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Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act

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WAVES OF EDUCATION: TRIBAL-STATE COURT COOPERATION AND THE INDIAN CHILD WELFARE ACT

Kathryn E. Fort*

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I. INTRODUCTION

The interactions of tribes and states have historically been characterized as antagonistic.¹ Certainly, the number of lawsuits between tribes and states over any number of issues demonstrates this difficult relationship.² The recent response of the mayor of New York to the Seneca Nation for cigarette taxes is another ugly example of this tension.³ However, finding ways to work together and avoid lawsuits is beneficial to both tribes and states, assuming it can be done without fundamental degradations of sovereignty.⁴ While some argue that these agreements damage tribal sovereignty regardless of the results, others point out the agreements can enhance tribal sovereignty, including the benefits in avoiding lawsuits, both from a monetary and predictability standpoint.

Practitioners and scholars are past the point, generally, of treating tribal-state agreements as unusual or unexpected.⁵ Tribes and states negotiate a host of issues, whether voluntarily⁶ or at the direction of a court.⁷ Any time tribes seek to regain authority in areas where states have stepped in, or have “traditionally” exercised authority, the likelihood exists for lawsuits.⁸ Recently, however, in those areas where tribes and states have to interact, tribal-state agreements are a potentially less costly and more outcome predictive. In addition, the very negotiation of these agreements constitutes an acknowledgement of tribal legitimacy.⁹

Michigan, with its history of tribal-state agreements, has been at the forefront of this trend. While some of these agreements have been consent decrees at the order of a

1. United States v. Kagama, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the states where . . . [tribes] are found are often their deadliest enemies.”).

2. See generally Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114 (2d Cir. 2010), cert. denied, 132 S. Ct. 452 (2011); Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979); United States v. Washington, 384 F.Supp. 312, 401 (W.D. Wash. 1974). See also Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 77 (2007) (describing the historical trend of U.S. Indian policy as “a never-ending quest to take Indian lands and resources, and in some circumstances, to eliminate Indians and Indian tribes”).

3. Jerry Zremski, *Narrow Rulings Keep Cigarette Tax Litigation Open-Ended*, BUFFALO NEWS, Sept. 13, 2010, <http://www.buffalonews.com/city/article188627.ece>.

4. Fletcher, *supra* note 2 at 74-75; P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 368 (1994).

5. Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 4 (2004); Gover, Stetson & Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277 (1991); Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 264 (1991).

6. See *infra* Part II.A; MINN. DEP’T OF HUMAN SERVS., 2007 MINNESOTA AMENDED TRIBAL/STATE INDIAN CHILD WELFARE AGREEMENT (Feb. 22, 2007), available at http://www.icwlc.org/docs/9-icwa_2007_tribal_state_agreement_dhs-5022-eng-2-07.pdf; see also Fletcher, *supra* note 5, at 5 n.29 (providing a list of tribal-state tax agreements in Michigan); Pommersheim, *supra* note 5, at 264-65.

7. MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 136-37 (2012); Consent Decree, United States v. Michigan, No. 2:73 cv 26 (W.D. Mich. Aug. 2000) (regarding treaty fishing); Consent Decree, United States v. Michigan No. 2:73 cv 26 (W.D. Mich. Nov. 2007) (regarding inland treaty rights).

8. See Fletcher, *supra* note 2, at 77-78.

9. *Id.* at 87 (“Each time a state or local government agrees to negotiate with an Indian tribe and then to execute a binding agreement with an Indian tribe, that non-Indian government is recognizing the legitimacy of the tribal government.”).

court, such as treaty fishing and inland fishing and gathering agreements,¹⁰ other have been crafted to avoid costly litigation.¹¹ Prior to negotiating the tax agreements, Michigan's governor specifically recognized a government-to-government relationship between the state and the tribes.¹² Finally, from a tribal-state court perspective, the Michigan Supreme Court and State Court Administrative Office ("SCAO") have periodically worked with tribes and tribal judges to help with cooperation between the tribal and state judicial systems.¹³

This article focuses on the relationship and agreements between tribal and state judicial systems in Michigan. In tracing that work, the article demonstrates the cyclical nature of tribal-state court relations,¹⁴ and the way the welfare of Indian children binds together tribal and state judicial systems, regardless of either side's participation. Federal intervention in this area under the auspices of the Indian Child Welfare Act ("ICWA")¹⁵ virtually forces tribes and states to work together. How the personnel in the tribal and state systems interact has a huge impact on the children of the tribes in Michigan.

Twice in the past twenty years representatives of the tribal and state judiciaries in Michigan have come together to negotiate agreements, create rules, and draft legislation. Once the work is done, however, how do the courts handle these kind of agreements? Part of the problem with state ICWA laws elsewhere is the courts' unwillingness to affirm a state law that differs from ICWA. Tribes and states willing to do the work to create a state ICWA law that is tailored to state laws, while providing more than the minimum standards created by the federal ICWA, have at times been greeted with hostility in the courts.¹⁶ Regardless, the relationships that develop through the process of drafting these laws and agreements benefit both tribal and state systems.

II. TRIBAL-STATE COURT COOPERATION IN MICHIGAN

There are a number of areas where the interests of tribes and state courts intersect, but perhaps the most common and important is in the area of child welfare. Because Indian children live across reservation and state boundaries, both state and tribal courts end up with cases involving children and parents who are under the jurisdiction of both the tribe and the state. How these cases are handled often turns on the court's relationship with the local tribe and tribal agencies.

Any number of projects may arise from the original concern of child welfare.¹⁷ For

10. See sources cited *supra* note 7.

11. See sources cited *supra* note 6.

12. See Fletcher, *supra* note 5, at 6.

13. Hon. Michael F. Cavanagh, Remarks at the Michigan State University College of Law: The First Tribal/State Court Forum and the Creation of MCR 2.615, at 2-3 (Michigan State University College of Law Indigenous Law & Pol'y Ctr., Working Paper No. 2007-16, Oct. 29, 2007).

14. The idea of cyclical relationships and the problems behind maintaining momentum in those relationships, came up in a conversation between the author and Prof. Christine Zuni Cruz after the author's presentation on the topic at the annual meeting of the Association of American Law Schools. As ideas from that brief discussion eventually became the frame for this article, the author thanks Prof. Zuni Cruz.

15. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963).

16. *In re J.L.*, 779 N.W.2d 481, 492-93 (Iowa Ct. App. 2009); *In re A.W.*, 741 N.W.2d 793, 811-12 (Iowa 2007); see also *infra* Part IV.

17. E.g., MICH. INDIAN TRIBAL COURT/STATE TRIAL COURT FORUM, REPORT OF THE STATE COURT AND

example, the first major project in Michigan to ensure better relations between tribal and state courts was a court rule ensuring a type of comity for court orders.¹⁸ As it happens, child support orders are often given in one court but enforced in a different jurisdiction. Projects which do not initially appear to turn on concerns over children and jurisdiction often do, especially in the area of tribal-state court relations.

Both the state of Michigan and the tribes are leaders in tribal-state agreements in the areas of taxation, treaty rights, and gaming compacts. However, official tribal-state court relations as represented by meetings or agreements have been more or less cyclical. Regardless of reason, the judiciary in Michigan has not kept up regular, official tribal-state court relations, whether due to benign neglect on the part of the state, or pulling back by the tribes. Since tribes in Michigan started judiciaries recognized by the State, there have been two major projects between the tribal and state judiciaries.¹⁹

The first, a Tribal-State Forum, began twenty years ago and was the first official interaction between the judiciaries.²⁰ Tribal judiciaries based on Anglo court models are a relatively recent development in Michigan, partly due to the unique histories of tribes in Michigan.²¹ For example, while there are now twelve federally recognized tribes in Michigan²² and twelve tribal court systems, at the time of the forum, only seven tribes in Michigan had what the Forum Report called “justice systems.”²³

For whatever reason, though that original collaboration created an impressive amount of recommendations and final actions, official meetings between the judiciaries did not continue. While other states continued their forums on an annual or quarterly

TRIAL COURT FORUM 4 (1992) [hereinafter FORUM REPORT], available at <http://turtletalk.files.wordpress.com/2007/11/indiantribalcourtstateforum.pdf> (stating various areas of “matters that require cooperation between state and tribal justice systems” included “subpoenas, traffic violations, law enforcement, child welfare, enforcement of custody and support orders, and extradition”).

18. See MICH. CT. R. 2.615.

19. Hon. Michael F. Cavanagh, *Remarks of Justice Michael F. Cavanagh: State Court Administrative Office – Court Improvement Programs, Indian Child Welfare Act Forum*, 89 MICH. B.J. 23, 25 (2010). Justice Cavanagh notes some of the other achievements that have happened in the time between the first Forum and the more recent effort. This article is focused on the formal, organized meetings between the judiciaries or their representatives, which is not to say that there has not been informal meetings and work done to maintain relations.

