

INDIAN CHILD WELFARE ACT
ANNUAL CASE LAW UPDATE AND COMMENTARY

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I. ABSTRACT

There are, on average, 200 appellate cases dealing with the Indian Child Welfare Act (ICWA) annually—including published and unpublished opinions.¹ There are usually around thirty reported state appellate court cases involving ICWA issues every year. Before last year, no legal scholar had published a systematic overview of the cases on appeal that analyzed the parties involved, the issues on appeal, and the trends present in these cases. For the second year in a row, this article seeks to fill that void.

This article provides a comprehensive catalogue of 2018 ICWA jurisprudence from across all fifty states. Designed as a quick reference for the ICWA practitioner, this article also summarizes key case decisions that have interpreted the law in meaningful, significant, or surprising ways and tracks current attempts by ICWA’s opponents to overturn the law piece-by-piece and in its entirety. By providing an overview of last year’s ICWA cases, this article is meant to keep practitioners up-to-date so that they can be effective in the juvenile courtroom without having to sort through and read dozens of cases published across all fifty jurisdictions.

II. INTRODUCTION

In 1978, Congress recognized “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often

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¹ Data on file with the authors and journal.

failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families,” and that this led to “an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”² To address this nation-wide issue, Congress passed the Indian Child Welfare Act (ICWA).³ ICWA creates “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” that state administrative and judicial bodies must follow.⁴

Because of ICWA’s fundamental structure—as a federal law interpreted and litigated in state courts—tracking appellate litigation interpreting the Act is relatively easy. Indeed, state court decisions make up the body of ICWA case law and have influence beyond the state in which they are decided. That is because state courts often turn to “sister jurisdictions” when deciding matters related to ICWA precisely because it is a federal law applied across the states.⁵ For this reason, unlike other child dependency attorneys, an ICWA practitioner has to stay up to date on decisions from across the country in addition to decisions in their home state. This can be particularly difficult for those with an active caseload and limited access to legal databases, such as tribes’ in-house ICWA attorneys, parents’ attorneys, and child advocates (including guardians ad litem or children’s attorneys). It has become increasingly evident that practitioners are in need of an annual published account of the cases.⁶ Although much of family law is under the purview of the states,⁷ ICWA, which is grounded in the federal government’s trust responsibility to tribes and Indian people, holds a unique place in child welfare jurisprudence.⁸ It is a federal law that

² 25 U.S.C. § 1901(4)–(5) (2012).

³ See 25 U.S.C. § 1901 (2012). For an overview of ICWA’s provisions, requirements, and an introduction to the law, see Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act, available at <https://www.narf.org/nill/documents/icwa/> [http://perma.cc/5WSH-6QUA]; Kelly Gaines-Stoner et al., The Indian Child Welfare Act Handbook (2018); National Council of Juvenile and Family Court Judges, Indian Child Welfare Act Judicial Benchbook, available at <http://www.ncjfcj.org/ICWABenchbook> [http://perma.cc/DGB3-2ZPV]

⁴ 25 U.S.C. § 1902 (2012).

⁵ See, e.g., Dep’t of Human Servs. v. J.G. (*In re C.G.*), 317 P.3d 936, 945 n.11 (Or. Ct. App. 2014) (looking to decisions of sister states when interpreting ICWA); State ex rel. Children, Youth and Families Dep’t v. Marlene C. (*In re Esther V.*), 248 P.3d 863, 871 (N.M. 2011); *In re Welfare of R.S.*, 805 N.W.2d 44, 65 (2011); People ex rel. A.R., 310 P.3d 1007, 1014 (Colo. Ct. App. 2012); *In re Welfare of S.R.K.*, 911 N.W.2d 821, 829 (Minn. 2018). See also *In re N.B.*, 199 P.3d 16, 19 (Colo. Ct. App. 2007) (collecting cases from the “several states” regarding ICWA’s application in step-parent adoptions), which was cited to in *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016) (applying the Washington State Indian Child Welfare Act to step-parent adoptions), which was further cited to and discussed in *S.S. v. Stephanie H.*, 388 P.3d 569, 574 (Ariz. Ct. App. 2017) (applying ICWA to a private abandonment and step-parent adoption proceeding).

⁶ Prof. Fort runs the ICWA Appellate Project at MSU College of Law. In 2017, her clinic handled inquiries in sixty-three different cases from more than thirty tribes handling cases in more than twenty states. In 2018, the clinic handled additional inquiries in more than forty cases from more than thirty tribes. Additionally, for the past few years, Prof. Fort has been collecting ICWA cases and discussing them online, but the need for a formal compendium has become increasingly obvious based on the inquiries from around the country both authors receive on a weekly basis. See Turtletalk ICWA Appellate Project, <https://turtletalk.wordpress.com/icwa/> [http://perma.cc/W4E5-8KMT].

⁷ But see Jill Elaine Hasday, Family Law Reimagined (2014) (arguing family law has long been the purview of the federal government and the states, despite Supreme Court dicta stating otherwise).

⁸ See 25 U.S.C. § 1901(1)–(2) (2012).

must be implemented in state courts—jurisdictions where there can be a great deal of diversity in the child welfare process.⁹

ICWA's provisions apply when there is an Indian child¹⁰ and a child custody proceeding.¹¹ The law's requirements include the following: States must inquire into the membership status of a tribal child,¹² provide tribes and parents notice in child welfare proceedings,¹³ and ensure that tribes are given the opportunity to intervene in the proceedings¹⁴ or transfer jurisdiction to the tribal court.¹⁵ The party removing a child or terminating parental rights must provide active efforts to prevent the breakup of an Indian family¹⁶ and present testimony of a qualified expert witness supporting such a decision¹⁷ before placing an Indian child in foster care or terminating the parental rights over an Indian child. Additionally, proceedings under ICWA involve increased burdens of proof,¹⁸ among other things.

ICWA has been interpreted to apply in conjunction with, and in some instances in addition to, state child welfare laws.¹⁹ When an Indian child, as defined in the law, is subject to a child custody proceeding, also defined in the law, ICWA's protections and standards must be implemented by state courts.²⁰ Though ICWA is not a unique federal intrusion into state family dependence proceedings, it is one of the few laws of this kind that are not required to be incorporated into state law in order for a state to receive federal funding. Many states have

⁹ While the federal funding provisions under Title IV-E of the Social Security Act require states to pass certain standards for foster care placements and termination of parental rights, there are many areas of state law that vary by state. 42 U.S.C. §§ 670–679c (2012). *See, e.g.*, Child Welfare Information Gateway, Wash., D.C.: U.S. Dep't of Health and Human Servs, Children's Bureau, *Consent to Adoption*, (2017) available at <https://www.childwelfare.gov/pubPDFs/consent.pdf> [http://perma.cc/VL7F-22FH]; Child Welfare Information Gateway, Wash., D.C.: U.S. Dep't of Health and Human Servs, Children's Bureau, *Representation of Children in Child Abuse and Neglect Proceedings* (2014) <https://www.childwelfare.gov/pubPDFs/represent.pdf> [http://perma.cc/4AUN-8Z7S]; Child Welfare Information Gateway, Wash., D.C.: U.S. Dep't of Health and Human Servs, Children's Bureau, *Rights of Unmarried Fathers* (2014), available at <https://www.childwelfare.gov/pubPDFs/putative.pdf> [http://perma.cc/3KUP-DU3G]; Child Welfare Information Gateway, Wash., D.C.: U.S. Dep't of Health and Human Servs, Children's Bureau, *Definition of Child Abuse and Neglect* (2016) <https://www.childwelfare.gov/pubPDFs/define.pdf> [http://perma.cc/BGJ3-883Z]. Even in an area where state law is arguably quite similar—child abuse and neglect cases, for example—the vocabulary across the states varies tremendously. Indeed, the authors of this article debated whether to call them “child abuse and neglect cases” (Michigan) or “child dependency cases” (Oregon).

¹⁰ 25 U.S.C. 1903(4) (2012) (a child under the age of eighteen who either is a tribal member or is both eligible for tribal citizenship and the biological child of a tribal member).

¹¹ *Id.* at (1).

¹² 25 U.S.C. § 1912(a) (2012).

¹³ *Id.*

¹⁴ 25 U.S.C. § 1911(c) (2012).

¹⁵ 25 U.S.C. § 1911(b) (2012).

