

**In The
Supreme Court of the United States**

—◆—
ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER
THE AGE OF FOURTEEN YEARS, ET AL.,

Respondents.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of South Carolina**

—◆—
**BRIEF *AMICUS CURIAE*
FOR THE OKLAHOMA INDIAN
CHILD WELFARE ASSOCIATION
SUPPORTING AFFIRMANCE**

—◆—
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QUESTION PRESENTED

Whether the South Carolina courts properly applied the Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.*, to award custody of an Indian child to her biological father over an adoptive couple, where the father acknowledged and established paternity and no remedial measures had been taken to avoid the termination of father's parental rights.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	11
I. ICWA Is Configured To Protect The Best Interests Of Indian Children And To Promote The Stability And Security Of Indian Tribes	11
A. Congress Concluded That Implemen- tation Of ICWA Itself Would Be In The Best Interest Of Indian Children.....	13
B. Early Notice To The Tribe Is Crucial	16
C. ICWA Envisioned A Higher Level Of Ser- vice Provision For Indian Families	18
D. ICWA Placement Preferences Advance The Best Interests Of Indian Children And Promote Tribal Sovereignty.....	19
E. ICWA Envisioned Tribal/State Collabo- ration Toward Implementation.....	21
CONCLUSION.....	28
APPENDIX	
Michael Nomura letter explaining Oklahoma Interstate Compact on the Placement of Children.....	App. 1
Form 100A	App. 10

TABLE OF AUTHORITIES

Page

CASES:

<i>Adoption of Baby Girl B.</i> , 67 P.3d 359 (Okla. App. 2003)	14, 15
<i>Alaska v. Native Vill. of Venetie Tribal Gov't</i> , 522 U.S. 529 (1998).....	4
<i>Cherokee Nation v. Nomura, et al.</i> , 160 P.3d 967 (Okla. 2007).....	24, 25, 26
<i>In the Matter of Baby Boy L.</i> , 103 P.3d 1099 (Okla. 2004).....	22
<i>Matter of Adoption of D.M.J.</i> , 741 P.2d 1386 (Okla. 1958).....	11
<i>Matter of Guardianship of Q.G.M.</i> , 808 P.2d 684 (Okla. 1991).....	17
<i>Matter of J.S. and M.C.</i> , 117 P.3d 590 (Okla. Civ. App. 2008)	18
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30 (1989).....	<i>passim</i>
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	4
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	13
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996).....	5
<i>United States v. Kagama</i> , 118 U.S. 375 (1886).....	5
<i>United States v. Lara</i> , 541 U.S. 193 (2004)	4, 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, TREATY, STATUTES AND REGULATIONS:

U.S. Const. art. I, §8, cl.3 (Indian Commerce Clause).....4

U.S. Const. art. II, §2, cl.2 (Treaty Clause)5

24 U.S.C. §1912(e)4

25 U.S.C. §671(a)(15)(D).....18

Indian Child Welfare Act of 1978

25 U.S.C. §§1901 *et seq.*2

25 U.S.C. §1902.....5, 12

25 U.S.C. §1903(1)6, 15

25 U.S.C. §1903(2)20

25 U.S.C. §1903(4)6

25 U.S.C. §1903(5)13

25 U.S.C. §1912(a)7, 15

25 U.S.C. §1912(d)4, 18

25 U.S.C. §1914.....17

25 U.S.C. §1915(a)8, 19, 20

25 U.S.C. §1915(b)8, 20

25 U.S.C. §1915(c).....19

25 U.S.C. §1919(a)9

25 C.F.R. §11.1 *et seq.*4

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES, STATE ADMINISTRATIVE CODE:

Okla. Stat. Ann. tit. 10 §40.1 (West 1994)	22
Okla. Stat. Ann. tit. 10 §40.3 (1982)	7
Okla. Stat. Ann. tit. 10 §577 (West 2008)	23, 24
Okla. Admin. Code §340:75-19-32 (2006)	23
Okla. Admin. Code §340:75-19-32(b) (2006)	23
Okla. Admin. Code §340:75-19-32(c) (2006)	23

MISCELLANEOUS:

44 Fed. Reg. 67,586(B)(1) (Nov. 26, 1979)	14
H.R. Rep. No. 95-1386 (1978)	13
S. Rep. No. 95-597 (1978)	6
B. J. Jones, <i>et al.</i> , <i>The Indian Child Welfare Act Handbook, A Legal Guide to the Custody and Adoption of Native American Children</i> (ABA 2008)	19
C. Blue Clark, <i>Indian Tribes of Oklahoma: A Guide</i> (Univ. of Okla. Press 2009)	3
Cheyanna L. Jaffke, <i>JUDICIAL INDIFFERENCE: WHY DOES THE “EXISTING INDIAN FAMILY” EXCEPTION TO THE INDIAN CHILD WELFARE ACT CONTINUE TO ENDURE?</i> , 38 WSULR 127 (2011)	22
Felix S. Cohen, <i>Cohen’s Handbook of Federal Indian Law</i> (Nell Jessup Newton ed., 2012)	13

TABLE OF AUTHORITIES – Continued

	Page
Manz, <i>Indian Child Welfare Act, A Legislative History of Public Law No. 95-608</i> , Volume 1 (2012).....	11, 12
Oklahoma Indian Child Welfare Association, Articles of Incorporation, A, Article III (1984).....	3
Oklahoma Indian Child Welfare Association Membership List (2013).....	1
Oklahoma Indian Child Welfare Act, By-Laws, Preamble (August 11, 2006)	2

INTEREST OF *AMICUS CURIAE*¹

Amicus is the Oklahoma Indian Child Welfare Association, Inc. (OICWA) whose membership list reflects 100% of Oklahoma's 38 federally recognized tribes² including: Absentee Shawnee Tribe of Oklahoma, Alabama Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation of Oklahoma, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Delaware Tribe of Indians, Eastern Shawnee Tribe of Oklahoma, Fort Sill Apache Tribe, Iowa Tribe of Oklahoma, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe of Oklahoma, Miami Tribe of Oklahoma, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Ottawa Tribe of Oklahoma, Otoe-Missouria Tribe of Indians, Pawnee Nation of Oklahoma, Peoria Tribe of Indians of Oklahoma, Ponca Tribe, Quapaw Tribe of Oklahoma, Sac & Fox Nation, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Shawnee Tribe, Thlopthlocco Tribal Town, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita and

¹ Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel makes a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

² Oklahoma Indian Child Welfare Association Membership List (2013) (on file with the OICWA office, Shawnee, OK).