20. Hon. Michael F. Cavanagh, *Michigan’s Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 712 (1999); *Tribal Courts and Families: Native American Sovereignty and the Indian Child Welfare Act*, THE CTR. FOR CT. INNOVATION (Aug. 17, 2011) [hereinafter *Tribal Courts and Families*] (downloaded using iTunes) (Judge Petoskey states that, “in Michigan, when the former chief justice and current justice Michael Cavanagh first brought tribal court and state court judges together over twenty years ago so that they could first meet each other and develop strategies for avoiding jurisdictional conflict and strategies also for cooperation, one of the very first things he said to us to us tribal judges was we will learn more from you probably than you will learn from us.”).

21. See FLETCHER, *supra* note 7, at 84-107 (explaining the “administrative termination” that some tribes in Michigan faced while focusing on the re-recognition of the Grand Traverse Band); see also *id.* at 148-57 (discussing pre-Anglo law and justice systems among the Anishinaabek). Each tribe in Michigan has its own unique history, but a number of them have been federally reaffirmed, re-recognized or recognized in the past twenty years. Cf. FORUM REPORT, *supra* note 17, at note 2 (listing pre-1992 Michigan Bar Journal articles on tribal courts and Indian tribes).

22. The twelve federally recognized tribes in Michigan are the Lac Vieux Desert Band of Lake Superior Chippewa Indians, Keweenaw Bay Indian Community, Hannahville Potawatomi Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Saginaw Chippewa Indian Tribe, Match-e-be-nash-she-wish Band of Pottawatomi, Nottawaseppi Huron Band of Potawatomi, and Pokagawbe Band of Potawatomi.

23. FORUM REPORT, *supra* note 17, at 1 (as opposed to eleven today).

basis, Michigan's did not.²⁴ However, a recent effort by the state and tribes has led to a second cycle of tribal-state court cooperation which is now three years old.

A. Tribal-State Forum and Michigan Rule 2.615

The ebb and flow of tribal-state court relations appears to depend heavily on individual commitment to the project. Two of Michigan's most respected judges, Justice Michael F. Cavanagh and Judge Michael Petoskey, have been committed to this work from the beginning. This relationship between a state Supreme Court Justice and Michigan's most experienced and respected tribal judge²⁵ provides an excellent model for staff, attorneys, and judges in the state, illustrating the importance of respect and cooperation at the highest levels of the legal profession.

The original Tribal-State Forum was appointed by the Michigan Supreme Court to "foster cooperation between the State and Tribal justice systems within Michigan."²⁶ At the time of the Forum, Justice Cavanagh was Chief Justice of the Michigan Supreme Court and the Forum was a project to which he was especially committed.

Tribal-State Forums like the one in Michigan started in 1990 with three pilot programs in Arizona, Oklahoma, and Washington.²⁷ The programs were funded by the State Justice Institute and administered by the National Center for State Courts, but the initiative for the program came from the Conference of Chief Justices.²⁸ The Project, called Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project, gave rise to a number of tribal-state forums across the country.²⁹ After the first three pilot states, Michigan, South Dakota, and North Dakota also held tribal-state court forums.³⁰

According to the National Center for State Courts, a forum is called by the state chief justice to "find mutually acceptable and practical solutions to conflicts" between tribal and state courts.³¹ The Center points out the centrality of ICWA to these forums.³² While tribes and states have many points of contact and places for negotiation, tribal and state courts are tied together by ICWA, given the jurisdictional provisions in the law.³³

24. See Marcy L. Kahn et al., *The First New York Listening Conference for Court Officials and Tribal Representatives*, 78 N.Y. ST. B.A.J. 11, 12 (2006); Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin*, 26 AM. IND. L. REV. 177, 182-84 (2002); Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 752-53 (2008).

25. Judge Michael Petoskey has been a judge for most of the tribes in Michigan, and importantly, has been the first judge for many tribes after federal re-recognition, driving the very creation of the modern tribal court systems.

26. FORUM REPORT, *supra* note 17, at 1 (members of the Forum were Hon. Garfield W. Hood, Hon. Michelle Boyer, Hon. Michael D. Petoskey, Hon. William T. Ervin, Hon. Michael W. MacDonald, Hon. Thomas A. Van Tiem Sr., Hon. Bradley Dakota).

27. H. CLIFTON GRANDY & H. TED RUBIN, *TRIBAL COURT-STATE COURT FORUMS: A HOW-TO-DO-IT-GUIDE TO PREVENT AND RESOLVE JURISDICTIONAL DISPUTES AND IMPROVE COOPERATION BETWEEN TRIBAL AND STATE COURTS* 1 (1993).

28. *Id.*

29. *Id.* at 1-2.

30. *Id.* at 2, 7.

31. *Id.*

32. See GRANDY & RUBIN, *supra* note 27, at 3.

33. See *id.* at 7; 25 U.S.C. § 1911(a), (b), (d) (2006).

Aside from ICWA, the forum may collect and evaluate other intergovernmental agreements, draft agreements to prevent litigation, and otherwise work together cooperatively.³⁴ According to Justice Cavanagh, Michigan's forum focused on the mutual recognition of tribal and state court orders in the tribal and state courts.³⁵ The reason for this focus, according to the Forum Report, was that in order to begin to resolve all of the issues identified by the Forum there needed to be "the consistent application of full faith and credit between the tribal and state courts."³⁶

Working from the Forum Report, the Michigan Supreme Court decided to propose a court rule to ensure the enforcement of tribal court orders.³⁷ One of the first projects addressed by the Michigan tribal-state forum was the enforcement of tribal court orders.³⁸ That rule, culminating in Michigan Court Rule 2.615, created a comity-like system, wherein each side agreed to enforce the other's decisions — a mutual promise with some language to allow some judicial discretion.³⁹ Justice Cavanagh explicitly states that the Court decided to pass a court rule rather than go through the legislature.⁴⁰ He discusses the difficulty of passing legislation related to tribes without the legislature bogging it down in other issues related to tribal and state relations.⁴¹ Further, tribal-state court agreements or court rules may be easier to accomplish than legislation in states with relatively tribal-friendly judiciaries. State cooperative agreements requiring legislative action require far more political capital and ability than working judiciary to judiciary.

Additional recommendations from the Forum included making the State Court Administrative Office for Continuing Legal Education and the Michigan Judicial Institute Services available to tribal courts, encouraging the cross visitation of judges and judicial personnel, listing tribal courts in the state Bar Journal directory, using the State law library to house tribal codes, forming an Indian law section of the state bar, and creating an on-going committee.⁴² Interestingly, the Forum Reports includes an appendix

34. GRANDY & RUBIN, *supra* note 27, at 7.

35. Cavanagh, *supra* note 13, at 5; see Deloria & Laurence, *supra* note 4, at 373-74 ("[T]ribal-state negotiation has a vital role to play in addressing the topic of cross-boundary enforcement."). However, the article does limit its advice for excellent reasons to money judgments while still acknowledging the "high-profile" judgments from tribal and state courts are "those involving domestic relations." *Id.* at 375-76.

36. FORUM REPORT, *supra* note 17, at 4. Issues listed included "service of process on and off the reservation, the issuance of subpoenas, traffic violations, law enforcement, child welfare, enforcement of custody and support orders, and extradition." *Id.*

37. Cavanagh, *supra* note 20, at 713. See generally B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998) (discussing the "concomitant need on the part of tribal, state and federal courts to convene to examine issues of common concern"); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, Or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381 (2004); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000).

38. Cf. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 908 (1990) (indicating that Congress requires both the states and the federal government to give "full faith and credit to tribal laws or judgments").

39. See MICH. CT. R. 2.615.

40. Cavanagh, *supra* note 13, at 11.

41. *Id.*

42. FORUM REPORT, *supra* note 17, at 11-14.

titled the Michigan Family Preservation Act, though it is not referenced in the report.⁴³

B. The Second Wave: The Indian Child Welfare Act & The Court Improvement Program

The second wave of the tribal-state judiciary work has so far culminated in a legislative proposal to incorporate ICWA into state law. Michigan is not the first state to attempt this,⁴⁴ and whether this proposal will become law is unknown.

1. The Indian Child Welfare Act

The Indian Child Welfare Act, a law designed to prevent the breakup of Indian families, relies on state court judges and personnel for enforcement.⁴⁵ ICWA was passed in 1978 to prevent the wholesale removal of Indian children from their families by state actors.⁴⁶ The Act essentially forces states and tribes to work together to make sure the law is enforced, even though legally the burden is entirely on the state.⁴⁷ However, because the interests and welfare of tribal children are at stake, it is almost always in a tribe's best interest to be involved with the State to make sure the Act is being properly enforced.