¹⁶ 25 U.S.C. § 1912(d) (2012).

¹⁷ 25 U.S.C. § 1912(e)–(f) (2012).

¹⁸ *Id.*

¹⁹ *See In re K.S.D.*, 904 N.W.2d 479, 482 (N.D. 2017); *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009) (collecting cases).

²⁰ 25 U.S.C. § 1903(1) (2012). *See also* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) (applying ICWA in ‘child custody proceedings’ involving an ‘Indian child’ as defined by the Act).

incorporated parts of the law, while a few have passed comprehensive Indian child welfare acts.²¹

To best serve the active practitioner, this article first provides an overview of related case data, including information on where there were reported (and unreported) decisions interpreting ICWA, what provisions courts most commonly interpreted, and what legal issues arose in 2018. The article then provides a descriptive commentary on a handful of 2018 state and federal cases that best illuminate the described themes. It closes with a full compendium of 2018 ICWA cases, which is topically organized for those practitioners who may not have access to this information.

III. SUMMARY OF THE DATA AND NATIONAL TRENDS

Every year, there are usually around thirty reported state appellate court cases involving ICWA issues. However, until recently, there has never been a systematic look at the cases on appeal that includes an analysis of who is appealing and what the primary issues are on appeal. Legal databases make both published and unpublished cases more readily available to the practitioner and scholar, but the sheer volume of cases can be overwhelming. The authors of this article read every case as they were released through daily alerts from Westlaw, LexisNexis, and the Alaska court system. Each ICWA case in the alerts was read and coded by the primary ICWA topic on appeal.²² The cases were also coded with the date, the court, the child's named tribe,²³ the parties involved, and the court's decision.²⁴ The data does not include federal challenges to the law; these decisions are discussed separately below under Cases of Note.

Because of time limits and work constraints, the ICWA topics on appeal have been coded by only one of this article's authors. This means there are some cases that cross topics, which could have been coded differently by a second reader. Therefore, the count of topics is not meant to be statistically sound, but rather provide general guidance concerning the issues on appeal. The general elements of each topic are listed below:

²¹ See, e.g., Michigan Indian Family Preservation Act, Mich. Comp. Laws §§ 712B.1–41 (2012) (comprehensive state ICWA); Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751–835 (1999) (comprehensive state ICWA); Washington Indian Child Welfare Act, Wash. Rev. Code §§ 13.38.010–190 (2011) (comprehensive state ICWA); Nebraska Indian Child Welfare Act Neb. Rev. Stat. §§ 43-1501–1516 (2015) (comprehensive state ICWA); Ariz. Rev. Stat. Ann. § 8-453 (2017) (merely requiring compliance with ICWA); Colo. Rev. Stat. § 19-1-126 (2002) (requiring compliance with ICWA and specifically-inquiry, notification, determination, transfer to tribal court); Or. Rev. Stat. §§ 419A.116, 419B.090, 118, 150, 171, 185, 192, 340, 365, 366, 452, 476, 498, 500, 875, 878, 923 (2001) (Imbedding ICWA standards in relevant areas across Oregon's dependency code).

²² Active efforts, burden of proof, qualified expert witness, inquiry, notice, transfer to tribal court, foster care proceeding, termination of parental rights, guardianship, Indian custodian, intervention, appealability, appointment of counsel.

²³ In notice cases, often there are a number of tribes identified as potential tribes for the child. We collect up to three named tribes and put them in the order they appear in the case. We publish the first named tribe here, unless the court determines the Indian child's tribe later in the opinion.

²⁴ Affirm, remand, reverse, dismissed

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*Inquiry*²⁵ considers whether the case primarily discusses social services or the court's failure to ask questions about a parent's indication that they may be American Indian. This may include cases where notice was sent without enough information, but the included cases are limited to those in which the issue is a lack of inquiry rather than incorrect notice.

*Notice*²⁶ is at issue any time there is discussion of the adequacy of notice to tribes. This includes notice that goes to the wrong tribe, the wrong address, not enough tribes, or was not updated with new information.

The nature of *foster care proceedings*²⁷ are analyzed to determine what proceedings are implicated under ICWA.

*Removal*²⁸: opinions involving the standards, including evidentiary, of the removal of a child from the home. These may include both emergency and non-emergency proceedings.

*Termination of Parental Rights*²⁹: When a parent or tribe challenges more than one element of an ICWA termination of parental rights, including active efforts, qualified expert witness, or the burden of proof.

*Active Efforts*³⁰: When a parent challenges the active efforts finding in either a foster care or termination proceeding.

*Qualified Expert Witness (QEW)*³¹: When a parent challenges the qualified expert witness testimony in either a foster care or termination proceeding.

*Indian Child*³²: When a tribe has been identified, and the court is trying to determine whether the child is an Indian child under ICWA's definition. This will include reason to know the child is an Indian child cases, which are separate from faulty notice cases.

*Placement Preferences*³³: the party appealing is contesting the placement order of one or more children.

*Jurisdiction*³⁴: When the state court is determining whether it has jurisdiction to hear the case.

*Transfer to Tribal Court*³⁵: when a party appeals an order either denying or granting a transfer of jurisdiction to tribal court.

²⁵ 25 U.S.C. § 1912(a) (2012); 25 C.F.R. § 23.107 (2018).

²⁶ 25 U.S.C. § 1912(a) (2012); 25 C.F.R. § 23.111 (2018).

²⁷ 25 U.S.C. § 1903(1) (2012); 25 C.F.R. § 23.103 (2018).

²⁸ 25 U.S.C. § 1912(e) (2012); 25 U.S.C. § 1922 (2012); 25 C.F.R. §§ 23.113–114 (2018).

²⁹ 25 U.S.C. § 1912(f) (2012); 25 C.F.R. §§ 23.120–123 (2018).

³⁰ 25 U.S.C. § 1912(e)–(f) (2012); 25 C.F.R. §§ 23.2, 23.120 (2018).

³¹ 25 U.S.C. § 1912 (e)–(f) (2012); 25 C.F.R. § 23.122 (2018).

³² 25 U.S.C. § 1903(4) (2012); 25 C.F.R. §§ 23.108–109 (2018).

³³ 25 U.S.C. § 1915 (2012); 25 C.F.R. §§ 23.129–132 (2018).

³⁴ 25 U.S.C. § 1911 (2012); 25 C.F.R. § 23.110 (2018).

³⁵ 25 U.S.C. § 1911(2012); 25 C.F.R. §§ 23.115–119 (2018).

*Guardianship*³⁶: When the court determines whether ICWA applies to a guardianship.

*Consent to Termination*³⁷: When a parent appeals an order terminating parental rights that involved the parent's consent to the termination.

*Appointment of Counsel*³⁸: When the case primarily addresses the right to appointment of counsel under ICWA.

*Burden of Proof*³⁹: when a party challenges either the clear and convincing evidence standard or the beyond a reasonable doubt standard of ICWA.

*Appealability*⁴⁰: when a court determines whether an order in an ICWA case is appealable.

*Tribal Customary Adoption*⁴¹: Cases interpreting California's Tribal Customary Adoption statute.

As the numbers show, ICWA is litigated more often than non-practitioners might imagine. State courts of appeal interpret the law across the country at a rate of once every other day. There are, on average, 200 appellate cases annually—including published and unpublished opinions.⁴² In 2017, there were 214 appealed ICWA cases.⁴³ Thirty-four were published.⁴⁴ In 2018, there were 206 appealed ICWA cases, but only forty-nine were published.⁴⁵ As we noted last year, the small number of reported ICWA cases understates the amount of appeals, and the lack of reporting leaves important analysis and guidance as non-binding.⁴⁶

Supreme Courts in seven different states issued reported ICWA-related opinions this year, including Alaska (three cases), Montana (seven cases), South Dakota (two cases), Michigan, Minnesota, Nebraska, and North Dakota.⁴⁷ Meanwhile, Alaska had another eight

³⁶ 25 U.S.C. § 1903(1) (2012); 25 C.F.R. § 23.103 (2018).

³⁷ 25 U.S.C. § 1912(f) (2012); 25 U.S.C. § 1913 (2012); 25 C.F.R. §§ 23.124–128j (2018); 25 C.F.R. §§ 23.136–137 (2018).

³⁸ 25 U.S.C. § 1912(b) (2012).

