

The U.S. Supreme Court did *not* hold that the rights of Indian tribes are on parity with the constitutional protections afforded to parents and children. This misrepresentation of the law by tribal advocates has resulted in disturbing decisions such as the recent Kansas Supreme Court case, *In re T.S.W.*²³ *T.S.W.* involved a voluntary adoption wherein the child's mother selected the adoptive placement. The mother and child were *not* domiciled on an Indian reservation. The Kansas Supreme Court held that the request of the mother alone did not constitute grounds for a finding of "good cause" to deviate from the ICWA placement preferences for purposes of allowing the adoptive placement the mother had insisted upon.²⁴ The Kansas Supreme Court concluded that "the district court erred in permitting Mother's preference to override the ICWA's placement factors absent some request for confidentiality."²⁵ In that case, the mother was not a party nor represented by counsel. The decision fails to mention, let alone discuss, the mother's constitutional rights and why the mother's constitutional rights were ignored in the outcome reached by the Kansas Supreme Court.

The U.S. Supreme Court has long held that the federal constitution protects familial relationships.²⁶ As a unanimous U.S. Supreme Court stated in *Whalen v. Roe*,²⁷ a parent's right of privacy embraces two protected interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."²⁸ Both of

²² *Id.*

²³ 276 P.3d 133 (Kan. 2012).

²⁴ *Id.* at 148 ("[T]he 'parental preference' referred to in [25 U.S.C.] § 1915(c) was not intended to permit a biological parent's preference for placement of a child with a non-Indian family to automatically provide 'good cause' to override the adoptive placement preferences of 25 U.S.C. § 1915(a).").

²⁵ *Id.*

²⁶ *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

²⁷ 429 U.S. 589 (1977).

²⁸ *Id.* at 599–600.

these protected interests are of paramount importance in an adoption case. In *Eisenstadt v. Baird*,²⁹ in the majority opinion, Justice Brennan stated, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁰

Why is it that when a case involves the ICWA, there is seldom, if ever, a discussion of a parent’s constitutional rights of privacy, substantive due process and equal protection? As the U.S. Supreme Court has stated:

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process.” The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.³¹

In addressing a parent’s substantive due process rights, the Supreme Court has stated:

[O]ur line of cases which interprets the Fifth and Fourteenth Amendments’ guarantee of “due process of law” to include a substantive component . . . forbids the government to infringe certain “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.³²

While Indian tribes have statutory rights pursuant to ICWA and state ICW laws, these rights are not on parity with the rights of a parent. State laws that grant Indian tribes greater or equal rights as those of a parent should be challenged. The Iowa ICW is such a law that violates the constitutional rights of a parent. The Iowa ICW states that where a parent selects an adoptive placement, other than a placement set forth by the Iowa state ICW law placement preferences, *the parent* must prove by clear and convincing evidence that the child’s placement within the state ICW order of placement preferences would be harmful to the child.³³ In finding this law unconstitutional, the Iowa Supreme Court stated that the parent’s “fundamental right to make decisions concerning the care of her child is *not*

²⁹ 405 U.S. 438 (1972).

³⁰ *Id.* at 453.

³¹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citations omitted).

³² *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

³³ IOWA CODE ANN. § 232B.9(6) (West 2006).

lessened because she intended to terminate her rights to [her child].”³⁴ The Iowa Supreme Court further added that “the State has no right to influence her decision by preventing [the mother] from choosing a family she feels is best suited to raise her child. Moreover, *we do not believe the federal ICWA condones state law curtailing a parent’s rights in this manner.*”³⁵

In a *voluntary* ICWA adoption, an Indian tribe’s rights are *not* on parity with those of a parent. In determining that a request of a parent may constitute “good cause” to deviate from ICWA placement preferences, the California Court of Appeals stated:

The tribe’s interest in actions involving Indian children living off the reservation is not as great. A review of ICWA’s provisions supports this difference in the interests and rights between an Indian child’s parents and his or her tribe. For example, section 1911(b) grants a preference to tribal courts in foster care and parental termination matters where an Indian child resides or is domiciled off the reservation “*absent objection by either parent.*” Also, section 1913(a) permits an Indian parent or custodian to voluntarily consent to a foster care placement or termination of parental rights without first notifying the tribe.³⁶

In a disturbing decision based upon a flawed legal analysis, the Oklahoma Supreme Court denied a constitutional challenge to the Oklahoma ICW law regarding a state mandate of notice to Indian tribes in *voluntary* adoption proceedings.³⁷ In addressing this issue, the Oklahoma court incorrectly stated that Oklahoma’s ICW law that requires notice to Indian tribes is permissible because the ICWA³⁸ requires notice to Indian tribes in voluntary proceedings.³⁹

If an adoption involves an Indian child and is a *voluntary* proceeding, the federal ICWA *does not* require notice whereas the parent or the Indian custodian and child’s tribe must be notified in an involuntary case pursuant to 25 U.S.C. § 1912.⁴⁰ This legal principle is further supported by the Department of Interior,

³⁴ *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008) (emphasis added).

³⁵ *Id.* (emphasis added) (citation omitted).

³⁶ *Baby Girl A. v. Native Village of Akhiok*, 230 Cal. App. 3d 1611, 1621 (1991) (first emphasis added).

³⁷ *Cherokee Nation v. Nomura*, 160 P.3d 967, 969 (Okla. 2007).

³⁸ 25 U.S.C. § 1913(a) (2006).

³⁹ *Cherokee Nation*, 160 P.3d at 976.

⁴⁰ *See Berry Creek Rancheria of Maidu Indians of Cal. v. Buckmeier*, No. 07-CV-4023-DEO, 2010 U.S. Dist. LEXIS 19065, at *8–12 (N.D. Iowa March 3, 2010); *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233, 1237–39 (E.D. Wash. 1999); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989); *In re Phillip A.C.*, 149 P.3d 51, 59, 60 n.44 (Nev. 2006) (noting in dicta that a tribe is not entitled to notice of a voluntary adoption proceeding under the ICWA); *In re Adoption of Baby Boy J.*, 944 N.Y.S.2d 871, 872–75 (2012); *Duncan v. Wiley*, 657 P.2d 1212, 1213 (Okla. Civ. App. 1982).

Bureau of Indian Affairs (BIA) interpretation of the ICWA.⁴¹ The BIA guidelines specifically state:

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. *The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones.* . . . For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. . . . *The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones.*⁴²

Recent attempts to amend the ICWA provide further proof that the ICWA does not require notice to Indian tribes in voluntary proceedings. In 1996, the National Congress of American Indians was a principal supporter of proposed legislation to amend the ICWA to require tribal notification and intervention of voluntary proceedings.⁴³ The proposed amendments were never enacted. The most recent attempt to amend the ICWA came in 2003 when Representatives Young (Alaska), Hayworth (Arizona), Kildee (Michigan), and Abercrombie (Hawaii) introduced H.R. 2750. Section 10 of H.R. 2750 would have amended 25 U.S.C. § 1913(c) to require notice to Indian tribes in voluntary proceedings.⁴⁴ H.R. 2750 was not enacted and died in the U.S. House of Representatives Resource Committee.

The Oklahoma Supreme Court woefully fails to grasp that Congress's authority to enact the ICWA does *not* authorize Oklahoma to pass laws that allow the expansion of tribal rights at the expense of the rights of parents and children. The Oklahoma case is disturbing as it is clear the Oklahoma Supreme Court does not comprehend the significance of a parent's constitutional rights. That court incorrectly stated, "[T]he U.S. Supreme Court has consistently rejected claims that laws which treat *Indians* as a distinct class violate equal protection."⁴⁵ This statement leads one to believe that the Oklahoma Supreme Court does not understand the legal basis that allowed Congress to enact the ICWA or the *Morton* decision. The Oklahoma Supreme Court also incorrectly states that the ICWA⁴⁶

⁴¹ See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

⁴² *Id.* at 67,586 (emphasis added).