Affiliated Tribes (Wichita, Keechi, Waco and Tawakonie) and the Wyandotte Nation.

OICWA tenders this brief from the perspective of the Oklahoma tribal child welfare worker. *Amicus'* expertise in implementing the Indian Child Welfare Act, 25 U.S.C. §§1901 *et seq.* ("ICWA") in both voluntary and involuntary child custody proceedings involving Indian children will assist the Court in evaluating the important issues presented in this case.

These Oklahoma tribal child welfare workers are the force on the ground with respect to day-to-day implementation of tribal child welfare laws, and the ICWA. Many of these tribal child welfare workers have devoted their entire careers in their respective tribal child welfare departments.

OICWA's preamble sets forth that OICWA's membership subscribes to the findings of the United States Congress relating to the enactment of the ICWA: to-wit; there is no resource more vital to the continued existence and integrity of Indian tribes than their children. OICWA further subscribes to the findings of the United States Congress that it is in the best interests of Indian children to be protected within their families and tribes, and that the stability and security of the Indian tribes and their families is to be promoted by ICWA.³ In addition, OICWA's

³ Oklahoma Indian Child Welfare Act, By-Laws, Preamble (August 11, 2006) (on file with the OICWA office, Shawnee, OK).

purpose is to prevent cruelty to Indian children by providing training to persons and agencies dealing with Indian children especially in instances where the Indian child has been removed from his or her family.⁴

Oklahoma has been home to American Indians since well before the arrival of Europeans. C. Blue Clark, *Indian Tribes of Oklahoma: A Guide*, 3 (Univ. of Okla. Press 2009). Historically, tribal sovereignty was consistently under attack and tribes were dealing with cultural assault, as schools and missions took children away from the tribes. *Id.* at 14, 15. Reform slowly began in the years after World War I, but it was not until the passage of the Indian Child Welfare Act in 1978 when significant efforts were made to preserve Native American families and their tribal and cultural identities. *Id.* at 16.

Each of Oklahoma's 38 federally recognized Indian tribes has a unique cultural and historical background. The majority of these Indian tribes were forcibly removed to Oklahoma. Each tribe has its own kinship tenets and child rearing traditions. Tribal familial relationships are often complex and are very often misunderstood or unappreciated by state agencies.

⁴ Oklahoma Indian Child Welfare Association, Articles of Incorporation, A, Article III (1984) (on file with the OICWA office, Shawnee, OK).

OICWA tribal child welfare workers are grounded in the knowledge of their respective tribe's customs, traditions, kinship structure and child rearing practices. Tribal child welfare workers engage daily with Oklahoma Indian children and work hard to keep those children safe, foster their families and promote the sovereignty of Oklahoma tribes. OICWA tribal child welfare workers navigate state, tribal and CFR⁵ courts inside Oklahoma and throughout the 50 states in both voluntary and involuntary child custody proceedings involving Indian children. Much of this work is through the remedial provisions set forth in ICWA. 25 U.S.C. §1912(d). OICWA tribal child welfare workers often testify in state courts regarding active efforts, remedial and rehabilitative measures, and whether the services were successful. Additionally, these tribal child welfare workers may testify as an expert witness in some cases pursuant to 24 U.S.C. §1912(e).



SUMMARY OF ARGUMENT

Pursuant to its plenary power, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 529, 531 n.6 (1998); see *United States v. Lara*, 541 U.S. 193, 200, 202 (2004); *Morton v. Mancari*, 417 U.S. 535, 551, 552 (1974), the United States Indian Commerce Clause, U.S. Const. art. I, §8, cl.3; The Treaty Clause, U.S.

⁵ Court of Federal Regulation, 25 C.F.R. §11.1 *et seq.*

Const. art. II, §2, cl.2; *Lara*, 541 U.S. at 200 (citing *Mancari*, 417 U.S. at 552); *see also United States v. Kagama*, 118 U.S. 375, 379, 380 (1886); *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996), Congress enacted the ICWA at a time when 25% to 35% of Indian children were being removed from their families and the adoption rate for Indian children was 8 times that of non-Indian children. Approximately, 90% of the Indian placements for these Indian children were in non-Indian homes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 33 (1989) (footnote and citations omitted). The ICWA is based upon the fundamental assumption that it is in the best interest of the Indian child for the tribal relationship to be protected.

The ICWA sets forth federal minimum standards for the removal of and placement of Indian children by state courts. 25 U.S.C. §1902. Congress believed that the ICWA would eliminate many of the subjective state standards regarding the best interest of the Indian child that led to the shameful situation that existed prior to the ICWA. ICWA's objectives are best served by tribal child welfare input regarding tribal child rearing practices, providing tribal services and ICWA's placement preferences.

OICWA tribal child welfare workers are entrenched in their tribal communities. The vast majority of OICWA tribal service providers are members of Indian tribes or extensively familiar with the tribal community norms in which they work. Long time tribal child welfare workers reported witnessing the

harm that resulted from some non-Indian placements of Indian children who had reached adulthood. These Indian adults returned home to their tribes expressing a desire to know their Indian families and communicating a feeling of never really fitting in with the non-Indian adoptive family. This corroborates the substantial evidence that separation of Indian children from their tribes and natural families often caused serious harm as the children got older. S. Rep. No. 95-597, at 43 (1978). See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, at 32-34 (1989) (footnotes and citations omitted).