The Act has a number of important provisions which were created to address the treatment of Native children and families. The Act also elevates the tribal interest in the children to nearly the height of parental interest.⁴⁸ For example, the State is required to notify the tribe when an Indian child is taken into foster care.⁴⁹ In the case where an Indian child is removed from her home and she lives off the reservation, her tribe has the right to intervene and to request the transfer of the case to tribal court.⁵⁰ These jurisdictional provisions, which the Supreme Court called the "heart of ICWA," attempts to ensure that the tribe itself gets to adjudicate the best interests of its children.⁵¹

However, even if a child remains in the state system, ICWA continues to apply to the proceedings. The state must provide what is called "active efforts" to preserve the

43. FORUM REPORT, *supra* note 17, at app. IV. The draft legislation appears to be out of a Department of Social Services [now Human Services] legislative work group. Speculation on its failure to become law focuses on the establishment of a state recognition process for tribes in Michigan.

44. *See, e.g.*, 2006 Cal. Stat. 6536-6614; Iowa Indian Child Welfare Act, IOWA CODE ANN. § 232B (West 2006); Minnesota Indian Family Preservation Act, MINN. STAT. ANN. §§ 260.751-260.835 (West 2007); Indian Child Welfare Act, 2011 Wash. Sess. Laws 1956-1986 (codified in scattered sections of WASH. REV. CODE ANN. §§ 13, 26, 74); WIS. STAT. ANN. § 48.028 (West 2011).

45. B.J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 4-5 (2d ed. 2008).

46. *See* 25 U.S.C. § 1901(3) (2006).

47. 25 U.S.C. § 1911(b) (2006) (requiring transfer of jurisdiction in proceedings with Indian children); § 1912(a) (2006) (requiring notice to tribes from states); § 1912(e), (f) (2006) (requiring a showing of clear and convincing evidence including qualified expert witness testimony before placing an Indian child in foster care); § 1915 (2006) (listing placement preferences including the Indian child's family and tribe); *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979), available at http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf (reasoning that the state must notice the tribe for the purposes of "tak[ing] into account the prevailing social and cultural conditions").

48. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)).

49. 25 U.S.C. § 1912(a) (2006).

50. 25 U.S.C. § 1911(b), (c) (2006).

51. *Holyfield*, 490 U.S. at 36.

Indian family.⁵² This has generally been interpreted to mean more than “reasonable efforts” on the part of the state.⁵³ This provision has been litigated extensively since Congress did not define “active efforts.”⁵⁴

In addition to notice, jurisdiction, and active efforts, the state must also have an expert witness testify as to the continued potential harm to the child if the child stays with her family.⁵⁵ The determination of what constitutes an expert witness as well as defining the content of the expert’s testimony can also stymie state courts and lead to significant litigation.

Placement preferences continue for the entire time the child is in the state system, and apply to pre-adoptive and adoptive placements.⁵⁶ Many tribes complain that this issue, the placement of Indian children with their relatives or other Indian families, is an area of contention with the state. In Michigan in particular, a class action suit against Department of Human Services (“DHS”) implicates various areas of placement, though not as it pertains to Indian children directly.⁵⁷

While the Act is interpreted in the courts, other actors, such as social workers, guardian *ad litem* (“GAL”), and counselors handle the brunt of the details behind the Act. Only if a state worker — or a court forcing the state worker — makes the inquiry into the family’s history and background, and only if that state worker then issues notice that is in compliance with the Act will the tribe even know there is an Indian child in the state court system. Ensuring that the workers are educated properly on ICWA’s requirements is not the responsibility of the tribe, but it certainly behooves them to work with the state to ensure it that such education occurs. This can be frustrating to tribes, especially if they lack funding or time to train state actors who should, by rights, be trained by the state anyway. One way to work with this issue is to use state and federal monies and staff to ensure ICWA compliance with the cooperation of local tribes. This is what Michigan has been attempting to do for the past few years.

The law’s importance to tribes is undisputed, but their role in ICWA cases that remain in state court is limited. ICWA’s requirements bind state courts, not tribal ones. However, tribes are well aware of the value of educating state court personnel on the law and cooperating when possible to ensure its enforcement. Unfortunately, parts of ICWA are vague and lack definitions.⁵⁸ Sections of ICWA can conflict with state law, creating

52. 25 U.S.C. § 1912(d) (2006).

53. BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 175-76, 260-68 (2010); *see, e.g., In re S.W.*, 727 N.W.2d 144, 149-50 (Minn. Ct. App. 2007); *Winston J. v. Dep’t of Health and Soc. Servs.*, 134 P.3d 343, 346 (Alaska 2006); *In re A.N.*, 106 P.3d 556, 560-61 (Mont. 2005).

54. *In re J.L.*, 770 N.W.2d 853, 862-64 (Mich. 2009); *State ex rel. C.D.*, 200 P.3d 194, 198, 203-04 (Utah Ct. App. 2008); *People ex rel. D.G.*, 679 N.W.2d 497, 502 (S.D. 2004); *In re Michael G.*, 74 Cal. Rptr. 2d 642, 647-48 (Cal. Ct. App. 1998); *In re Kreft*, 384 N.W.2d 843, 848 (Mich. Ct. App. 1986).

55. 25 U.S.C. § 1912 (e), (f) (2006).

56. 25 U.S.C. § 1915 (2006).

57. *See infra* Part III.B.3.

58. *See* 25 U.S.C. § 1911(b) (2006) (specifying transfer to tribal court for foster care placement or termination proceedings, but not specifying for preadoptive or adoptive placements); 25 U.S.C. § 1912(d) (2006) (“Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful” is the extent of the active effort definition.); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56

disagreement even among those who agree with the Act's purpose. ICWA, therefore, is one area of the law where tribal-state cooperation and tribal-state agreements can be helpful in avoiding protracted court battles that only harm the children involved.

ICWA education is an ongoing project.⁵⁹ Perhaps because of the high turnover of social workers,⁶⁰ the lack of training in the area,⁶¹ or the general belief that things are getting better for tribes,⁶² Indian children in the system are too often lost to the tribe, partly due to the cycles of education on ICWA. Because ICWA is a federal statute enforced by the states, tribes are in a particularly vulnerable position when information about their children is dependent on the actions of state social workers. Maintaining consistent, high quality, ICWA education for state workers seems to be a particularly thorny issue. Maintaining forward movement on ICWA issues with states is a nationwide issue for tribes. As of yet, it remains difficult to avoid the ebbing of interest on the part of the state, either due to fiscal issues or staff changes.

One answer to this problem is to identify individuals in the state court systems with deep and personal commitments to the cause of children in general, and to Indian children in particular, to push the state's engagement with tribes and ICWA. For example, Michigan has one circuit court judge who has taken on ICWA issues as his particular focus. Rather than waiting for education or for a change in state law, his court has identified him as the point judge for all ICWA cases in his jurisdiction.⁶³ The most recent project in Michigan has attempted to bring together people across tribes and the state with similar commitments to maintain the necessary, high-level and on-going education on ICWA and issues facing Indian children.

2. Funding Collaboration: The Court Improvement Program⁶⁴

One of the major issues facing states and tribes interested in collaborating on issues that face the judiciaries is funding the effort. This is especially true in states hit

(1978) (stating only tribes can determine tribal membership); JONES ET AL., *supra* note 45, at 60. Compare 25 U.S.C. § 1912(a) (2006) (stating notice is only required for involuntary proceedings involving Indian children), with 25 U.S.C. § 1911(c) (2006) (stating tribes have a right of intervention in foster care placement or termination of parental rights regardless of voluntariness).

59. *Tribal Courts and Families*, *supra* note 20. Judge Petoskey states: "Education is ongoing, it's not a one time kind of thing. We as Indian people carry the burden of making sure that others understand who we are, what we are about, so that we can alleviate any fears or any misconceptions that they might have about what a cooperative relationship looks like." *Id.*

60. Class Action Complaint at 2-4, Dwayne B. v. Granholm, No. 2:06-cv-13548 (E.D. Mich Aug. 8, 2006) [hereinafter Class Action Complaint] (detailing the devastating results of Gov. Engler's early retirement programs on the DHS labor force).

61. *Id.* at 2-5 (detailing the level of turnover of DHS social workers and lack of general education because of the turnover).

62. Often based on the false understanding that gaming revenues make all tribes "rich," see STEPHEN CORNELL ET AL., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 31 (1998).

63. Washtenaw County Trial Court Local Administrative Order 2010-J (June 7, 2010), available at <http://turtletalk.files.wordpress.com/2010/08/2007-06j-case-assignments-lao-2007.pdf> (assigning all ICWA related cases to Judge Timothy Connors).