³⁹ 25 U.S.C. § 1912(e)–(f) (2012); 25 C.F.R. § 23.121 (2018).

⁴⁰ 25 U.S.C. § 1914 (2012).

⁴¹ Cal. Welf. & Inst. Code § 366.24 (West 2013).

⁴² Data on file with the authors and journal.

⁴³ Cases are collected from both Westlaw and Lexis over the course of the year via case alerts that collect cases from all fifty states and using the search terms “Indian Tribe”, “American Indian”, “Native American”. The cases are sorted by case name, the date, the court, the state, whether the case is reported or not, the top two issues, up to three named tribes, the outcome of the case, and who appealed the case.

⁴⁴ Data on file with the authors and journal.

⁴⁵ 2018 Data on file with authors and journal.

⁴⁶ See Kathryn E. Fort and Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 AM. INDIAN L.J. 32, 36 (2018); *Matter of Dependency of K.S.*, 199 Wash. App. 1034, 2017 WL 2634788 (Div. I June 19, 2017); *New Jersey Div. of Child Protection and Permanency v. E.W.*, 2018 WL 3384284 (N.J. Super. Ct. App. Div. July 12, 2018) (discussing equal protection challenges to ICWA).

⁴⁷ It is important to note that Alaska, Montana, North Dakota and South Dakota, do not have or use their court of appeals for child welfare cases; appeals are taken directly to the state supreme court. See Section III for a summary of these cases. That said, last year Montana only had two reported cases.

unreported decisions, Montana another three, and Nevada issued one. The remaining opinions, published and unpublished, were authored by states' intermediate Courts of Appeal. The number of ICWA appellate cases varied significantly by jurisdiction, as did the number of cases which the courts chose to report.⁴⁸

While unpublished opinions cannot be used for precedent, the authors include those cases in the numbers here to reflect the actual litigation practitioners encounter. As always, the authors have only summarized reported cases, but practitioners may want to keep in mind that unreported ones may still have significant legal research and reasoning useful to their cases. Last year, we speculated on the reasons why there may be so many unpublished decisions but did not land on an answer. However, most of these unreported cases address the issue of inquiry and notice—an area so common and well-established that there may no longer be a need to report these opinions.

Similar to what we saw last year, the vast majority of this year's Active Efforts cases—eleven out of thirteen—were unreported.⁴⁹ This may reflect how fact specific most Active Efforts cases are. There is, however, a drawback to this lack of reporting because the determinations of what active efforts consists of remain inconsistent. In thirteen cases in eight different states, only one was remanded for the trial court to make specific active efforts findings.⁵⁰

In addition, a little more than half of the Termination of Parental Rights cases were reported.⁵¹ These cases concern multiple aspects of the findings that are required for termination, including active efforts, the burden of proof, and qualified expert witnesses. In every single case, the termination was affirmed. Finally, there were more placement preference cases than last year, and although only two of these cases were published, nine were decided.

The most litigated issues were Notice and Inquiry,⁵² followed by Active Efforts, Termination of Parental Rights (which includes burden of proof issues), Placement Preferences,

⁴⁸ Yet again, California leads the states with 125 cases, but only nine were reported. California has both the most number of cases, and one of the lowest percentages of unreported cases at about seven percent. Alaska is second with eleven opinions, three reported; followed by Montana with ten opinions, and seven reported. Michigan had eight opinions but reported only two, while Colorado issued 8 opinions and published all eight. Ohio, Arizona, and Texas each issued four opinions, and reported two, one, and two, respectively. Illinois issued three unreported opinions. Indiana, Iowa, New Jersey, and Washington each issued two unreported opinions. Missouri, Oklahoma, South Dakota each issued two reported decisions. Finally, Connecticut, Idaho, Kansas, and Nevada issued one unpublished opinion each, and Minnesota, Nebraska, and North Dakota each published their one decision.

⁴⁹ *In re B.Y.*, 432 P.3d 129 (Mont. 2018); *In re Adoption of Micah H.*, 918 N.W.2d 834 (Neb. 2018), Terry S. v. Superior Court, No. A148984, 2018 WL 300078 (Cal. Ct. App. Jan. 5, 2018); *In re K.R.*, No. A153781, 2018 WL 6428088 (Cal. Ct. App. Dec. 7, 2018); *In re D.R. Wolf*, No. 343001, 2018 WL 6070462 (Mich. Ct. App. Nov. 20, 2018); *In re S.D.M.*, No. 78142-1-I, 2018 WL 5984147 (Wash. Ct. App. Nov. 13, 2018); *Jude M. v. State*, 394 P.3d 543, 547 (Alaska 2017); *Vanessa W. v. Dep't of Child Safety*, No. 1 CA-JV 17-0461, 2018 WL 2147213 (Ariz. Ct. App. May 10, 2018); *Ronald H. v. State*, No. S-16725, 2018 WL 1611648 (Alaska Mar. 28, 2018); *In re A.F.*, No. 17-0487, 2018 WL 1282575 (Mar. 13, 2018); *In re C.P.*, No. F075660, 2018 WL 1045063 (Cal. Ct. App. Feb. 26, 2018); *Janice H. v. Dep't of Child Safety*, No. 1 CA-JV 17-0343, 2018 WL 893981 (Ariz. Ct. App. Feb. 15, 2018); *Charles V. v. State*, No. S-16575, 2018 WL 913105 (Alaska Feb. 14, 2018).

⁵⁰ *In re B.Y.*, 393 Mont. 530, 432 P.3d 129 (2018);

⁵¹ Ten out of eighteen cases were reported.

⁵² Notice was the subject of litigation in eighty-six cases, and Inquiry was the subject of litigation in forty-three cases.

Foster Care Proceeding, Tribal Customary Adoption, and determination of Indian Child.⁵³ Of all the cases, seventy-nine or around forty percent were reversed or remanded.⁵⁴ This year exactly half of the Notice cases were remanded for proper notice (forty-two), and two were reversed. Slightly more than half of the Inquiry cases were remanded as well (twenty). Fifty-seven different tribes were named as possible tribes of the children in these cases. In twenty-six cases, the tribe was unknown (the parent did not know name of his or her tribe). In seventeen, the tribe was unnamed (the court did not record name of tribe in the opinion).

There are a few trends worth noting this year. While the total number of cases is down, the number of reported cases has increased considerably given the small sample size. This indicates one reason to distinguish published cases from unpublished cases; this way, the count does not seem artificially inflated by the number of reported cases. The types of cases remained generally the same as last year.

In all the cases reviewed by the authors this year, no ICWA case was appealed by a tribe. While there are no clear statistical reasons for this, the authors can provide some anecdotal ones based on their experience. Many tribes simply do not have the capacity to take a case up on appeal; either these tribes lack counsel or their counsel does not have the capacity to take such a case up. In some cases, the tribe or its outside counsel may either disagree with the appeal or have interests adverse to the parent's position. Tribal attorneys are also often concerned about the duration of the appeals process and the effect it may have on a child. In many cases, tribes are simply never notified of an appeal by a parent. Even if a tribe does receive notice of a case going up on appeal and wants to participate, finding a local attorney for *pro hac vice* is incredibly difficult in some states. The court or agency may also be unwilling to share even basic information with the tribe if it considers that information to be confidential. If a tribal attorney can get past all of that, many state appellate court rules simply do not contemplate intervenor party briefs at the appellate level, so tribes are forced to choose between filing an amicus brief or attempting motion practice on appeal to ensure their status as a party. Unfortunately, without any tribal brief on appeal, appellate courts often have no guidance concerning a tribe's position. The lack of a brief or participation is sometimes misinterpreted as a lack of concern for the child or family or the alignment of tribal and parental interests. In some decisions, the court's confusion is apparent and its ignorance of the tribe's position comes through in the opinion.

An additional trend this year is the increased number of cases interpreting state laws that implement ICWA. California and Michigan in particular had cases that rest heavily on interpretations of state law.⁵⁵ California's tribal customary adoption law, a unique state law that

⁵³ The numbers of cases for each category of litigation are as follows: Placement Preferences (nine), Active Efforts (thirteen), Termination of Parental Rights (eighteen), Indian Child (twelve), Tribal Customary Adoption (four), Transfer to Tribal Court (one), and QEW (one).

⁵⁴ Of the 206 total cases, seventy-four were remanded and five were reversed. Of the forty-nine reported cases, twenty-five were affirmed; twenty-two were remanded or reversed; one was dismissed; and one was affirmed in part and reversed in part.