A. Determination whether a child is an Indian child is the first predicate in determining whether a case is an ICWA case. 25 U.S.C. §1903(4). However, many OICWA tribal child welfare workers report numerous delays in this stage of the ICWA analysis. The delays result from imprecise, incomplete information being sent to the tribal enrollment department requesting a finding of whether or not an individual is a member or eligible for membership. Determining membership is a critical first step in the ICWA analysis. Courts and attorneys must make it a priority to conduct thorough investigations into the Indian heritage of a child and provide complete and accurate information to the tribe for a determination of membership. Once a tribe determines an Indian child's membership or eligibility of membership, the next predicate for an ICWA application is whether the case is a child custody proceeding as defined by the ICWA. 25 U.S.C. §1903(1). The South Carolina court

found that the two predicates were satisfied in this case and properly applied the ICWA. Pet. App. 13a (majority); Pet. App. 59a (dissent).

B. Once the court determines that ICWA applies, ICWA notice provisions should be initiated. 25 U.S.C. §1912(a). Notice of involuntary proceedings must be given to the parents or Indian custodian and the Indian child's tribe.⁶ *Id.* Notice to the tribe ultimately alerts the tribal child welfare worker that there is a tribal family in need and the worker begins to implement a plan, oftentimes collaborating with the state child welfare worker, to evaluate need and to tailor a service plan for each family. Delayed notice may circumvent the tribe's ability to offer tribal services to the family.

C. Oklahoma tribes vary widely with respect to the types and number of tribal services available to families. Generally, Oklahoma tribes may offer services such as parenting classes, substance abuse assessment and treatment, medical treatment, child-care and housing.

D. If remedial and rehabilitative services to the family are not successful, ICWA's presumptive

⁶ Additionally, Oklahoma law requires notice to tribes in voluntary child custody proceedings involving an Indian child "regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated." Okla. Stat. Ann. tit. 10 §40.3, 40.4 (1982).

placement preferences guide the state court with respect to the best interest of the Indian child in foster care, preadoptive and adoptive placements. 25 U.S.C. §1915. In *Holyfield*, this Court noted that the most important substantive requirements imposed on the state courts were the placement preferences set out in 25 U.S.C. §1915(a). *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36, 37 (1989).

Based upon extensive testimony regarding the devastating impact on tribes as a result of state abuses, Congress carefully designed the ICWA placement preferences to promote an Indian child's continued connection to her tribe's cultural ties. A primary objective of the placement preference section is to prohibit state courts from imposing value judgments of the non-Indian community. Section 1915 also allows tribes to change the order of the placement preferences by resolution as long as the placements are the least restrictive alternative for the child. 25 U.S.C. §1915(b). To date, 35 of Oklahoma's 38 federally recognized tribes have entered into formal written agreements with the Oklahoma Department of Human Services (hereinafter OKDHS) to utilize tribal placement preferences.⁷

⁷ Oklahoma Tribal Placement Preferences (2011) (on file with Indian Child Welfare Program Manager, OKDHS CWS Specialized Services and Partnerships, P.O. Box 25352, Oklahoma City, OK 73125). The following tribes have enacted tribal placement preferences: Absentee Shawnee Tribe of Oklahoma, Alabama Quassarte Tribal Town, Apache Tribe of Oklahoma, (Continued on following page)

E. ICWA also envisions and promotes tribal/state collaborations. 25 U.S.C. §1919(a). Where tribal/state relationships promote collaboration, OICWA tribal child welfare workers engage and cooperate with state social workers to design case plan and provide services for the Indian child and his or her family. Indian families may be more likely to seek services from tribal agencies as opposed to state agencies for a variety of reasons including distrust of the state agencies and bias. However, some Indian families may opt to receive services that are provided in collaboration between a tribal child welfare provider and a state child welfare provider.

OICWA's tribal/state collaborations are made, in part, pursuant to Oklahoma law and formal tribal/state foster care agreements, which address tribal/state collaborative efforts and may set forth tribal foster care and adoptive placement preferences. Currently, 35 of Oklahoma's 38 federally recognized

Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe, Miami Tribe, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Otoe-Missouria Tribe of Indians, Ottawa Tribe of Oklahoma, Pawnee Nation of Oklahoma, Peoria Tribe of Oklahoma, Ponca Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Sac & Fox Tribe, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita & Affiliated Tribes and the Wyandotte Nation.

tribes have entered into formal tribal/state foster-care agreements with OKDHS wherein the responsibilities of the tribe and the state child welfare agency are carefully set out.⁸

Impediments to ICWA's application had an impact on this litigation, but once ICWA was applied, the case proceeded true to the statute and according to expressed congressional intent. This Court should affirm the South Carolina Supreme Court decision that allowed Baby Girl to return to her Father and extended family within the Cherokee Nation.



⁸ Oklahoma Tribal/State Foster Care Agreements (2011) (on file with Indian Child Welfare Program Manager, OKDHS CWS Specialized Services and Partnerships, P.O. Box 25352) Oklahoma City, OK 73125. The following tribes have enacted tribal foster care agreements: Absentee Shawnee Tribe of Oklahoma, Alabama/Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe, Miami Tribe, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Otoe-Missouria Tribe of Indians, Ottawa Tribe of Oklahoma, Pawnee Nation of Oklahoma, Peoria Tribe of Oklahoma, Ponca Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Sac & Fox Tribe, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita & Affiliated Tribes and the Wyandotte Nation.

ARGUMENT

THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED ICWA.

I. ICWA Is Configured To Protect The Best Interests Of Indian Children And To Promote The Stability And Security Of Indian Tribes.

“One might ask, since both Indian and non-Indian systems should act in the best interest of the child, what difference it makes which court has jurisdiction. The difference is that these decisions are inherently biased by the cultural setting of the decisionmaker. . . .”

Manz, *Indian Child Welfare Act, A Legislative History of Public Law No. 95-608*, Volume 1, p. 44 (2012) (citing *Indian Family Defense*, Winter, 1974).

“ICWA is intended to protect not only the interests of individual Indian children and families but also the interests of the tribes themselves in long-term tribal survival.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *See also Matter of Adoption of D.M.J.*, 741 P.2d 1386, 1390 (Okla. 1958) (the purpose of the ICWA is to promote the stability and security of Indian tribes, children and families).

Perhaps Chief Isaac of the Mississippi Band of Choctaws said it best:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal

heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribe's ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, at 34 (citations omitted).