64. *Tribal Courts and Families*, *supra* note 20. Judge Thorne: "Historically tribal child welfare systems have not had access to the federal support systems available to the states. The biggest has been IV-E, which is a five billion dollar pot of money. Congress just recently authorized tribes to have access to that. There is also a separate fund that the federal government makes available to every state to improve their juvenile court system. It's called Court Improvement funds, and tribes don't have access to those." *Id.*

hardest by the Great Recession, including Michigan.⁶⁵ While earlier efforts between tribal and state judiciaries were funded by grants from national organizations, the Michigan State Court Administrative Office decided to use money from the Court Improvement Program (“CIP”) funding.⁶⁶ This funding comes from a federal grant program, established in 1993 as part of the Omnibus Budget Reconciliation Act.⁶⁷ The money is to be used to “conduct assessments of . . . [state] foster care and adoption laws and judicial processes, and to develop and implement a plan for system improvement;” to implement “improvements the highest courts deem necessary to provide for the safety, well-being, and permanence of children in foster care;” and to “implement a corrective action plan, as necessary.”⁶⁸

The Michigan CIP grants are broken down into three categories: training grants, data collection and analysis grants, and the main grant.⁶⁹ The training grant includes judicial education and training. The data collection grant is for data collection about family courts, foster care, and adoption issues in all of the Michigan courts.⁷⁰ The main grant funds all of SCAO’s major projects on child welfare including everything related to tribal-state relations done in the past few years.⁷¹ The CIP program in Michigan is run through a Statewide Task Force of child welfare professionals. Until recently, there were four permanent committees that made up the statewide task force before SCAO added the Tribal Court Relations committee. The original four were the Policy, Quality Representation, Quality and Depth of Hearing, and Child and Family Services Review committees.⁷²

Using the CIP funding, SCAO was able to pay for mileage, lodging, and food for the representatives of the twelve federally recognized tribes in Michigan to attend meetings with state stakeholders to discuss ICWA education and to draft an ICWA Court Resource Guide.⁷³ Because of SCAO’s role and mandate, this latest wave of education has been necessarily limited to what the Supreme Court and SCAO could do without the participation of the Legislature.

65. Karen Bouffard, *Report: It’s Taking Jobless in Mich. Longer to Find Work*, DETROIT NEWS, August 31, 2010; Lindsay VanHulle, *Kids Count: Economy Takes Toll on Michigan’s Children*, LANSING ST. J., Aug. 17, 2011; see also Kevin Grasha, *Suggested Cuts Target 49 Judgeships in Michigan*, LANSING ST. J., Aug. 18, 2011.

66. Brenda Austin, *Proposed State Legislation Will Bring Clarity to the Indian Child Welfare Act if Passed* WIN AWENEN NISITOTUNG, Sept. 3, 2010, at 9.

67. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312; *Court Improvement Program*, U.S. DEPARTMENT OF HEALTH AND HUM. SERVICES, available at http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/ct_imprv.htm (last updated April 21, 2010).

68. *Court Improvement Program*, supra note 67.

69. *Michigan Court Improvement Program*, MICHIGAN COURTS, <http://courts.michigan.gov/scao/services/cip/cip.htm> (last updated Feb. 24, 2012).

70. *Id.*

71. *Id.*

72. *Id.*

73. ICWA SPECIAL COMMITTEE STATE COURT ADMIN. OFFICE, INDIAN CHILD WELFARE ACT OF 1978: A COURT RESOURCE GUIDE (2011), available at <http://www.courts.michigan.gov/scao/resources/publications/manuals/cws/ICWActResourceGuide.pdf> [hereinafter COURT RESOURCE GUIDE].

3. ICWA Court Resource Guide and Court Rule

Though ICWA is a federal law and the states are required to follow it, state judges often render inconsistent decisions. These decisions may not be wrong, and may be more in the spirit of ICWA than not, but they are still decisions at the hands of individual judges rather than in statute. For example, in some courts, intervention of the tribe in the court is done with virtually no fanfare.⁷⁴ In others, intervention may be denied for timeliness or other reasons.⁷⁵ In another example, courts vary when determining what triggers the notice requirement.⁷⁶

Different groups have written handbooks and guides to survey the field and provide guidance to state courts.⁷⁷ The attraction of a state specific handbook is the focus on how and where the Act intersects or conflicts with existing state law and case law. Michigan's Court Resource Guide, or ICWA Handbook, arose out of the realization that there was a need for ICWA education for state court personnel.⁷⁸ Specifically, conversations between SCAO and the Department of Human Services revealed issues with how Michigan state courts apply ICWA.⁷⁹ The Supreme Court in turn created the special committee to draft the court resource guide.⁸⁰ Because of the foresight of the person running the project, the guide was not drafted simply by a few people in the State Court Administrator's Office. Rather, SCAO invited representatives from all twelve of the federally recognized tribes in Michigan, the Departments of Human Services and Community Health, the Michigan State Police, and a representative from an urban Indian organization to participate in the drafting.⁸¹ This committee met four times between September 2008 and May 2009 to draft what became the Indian Child Welfare Act of 1978 Court Resource Guide for Michigan courts.⁸²

The Resource Guide is particularly useful in matching Michigan state laws with applicable ICWA provisions. For example, ICWA applies to "child custody proceedings," that include "foster care placement," "termination of parental rights," and "preadoptive placement."⁸³ The ICWA definition of foster care placement is broad, including any "temporary placement in a foster home or institution or home of a guardian or conservator" where the parents cannot have the "child returned upon

74. The author experienced this in one court where the presenting attorney for the Pokagon Band of Pottawatomie Indians treats her intervention in state court as a right of intervention rather than as a request.

75. *In re A.B.*, 707 N.W.2d 75, 77-78 (N.D. 2005) (denying an appeal of the district court's grant of intervention as a non-final order); *In re A.K.H.*, 502 N.W.2d 790, 792, 795-96 (Minn. Ct. App. 1993) (reversing district court's denial of intervention); *In re Sengstock*, 477 N.W.2d 310, 313 (Wis. Ct. App. 1991) (finding that ICWA does not apply, but affirming trial court's order granting the tribe the right to intervene).

76. *See Dwayne v. Superior Court*, 126 Cal. Rptr. 2d 639, 646-49 (Cal. Ct. App. 2002); *In re N.E.G.P.*, 626 N.W.2d 921, 923-24 (Mich. Ct. App. 2001); *In re I.E.M.*, 592 N.W.2d 751, 756-57 (Mich. Ct. App. 1999); *In re A.M.*, 455 N.W.2d 572, 573 (Neb. 1990).

77. *See JONES ET AL.*, *supra* note 45; NATIVE AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT (2007).

78. COURT RESOURCE GUIDE, *supra* note 73, at 1.

79. *Id.*

80. *Id.*

81. *Id.* at i-ii.

82. *Id.* at 1.

83. 25 U.S.C. § 1903 (2006).

demand, but where parental rights have not been terminated.”⁸⁴ The Resource Guide then goes to list the specific Michigan proceedings this definition would include.⁸⁵

Another area of ICWA that is a source of conflict for states is the requirement of “active efforts” to “prevent the breakup of the Indian family.”⁸⁶ Active efforts are highly litigated, and at the time of the drafting of the Court Resource Guide, the Michigan Supreme Court was faced with an active efforts case.⁸⁷ This made for interesting conversations, as parties who drafted amicus briefs for the parent were in the same meetings as representatives of DHS, and representatives of the Sault Ste. Marie tribe, all of whom had argued for different interpretations of active efforts. The Court Resource Guide cited to three different state appellate courts that attempted to define active efforts.⁸⁸ The Guide also cited to a Michigan Court of Appeals case that listed all of the efforts in a specific case and found they met the active efforts standard.⁸⁹ The Resource Guide also offered an interpretation of the same contentious active efforts case that was decided after the meetings concluded but before the Resource Guide was published.⁹⁰

As a part of the Resource Guide drafting process, SCAO created a subcommittee to draft new court rules that would rescind the one Michigan court rule on ICWA,⁹¹ and instead insert ICWA appropriate language into all of the applicable court rules. The Supreme Court adopted those changes in January, 2010.⁹²

III. SHIFTING FROM COURT COOPERATION TO LEGISLATION

As the committee was working on the handbook project, SCAO decided to add the Tribal Court Relations Committee as a permanent CIP committee. The work of that committee was to ensure continued contact between the state and tribal judiciaries. Both the larger Resource Guide drafting group and the smaller Tribal Court Relations Committee agreed that drafting a Michigan version of ICWA would be beneficial.

*A. Michigan Indian Family Preservation Act (MIFPA)*⁹³

The creation of a state ICWA at first appears duplicative, but given the numbers of ways different courts have found to interpret the federal law,⁹⁴ some states have found it

84. 25 U.S.C. § 1903(1)(i) (2006).

85. COURT RESOURCE GUIDE, *supra* note 73, at 4 (listing MICH. COMP. LAWS §§ 700.1101-8102 (2005), MICH. COMP. LAWS §§ 710.21-70 (2005), MICH. COMP. LAWS §§ 712A1-32 (2005), and MICH. COMP. LAWS §§ 722.95-906 (2005), as incorporating definitions from ICWA).

86. 25 U.S.C. § 1912(d) (2006).

87. *In re J.L.*, 770 N.W.2d 853, 856 (Mich. 2009). See ATWOOD, *supra* note 53, at 263-68 for an extended discussion of this case.

88. COURT RESOURCE GUIDE, *supra* note 73, at 14.

89. *Id.* at 15; *In re Kreft*, 384 N.W.2d 843, 848-49 (Mich. Ct. App. 1986).