⁵⁵ See *In re J.Y.*, 241 Cal.Rptr.3d 856 (Cal. Ct. App. 2018); *In re A.S.*, 239 Cal.Rptr.3d 20 (Cal. Ct. App. 2018); *In re Williams*, 915 N.W.2d 328 (Mich. 2018).

allows a state court to apply tribal law in the context of an adoption, was interpreted four times by California state courts.⁵⁶ In addition, Michigan had a procedurally difficult and complex case involving a father consenting to termination in the face of a state termination hearing.⁵⁷ The outcome of that case was based exclusively on the Michigan Supreme Court's reading of the Michigan Indian Family Preservation Act rather than a reading of ICWA. The cases summarized in Section III are only those in which courts interpreted ICWA, but practitioners must be increasingly aware of state-specific law holdings insofar as they apply to Indian children.

Two states in particular had an uptick in the number of opinions they issued—Montana and Colorado. In particular, Colorado's Court of Appeals issued a number of considered opinions regarding inquiry and notice for which it provided specific and detailed remand instructions.⁵⁸ Remand instructions in child welfare cases are particularly important and should be an area of focus for ICWA appellate practitioners. The most obvious example of a problematic reversal or remand on appeal was in *Adoptive Couple v. Baby Girl*,⁵⁹ after which no state court held a placement hearing regarding the child's best interest. Because a remand or reversal can end up changing the placement of a child immediately, appellate attorneys should consider providing specific instructions on that issue in the conclusion portions of their briefs.⁶⁰

Montana's reported cases ran the gamut of ICWA issues, including active efforts, the determination of who may be considered an Indian child under the law, notice, and the termination of parental rights. While the Montana court continued to apply *Adoptive Couple v. Baby Girl*⁶¹ to its paternity cases, to the detriment of Native fathers, it also applied the ICWA Regulations in a fairly strict manner.⁶² Montana is also the location of a new ICWA court in Yellowstone County.⁶³ The court currently allows for more collaboration between the state and local tribes to the child welfare process when it involves Indian children. The court is an attempt to treat all parties—parents, tribes, and children—with the respect and consideration they deserve.

And finally, as had been the case since 2015, the federal challenges to ICWA continue apace. Though standard ICWA practice continues in state courts around the country, much of the media coverage and national legal work has focused extensively on cases out of Texas and Arizona. In particular, the facial challenge to the law by the states of Texas, Indiana, and

⁵⁶ *In re J.Y.*, 241 Cal.Rptr.3d 856 (Cal. Ct. App. 2018); *In re A.S.*, 239 Cal.Rptr.3d 20 (Cal. Ct. App. 2018); *In re L.S.* 2018 WL 3371960 (Cal. Ct. App. July 11, 2018); *In re A.S.*, 2018 WL 3196529 (Cal. Ct. App. June 29, 2018).

⁵⁷ *Williams*, 915 N.W.2d 328 (Mich. 2018)

⁵⁸ *In re J.L.*, 428 P.3d 612, 616–617 (Colo. Ct. App. 2018).

⁵⁹ 570 U.S. 637, 133 S.Ct. 2552 (2013)

⁶⁰ Compare *In re JJW*, 902 N.W.2d 901, 919 (Mich. Ct. App.) (vacating an order denying an adoption petition, vacating the order removing children from petitioners with no instructions as to where the children should go), with *In re Williams* 915 N.W.2d 328, 337 (Mich. 2018) (describing where the children should stay during the remand).

⁶¹ *Matter of P.T.D.*, 424 P.3d 619 (Mont. 2018).

⁶² *Matter of B.Y.*, 432 P.3d 129 (Mont. 2018).

⁶³ Phoebe Tollefson, *1 year into Native foster care court, most kids taken from unsafe homes are placed in tribe-approved homes*, BILLINGS GAZETTE (July 24, 2018), https://billingsgazette.com/news/local/year-into-native-foster-care-court-most-kids-taken-from/article_d709c08a-b094-5ef2-b4f0-d5ff77b82762.html [http://perma.cc/2LMX-3DGL]

Louisiana is the greatest threat to ICWA since its passage, though none of the arguments made in that case are new or were unconsidered by Congress and courts at the time of ICWA's passage.

IV. III. CASES OF NOTE

The authors have chosen to highlight and summarize the cases below because they present relevant issues, reflect trends in litigation from across the country, and/or sit in a unique procedural posture that reflects the current challenges to and interpretations of ICWA that are described above. They address issues of Jurisdiction, Indian Child, Qualified Expert Witnesses, and Active Efforts. A full listing of the forty-nine published cases are in Section IV.

A. Federal Cases

Because ICWA is implemented in state court, federal cases involving the law are usually rare. However, due to a series of affirmative attacks on the law in federal court which started in 2015, there have been a number of published federal opinions (from district courts, appellate courts, and the Supreme Court) over the past four years. This article includes published decisions from 2018 and notes concerning cases that are currently under appeal.⁶⁴

■ *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Texas, 2018) (on appeal to the Fifth Circuit as *Brackeen v. Bernhardt*, No.18-11479 (5th Cir. 2019)).

In this federal case, three state plaintiffs, Texas, Louisiana, and Indiana, and a number of individual plaintiffs, including the Brackeens, a couple from Texas looking to adopt a Navajo and Cherokee child whose mother's rights had been previously terminated by the state; the Librettis, a couple from Nevada looking to adopt a child from Ysleta del sur Pueblo and the child's biological mother; Ms. Hernandez, who would like to place her child with the Librettis; and the Cliffords, a foster couple from Minnesota looking to adopt a child who is a member of the White Earth Band of Ojibwe Tribe sued the United States, seeking to have ICWA declared unconstitutional. The named defendants are the United States Department of the Interior and its Secretary Ryan Zinke; the Bureau of Indian Affairs (BIA) and its Director Bryan Rice; BIA Principal Assistant Secretary for Indian Affairs, John Tahsuda III; the United States Department of Health and Human Services; and Secretary Alex M. Azar II (each of the individual defendants are named in their official capacities). Not long after the case was filed, four tribal nations, Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, moved to intervene as party defendants.

The plaintiffs filed two amended complaints, and the federal government and tribal intervenors both filed motions to dismiss. In their opposition to the motion to dismiss, the

⁶⁴ The Ninth Circuit dismissed, in an unpublished memorandum decision, *Carter v. Tahsuda*, No. 17-15839, 743 Fed.Appx. 823 (Aug. 6, 2018), *appeal docketed*, No. 18-923 (U.S. Jan. 16, 2019).

plaintiffs filed a motion for summary judgment. The court allowed briefing to move ahead on the summary judgment. In addition to the parties stated above, six states (California, Alaska, Montana, New Mexico, Oregon and Washington) filed an amicus brief in support of the federal government, as did 123 tribes and fourteen tribal organizations. The State of Ohio and the Goldwater Institute filed amicus briefs on behalf of the plaintiffs.

On October 4th, the court issued an opinion finding much of ICWA unconstitutional and the ICWA regulations violative of the Administrative Procedure Act (APA). Most disturbingly, the court held that ICWA violates the equal protection requirements of the Fifth Amendment. The court found that “by deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA’s jurisdictional definition of ‘Indian children’ uses ancestry as a proxy for race and therefore ‘must be analyzed by a reviewing court under strict scrutiny.’”⁶⁵ The court then found that the statute failed the test under strict scrutiny because it was overbroad; the court also held that the Act “establishes standards that are unrelated to specific tribal interests and applies those standards to potential Indian children” and is therefore unconstitutional.⁶⁶

Second, the court held that section 1915(a) of ICWA violates the Non-Delegation Clause in Article I.⁶⁷ Section 1915(a) allows for tribes to set preferences concerning the placement of Indian children that states must follow. The court held that, because tribes are not federal actors and “[t]he power to change specifically enacted Congressional priorities and impose them on third parties can only be described as legislative”⁶⁸ as opposed to regulatory, 1915(a) impermissibly delegates legislative authority to tribes.