Congress' declaration of policy includes providing assistance to Indian tribes in the operation of child and family services. 25 U.S.C. §1902. This policy is the calling of the OICWA tribal child welfare worker. OICWA's membership consists of members from each and every federally recognized tribe in Oklahoma. These tribal child welfare workers assist member Indian children and their families who are involved in child custody proceedings in tribal courts and state courts across the nation.

Prior to the enactment of the ICWA, the Indian Child Welfare Statistical Survey indicated that 1 out of every 40.8 Indian children in Oklahoma had been adopted compared to 1 out of every 188.1 non-Indian children. One out of every 133 Indian children was placed in foster care as opposed to 1 out of every 551 non-Indian children. That calculates 4.4 times as many Indian children in adoptive homes as non-Indian children and 3.9 times as many Indian children in foster care as non-Indian children. Manz, *Indian Child Welfare Act, A Legislative History of*

Public Law No. 95-608, Volume 1, p. 47 (2012) (citing *The Indian Child Welfare Statistical Survey*, July 1976, prepared by the Association on American Indian Affairs, Inc.).

A. Congress Concluded That Implementation Of ICWA Itself Would Be In The Best Interest Of Indian Children.

H.R. Rep. No. 95-1386 (1978). A determination that a child is an Indian child is the first predicate of an ICWA analysis. The ICWA definition of an Indian child “means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. §1903(5).

Determining whether a child is a member of an Indian tribe is a key attribute of sovereignty and is directly tied to tribal survival. Indian tribes have the exclusive power to determine their own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Indian tribes may determine tribal membership by written law, customs, intertribal agreements or by treaties. Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law*, §4.01[2][b], at 214 (Nell Jessup Newton ed., 2012) (citing footnote 76). Bureau of Indian Affairs Guidelines for State Courts sets forth that the determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological

parent is or is not a member of the tribe is conclusive. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,586(B)(1) (Nov. 26, 1979).

In an ICWA case, state social services or private adoption agencies make initial inquiries regarding Indian heritage. The inquiries as to the Indian heritage of a child in custody cases should not be taken lightly. Attorneys working with Indian children or their families are under a duty to investigate a child's possible Indian heritage and inform the court if the attorney suspects Indian heritage.

In fact, Oklahoma case law indicates that a failure to inquire as to a child's Indian status may give rise to malpractice and/or bar sanctions. *See Adoption of Baby Girl B.*, 67 P.3d 359, 374 (Okla. Civ. App. 2003) ("This Court holds that *every* attorney involved in matters concerning Indian children subject to the Indian Child Welfare Act is under an affirmative duty to insure full and complete compliance with the Acts [state and federal ICWA]. This Court recognizes that an attorney who is *solely* an advocate for prospective adoptive parents may, in the course of advocacy, argue that good cause and the best interests of the child favor the adoptive parents. However, this Court further holds that this same attorney, while acting solely as an advocate for prospective adoptive parents, qualifies as "any person" under [the Oklahoma Indian Child Welfare Act (hereinafter "Okla. ICWA") Section 40.6, when the attorney becomes involved to the extent of being an

intermediary between a parent and prospective adoptive parents and then participating in legal proceedings leading to the placement of an Indian child.”) *Id.* at 372 (citation omitted and emphasis added).

The second predicate in the ICWA analysis is whether the action falls into one of four types of cases listed as child custody proceedings. 25 U.S.C. §1903(1). Child custody proceedings are listed as: foster care placements, termination of parental rights, preadoptive placements and adoptive placements. Each of those terms is defined in ICWA. 25 U.S.C. §1903(1)(i-iv). In the instant case, the issues of whether *Baby Girl* is an Indian child and whether the proceeding was a child custody case as defined by the ICWA are not in dispute. Once these two predicates were established, ICWA mandated that notice be given to the parents or Indian custodian and the tribe. 25 U.S.C. §1912(a)

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe by registered mail with return receipt requested, of the pending proceeding and their right of intervention.

Id.

B. Early Notice To The Tribe Is Crucial.

Notice begins the chain of events wherein the tribal child welfare worker draws upon tribal customs and traditions, tribal child rearing practices and tribal resources in order to begin tailoring a plan of tribal services to offer the Indian child and the family. Delays in this stage can have profound results.

In *Baby Girl*, Mother testified “that she knew ‘from the beginning’ that Father was a registered member of the Cherokee Nation, and that she deemed this information ‘important’ throughout the adoption process.” Pet. App. 5a. “It appears that there were some efforts to conceal [Father’s] Indian status”; the adoption agency’s pre-placement form indicates that “[i]t was determined that naming him would be detrimental to the adoption.” Pet. App. 6a. Mother’s attorney provided the Cherokee Nation with Father’s name while inquiring whether the child would be an “Indian child” subject to ICWA, however the attorney misspelled the Father’s first name and provided both the wrong day and the wrong year for Father’s date of birth. *Id.* This misinformation presented an impediment to the timely application of the ICWA not caused by the Father or the Tribe.

Errors and omissions at this stage create unwarranted frustration and heartache for everyone involved in the case. It is imperative that the tribal enrollment office be given as much correct information as possible to prevent a delay in the application of ICWA. OICWA tribal child welfare workers cite

incomplete information common in this area to include: providing only the child's first initial and last name with no birthdate, misspelled names, and incorrect birthdates being sent to tribal enrollment offices regarding an Indian child inquiry. The notice provision is so crucial that ICWA has included a safety valve in its language to allow parties to seek relief if the notice provisions of the ICWA have been violated. 25 U.S.C. §1914.

Notice triggers the tribal child welfare worker to begin implementation of the tribe's child welfare policy regarding ICWA cases and the worker begins to formulate whether to intervene and/or request a transfer of the case to tribal court. Since the majority of Oklahoma tribes do not have attorneys for their Indian Child Welfare Departments, the tribal child welfare worker may appear in state court to inform the state court of the tribe's intentions. If the tribe intervenes, the tribal child welfare worker appears in state court and may make tribal recommendations regarding what the tribe feels is best for the child based upon tribal customs and traditions. The Oklahoma Supreme Court has held that a failure to allow a tribe to intervene is reversible error and that any party could raise that issue on appeal. *Matter of Guardianship of Q.G.M.*, 808 P.2d 684, 689 (Okla. 1991). (We cannot ignore the plain words of a statute. ICWA allows a tribe to intervene at any point in the proceeding.)