90. COURT RESOURCE GUIDE, *supra* note 73, at 15-16.

91. MICH. CT. R. 3.980 (rescinded May 1, 2010).

92. COURT RESOURCE GUIDE, *supra* note 73, at 1.

93. Michigan Indian Family Preservation Act Draft (on file with author). Because of the ongoing nature of this work, information included in this section is from conversations with other members of the working committee. At this time, the ultimate outcome of the potential bill is unknown.

94. See Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 420-21 (1998).

useful to reinforce ICWA as a state law.⁹⁵ This tactic, creating a state ICWA, initially has some obvious benefits. The most pragmatic is fixing some of the ambiguities in the federal ICWA, and bringing some of it in line with individual state laws. Not surprisingly, however, changes to any portion of ICWA are extraordinarily difficult. The reasons for the ambiguities and holes in ICWA become clear when a large group of stakeholders attempts to shift any one of them. Parents' attorneys have issues with definitions the tribes want. DHS officials become concerned about changes the probate judges suggest. Tribes are suspicious of a definition from DHS. Of the many issues the MIFPA drafting committee struggled with, three in particular stood out: domicile, definition of an Indian child, and guardianship provisions.⁹⁶

While the only Supreme Court case on ICWA focused on the definition of domicile,⁹⁷ the committee made some attempts to provide a definition of domicile that was not entirely based on the location of the mother, which is especially important for children born out of wedlock. If a child born out of wedlock is living with her grandmother or father, it is possible she may still retain the domicile of her mother.⁹⁸ The smaller committee wrestled with a less gender-based definition of domicile. While appearing to be a seemingly minor definitional change, domicile is vital in ICWA because of the law's jurisdictional provisions, where tribes have exclusive jurisdiction over children domiciled on tribal land.⁹⁹ The committee wanted to ensure that if a child lived with her father or an Indian custodian on tribal land, the tribe would retain jurisdiction even if the mother lived off the reservation. However, some committee members saw ways this definition could, instead, unintentionally divest the tribe of jurisdiction. Any definition of domicile became so problematic that the definition was removed from the draft that came out of the SCAO.

Members of the committee also saw an opportunity to change the definition of Indian child to fit what was happening in courts and to expand the number of Indian children protected by ICWA. However, the committee was also aware of the recent Iowa Supreme Court decision finding that the Iowa ICWA's broad definition of Indian child was unconstitutional.¹⁰⁰ Because of Michigan's border with Canada, there was discussion of including First Nation's children. However, because of the concern of constitutionality, the final definition mirrors ICWA but eliminates the need for the parent of the child to be an enrolled member of a tribe. This ought to meet constitutional concerns because it maintains the requirement that the *child* be a member, or eligible for membership, in a federally recognized tribe.¹⁰¹ The committee's decision on this was

95. See *supra* note 91.

96. This section is based on the author's notes and recollections of the meetings she attended as a member of both the Tribal Court Relations Committee and the larger drafting committee. Other committee members may find different provisions more contentious.

97. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (holding that a child born out of wedlock takes the domicile of his or her mother).

98. *Id.*

99. 25 U.S.C. § 1911(a) (2006).

100. *In re A.W.*, 741 N.W.2d 793, 811-13 (Iowa 2007). See *infra* Part IV for a discussion of this case.

101. Michigan Indian Family Preservation Act (on file with author). This draft is not currently in front of the legislature, and will likely be changed prior to either the publication of this article or enactment into law. It is cited here for the purpose of demonstrating how a large group came to various compromises when faced with the difficult goal of putting ICWA into state law.

based on at least two concerns. The first was that the new definition no longer required the biological parent, who may herself have been adopted out, to be enrolled to protect a child eligible for enrollment. The other concern was that some of the tribes in Michigan have closed their rolls to newly enrolled members over the age of eighteen.¹⁰² It may, in fact, be impossible for a biological parent to be enrolled, even if the child is eligible. These examples seemed to be situations where ICWA ought to apply, regardless of the parent's status.¹⁰³

Finally, issues relating to guardianships took up the most amount of meeting time in both the drafting of the ICWA handbook and the MIFPA. In Michigan, guardianships are governed by state probate law, the Estates and Protected Individuals Code, or "EPIC."¹⁰⁴ In 2008, the Michigan Appellate Court handed down an important case on the application of ICWA to guardianships in Michigan.¹⁰⁵ First, the court held that ICWA applies to guardianships under the law's own definition of foster care placement.¹⁰⁶ Because the "trial court named the Scotts temporary guardians of Z.E., ordered that Z.E. shall not be removed from the custody of the Scotts absent the consent and order of the court, and did not terminate the parental rights of Empson," the proceeding was a voluntary foster care placement under ICWA..¹⁰⁷ When the biological mother moved to have the guardianship revoked, the guardians filed a child custody proceeding. Under Michigan law, the effect of this move was to put the guardianship proceedings on automatic hold.¹⁰⁸ Therefore, the hearing on the guardianship revocation by the mother could not be held until the custody hearing was over and the lower court erroneously found that ICWA did not apply to either.¹⁰⁹ The appellate court held that ICWA preempted the stay of guardianship proceedings.¹¹⁰ Reconciling this strongly pro-ICWA result with the logistical details of applying ICWA to all guardianships was the source of much discussion among committee members.

This area is a perfect example of the type of tensions that arise from working on a state draft of ICWA. The parents' attorneys, understandably, wanted the case law in the statute exactly, with no exceptions. The probate clerks brought up numerous logistical concerns, including how an individual filing for guardianship bears the burden of noticing tribes, providing active efforts for the reunification of the Indian family, or finding an expert witness to testify in guardianship hearings. Finally, the probate clerks were especially concerned with the example of a child in a guardianship for many years being returned immediately to a parent the probate court thought might be unfit. This

102. See *Tribal Enrollment*, SAULT TRIBE OF CHIPPEWA INDIANS, <http://www.saulttribe.com/membership-services/tribal-enrollment> (last visited Mar. 2, 2012) (stating membership rolls have been closed since 1998, though the "minor children of full bonifide members are still being enrolled").

103. Since this definition was included in a potential state law, the discussion here does not address the way tribes continue to wrestle with membership definitions to keep children under ICWA, nor the way the federal courts have treated those attempts, see *Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011).

104. MICH. COMP. LAWS §§700.5201-5219 (2005).

105. *Empson-Laviolette v. Crago*, 760 N.W.2d 793 (Mich. Ct. App. 2008).

106. *Id.* at 799.

107. *Id.*; 25 U.S.C. § 1903(1)(i) (2006).

108. *Empson-Laviolette*, 760 N.W.2d at 801; MICH. COMP. LAWS § 722.26b(4) (2005).

109. *Empson-Laviolette*, 760 N.W.2d. at 797-98.

110. *Id.* at 802.

situation ought to be, as it was pointed out by parents' attorneys and tribes, sent to DHS to open a neglect case. However, some participants claimed it was not entirely clear if the probate court could order a DHS investigation. Each party involved in the discussions firmly believed it was advocating for the interests of the child while upholding its interpretation of ICWA. Notably, there was no one arguing against ICWA; rather, the arguments focused on how to interpret and then enforce ICWA in the unique area of Michigan guardianships.¹¹¹ Ultimately voluntary guardianships were included in the voluntary proceedings section of MIFPA, and included the right to revoke consent at any time in order to have the child returned to the parent, following both Michigan case law and a strict interpretation of foster care proceedings under ICWA.¹¹² Other types of guardianships fall under the involuntary proceedings section.¹¹³

The completion of the draft of MIFPA, which, at thirteen pages, is surprisingly short and concise, represented a victory in the area of tribal-state court relations. The project forced members of the committee to discuss the difficult areas in ICWA and to recognize the different interests represented in these cases. The project led to increased education across the board, established a permanent sub-committee at the SCAO, and brought representatives of the tribes and state together in one room multiple times a year. Regardless of the ultimate fate of the draft law, the act of drafting was an important and vital reengagement of the tribal and state judiciaries.

B. Hurdles and Differing Strategies

However, passing a state law that is not on the top of the legislature or governor's agenda can be notoriously difficult. Passing a state ICWA law in Michigan's current political and economic climate could prove nearly impossible. In addition, Michigan's draconian term limits mean that educating state legislators has to be done in a short time frame; attempts to build momentum and coalitions in the legislature is far more frustrating, given the six to eight year time limit on serving.¹¹⁴

Timing the law's introduction with upcoming tribal gaming contracts requires a high level of political sophistication. In the case of MIFPA, the SCAO is not allowed to lobby the legislature or introduce legislation. This means that the committees convened by SCAO can no longer continue to work with SCAO's backing on the bill. Committee members instead have to rely on each other and other organizational structures to maintain momentum. In Michigan, responsibility for moving the bill forward shifted to Voices for Michigan's Children ("Michigan's Children"), an organization that lobbies on behalf of children's rights and legislation.¹¹⁵

Michigan's Children is an organization that regularly works with the legislature, and as such is an appropriate group to move a potential law through the legislature. However, it unfortunately does not have established relationships with the tribes. Thus,

111. The author was involved in these discussions and found these were difficult conversations, particularly in the case of a long-term guardianship established with a member of the child's Indian family, for example.