Third, the court held that 25 U.S.C. §§ 1901–23 and 1951–52 violate the Tenth Amendment. The court found that, because those provisions “require the States to apply federal standards to state created claims,”⁶⁹ they are impermissibly commandeering state courts and agencies to administer federal law. The court added, “While Supremacy Clause preemption may apply to a conflict between state and ‘federal law that regulates the conduct of private actors,’ it cannot rescue a law that directly regulates states.”⁷⁰

Finally, the Court held that the BIA lacked the authority to promulgate the 2016 ICWA Regulations and that doing so violated the APA.⁷¹ The court noted that in 1979, the BIA found that it lacks authority to promulgate regulations. The court then noted that the BIA did not adequately address its authority to promulgate regulations in 2016 despite extensive regulatory discussion on this issue that preceded the issuance of the regulations. The court then stated,

⁶⁵ *Brackeen v. Zinke*, 338 F.Supp.3d 514, 533–34 (N.D. Texas, 2018).

⁶⁶ *Id.* at 535.

⁶⁷ *Id.* at 536. The non-delegation clause generally stands for the proposition that Congress cannot delegate its legislative authority to another branch of government, such as the executive branch. As Indians and Indian tribes are only mentioned in two clauses of the Constitution, the non-delegation clause obviously does not address delegation to Indian tribes.

⁶⁸ *Id.* at 537.

⁶⁹ *Id.* at 539.

⁷⁰ *Id.* at 541.

⁷¹ *Id.* at 542.

“Because the BIA does not explain its change in position over its authority to ‘carry out the provisions’ and apply the ICWA—and therefore its authority to issue binding regulations—the Court finds those regulations remain not necessary to carry out the ICWA.”⁷² For those reasons, the court held that the BIA “exceeded the statutory authority Congress granted to it to enforce the ICWA”⁷³ when it promulgated binding regulations (as opposed to advisory guidelines) and, therefore, violated the APA in doing so.

The court also found that ICWA does not violate a foster parent’s substantive due process rights.⁷⁴ The court reasoned that foster parents do not have a constitutionally protected right to an intimate relationship with their foster child. No party has appealed this issue.

The intervenor tribes moved to stay the opinion of the district court pending appeal to the Fifth Circuit. The tribes pointed out the decision is contrary to precedent on all grounds, including basic precepts of standing and mootness, federal Indian law, administrative law, and constitutional law. The tribes also noted the decision is specifically contrary to Congressional intent and that the application of the decision would cause considerable confusion nationwide.⁷⁵ The district court denied the stay⁷⁶ and the tribes both filed for a stay and appealed the decision to the Fifth Circuit.⁷⁷ They were later joined in the appeal by the federal government.⁷⁸ The Fifth Circuit granted the stay.⁷⁹ At the time of this writing, the Fifth Circuit case has been briefed and oral arguments were held on March 13, 2019.⁸⁰ In addition, the Navajo Nation filed to intervene in the District Court for the purpose of appeal, which the Court deferred to the Fifth Circuit, where it was granted.⁸¹

While the State of Texas attempted to hold its attorneys and courts to the district court’s decision,⁸² no state court has agreed with the reasoning or agreed to apply the holding to other cases. As a state court in Texas noted,

The Department contends the . . . [district court’s] order render’s J.R.M.’s complaints moot, but the order does not indicate that the plaintiffs challenged the

⁷² *Id.* at 543.

⁷³ *Id.*

⁷⁴ *Id.* at 546.

⁷⁵ Opposed Mot. for Expedited Consideration and Mot. to Stay Pending Appeal of Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, Brackeen v. Zinke No. 17-cv-858 (N.D. Tex. Oct. 10, 2018).

⁷⁶ Order, Brackeen v. Zinke, No. 17-cv-858 (N.D. Tex. Oct. 29, 2018).

⁷⁷ Mot. to Stay Pending Appeal, Brackeen v. Zinke, No. 18-11479 (5th Cir. Nov. 19, 2018).

⁷⁸ Notice of Appeal, Brackeen v. Zinke, No. 18-11479 (5th Cir. Nov. 30, 2018).

⁷⁹ Per Curiam Order, Brackeen v. Zinke, No. 18-11479 (5th Cir. Dec. 3, 2018).

⁸⁰ All of the briefing is available at <https://turtletalk.blog/icwa/texas-v-zinke-documents-and-additional-materials/texas-v-zinke-fifth-circuit-document/> [http://perma.cc/2Y9F-HN2U]

⁸¹ Order, Brackeen v. Bernhardt, No. 18-11479 (5th Cir. Jan. 25, 2019).

⁸² Inapplicability of the Indian Child Welfare Act to Texas Child Custody Proceedings Op. Tex. Att’y Gen. 51 (2018), http://texaschildrenscommission.gov/media/83949/oag-icwa-ruling-letter-to-dfps_10252018.pdf [http://perma.cc/E4YE-7JVD] *cf.* Resource Letter: For Judges and Attorneys Handling Child Protective Services Cases, <https://myemail.constantcontact.com/Important-Information-for-Judges-and-Attorneys-Handling-CPS-Cases.html?soid=1129497844492&aid=5xaJ5st1Gcw> [http://perma.cc/PTF8-3JJG].

specific ICWA provisions at issue in this case. Further, the *Brackeen* case may be appealed and ICWA has previously been upheld by the United States Supreme Court. . . . Therefore, we will address the merits of the issues raised on appeal.⁸³

Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018). In this long-running federal court case challenging both ICWA and due process violations in child welfare cases in Pennington County, South Dakota, the Eighth Circuit held that the Younger abstention doctrine applied and vacated and remanded with instructions to dismiss.

This case was a class action lawsuit brought by the Oglala Sioux and Rosebud Sioux Tribe, as well as Madonna Pappan and Lisa Young, mothers who had their children removed by the State and eventually returned to them. The plaintiffs claimed that the initial 48-hour hearing held after the State removed a child from the home violated both ICWA and fundamental due process rights, including a lack of notice and the right to cross examine witnesses. The district court agreed and granted declaratory and injunctive relief. The Eighth Circuit found that under *Moore v. Sims*, 442 U.S. 415 (1979), the State’s emergency hearings were of the type that is due Younger abstention. While the plaintiffs argued that the relief sought was prospective and that there was no opportunity to address the federal claims in those hearings, the Court noted that there were on-going emergency hearings during the pendency of the federal proceeding and that “[t]he relief requested would interfere with the state judicial proceedings by requiring the defendants to comply with numerous procedural requirements at future 48-hour hearings.”⁸⁴

B. State Cases

■ *In re L.D.*, 391 Mont. 33 (2018).

In this Montana case, the initial petition stated that “to the best of the petitioners belief” the child “is an Indian child for the purposes of [ICWA].”⁸⁵ At the initial show-cause hearing, the parents both stated that they did not believe the child to be eligible for tribal enrollment, and the child’s mother (who was herself enrolled) stated that she had unsuccessfully attempted to enroll the child.⁸⁶ The agency remained uncertain, stating that it would further investigate, and asked that the court proceed under ICWA.⁸⁷ The tribe was notified regarding the case and advised the agency that it would not intervene or assume jurisdiction.⁸⁸

Nearly a year after the show-cause hearing, the agency filed a petition to terminate the father’s parental rights, stating that the department “believed” that the child was “subject to

⁸³ *In re A.M.*, 2018 WL 6583392, 2 (Tex. Ct. App. Dec. 14, 2018). *See also In re M.D.*, 920 N.W.2d 496 (S.D. 2018).

⁸⁴ *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 612 (8th Cir. 2018), *appeal docketed*, No. 18-1245 (U.S. Mar. 26, 2019)

⁸⁵ *In re L.D.*, 391 Mont. 33, 34, 414 P.3d 768 (2018).

⁸⁶ *Id.* at 35.

⁸⁷ *Id.*

⁸⁸ *Id.*

[ICWA],” and served the tribe.⁸⁹ The tribe did not appear at the termination proceeding, but an expert witness testified and the court’s findings were made pursuant to termination standards in section 1912 of ICWA.⁹⁰ Four months later, the agency filed a termination petition against the mother.⁹¹ At the termination proceeding, the State asserted—for the first time—that the child was not an “Indian child.” When the mother did not object, the court determined that the standards of ICWA did not apply to the termination proceeding.⁹² For this reason, the agency did not present an expert witness and the judge did not make findings in compliance with section 1912.⁹³ The mother appealed.