⁴³ H.R. REP. NO. 104-808, at 15 (1996) (recognizing the draft amendments would "for the first time" entitle tribes "to receive notice when a voluntary child custody proceeding is underway").

⁴⁴ H.R. 2750, 108th Cong. (2003).

⁴⁵ *Cherokee Nation v. Nomura*, 160 P.3d 967, 974 (Okla. 2007) (emphasis added).

⁴⁶ 25 U.S.C. § 1921 (2006).

authorizes the states to enact state laws that grant Indian tribes greater rights than those afforded to Indian tribes pursuant to the ICWA.⁴⁷ The federal ICWA specifically 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.⁴⁸

The statute clearly states it applies *only* to Indian parents or Indian custodians. It is a longstanding and universal rule of statutory interpretation that where the statute is clear and unambiguous on its face, courts may not apply their personal interpretation.⁴⁹ The ICWA contains numerous instances where Congress specifically designated a parent having a specific right and did not afford that right to Indian tribes. For example, the ICWA grants only a parent the right to veto a request for a transfer of jurisdiction from state court to federal court.⁵⁰ Needless to say, attorneys who represent parents need to challenge the misconception that tribal rights preempt a parent's constitutional rights.

III. THE RIGHTS OF INDIAN TRIBES ARE NOT ON PARITY WITH THE RIGHTS OF INDIAN CHILDREN

What is glaringly absent in many appellate decisions is recognition of the rights of the Indian child. Tribal advocates often argue that the tribes' interest includes the interests of the Indian child. Such a position is simply not true. It is clear that the outcome of these cases will have the most profound impact upon the Indian child and will determine their future and familial upbringing. It is a well-established legal principle—which is often overlooked in ICWA cases—that children have constitutionally protected rights. As the U.S. Supreme Court has stated, “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁵¹ The Supreme Court has long recognized that children have constitutionally protected rights and liberties.⁵²

In *Troxel v. Granville*,⁵³ the Supreme Court's majority took exception to Justice Stevens' dissenting opinion and stated, “Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of

⁴⁷ See *Cherokee Nation*, 160 P.3d at 976–77.

⁴⁸ 25 U.S.C. § 1921 (emphasis added).

⁴⁹ See *Jay v. Boyd*, 351 U.S. 345, 357 (1956) (finding that the Supreme Court “must adopt the plain meaning of the statute, however severe the consequences”).

⁵⁰ See 25 U.S.C. § 1911(b).

⁵¹ *In re Gault*, 387 U.S. 1, 13 (1967).

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

⁵³ 530 U.S. 57 (2000).

course, is not meant to suggest that ‘children are so much chattel.’”⁵⁴ Numerous state appellate decisions have likewise recognized the fundamental right of the child to be protected from neglect and to “have a placement that is stable, permanent, and which allows the caretaker to make a full emotional commitment to the child.”⁵⁵ As the California Supreme Court forcefully stated, “Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent.”⁵⁶ Indeed, a child’s liberty interest in their familial association is a constitutionally protected right and a state may only interfere with the child’s liberty interest after providing due process of law.⁵⁷

In one of the few decisions addressing children’s constitutional rights being infringed by a state ICW law, the Iowa Court of Appeals held section 232B.5 of the Iowa Code to be unconstitutional. This Iowa statute restricted the good-cause exception of the ICWA that allows a court to deny the transfer of a case from state court to tribal court.⁵⁸ This statute, as part of the Iowa ICW law, does *not* allow a child to raise an objection to a request to transfer a case to tribal court.⁵⁹ The Iowa Court of Appeals found that the Iowa ICW law’s narrow definition of good cause for purposes of challenging requests to transfer a case, prevented children from asserting any argument and that the statute placed the rights of the tribe above those of the child.⁶⁰ The court found that the narrow definition of good cause violated the children’s substantive due process rights.⁶¹

IV. CAN STATE ICW LAWS EXPAND TRIBAL RIGHTS BEYOND THE STATUTORY RIGHTS TRIBES HAVE PURSUANT TO THE FEDERAL ICWA?

While Congress has the authority to enact the ICWA, based on the U.S. government’s unique trustee relationship with federally recognized tribes, no such trust relationship exists between Indian tribes and the states. A review of the constitutions of states that have enacted ICW laws reveals that they do not include constitutional authority allowing for the expansion of tribal rights. This raises obvious questions. For instance, how can states expand tribal rights at the expense of the rights of parents and children? And, do state ICW laws constitute a government imposed discrimination based upon a racial classification?