C. ICWA Envisioned A Higher Level Of Service Provision For Indian Families.

ICWA mandates that any party seeking to effect a foster care placement of, or termination to, an Indian child under State law must satisfy the court that active efforts have been made to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proven unsuccessful. 25 U.S.C. §1912(d). *Active* efforts require more than the *reasonable* efforts mentioned in the Adoption and Safe Families Act. 25 U.S.C. §671(a)(15)(D). In Oklahoma, failing to go beyond a minimal approach to service providing is reversible error. *Matter of J.S. and M.C.*, 117 P.3d 590, 593, 594 (Okla. Civ. App. 2008).

The day-to-day work of a tribal welfare worker includes incorporating tribal customs and traditions into tribal family service programs. Tribal child welfare workers understand that ICWA's remedial protections for the parents of an Indian child apply irrespective of whether that parent is Indian or non-Indian. Thus, a non-Indian parent of an Indian child is protected under the ICWA just the same as the Indian parent. An OICWA worker will offer services to the family irrespective of whether or not the parent is Indian. Active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family are mandated by ICWA. However, in *Baby Girl*, the South Carolina Supreme Court found that **no** efforts were made to prevent the breakup of the Indian family and petitioners did not

contend otherwise. Pet. App. 26a (emphasis added). The lack of active efforts in this case presented a stark departure from the ICWA mandates.

**D. ICWA Placement Preferences Advance
The Best Interests Of Indian Children
And Promote Tribal Sovereignty.**

The intent of ICWA placement preferences is to provide a home for Indian children, which adequately reflects their cultural value and traditions. B. J. Jones, *et al.*, *The Indian Child Welfare Act Handbook, A Legal Guide to the Custody and Adoption of Native American Children* (ABA 2008). ICWA sets forth presumptive placement preferences for the state court to follow in adoptive placements involving Indian children: 1) a member of the Indian child's extended family, 2) other members of the Indian child's tribe, and 3) other Indian families. 25 U.S.C. §1915(a). ICWA includes a provision that allows tribes to enact their own placement preferences by tribal resolution so long as the placement preferences are the least restrictive setting appropriate to meet the particular needs of the child. 25 U.S.C. §1915(c) (1978). The ICWA placement preference scheme requires that the best interest of the child be analyzed against the backdrop of the mutual interests of the child and the tribe in maintaining tribal connections.

The OICWA tribal child welfare worker begins early on at the notice stage working in concert with

adoption agencies seeking to place Indian children and with the state child welfare worker to locate a range of possible placements that are in accordance with ICWA or the tribe's placement preferences. The extended family of the Indian child is the preferred placement and may include both Indians and non-Indians. The extended family is defined in the ICWA but also may be defined according to the law or custom of the tribe. 25 U.S.C. §1903(2). Some Oklahoma tribes have ample tribal foster care, preadoptive and adoptive placement options while other tribes do not. In the absence of an extended family member placement, a tribal child welfare worker may seek out Indian foster, preadoptive or adoptive placement from other tribes in an effort to place the Indian child with an Indian family. The tribal child welfare worker may advocate for these placement preferences in state court.

The placement preference scheme contains a "good cause" exception. 25 U.S.C. §1915(a) and (b). The good cause language must be utilized in a manner that is consistent with congressional finding that it is best for Indian children to be raised within their extended families or in tribal homes. The good cause provision provides a flexible option when facts are presented that can compellingly justify deviation from the presumptive placement preferences.

In *Baby Girl*, the petitioners knew from the four-month mark, that Father wanted custody. Pet. App. 27a. The litigation lingered until Baby Girl turned two. The South Carolina Court held that the bonding

that took place during the protracted litigation did not constitute good cause to deviate from the ICWA placement preferences. Pet. App. 38a-39a. This finding is true to the ICWA statute and consistent with congressional intent.

E. ICWA Envisioned Tribal/State Collaborations Toward Implementation.

Tribal/State collaboration is an important touchstone of the ICWA. Accordingly, Oklahoma has amended the Oklahoma Indian Child Welfare Act to reflect this Court's guidance in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), to promote and protect the sovereignty of Oklahoma tribes and to enhance tribal/state cooperation on ICWA cases. The Oklahoma ICWA's purpose is as follows:

The purpose of the Oklahoma Indian Child Welfare Act is the clarification of state policies and procedures regarding the implementation by the State of Oklahoma of the federal Indian Child Welfare Act, P.L. 95608. It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated. It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of

the federal Indian Child Welfare Act are enforced.

Okla. Stat. Ann. tit. 10 §40.1 (West 1994).

Moreover, the Oklahoma Supreme Court held *In the Matter of Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) that the Oklahoma Indian Child Welfare Act and the ICWA applied to a case wherein a non-Indian adoptive mother sought an adoption without the consent of the Indian father. The non-Indian mother argued that neither Act was applicable because the proceeding did not involve the dissolution of an Indian family or the removal of custody from an Indian parent. The court held that “because of the recent statutory amendments, which in essence codified the holding in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), we determine the ‘existing Indian family exception’ is no longer pertinent to Indian child custody proceedings in Oklahoma. . . .” *Baby Boy L.* at 1101. Thus, *Baby Boy L.* expressly overruled prior inconsistent Oklahoma case law regarding the existing Indian family exception. *Id.*

The creation and survival of the existing Indian family exception to the ICWA is proof that ICWA is still needed. “By applying the existing Indian family exception, the states are using a back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child custody cases involving American Indian children.” Cheyanna L. Jaffke, *JUDICIAL INDIFFERENCE: WHY DOES THE “EXISTING INDIAN FAMILY”*

EXCEPTION TO THE INDIAN CHILD WELFARE ACT CONTINUE TO ENDURE?, 38 WSULR 127, 134 (2011) (citing Amanda B. Westphal, Comment, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. Rev. 107, 124 (2003)).