The appellate court found that when there is reason to believe that a child is an Indian child, as there was here, the agency has a “threshold duty to obtain a conclusive determination from an Indian tribe of tribal eligibility” prior to proceeding with a termination.⁹⁴ It further noted that a parent cannot waive the application of ICWA—for only a tribe can determine its membership and thus, the application of the law.⁹⁵ The appellate court then reversed the decision and remanded it for the appropriate determination regarding ICWA’s applicability.⁹⁶

■ *J.W.E. v. State*, 419 P.3d 374 (Okla. Civ. App. 2018)(*In re J.W.E.*).

In this Oklahoma termination of parental rights case, the agency caseworker testified that at the time of the trial, January 23, 2017, they had received letters from the Cheyenne and Arapaho Tribes and the Choctaw Nation stating that the children were not eligible for enrollment.⁹⁷ The mother also explained that, while she was a member of the Cheyenne and Arapaho Tribes, her children were not eligible for membership in that tribe.⁹⁸ She also stated that until she became an enrolled member of the Choctaw tribe,⁹⁹ her children would also be ineligible for membership in that tribe.¹⁰⁰ At the time of the termination trial, the mother testified that she was enrolled as a

⁸⁹ *Id.* at 35-36.

⁹⁰ *Id.* at 36.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 37.

⁹⁴ *Id.* at 40.

⁹⁵ *Id.* The Supreme Court of Montana added the following:

While we appreciate the difficult position in which the District Court found itself as a result of the parties’ imprudent agreement or acquiescence that ICWA did not apply, it was ultimately the Court’s responsibility to demand and ensure strict compliance with ICWA and due process of law regardless of the parties’ invitation and escort down the proverbial garden path. Under the circumstances of this case, we hold that the District Court erred and abused its discretion by proceeding to terminate Mother’s rights * * * without a conclusive tribal determination of [the child’s] membership status and eligibility.

Id. at 41.

⁹⁶ *Id.* at 41.

⁹⁷ *J.W.E. v. State*, 419 P.3d 374, 376 (Okla. Civ. App. 2018)(*In re J.W.E.*).

⁹⁸ *Id.* at 375.

⁹⁹ Based on the explanation in the record, this meant that although she was a member of the Choctaw Tribe, her enrollment in Cheyenne Arapaho precluded her from receiving benefits from Choctaw Nation. *Id.* at 375.

¹⁰⁰ *Id.* at 376.

member of the Choctaw Nation and had filed Choctaw enrollment paperwork for her children.¹⁰¹ In fact, the mother described in great detail the numerous conversations she had had with the Choctaw child welfare and enrollment departments; the efforts she had made to obtain the necessary information, including birth certificates and death certificates, to apply for tribal enrollment for her children and herself; the fact that enrollment applications had been submitted; and that it typically takes the Choctaw Nation about three months to make a decision.¹⁰²

On January 31, 2017, the trial court (pursuant to a jury decision) terminated the mother's parental rights.¹⁰³ The order terminating her rights stated that the court had previously found that the children were not Indian children for the purposes of ICWA.¹⁰⁴

Shortly after the announcement of the jury verdict, the mother received notice that the children had been enrolled in the Choctaw Nation and that their membership had been certified by the Bureau of Indian Affairs on January 10, 2017, and by Choctaw Nation on January 20, 2017.¹⁰⁵ The mother promptly filed a motion for a new trial asserting that "because the children were enrolled members prior to and at the time of trial, all proceedings, including the trial, were subject to [ICWA] and [the] Oklahoma Indian Child Welfare Act" and that none of the requirements of those statutes had been followed.¹⁰⁶ The trial court denied the mother's motion and she appealed.¹⁰⁷

The appellate court began its opinion by reciting the language from section 1912(a) of ICWA which requires notice when there is "reason to know" that a child is an Indian child and citing to *George v. Traylor*, 68 Va. App. 343, 808 S.E.2d 541 (2017), which states that the quoted language "is a clear indication that Congress intended the notice provisions to be effective in situations where there was still question as to whether the child is an Indian child."¹⁰⁸

Then, after extensively reviewing the relevant 2016 Guidelines and the Federal Regulations, the court concluded that, in spite of the Choctaw Nation's earlier letters, the mother's detailed testimony at the termination trial was sufficient to put the court on notice that there was reason to know that these children were Indian children and that ICWA applied.¹⁰⁹ Further, the appellate court found support from an Oklahoma case, *In re M.H.C.*, 381 P.3d 710 (Okla. 2016)—a case in which the court held that "ICWA applies prospectively to a proceeding when the record establishes [that] the child meets ICWA's definition of Indian child"—for its holding that the date an individual gains membership is the date ICWA becomes applicable.¹¹⁰ Here, the court noted the relevant date, January 20, 2017, was before the commencement of the

¹⁰¹ *Id.* at 375.

¹⁰² *Id.* at 375–76.

¹⁰³ *Id.* at 376.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 378.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 380.

termination trial, January 23, 2017.¹¹¹ For those reasons, the appellate court reversed the decision to deny the mother a new trial.

■ *In re A.P.*, 818 S.E.2d 396 (N.C. 2018).

At the abuse and neglect adjudication for this North Carolina case, the court admitted into evidence a form indicating that the mother and child have “American Indian Heritage” within the “Cherokee” and “Bear Foot” tribes.¹¹² The mother’s counsel brought this form to the court’s attention and argued that the hearing should be continued because the tribe had not received notice pursuant to ICWA.¹¹³ The trial court proceeded with the hearing, indicating that it had already made a finding that ICWA was not applicable in its non-secure/temporary custody order.¹¹⁴

The court of appeals found that the record was sufficient to “put the trial court on notice and provided ‘reason to know that an ‘Indian child’ [was] involved.’”¹¹⁵ The trial court was therefore required to direct the agency to send a notification letter to the tribe before proceeding.¹¹⁶ The appellate court reversed the decision and remanded to ensure that “ICWA’s notice and other mandatory requirements are met.”¹¹⁷

■ *In re Beers*, 325 Mich.App. 653 (2018)).

In this Michigan termination of parental rights case, the court terminated the father’s parental rights under state law and the mother’s parental rights under the requirements of ICWA and the Michigan Indian Family Preservation Act (MIFPA), reasoning that ICWA only applied to the mother who had Indian heritage.¹¹⁸ The mother¹¹⁹ and father appealed.

The appellate court found that there was no doubt that the child was an “Indian child” as defined by the Act.¹²⁰ It also noted that the father who had acknowledged that he was the child’s biological father by signing an affidavit of parentage, was a “parent” as defined by ICWA and

¹¹¹ *Id.* at 381. The court also clarified that ICWA became applicable on the date of enrollment and therefore it did not apply retrospectively even though the case began years earlier in 2011. *Id.*

¹¹² *In re A.P.*, 818 S.E.2d 396, 400 (2018).

¹¹³ *Id.* at 398–400.

¹¹⁴ *Id.* at 400.

¹¹⁵ *Id.*

¹¹⁶ *Id.* Interestingly, the court noted that because of ICWA’s application, notice and the tribe’s response was of particular importance because it could deprive the court of subject matter jurisdiction—not just because it could require a variety of different protections in state court. *Id.*

¹¹⁷ *Id.* at 400-01.

¹¹⁸ *In Re Beers*, Nos. 341100–1, 2018 WL 4339705 *4 (Mich. Ct. App. Sept. 11, 2018).

¹¹⁹ On appeal, the mother made fact-based arguments that the evidence was insufficient to show that the agency had provided reasonable efforts and that continued custody of her child would likely result in serious emotional or physical harm. *Id.* at *11. These arguments were unremarkable—and therefore not summarized here. Ultimately, the appellate court affirmed the termination of her rights under ICWA and MIFPA. *Id.* at *11-12.