112. Michigan Indian Family Preservation Act, § 712B.11 (on file with author).

113. *Id.* § 712B.13 (on file with author).

114. MICH. CONST. art. 4, § 54 (state representatives can serve a total of six years, senators eight).

115. *About Us*, VOICES FOR MICHIGAN'S CHILDREN, <http://www.michiganschildren.org/About-Us-2/> (last visited Mar. 2, 2012).

the shift will require capacity building by Michigan's Children to insure tribal participation and support in meetings, working groups, and lobbying efforts to individual members of the legislature.

1. Political Organization

In any legislative effort, receiving the support of all of the parties the law will affect is important. A state ICWA law is particularly sensitive for various reasons, including the possibility of suit.¹¹⁶ While most of the tribes in Michigan agreed to go forward with drafting a state version of ICWA, moving forward with actual legislation is another matter. Currently one tribe in the State has passed a resolution supporting MIFPA.¹¹⁷ Whether the other tribes will follow suit is still up for question. Without the support of the twelve federally recognized tribes in Michigan, it is unclear whether the law would — or should — pass the legislature.

Other necessary parties to the legislation include DHS, the State Bar, and various judicial organizations, especially the Probate Judges Association. Given the current economic climate in Michigan, if any of the state groups argue that the law is not revenue neutral, moving through the legislature could become difficult. Finally, while the SCAO ensured all of the parties were a part of the drafting process, moving from drafting to passing legislation is a difficult transition. Moving from the organization of the SCAO office to Michigan's Children requires more work on the part of the committee participants. While Michigan's Children is a necessary and welcome participant in the process, ensuring all engaged parties are on the same page and ensuring SCAO transferred all of the necessary information takes time and communication among committee members. Maintaining coalitions through this process is difficult and requires open communication and cooperation.

2. Separating ICWA from other Indian law issues

As Justice Cavanagh pointed out in his article, facing the legislature with one tribal issue can sometimes pull in *all* of the issues at stake between the state and the tribes.¹¹⁸ This was the main reason he gave for creating a court rule to handle comity between the tribes and the state, rather than going through the legislature. His concerns are not unfounded. In particular, tribal gaming in Michigan has been an especially sensitive issue of late.¹¹⁹ In addition, the 1993 Tribal-State Gaming Compacts are coming up for renewal in 2013,¹²⁰ which means many of the tribes in Michigan will have to be

116. *See infra* Part IV.

117. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, DECLARATION 082111-01 (Aug. 21, 2011).

118. Cavanagh, *supra* note 13, at 11-12 ("The fact of the matter, as we all know, is that it is very difficult for a legislative body to explore any issue relating to American Indian law, without someone wanting to take a detour into such areas as fishing and gaming.").

119. *See* Reply Brief, Michigan v. Bay Mills Indian Cmty., No.11-1413 (6th Cir. Aug. 17, 2011), *available at* <http://turtletalk.wordpress.com/tag/state-of-michigan-v-bay-mills-indian-community/>; www.turtletalk.wordpress.com/?s=lansing+casino (a collection of the articles and commentary about the Sault Tribe's attempt to open a casino in Lansing, the state capitol).

120. *See* A Compact Between the Bay Mills Indian Community and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/BMIC_Compact_70611_7.pdf; A Compact Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan (Aug. 20, 1993), *available at*

negotiating with the governor and legislature. The Michigan legislature has recently demonstrated its willingness to complicate matters as it relates to gaming,¹²¹ and has been hostile to existing laws protecting Native education scholarships.¹²²

Any proposal to change the child welfare laws to include a state version of ICWA will necessarily bump up against other hot buttons in the state. To further complicate matters, Michigan is one of the few states that passed the anti-affirmative action amendment to the state constitution.¹²³ While that amendment does not affect tribes or tribal members, and the Sixth Circuit recently struck it down,¹²⁴ the mentality attached to the amendment remains. Questions about a need for a so-called “special” law for Indian children are inevitable.¹²⁵ Addressing these questions will be the difficult job of lobbyists, tribes, and their judicial allies.

3. Dwane B. v. Snyder

Another problem facing the state is the ongoing class action lawsuit involving the Department of Human Services.¹²⁶ While the lawsuit does not directly implicate ICWA, there are considerable tensions between the federal law and the Modified Settlement Agreement recently achieved between the parties involved. Whether a state ICWA law would focus some attention on the presence of Indian children in the state foster care system is not entirely clear. The hope, however, is that the law would force the lawyers involved to at least consider Indian children in a way they have not yet done in this case.

In 2006, Children’s Rights, a national watchdog organization¹²⁷ filed a class action suit against Michigan’s Department of Human Services. Alleging the Department was violating substantive and procedural due process rights, thus depriving the children of liberty interests, privacy interests, and “associational rights conferred on them by the

http://www.michigan.gov/documents/GTB_Compact_70613_7.pdf; A Compact Between the Hannahville Indian Community and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/HIC_Compact_70614_7.pdf; A Compact Between the Keweenaw Bay Indian Community and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/KBIC_Compact_70615_7.pdf; A Compact Between the Lac Vieux Desert Band of Lake Superior Chippewa Indians and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/LVD_Compact_70616_7.pdf; A Compact Between the Saginaw Chippewa Indian Tribe of Michigan and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/SCIT_Compact_70617_7.pdf; A Compact Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan (Aug. 20, 1993), *available at* http://www.michigan.gov/documents/SSM_Compact_70618_7.pdf.

121. See Matthew L.M. Fletcher, *Commentary: Now is the Time for Michigan Tribes to Renew Their Gaming Compacts*, TURTLE TALK (Feb. 22, 2009, 7:34 PM), <http://turtletalk.wordpress.com/2009/02/22/commentary-now-is-the-time-for-michigan-tribes-to-renew-their-gaming-compacts/>; Kate Fort, *Little River Band’s Fruitport Casino Compact Not Discharged from Committee*, TURTLE TALK (Aug. 26, 2010, 9:40 AM), <http://turtletalk.wordpress.com/2010/08/26/little-river-bands-fruitport-casino-compact-not-discharged-from-committee/>.

122. See, e.g., Darin Estep, *Michigan Lawmaker Wants To End Tribal Tuition Waiver*, GRAND RAPIDS PRESS (June 2, 2008, 5:43 AM), http://blog.mlive.com/grpress/2008/06/lawmaker_wants_to_end_tribual.html.

123. MICH. CONST. art I, §26.

124. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 652 F.3d 607, 631 (6th Cir. 2011), *reh’g en banc granted, opinion vacated* (Sept. 9, 2011).

125. See Peter d’Errico, *‘Special Rights’ Is a Loaded Term*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 29, 2011), <http://indiancountrytodaymedianetwork.com/ict-sbc/special-rights-is-a-loaded-term/>.

126. Class Action Complaint, *supra* note 60.

127. *About Us*, CHILD. RTS., <http://www.childrensrights.org/about/mission-and-methods/> (last visited Mar. 3, 2012).

First, Ninth, and Fourteenth Amendments to the United States Constitution,”¹²⁸ in violation of the Adoption Assistance and Child Welfare Act of 1980 and in breach of federal contractual obligations, Children’s Rights successfully achieved a settlement agreement with DHS and the State to address the large and real problems in Michigan’s foster care system.¹²⁹

No consideration in either the complaint or the modified settlement agreement recognized the problems Indian children face in the state system. The modified settlement agreement ought to benefit all children in foster care, but there is no mention of specific provisions that might either help or hurt an Indian child in the system. However, ICWA is not mentioned at all in either document. This is a problematic omission. The areas of concern addressed in the Modified Settlement Agreement can be read in contradiction to ICWA, or could potentially force a DHS worker to choose whether to follow the agreement or federal law. The principles of the agreement are in line with ICWA’s ultimate goals,¹³⁰ but how they are interpreted in a conflict between ICWA and the agreement is still unclear.

For example, one of the major issues addressed in the settlement agreement is permanency.¹³¹ Permanency is a particularly difficult concept under ICWA.¹³² While all children do well with consistency, for Indian children it can sometimes take a while to find an appropriate adoptive placement under ICWA. In addition, not all tribes believe the termination of parental rights is always the right way to handle a permanency situation.¹³³ Strict time limits on the time children are kept in foster care, like those in the Adoption and Safe Families Act,¹³⁴ intend to protect children from spending long periods of time in foster care. These time limits, however, create false deadlines that can interfere with the licensing of Indian family foster homes, addressing parental addiction issues,¹³⁵ and reunifying a family.

In addition, while DHS was allegedly bouncing children around foster care homes, institutions, and even jail, rather than finding them a permanent home,¹³⁶ most tribes were concerned about the inability or unwillingness of DHS to move an Indian child from an improper placement to an ICWA compliant placement in the name of permanency. This possible conflict is apparent in the Modified Settlement Agreement principles, where the paragraph on placement starts with “[t]he ideal place for children is

128. Class Action Complaint, *supra* note 60, at 58-63.

129. Modified Settlement Agreement and Consent Order, Dwayne B. v. Snyder, No. 2:06-cv-13548 (E.D. Mich. 2011), available at http://www.michigan.gov/documents/dhs/2011ConsentDecree_358360_7.pdf.