OICWA tribal child welfare workers collaborate with the Oklahoma Department of Human Services (“OKDHS”) caseworkers pursuant to a variety of Oklahoma statutes. The Oklahoma Administrative Code sets out the parameters of tribal/state foster care agreements with respect to Oklahoma Indian children. Okla. Admin. Code §340:75-19-32 (2006) (Tribal/State Agreements For Foster Care). These agreements allow tribes and OKDHS to come together collaboratively to better serve the needs of Oklahoma Indian children. The statute sets out that OKDHS will pay the cost of foster care for Indian children who are placed in tribally approved foster homes or who are in the custody of OKDHS. Okla. Admin. Code §340:75-19-32(b) (2006). Tribes may develop and implement tribal foster home standards according to each tribe’s culture and traditions and OKDHS agrees to follow the tribal standards set forth in the agreement. Okla. Admin. Code §340:75-19-32(c) (2006).

OICWA tribal child welfare workers work collaboratively with Oklahoma agencies through Oklahoma’s Interstate Compact on the Placement of Children (ICPC). Okla. Stat. Ann. tit. 10 §577 (West 2008). The ICPC was created to provide a process

through which children who are subject to the Act can be placed in safe and suitable homes in a timely manner. *Id.* at 577(1). The ICPC requires a promulgation of guidelines, in collaboration with Indian tribes for interstate cases involving Indian children. *Id.* at 577(8).

Article XVIII of the ICPC sets forth:

Notwithstanding any other provision in this compact, the Interstate Commission may promulgate guidelines to permit Indian tribes to utilize the compact to achieve any or all of the purposes of the compact as specified in Article I. The Interstate Commission shall make reasonable efforts to consult with Indian tribes in promulgating guidelines to reflect the diverse circumstances of the various Indian tribes.

Id.

OICWA tribal child welfare workers engage in the ICPC process to advocate for adherence to the ICWA and the Oklahoma ICWA. The Oklahoma ICWA and the ICPC were questioned in the case of *Cherokee Nation v. Nomura, et al.*, 160 P.3d 967 (Okla. 2007). In *Nomura*, an Indian child born in Oklahoma to an Indian mother was voluntarily placed for adoption with a non-Indian Florida couple through a Florida adoption agency. The Florida court terminated the parental rights of the birth mother and to any known and unknown biological father. The Florida court held that although the case was an ICWA case, a voluntary proceeding did not require notice to the Tribe. *Id.* at

969, 970. The Florida court held that all provisions of the ICWA had been complied with. The Florida court found that mother's preference constituted good cause to waive the placement preferences. Michael Nomura, the Oklahoma Administrator of the ICPC, withdrew his previous approval indicating all ICPC requirements had been met in Oklahoma. *Id.* at 972.

The Cherokee Nation received notice after the Florida judgment was entered. *Id.* at 970. The Cherokee Nation sought a temporary restraining order to prevent Mr. Nomura from issuing a Form 100A that would permit the Florida adoption of an Oklahoma-born Indian child to go forward. Mr. Nomura sought a declaratory judgment regarding the applicability of the ICWA and the Oklahoma ICWA to the Florida adoption proceedings. *Id.* at 969.

The Florida adoption agency argued that the mother, as opposed to Mr. Nomura, was the "sending agency" under the ICPC and that Mr. Nomura had no authority to refuse to sign the Form 100A and send it to Florida. The Florida agency also contended the Oklahoma ICWA was unconstitutional as it infringed upon the mother's constitutional and fundamental rights in and to her child and that the Oklahoma ICWA was a race-based statute. The Florida agency urged the strict scrutiny test be applied when examining the Oklahoma statute. *Id.* at 972.

Mr. Nomura contended that the ICPC required a parent wishing to relinquish parental rights to demonstrate the parent had utilized the tribe's resources

to the maximum extent possible. Mr. Nomura contended that his signature on Form 100A indicates to a receiving state that the evaluation process is complete. Mr. Nomura also stated that the Florida agency had attempted to ignore the clear intent of the federal ICWA and the Oklahoma ICWA. *Id.* at 973, 974.

The court held that the Oklahoma ICWA was constitutional and did apply to this voluntary proceeding. The court adhered to the teachings of *Holyfield*, namely that the placement preferences are the most important substantive requirement imposed on state courts. The trial court held that the ICWA and the Oklahoma ICWA must be followed. *Id.* at 977. The court also held that Mr. Nomura in his official capacity has a duty to see that there is compliance with the placement preferences of both the ICWA and the Oklahoma ICWA prior to approving the adoption under the Interstate Compact. *Id.* at 974, 975. The court went on to hold that adoptions of Oklahoma Indian children require notice to the Tribe and compliance with the Oklahoma ICWA and ICWA whether the proceedings were voluntary or involuntary. *Id.* at 974.

In *Baby Girl*, the ICPC Form 100A signed by Mother, “reported Baby Girls’ ethnicity as ‘Hispanic’ instead of ‘Native American.’” Pet. App. 7a. Had the Father’s status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the Indian child from Oklahoma. *Id.* at 107a. *See id.* at 7a-8a & n.8; *see also* Nomura policy

letter on how the ICPC applies to ICWA-eligible children at Appendix 1a and Form 100A at Appendix 2a. This misinformation presented another impediment to the timely application of the ICWA.

While ICWA has brought about many changes in the way state courts proceed in ICWA cases, there is still much work to be done. More education on the ICWA is needed for state court judges, attorneys and state social workers. This case presented nothing new to the OICWA workers; they have not been strangers to attempts to thwart the application of ICWA and the protections it provides Indian children, families and tribes. Ultimately, the OICWA tribal child welfare workers will continue doing the work they always do with grace and resolve: promoting the best interests of Indian children and tribal sovereignty utilizing the ICWA.



CONCLUSION

The South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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NATIVE AMERICAN LEGAL
RESOURCE CENTER DIRECTOR
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APPENDIX

**Oklahoma Interstate Compact
on the Placement of Children
Under Contract with OKDHS – ICPC**

Heritage Family Services, Inc.