¹²⁰ *Id.*

MIFPA.¹²¹ The State conceded that ICWA and MIFPA should have applied to the father's proceeding and the case was remanded to allow the trial court to apply the relevant provisions of ICWA and MIFPA.¹²²

The appellate court, however, raised the issue of whether ICWA section 1912(f) and MIFPA MCL 712B.15(4), which state that “no termination of parental rights may be ordered in the absence of a determination...[and] that *continued custody* of the child by the parent...is likely to result in serious emotional or physical damage to the child,” applied to this case because, as is required under *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S.Ct. 2552 (2013), the father never had legal custody of the child.¹²³ The Michigan appellate court noted that although the majority opinion required a parent to have physical or legal custody for section 1912(f) to apply, Justice Breyer's concurrence concluded that the decision was fact-specific and that the father in that case not only lacked custody of his child but also never lived with or cared for her.¹²⁴ For those reason, Breyer stated that different facts—e.g. regular visitation or satisfactory payment of child support by a non-custodial parent— could lead to a different conclusion.¹²⁵ The Michigan court also noted that it was unclear whether the Supreme Court intended the requirement of physical custody to entail legal custody or if that requirement could be met when “a custodial-like environment existed on a practical level absent any technical custodial rights.”¹²⁶

The Michigan court then determined that the facts in this case were dissimilar from those discussed in *Baby Girl* because here the father had acknowledged his paternity and lived with and cared for the child for a period of time. This meant that the State's intervention had “discontinued the custodial arrangement that had existed with respect to [the child], if not in law, in practice,” rendering ICWA section 1912(f) and MIFPA MCL 712B.15(4) applicable to the termination proceeding.¹²⁷

Finally, the court noted that although the active efforts provisions of ICWA section 1912(d) and MIFPA MCL 712B.14(3) only apply to the “breakup” of an Indian family, here the family was previously intact and, therefore, those sections apply in spite of the decision in *Baby*

¹²¹ ICWA defines parent as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.” 25 U.S.C. § 1903(9) (1978); *see also* MIFPA MCL 712B. 1-41 (stating the same).

¹²² *Beers*, No. 341100-1, 2018 WL 4339705 at *5, 10. The State also argued that under plain error review the trial court's decision should be affirmed and that in any rate the decision can be upheld, even under the ICWA and MIFPA standards. *Id.* at *9. The court found that there was no preservation issue requiring plain error review and that to otherwise affirm would require impermissible fact-finding by the appellate court that the court refused to do. *Id.*

¹²³ *Id.* at *5-6

¹²⁴ *Id.* at *8.

¹²⁵ *Id.*

¹²⁶ *Id.* at 8

¹²⁷ *Id.*

Girl, which stated that custody was a necessary prerequisite for the application of those provisions.¹²⁸

■ *In re E.R.*, 2018 COA 58, (Colo. App. 2018).¹²⁹

In this Colorado case the child was born six weeks premature¹³⁰ and the agency sought and received emergency custody after the hospital reported that it could not locate the parents to take him home.¹³¹ The agency then filed a dependency and neglect petition. Later at a shelter hearing, the court granted the agency's request to return the child to his parents with agency supervision.¹³² At that hearing, the court did not ask whether the child was an Indian child and instead checked the box stating that "[t]he Indian Child Welfare Act of 1978 is not applicable because the child[] is not placed out of the home."¹³³ The case then proceeded to adjudication and disposition and the mother appealed from the court's dispositional order¹³⁴ because it did not apply ICWA's standards.¹³⁵

Citing to both the 2016 Guidelines and the new regulations, the appellate court found that the shelter hearing was subject to ICWA because "ICWA applies to any action that *may* result in a foster care placement." The court then stated that "[f]or the purposes of ICWA, it is immaterial that the child is not *presently* placed out of the home."¹³⁶ The opinion explains that in this case, the trial court might have decided to continue the removal and that because the court decided to leave the dependency action open, it continued to have authority to remove the child at any time thereafter.¹³⁷

Having decided that ICWA applied, the appellate court, again citing to the 2016 Guidelines and the new regulations, held that the court erred when it failed to ask whether the

¹²⁸ *Id.* at *10. The court also distinguished this case from a Michigan case that found *Baby Girl* applicable, *In re S.D.*, 236 Mich. App. 240, 599 N.W. 2d 772 (1999). In that case, there was no agency intervention and the family had been living apart for quite some time before the termination proceeding—so the appellate court found that the family had "already broken up by the time the termination proceedings were initiated." *Id.* at *9. Here, the court reasoned reunification services were necessary because the State had intervened but the family had otherwise been and would be intact. *Id.*

¹²⁹ *People In Interest of E.R.*, also discusses a state law question regarding the admissibility of results of a umbilical cord drug test at the adjudicator hearing, finding that those test results are admissible under Colorado's medical treatment hearsay exception. No. 17CA0460, 2018 WL 1959477, at *2-4 (Colo. App. Apr. 19, 2018).

¹³⁰ Each state (and sometimes each county within a state) has a different name for the agency that performs child protective work and oversees the out-of-home placement of children whose parents are unfit or alleged to be unfit, for ease and clarity that entity will be referred to as "the agency" throughout this article regardless of the state or county in question.

¹³¹ *E.R.* at *5. Supra note 128 at *5.

¹³² *Id.* at *1.

¹³³ *Id.*

¹³⁴ ICWA section 1912's provisions apply to a "foster care placement" as defined by the act. 25 U.S.C. § 1903 (1). Whether the adjudication or disposition is the "foster care placement" proceeding is a question courts across the country disagree on. See, e.g., *In re Esther V.*, 149 N.M. 315, 248 P.3d 863 (2011) (finding the adjudication to be the foster care proceeding; But see, e.g., [CITE] (finding the disposition to be the adjudication).

¹³⁵ *E.R.*, at *1

¹³⁶ *Id.* at *5 (emphasis in original).

¹³⁷ *Id.* (emphasis in original; citing to 25 C.F.R. § 23.2 and 2016 Guidelines at 13).

child was an Indian child.¹³⁸ The applicable federal mandates, the appellate court reminded, required “the trial court to ask at the commencement of each child custody proceeding whether any participant knows or has reason to know that the child is an Indian child” as defined in ICWA.¹³⁹ The court then remanded the case with instructions to determine whether the child was an Indian child and, if the child was identified as such, to comply with section 1912(a) of ICWA—the section that regulates notice to tribes in a *foster care proceeding*.¹⁴⁰

■ *Matter of Welfare of S.R.K.*, 911 N.W. 821 (2018).

In this Minnesota termination of parental rights case, the parents’ rights were terminated after a QEW signed a notarized affidavit before trial stating that “[c]ontinued custody of the children by the parent(s) is likely to result in serious physical and/or emotional damage to the child,” but testified at trial that she had no opinion about whether children could be returned to the parents, that her affidavit remained true, and that she had not honestly considered the child’s father when preparing the affidavit.¹⁴¹ Both parents appealed.

The appellate court began by noting that section 1912(f) of ICWA and the Minnesota Indian Family Protection Act (MIFPA) counterpart provision, Minn. Stat. § 260.771, subd. 6(a), are substantively identical.¹⁴² Then, the appellate court went on to interpret those provisions using Minnesota rules of statutory interpretation,¹⁴³ finding that the statute was unambiguous:

¹³⁸ *Id.*

¹³⁹ *Id.* at *5 (citing 25 C.F.R. § 23.107(a) and 2016 Guidelines at 11). Interestingly, the court also noted that Colorado’s ICWA-Implementing legislation, §19-1-126(1)–(2), C.R.S. 2017, requires trial courts and child welfare agencies to inquire into the children’s tribal connections “at the earliest opportunity.” *Id.*

¹⁴⁰ This is of note, because the question of what provisions apply to a shelter hearing—or any hearing that occurs before the full abuse or neglect adjudication—is one that states continue to grapple with: some finding section 1922’s emergency removal requirements applicable, others finding section 1912 foster care proceedings requirements applicable. Importantly, the regulations define emergency proceeding as “any court action that involves an emergency removal or emergency placement of an Indian child.” 25 C.F.R. § 23.2. Where the guidelines state, “[w]hile States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.” Guidelines at 23.

¹⁴¹ *Matter of Welfare of S.R.K.*, 911 N.W.2d 821, 825–26 (2018).

¹⁴² *Id.* at 827–28. Compare 25 U.S.C. § 1912(f) (“No termination of parental rights may be ordered ... in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child.”) with Minn. Stat. § 260.771, subdiv. 6(a). (“In a termination of parental rights proceeding, the court must determine by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child as defined in [25 U.S.C. § 1912(f)].”).

¹⁴³ *Id.* at 827. As recited by the case, those rules are as follows:

The first step in statutory interpretation is to determine whether the statute’s language, on its face, is ambiguous.” *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013) (citation omitted) (internal quotation marks omitted). “A statute is ambiguous only if it is susceptible to more than one reasonable interpretation.” *Id.* To determine the plain meaning of a statute, we will construe the words “according to the rules of grammar and their common and approved usage.” *Jones v. Borchardt*, 775 N.W.2d 646, 647 (Minn. 2009); see also Minn. Stat. § 645.08(1) (2016) (same). We will also “look to the dictionary definitions of [the] words and apply them in the context of the statute.” *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016).