130. *Id.* at 3 (“The ideal place for children is in their own home with their own family. . . . DHS must reunify children with their siblings and families as soon as is safely possible. . . . When DHS intervenes on behalf of children it must strive to leave children and families better off than if there had been no intervention.”).

131. *Id.* at 3, 5, 21-24.

132. See, e.g., B.J. Jones, *Differing Concepts of “Permanency”: The Adoption and Safe Families Act and the Indian Child Welfare Act*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* AT 30, 127-47 (Matthew L.M. Fletcher et al. eds., 2009); ATWOOD, *supra* note 53, at 251-81.

133. ATWOOD, *supra* note 53, at 144-51.

134. Adoption and Safe Families Act of 1997, P.L. 105-89, § 103, 111 Stat. 2115.

135. See JONES ET AL., *supra* note 45, at 3 (stating that while alcoholism is a pernicious issue among Native families, Native children are also removed for this at a higher rate than other children); Class Action Complaint, *supra* note 60, at 43 (stating that substance abuse was one of the three most challenging parental concerns).

136. Class Action Complaint, *supra* note 60, at 38.

in their own home with their own family,” but ends with “DHS must strive to make the first placement the best and only placement.”¹³⁷ For various reasons, with Indian children, that first placement may *not* be the ideal placement, nor be ICWA compliant.¹³⁸ In order to find an Indian family placement or an extended family placement as mandated by ICWA,¹³⁹ the State usually must contact the tribe. In an emergency placement situation, the State rarely looks to ICWA compliance first. Adhering to the “first placement equals best placement” principle can become a stumbling block when faced with ICWA’s placement preferences and the best interest of the Indian child.

A similar tension exists in relative placements. On the one hand, the consent decree could be helpful for Indian foster placements, particularly relative placements. The modified settlement agreement addresses the issue of not paying a family to take in a child related to them.¹⁴⁰ Because family placements cost DHS virtually no money, DHS was relying too heavily on inappropriate family placements.¹⁴¹ However, in ICWA cases, tribes often try to place children with extended family members to comply with ICWA and keep the children within their tribal culture. Paying these families for a fraction of the costs it takes to raise a child would be hugely beneficial.

The reason for paying family members, however, and requiring licensing of family foster homes, was the complaint that DHS was using unfit the family foster homes.¹⁴² Under the Modified Settlement Agreement, a provision that governs “[p]lacement with a [f]it and [w]illing [r]elative” could cause conflict with ICWA placements.¹⁴³ Specifically, the provision states that DHS “shall not assign a permanency goal of placement with a fit and willing relative to a child for whom it has not made adoption efforts unless” DHS complies with a list of requirements, including approval of the permanency goal by the County Child Welfare or County Director.¹⁴⁴ This appears to mean that, unless the relative placement is done with adoption as the ultimate goal, placing a child with a relative for an extended period of time creates an additional burden on the DHS worker. The provision could also limit temporary relative placements. While the provision provides reasons for why a child might be placed with a relative without an adoption, the presumption is against it, and as such creates an ICWA conflict.¹⁴⁵

Finally, the Modified Settlement Agreement has an entire provision on “Placement

137. Modified Settlement Agreement and Consent Order, *supra* note 129, at 3.

138. COURT RESOURCE GUIDE, *supra* note 73, at 30.

139. 25 U.S.C. § 1915 (2006).

140. Modified Settlement Agreement and Consent Order, *supra* note 129, at 39.

141. Class Action Complaint, *supra* note 60, at 36.

142. *Id.*

143. Modified Settlement Agreement and Consent Order, *supra* note 129, at 22-23.

144. *Id.* The requirements include: “a. An appropriate relative has been identified and has cleared all background checks required for placement of a child in the home; b. The relative is willing to assume long-term responsibility for the child but has legitimate reasons for not adopting the child or pursuing permanent legal guardianship c. It is in the child’s best interest to remain in the home of the relative rather than be considered for adoption by another person; and d. The permanency goal receives the documented approval of the following: i. In a Designated County, by the county Child Welfare Director; ii. In any other county, by the County Director.” *Id.*

145. *Compare id.*, with 25 U.S.C. § 1915 (placement provisions which make no mention of state licensing, for example).

Standards and Limitations.”¹⁴⁶ Nowhere in that portion of the agreement is there any nod or reference to ICWA. The standards are not parallel to ICWA’s placement preferences, obviously, given those placements are specific to Indian children. The standards do require placements “in accordance with their individual needs, taking into account a child’s need to be placed as close to home and community as possible”¹⁴⁷ While there has been no discussion in the courts as to ICWA’s supremacy over the Modified Settlement Agreement, the people most concerned with compliance are the social workers and employees at DHS who are bound by the agreement. By not making any exceptions or references to ICWA or Indian children, there is a fear that the Agreement may make ICWA compliance at the social worker level more difficult. Whether the existence of a state ICWA would have made an impression on the drafters of the agreement is far from certain, but it does seem possible that conflicts between the settlement agreement and a state law would have been flagged.

IV. STATE ICWA LAWS AND THE JUDICIARY

Assuming Michigan passes a version of the MIFPA, litigation stemming from the law is anticipated. The result of appellate litigation based on state versions of ICWA in other states is not entirely positive. Ironically, while the motivation for the law is to clarify the federal law and encourage state court compliance,¹⁴⁸ based on the experience of other states, a state ICWA law may unfortunately lead to litigation. The experience of other states provides a roadmap, however, of future work for tribal-state court collaboration to tackle.

A. California

Most famously, perhaps, has been California’s attempt to root out the pernicious, judicially created, existing Indian family exception (“EIF”).¹⁴⁹ The existing Indian family exception “precludes application of [the] ICWA when neither the child nor the child’s parents have maintained a significant social, cultural, or political relationship with his or her tribe.”¹⁵⁰ The exception undermines the federal law, and provides state court judges with an excuse not to apply the law.

California’s state appellate courts remain split on EIF, and its courts have provided some of the most egregious justifications for the exception, including the creation of Constitutional rights that have yet to be recognized by either Congress or the Supreme Court.¹⁵¹ After one case found ICWA unconstitutional without the application of the EIF,¹⁵² the California legislature passed explicit legislation directing the courts not to apply the EIF.¹⁵³ Section 360.6 of the California Welfare and Institution Code sought to

146. Modified Settlement Agreement and Consent Order, *supra* note 129, at 42.

147. *Id.*

148. Austin, *supra* note 66.

149. See ATWOOD, *supra* note 53, at 204-17.

150. *Id.* at 204.

151. See JONES ET AL., *supra* note 45, at 15.

152. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

153. Daniel Albanil Adlong, Note, *The Terminator Terminates Terminators: Governor Schwarzenegger’s Signature, S.B. 678, and How California Attempts to Abolish the Existing Indian Family Exception and Why*

eliminate the application of the exception.¹⁵⁴ Regardless, in a particularly egregious case, a California court of appeals overturned the law.¹⁵⁵ The California legislature in turn passed a law enforcing specific placement preferences, considering tribal determination of membership final, and incorporating all of ICWA into state law under Public Law 280.¹⁵⁶ Litigation over the law continues.¹⁵⁷

B. Iowa

Both Iowa and Minnesota have had recent trouble with guardian *ad litem*s, objecting to various portions of ICWA, specifically tribal transfer and intervention requests.¹⁵⁸ So far in Minnesota, no court has determined provisions of its Minnesota Indian Family Preservation Act as unconstitutional, although the Supreme Court is currently considering a case on the transfer provisions in the Minnesota Indian Family Preservation Act, which are nearly identical to ICWA.¹⁵⁹ While at this point it seems unlikely that the Minnesota Supreme Court will find provisions of the MIFPA unconstitutional, the guardian *ad litem*'s brief in the case did attempt to make a Tenth Amendment argument.¹⁶⁰

However, the Iowa Supreme Court has struck down portions of the Iowa ICWA as unconstitutional. Three recent cases deserve discussion. In 2007, the Iowa Supreme Court determined that the Iowa ICWA statute's definition of "Indian child" was too broad.¹⁶¹ The law defined an Indian child as "an unmarried Indian person who is under eighteen years of age or a child who is under eighteen years of age that an Indian tribe identifies as a child of the tribe's community."¹⁶² The guardian *ad litem* and county attorney opposed the tribe's intervention in the case, claiming the tribe was not the Indian child's tribe.¹⁶³ Although the tribe at issue, the Winnebago Tribe of Nebraska,

Other States Should Follow, 7 APPALACHIAN J. L. 109, 126 (2007).

154. *Id.*

155. *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001).

156. 2006 Cal. Legis. Serv. Ch. 838 (West); Adlong, *supra* note 153, at 129-30.