*5110 S. Yale Avenue, Suite 525 ♦ Tulsa, OK 74135 ♦
Tel 918 491-6767 ♦ Fax 918 491-6717*



Building Families & Changing Lives

**Letter Submitted Via Email
to angela.connor@chickasaw.net**

March 25, 2013

Angela Connor
OICWA President
P. O. Box 1274
Shawnee, OK 74802-1274

Dear Angela,

I am responding to your request for information about how our office's procedures for handling cases for the Interstate Compact on the Placement of Children (ICPC) when the child appears to be subject to the Indian Child Welfare Act (ICWA). The ICPC compact includes all fifty states, the District of Columbia, and the U.S. Virgin Islands. Compacts are allowed under the U.S. Constitution and create binding agreements between the states. The ICPC is statutory law in all member states. At this time, federally recognized Indian tribes are not part of the ICPC compact, but we have worked cooperatively with a number of Oklahoma tribes to effectuate interstate placements.

I will begin by providing some general information on the handling of ICPC cases and then will provide more specific information on the handling of ICWA cases through the ICPC. As you know, Heritage Family Services is under contract with the Oklahoma Department of Human Services to administer the ICPC process for all adoption cases into or out of Oklahoma through the ICPC process. Heritage has been performing this function for nearly fifteen years now, since June of 1998. During the time we have administered the ICPC contract, we have process [sic] approximately 5,600 interstate adoption cases. These include public custody adoptions, placements through private adoption agencies, and independent adoption cases.

When an agency or an attorney initiates an ICPC request for an adoptive placement, they must begin by submitting a packet of information to the ICPC office for the “sending state” from which the child’s placement is originating. The “sending agency or party” must fill out and sign an **ICPC form 100A**, which is the form used nationwide to request an ICPC placement. This form must be signed by one who has legal authority to place the child for adoption. This “sending party” could be the birth parent, the court, an adoption agency, or in some cases by an Oklahoma attorney to whom the child has been relinquished. The packet must also contain copies of legal documents such as a consent for adoption, a relinquishment of parental rights, or an order terminating parental rights. The packet must include information about the child, such as medical records, social history and other documents

on the child. The packet must include a current adoption home study on the prospective adoptive family, including all required criminal and child abuse background checks. Most states, including Oklahoma, require a form filed [sic] out by the birth mother or by both birth parents which provides medical and social history on the birth parents. These are some of the general items that are required to be included in every packet submitted with an ICPC form 100A. These forms are carefully reviewed by our office. The review focuses on the completeness of the documentation as well as on the compliance with state and federal laws regarding adoption.

One of the first topics for assessment is whether ICPC applies or not. There are some types of placements, especially those placements between close relatives, that are not subject to the ICPC. Second, we look at whether the sending party has the legal authority to send the child for an adoptive placement. Third, we look at whether the child is legally eligible to be adopted or what stage or stages of the legal process have been completed. If both parents have not given their voluntary consent to the adoption or had their parental rights terminated by the court, then the prospective adoptive parents must sign a form acknowledging that this is a “legal risk” placement and they might have to return the child if the adoption cannot be completed legally. This legal analysis includes an evaluation of whether the adoption is or is not subject to ICWA, and this process will be discussed in more detail in a subsequent paragraph.

Fifth, we evaluate if the prospective adoptive parents have met the requirements in their state of residence to adopt. This requires a thorough review of the adoptive home study and all the documentation that goes along with this assessment of the family. Sixth, our office evaluates whether or not the prospective adoptive family appears to be an “appropriate” placement for the child. This includes looking at any special needs the child may have and whether the adoptive family has the strengths and resources to meet those needs. Based on all of these steps, the ICPC office then has the responsibility of either approving or denying the placement on the ICPC form 100A. Then the ICPC decision must be communicated to the sending party and to the other ICPC office.

There are several ways that our ICPC office might learn that a child has Native American heritage. First, there is a box on the 100A form which asks if the child is “ICWA Eligible.” Second, there is an area of the 100A form for ethnicity information with one of the options being Native American. Third, the legal documents should contain a finding by the court whether or not ICWA applies to the adoption. These documents may include the birth mother’s consent, the birth father’s extrajudicial consent, or a court order terminating parental rights. Fourth, in a minority of cases a letter from the child’s tribe has been secured to verify ICWA applicability. Fifth, the medical and social history form completed by the birth parents may indicate ethnicity and tribal membership. Sixth, some medical records may provide clues,

especially if the child was born at an Indian health facility. Seventh, some attorneys or adoption agencies will provide explicit information about ICWA applicability, such as affidavits by the birth parents about any tribal membership.

Oklahoma's ICPC office is more aware of ICWA than other states ICPC offices, since Oklahoma has thirty-nine federally recognized Indian tribes within the second largest population of Native Americans of all the states. Therefore, our ICPC office pays close attention to the Indian status of every child whose case we handle. Our standard practice is to monitor each case in which ICWA applies to insure that the child's Indian tribe has been given legal notice of the adoption, thus insuring the tribe has the option under ICWA to intervene in the legal case.

Oklahoma ICPC must monitor for compliance not only with the federal ICWA, but our state legislature has adopted in state statutes an Oklahoma Indian Child Welfare Act (OICWA) to support and supplement the federal act. 25 USC §1921 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." Therefore, the Oklahoma ICPC office includes in our monitoring of ICWA cases, whether there has been compliance with certain sections of

OICWA, which appear to create a higher standard that [sic] found in federal ICWA.

One of these higher standards may be found in 10 O.S. 2011 § 40.6 of OICWA. This section states in part:

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. (Emphasis added).

In 2007, the Oklahoma Supreme Court upheld this section of OICWA in ***Cherokee Nation v. Nomura***, 2007 OK 40, 160 P.3d 967. Specifically, the Oklahoma Supreme Court affirmed the declaratory judgment that our ICPC office had requested from the trial court. In doing so, the OK Supreme Court declared:

We hold that adoptions of Oklahoma Indian children require notice to the Tribe and compliance with the Oklahoma Act, whether the child custody proceedings are voluntary or involuntary. ***The Administrator has a duty to question whether compliance has been made before signing the Form 100A*** which

facilitates sending the adoption to another state to complete. (Emphasis added).

As a result of this significant ruling, our office has sought to live up to this duty by carefully scrutinizing every ICPC case for compliance with both federal ICWA and OICWA.