Iowa’s Supreme Court and Court of Appeals have addressed these issues regarding Iowa’s ICW law. In three cases, discussed below, the Iowa courts have

⁵⁴ *Id.* at 64 (citation omitted).

⁵⁵ *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993).

⁵⁶ *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994).

⁵⁷ *Santosky v. Kramer*, 455 U.S. 745, 760–61 n.10 (1982); *In re J.L.*, 779 N.W.2d 481, 489 (Iowa Ct. App. 2009).

⁵⁸ IOWA CODE ANN. § 232B.5(13) (West 2006).

⁵⁹ *Id.*

⁶⁰ *J.L.*, 779 N.W.2d at 491–93.

⁶¹ *Id.*

ruled that state law cannot grant increased tribal rights at the expense of the rights of a parent or the child. It is interesting to note that all three cases originated in the Iowa District Court for Woodbury County, Sioux City, Iowa.

*A. In re A.W. and S.W.*⁶²

In this case, the Iowa Supreme Court found section 232B.3(6) of the Iowa Code unconstitutional. The Iowa Supreme Court stated that given the limits of the state authority to legislate in favor of members of federally recognized tribes, Iowa's ICW law's expansion of the definition of "Indian Child" to include ethnic Indians not eligible for tribal membership constituted a racial classification that does not survive a strict scrutiny equal protection analysis.⁶³ The Iowa Supreme Court concluded that the ICWA's definition of an Indian child represents the boundary of federal trust authority and limits a state to only enacting laws as to children who are members or who are eligible for membership in a federally recognized Indian tribe.⁶⁴ The court further ruled that given the limits of the governmental authority, Iowa's expanded definition constituted a racial classification that does not survive a strict scrutiny equal protection analysis.⁶⁵

*B. In re N.N.E.*⁶⁶

In this case, the Iowa Supreme Court examined the constitutionality of the Iowa ICW law's placement preferences and in particular section 232B.9(6) of the Iowa Code, which states in pertinent part:

Unless there is clear and convincing evidence that placement within the order of preference applicable under subsection 1, 2 or 5 would be harmful to the Indian child, consideration of the preference of the Indian child or parent or a parent's request for anonymity shall not be a basis for placing an Indian child outside the applicable order of preference.⁶⁷

The Iowa Supreme Court held this section to be unconstitutional.⁶⁸ The court found the statute is not narrowly tailored and makes the rights of a tribe greater

⁶² 741 N.W.2d 793 (Iowa 2007).

⁶³ *Id.* at 811.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 752 N.W.2d 1 (Iowa 2008). The Author feels compelled to disclose that he had the privilege of representing the mother in this case and to serve as co-counsel with Suzan Boden, Esq., Vriezelaar, Tigges, Edgington, Bottaro, Boden & Ross, L.L.P., Sioux City, Iowa.

⁶⁷ IOWA CODE ANN. § 232B.9(6) (West 2006).