157. See *In re W.B., Jr.*, 230 P.3d 1117 (Cal. 2010) (granting review for petition over whether a tribe would receive notice in a delinquency case). California's ICWA situation is troublesome. See Kathryn E. Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act*, (M.S.U. Coll. of Law, Legal Studies Research Paper Series No. 07-07, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392293.

158. An early stage study of appellate ICWA cases around the country indicates guardian *ad litem*s opposing transfer to tribal court has been on the increase since 2005 (research on file with author); see *In re C.L.*, Nos. A10-1929, A10-1991, 2011 WL 1466481, at *1 (Minn. Ct. App. Apr. 19, 2011); *In re R.S.*, 793 N.W.2d 752, 753 (Minn. Ct. App. 2011), *rev'd*, 805 N.W.2d 44 (Minn. 2011); *In re M.F.*, 225 P.3d 1177, 1179 (Kan. 2010); *In re J.L.*, 779 N.W.2d 481, 484 (Iowa Ct. App. 2009); *In re Louis S.*, 774 N.W.2d 416 (Neb. Ct. App. 2009); *In re R.A.J.*, 769 N.W.2d 297, 300 (Minn. Ct. App. 2009); *In re Lawrence H.*, 743 N.W.2d 91, 94-95 (Neb. Ct. App. 2007); *In re R.M.B.*, 735 N.W.2d 348, 349 (Minn. Ct. App. 2007); *In re T.T.B.*, 724 N.W.2d 300, 301 (Minn. 2006); *Ex parte C.L.J.*, 946 So. 2d 880, 882-83 (Ala. Ct. App. 2006); *In re Enrique P.*, 709 N.W.2d 676, 680 (Neb. Ct. App. 2006); *In re Branden F.*, No. 04-2560, 281 Wis. 2d 274, at * 1 (Wis. Ct. App. March 22, 2005).

159. *In re R.S.*, 805 N.W.2d 44 (Minn. 2011).

160. Brief for Appellant at 17, *In re R.S.*, 805 N.W.2d 44 (Minn. 2011) (No. A10-1390).

161. *In re A.W.*, 741 N.W.2d 793, 796 (Iowa 2007).

162. *Id.* at 799; IOWA CODE ANN. § 232B.3 (West Supp. 2010), *recognized as unconstitutional by In re N.N.E.*, 752 N.W.2d 1, 4 (Iowa 2008), *unconstitutional as applied by In re A.W.*, 741 N.W.2d 793.

163. *In re A.W.*, 741 N.W.2d at 796-97. Interestingly, the Iowa Attorney General argued that the county attorney had no standing to bring the appeal without the approval of the Attorney General. The guardian *ad*

had adopted a resolution specifically addressing the issue of children who are tribal children but not eligible for membership,¹⁶⁴ the Court determined that the Iowa ICWA's more inclusive definition violated the Equal Protection Clause. As such, the definition did not stand up under strict scrutiny because "[t]he Iowa ICWA's failure to maintain that integral link to tribal self government results in an over-inclusive racial classification."¹⁶⁵ While the Court made an interesting point as to the inability of these children to ever be political members of the tribe under the tribe's current constitution, it unfortunately fell back on old arguments familiar to anyone who has read a case based on the existing Indian family exception.¹⁶⁶

In 2008, the Iowa Supreme Court struck down the placement preference provisions in voluntary cases as unconstitutional.¹⁶⁷ In a particularly difficult case, the mother of the child chose to give her child to a family in Arizona.¹⁶⁸ The tribe, the Tyme Maidu Tribe of the Berry Creek Rancheria, was given deficient notice, was not allowed to have a non-lawyer represent them in a hearing, and disallowed to appear telephonically.¹⁶⁹ The Iowa Supreme Court determined that while notice was deficient,¹⁷⁰ the non-lawyer should be able to represent the tribe,¹⁷¹ and that while the trial court did not abuse its discretion in disallowing telephonic appearance, the Supreme Court encourages such appearances,¹⁷² and that therefore, the voluntary placement preferences violated the parent's substantive due process rights.¹⁷³ The Court found that the Iowa ICWA's lack of a "good cause" provision, like the federal ICWA and the explicit statement that parents may not object to placing a child with a family within the placement preferences, violates due process.¹⁷⁴

Finally, perhaps in an attempt to curb the trend of guardian *ad litem* opposing transfer to tribal court,¹⁷⁵ the Iowa ICWA prohibits them to oppose such a transfer.¹⁷⁶ The Iowa Appellate Court in 2009 found that provision unconstitutional as violative of children's due process rights under both the United States and Iowa Constitution.¹⁷⁷ The Iowa ICWA limited those who could object to a transfer to tribal court to the child's

litem, however, was able to bring the appeal, and since the guardian *ad litem* had joined in and adopted the county attorney's arguments, the Court considered the brief of the county attorney as if the guardian *ad litem* had brought the case alone.

164. *Id.* at 799; see WINNEBAGO TRIBE OF NEBRASKA CONST. art. II, § 1(c).

165. *In re A.W.*, 741 N.W.2d at 812.

166. *Id.* at 799 ("There is no evidence on the record tending to prove the children have ever lived on the Winnebago Reservation."). Presumably this decision puts the onus on tribes to determine whether it is worthwhile to broaden membership provisions to protect children under both federal and state ICWA laws.

167. *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008).

168. *Id.* at 4. The role of the adoption attorney, first as the attorney who helped the mother pick the adoptive parents, then as the adoption attorney for the adoptive parents, and finally as the person who was appointed as the child's legal custodian, brings up questions of who the attorney's official client was, and how she could best represent the interests of three potentially opposing parties [biological mother, adoptive parents, child].

169. *Id.* at 11-12.

170. *Id.* at 10-12.

171. *Id.* at 12.

172. *Id.* at 13.

173. *Id.* at 8-9.

174. *Id.*

175. See *supra* note 158.

176. *In re J.L.*, 779 N.W.2d 481, 487 (Iowa Ct. App. 2009).

177. *Id.* at 491-93.

parents, the Indian custodian, or the child's tribe.¹⁷⁸ Children themselves, through their guardian *ad litem*, are not allowed to oppose transfer. In addition, the Iowa ICWA good cause provision to prevent transfer, broad and amorphous in the federal ICWA, is limited to four possible reasons in the Iowa statute.¹⁷⁹ In finding that this violated the children's due process rights, the appellate court remanded and reversed for a hearing on transfer, and specifically allowed the children to introduce best interests evidence in a transfer motion.¹⁸⁰

This is a troubling result because ICWA advocates have long argued that there is no place for a best interests argument in a transfer motion.¹⁸¹ Transfer motions are jurisdictional, and should be determined on a purely jurisdictional argument.¹⁸² Introducing best interests language into the decision presumes the state court knows what the tribal court will do with the children, and introduces majority culture biases into an evaluation of tribal courts, a place it does not belong. This Iowa decision specifically sides with the states that have allowed best interests to be a part of the transfer motion.¹⁸³

V. CONCLUSION

Tribes and states have used different tactics to counter the cycles of attention states give to ICWA. In some states, tribes have created tribal/state agreements. In others, the state legislature has passed a state version of ICWA. For some reason, though ICWA is a federal statute, some state court judges have been reluctant to enforce the law, likely seen as an encroachment on areas "traditionally reserved" to state courts.¹⁸⁴ This failure of enforcement, best exemplified by the creation of the existing Indian family exception, has left ICWA advocates arguing that the law means what it says. One strategy to counter that has been to codify ICWA into state law.

Incorporating ICWA into state law, changing court rules, creating proper forms and educating personnel are just some ways the states are working to ensure ICWA compliance. Seeing the completed work from the outside is both inspiring and overwhelming. Where do these initiatives start? How are they funded? Who is involved with the work? Michigan, a state at the forefront of tribal-state agreements in other areas, has started working on these issues. The State Court Administrative Office has taken the lead in coordinating meetings between tribal and state stakeholders, initially to create a Michigan-specific judicial handbook for ICWA. After a year of building trust through face-to-face meetings, the workgroup has gone on to change the state court rules and is moving to incorporate ICWA into state law. This ongoing work has led to a resurgence in relations between tribal and state court judges, and the creation

178. *Id.* at 487.

179. *Id.*

180. *Id.* at 493.

181. JONES ET AL., *supra* note 45, at 64-65; ATWOOD, *supra* note 53, at 173-74 & n.92.

182. JONES ET AL., *supra* note 45, at 65 ("The concrete issue in a transfer proceeding is whether the tribal court is in a position to hear all the evidence and make a decision without causing a hardship on the parties and witnesses, not whether the tribal court will make the right decision.").

183. *In re J.L.*, 779 N.W.2d 481, 486-87 (Iowa Ct. App. 2009).

184. JONES ET AL., *supra* note 45, at 1.

of an ICWA bench/bar forum, now in its infancy stages, which allows judges and lawyers to trade information on how policies are working across the state. Ultimately, this group could effect change across the courts and beyond.