In any case where the adoption of the child appears to be subject to ICWA, our office asks the adoption agency or attorney who is sending the child for adoption and who submitted the ICPC case to provide documentation of complying specifically with § 40.6 of OICWA. We ask that this documentation show communication with the tribe and efforts made to use the tribe's services to find a placement within the preferences of federal ICWA. In ***Cherokee Nation v. Nomura***, the Court declined to define "maximum efforts" but noted that there had been no notice given at all to the tribe. Likewise, our office does not attempt to define "maximum efforts" but instead looks for a good faith attempt to reasonably use the services of the child's tribe.

Some Oklahoma tribes will provide information on available tribal adoptive families to adoption agencies or attorneys. Other tribes chose to not provide such information and some of the smaller tribes do not have adoption programs. For instance, the Cherokee Nation routinely provides profiles of tribal adoptive families who are willing to work with private adoption agencies or attorneys. In those case, our ICPC office asks the sending agency or attorney to present

these profiles of adoptive families to the birth mother. We would ask them to have the birth mother give a good faith consideration to the tribal families. Whether the placement then is made with a tribal family or with an adoptive family who is outside the preferences may be up to a court to decide, since any departure from the ICWA placement preferences requires a court to determine that good cause exists to depart from the federal preferences. By that time, the tribe has received notice of the proceedings and has the opportunity to exercise its ICWA rights to intervene, seek transfer to tribal court, and argue over the issue of good cause.

The OK-ICPC office does not attempt to determine good cause, as that is for a court to do. Our determination of whether to let the ICPC case go forward focuses on whether a valid attempt has been made to utilize the services of the child's tribe to find a placement within the preferences in compliance with §40.6 of OICWA. Once that attempt has been made and documented, the ultimate outcome of an adoptive placement will be up to a court and not to our office. At that point, if the other ICPC requirements have been made, then our ICPC office will sign the form 100A and allow case to be sent on for processing by the receiving state's ICPC office. If the receiving state approves the placement, then the child may be placed with that prospective adoptive family in that state. Until both the sending and receiving state ICPC offices have processed the case and the receiving state

has given its approval, it is illegal for the child to leave the sending state.

Once the placement is made, our office will monitor the adoption until it finalizes or some other outcome occurs. Our office will request and review supervisory reports about how the child and family are adjusting. In some instances, where there is an appeal or some other reason for a delay in finalization of an adoption, then our office will continue to monitor the case until the issues are resolved by the court.

Sincerely,

/s/ Michael A. Nomura
Michael A. Nomura
OK-ICPC for Adoptions
Under Contract with
OKDHS-ICPC
General Counsel
Heritage Family Services, Inc.

TO: FROM:

SECTION I – IDENTIFYING DATA									
Notice is given of intent to place – Name of Child:					Ethnicity: Hispanic Origin: ☐ Yes ☐ No ☐ Unable to determine/unknown				
Social Security Number:				ICWA Eligible ☐ Yes ☐ No	Race: ☐ American Indian ☐ Native Hawaiian/ or Alaska Native Other Pacific Islander ☐ Asian ☐ Black or African American ☐ White				
Sex:	Date of Birth		Title IV-E determination ☐ Yes ☐ No ☐ Pending						
Name of Mother:					Name of Father:				
Name of Agency or Person Responsible for Planning for Child:							Phone:		
Address:									
Name of Agency or Person Financially Responsible for Child:							Phone:		
Address:									
SECTION II – PLACEMENT INFORMATION									
Name of Person(s) or Facility Child is to be placed with:					Soc Sec # (optional): Soc Sec # (optional):				
Address:					Phone:				
Type of Care Requested: ☐ Foster Family Home ☐ Group Home Care ☐ Child Caring Institution ☐ Residential Treatment Center ☐ Institutional Care-Article VI, Adjudicated Delinquent					☐ Parent ☐ Relative (Not Parent) Relationship: _____ ☐ Other: _____			☐ ADOPTION ☐ IV-E Subsidy ☐ Non IV-E Subsidy To Be Finalized In: ☐ Sending State ☐ Receiving State	
Current Legal Status of Child: ☐ Sending Agency Custody/Guardianship ☐ Parent Relative Custody/Guardianship ☐ Court Jurisdiction Only					☐ Protective Supervision ☐ Parental Rights Terminated-Right to Place for Adoption ☐ Unaccompanied Refugee Minor ☐ Other:				
SECTION III – SERVICES REQUESTED									
Initial Report Requested (if applicable): ☐ Parent Home Study ☐ Relative Home Study ☐ Adoptive Home Study ☐ Foster Home Study			Supervisory Services Requested: ☐ Request Receiving State to Arrange Supervision ☐ Another Agency Agreed to Supervise ☐ Sending Agency to Supervise			Supervisory Reports Requested: ☐ Quarterly ☐ Semi-Annually ☐ Upon Request ☐ Other:			
Name and Address of Supervising Agency in Receiving State:									
Enclosed: ☐ Child’s Social History ☐ Home Study of Placement Resource ☐ Court Order ☐ ICWA Enclosure					☐ Financial/Medical Plan ☐ IV-E Eligibility Documentation ☐ Other Enclosures				
Signature of Sending Agency or Person:							Date:		
Signature of Sending State Compact Administrator, Deputy or Alternate:							Date:		
SECTION IV – ACTION BY RECEIVING STATE PURSUANT TO ARTICLE III(d) OF ICPC									
☐ Placement may be made					☐ Placement shall not be made				
REMARKS:									
Signature of Receiving State Compact Administrator, Deputy or Alternate:							Date:		

DISTRIBUTION (Complete six (6) copies):

- Sending Agency retains (1) copy and forwards completed original plus four (4) copies to:
- Sending Compact Administrator, DCA or alternate retains a (1) copy and forwards completed original and three (3) copies to:
- Receiving Agency Compact Administrator, DCA, or alternate who indicates action (Section IV) and forwards a (1) copy to receiving agency and the completed original and one (1) copy to sending Compact Administrator, DCA, or alternate within 30 days.
- Sending Compact Administrator, DCA, or alternate retains a completed copy and forwards the completed original to the sending agency.

App. 10