⁶⁸ *N.N.E.*, 752 N.W.2d at 8–10.

than the rights of an Indian parent.⁶⁹ The court also concluded that the mother's fundamental right to make decisions regarding the care of her child is not lessened because she intended to terminate her parental rights for purposes of the child's adoption.⁷⁰

C. *In re J.L.*⁷¹

The Iowa Court of Appeals held that Iowa's ICW law⁷² is unconstitutional given its limitations.⁷³ In this case, the court noted how two of the children had exhibited signs of sexual abuse or complained of sexual abuse by their grandfather, in whose home they were to be placed upon transfer of the case from state court to tribal court.⁷⁴ Furthermore, the children also asserted, through their counsel, "that they were bonded with one another and [that] the placements advanced by the Tribe would separate the siblings."⁷⁵ These critical issues pertaining to the children's best interests were not allowed to be raised due to the limited definitions of "good cause" and "best interests" under Iowa's ICW law.⁷⁶ What is widely misunderstood is that states may only legislate within the boundaries of the delegated federal Indian trust authority and the state's interest is defined by those boundaries. The two situations wherein states may legislate on behalf of Native Americans in order to further the purposes of the federal trust authority are: "[I]n the first, the state acts under a particularized, state-specific congressional delegation of jurisdiction; in the second, the state acts to accommodate federal supremacy in the field by enforcing congressionally created federal obligations toward Indian tribes that the federal government would otherwise enforce on its own."⁷⁷

The Iowa Supreme Court has held that state ICW laws fall under the delegation of authority category, and therefore, state legislatures may only enact state ICW laws within the boundaries of the Congressional authority granted to the states to enact legislation favoring Native Americans.⁷⁸ Thus, any state ICW law that grants rights to Indian tribes beyond the confines of the Congressional authority delegated to the states is susceptible to being challenged on constitutional grounds. State laws that grant increased tribal rights beyond those rights authorized by the ICWA and that treat Indian children and parents differently should be

⁶⁹ *Id.* at 9.

⁷⁰ *See id.*

⁷¹ 779 N.W.2d 481 (Iowa App. 2009).

⁷² IOWA CODE ANN. § 232B.5(10), (13) (West 2006).

⁷³ *See J.L.*, 779 N.W.2d at 489.

⁷⁴ *Id.* at 490.

⁷⁵ *Id.*

⁷⁶ *Id.* at 490–92.

⁷⁷ *Malabed v. N. Slope Borough*, 70 P.3d 416, 423 (Alaska 2003); *see also Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819, 822–24 (Wash. 1979); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695–96 (1979).

⁷⁸ *In re A.W.*, 741 N.W.2d 793, 808 (Iowa 2007).

challenged, as such laws constitute government imposed discrimination based upon race.

In *Palmore v. Sidoti*,⁷⁹ the U.S. Supreme Court struck down a Florida Court of Appeals decision that had affirmed a trial court's ruling removing a child from his mother's custody and awarding custody to the father solely because mother had remarried a member of a minority race. The Supreme Court stated that the goal of the Florida law was to mandate custody determinations based upon the best interests of the child, and "the goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."⁸⁰ The Supreme Court found that the Florida rulings had violated the mother and child's constitutional rights of equal protection pursuant to the Fourteenth Amendment.⁸¹ The *Palmore* decision should be applicable to cases involving state ICW laws that use race as the controlling reason in determining the fate of the Indian child. Additionally, the Multiethnic Placement Act states:

(1) Prohibited conduct. A person or government that is involved in adoption or foster care placements may not—

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color or national origin of the adoptive or foster parent, or the child, involved.⁸²

While the Multiethnic Placement Act states that it should not be construed to affect the application of the ICWA of 1978, it clearly is applicable to state ICWA laws and bans such laws from determining a child's adoptive or foster care placement based upon race, color, or national origin.⁸³

CONCLUSION

State ICWA laws may not grant Indian tribes greater rights "at the expense of the parents' or children's rights."⁸⁴ It is incumbent upon child advocates and counsel for parents to protect the rights of their clients and to challenge these laws.

⁷⁹ 466 U.S. 429 (1984).

⁸⁰ *Id.* at 432-34.

⁸¹ *Id.* at 433.

⁸² 42 U.S.C. § 1996b(1) (2006).

⁸³ *Id.* § 1996b(3).

⁸⁴ See *In re J.L.*, 779 N.W.2d 481, 489 (Iowa App. 2009) (citing *In re N.N.E.*, 752 N.W.2d 1, 9. (Iowa 2008)).