Read straightforwardly, the statute provides that to terminate parental rights, a district court must determine that "continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(f). This determination must be supported by evidence "beyond a reasonable doubt," and part of the supporting evidence must be QEW testimony.¹⁴⁴

Notably, the appellate court rejected both the State's argument—that a QEW must testify but that it need not support the determination regarding continued custody—and the parents' argument—that the QEW must specifically testify that to the language of the continued custody determination.¹⁴⁵

The appellate court then found that the testimony of the QEW supported the finding that continued custody by the mother would be detrimental to the children and that this evidence coupled by the other evidence met the beyond a reasonable doubt standard of proof.¹⁴⁶ With regard to the father, however, the court found that termination had been improper because the agency had failed to provide testimony from a QEW that supported a finding that continued custody would be detrimental to the child.¹⁴⁷ The court therefore reversed the termination of the father's rights.¹⁴⁸

■ *Diego K. v. State Dept. of Health & Soc. Svcs.* 411 P.3d 622 (Alaska, 2018)

In this Alaska case regarding the standards of removing a child from the home, the mother and father appealed a superior court order removing their 16-year-old child, Mary, from their home, arguing that the Office of Children's Services (OCS) did not meet the standards required under ICWA.¹⁴⁹

In 2014, OCS took emergency custody of the couple's children after it received information indicating that their older son had to be medevac'd out of the village due to alcohol poisoning and that the entire family abused alcohol.¹⁵⁰ After a two day disposition hearing that began on the last day of December, the court found the expert witness testimony to be deficient and returned Mary to her parents, but the court also kept the family under OCS supervision.¹⁵¹ Between January 2015 and April 2016, the court held six status hearings.¹⁵² Those hearings were informal, and no evidence was admitted. In April 2016, the court held a removal hearing where OCS called a number of witnesses. The witnesses testified as to Mary's absenteeism from

¹⁴⁴ *Id.* at 830.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 831. Other evidence showed long-term agency involvement, testimony from a psychologist of mother's poor life choices belief that the children should not be returned, and testimony that mother was not engaging in any of the required services. *Id.*

¹⁴⁷ *Id.* at 832.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 624.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 625.

¹⁵² *Id.* at 626.

school, the social worker's inability to address the mold issue in the home, and the social worker's unwillingness to work with the father. The village administrator also testified that the parents were missing their sobriety checks.¹⁵³ After the hearing, the court ordered Mary to be removed from the home. The court based the removal and findings of active efforts on information provided in the previous hearings.¹⁵⁴

The Alaska Supreme Court remanded that order to make additional removal findings, and the court amended its order to explain that the findings were based on the previous, unsworn testimony of the social workers.¹⁵⁵ The parents again appealed, arguing that the findings used to remove Mary from the home could not be based on unsworn testimony. The Supreme Court agreed, noting that the Alaska Evidence Rules apply in all Child in Need of Aid (CINA) cases.¹⁵⁶

The Alaska Supreme Court discussed the relatively informal nature of CINA cases and the need for multiple parties to communicate throughout the case, including parents, attorneys, guardians ad litem, and social workers. The courts may choose to schedule informal hearings for updates. However, when the discussion at the hearing shifts from updates to making specific legal and factual findings, the court held that those findings must be based on admitted evidence.¹⁵⁷ The court also held that the parents' preserved this issue for appeal, both by objecting to testimony and by requesting that the court swear in a witness.¹⁵⁸ In addition, the parents could not have known at the time of testimony that the court would later rely on that unsworn evidence to make removal findings four months later.¹⁵⁹ The Alaska Supreme Court vacated the removal order and remanded the case back to superior court.

■ *In re B.Y.*, 432 P.3d 129 (Mont. 2018).

In this Montana termination of parental rights case, neither the hearing transcripts nor written orders discuss how the agency had made active efforts before removal and termination.¹⁶⁰ Notably, the appellate court found that the trial court correctly applied ICWA because there was "reason to know" the children were Indian children as indicated in the agency's affidavits. The appellate court also noted that although the agency served relevant tribes with requests to determine the tribal status of the children, one of the tribes never replied. The appellate court then held that without an answer from that tribe, the trial court correctly determined that the case should proceed as though ICWA applied. The father appealed.

After reciting the 2016 ICWA regulations, the appellate court stated that under ICWA, "the district court must document in detail in the record how active efforts have been made by clear and convincing evidence prior to removal and beyond a reasonable doubt prior to termination," and because the trial court in this instance had failed to provide that

¹⁵³ *Id.* at 627.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 629.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *In re B.Y.*, 432 P.3d 129, 130 (Mont. 2018);

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documentation, it erred.¹⁶¹ The court then vacated the termination order and remanded the matter “for the court to ‘document in detail’ if the [agency] met its burden of providing ‘active efforts’ by clear and convincing evidence prior to removal and beyond a reasonable doubt prior to termination.”

IV. All Reported State Cases

As a federal law implemented by state courts, ICWA holds a unique place in child welfare jurisprudence. Included below is a comprehensive listing of all reported 2018 state and federal cases involving ICWA. This quick reference should allow busy practitioners to quickly find and review all new case law on any given ICWA topic that may arise in their caseload without the tedious work of searching through fifty jurisdictions and numerous topics.

Cases that were not reported and reported cases that only mention ICWA to clarify that the child involved was not ICWA-eligible have not been included.

Case Name	Citation	Named Tribe ¹	Outcome	Party Appealing
Active Efforts				
<i>In re</i> B.Y.	432 P.3d 129 (Mont. 2018)	Unknown	Remand	Father
Adoption of Micah H. v. Tyler, R. (<i>In re</i> Adoption of Micah H.)	918 N.W.2d 834 (Neb. 2018)	Oglala Sioux Tribe	Affirmed	Father
Appealability				
<i>In re</i> Interest of M.R.M.	No. 17CA0255, 2018 COA 10 (Colo. App. 2018)	Unnamed	Affirmed	Mother
Appointment of Counsel				
B.L.L.S. v. B.S. (<i>In re</i> Interest of B.L.L.S)	557 S.W.3d 486 (Mo. Ct. App. 2018)	Cherokee Nation	Affirmed	Mother and Father

¹⁶¹ *Id.* at 131.

¹ The “named tribe” is the most specific information available in the case. When a tribe is named it indicates that there is “reason to believe” the child might be an Indian child. If the tribe is “unnamed,” this means that the tribe’s name does not appear in the case. If the tribe is “unknown,” this means that the parent does not know the tribe’s name but has stated there is an affiliation.

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Burden of Proof				
<i>In re</i> Interest of M.V.	432 P.3d 628 (Colo. App. 2018)	Sioux	Remand	Mother
Consent to Termination				
<i>In re</i> Williams	915 N.W.2d 328 (Mich. 2018)	Sault Ste Marie Tribe of Chippewa Indians	Remand	Father
Foster Care Proceeding				
K.L. v. A.A. (<i>In re</i> K.L.)	237 Cal.Rptr.3d 915 (Cal. Ct. App. 2018)	Karuk Tribe	Affirmed	Father
<i>In re</i> E.R.	No. 17CA0460, 2018 COA 58 (Colo. App. 2018)	Unknown	Remand	Mother
Guardianship				
<i>In re</i> Guardianship of I.L.J.E.	921 N.W.2d 463 (S.D. 2018)	Oglala Sioux Tribe	Affirmed	Father
Indian Child				
<i>In re</i> Beers	Nos. 341100, 341101, 3256 Mich.App. 653 (2018).	Cheyenne River Sioux Tribe	Remand	Mother and Father
B.B.S. v. B.T.S. (<i>In re</i> Interest of B.S.S.)	557 S.W.3d 511 (Missouri Ct. App. 2018)	Cherokee Nation	Affirmed	Mother and Father
<i>In re</i> J.J.C.	432 P.3d 149 (Mont. 2018)	Arapahoe Tribe	Affirmed	Mother
<i>In re</i> L.D.	414 P.3d 768 (Mont. 2018)	Chippewa Cree Tribe	Remand	Mother
J.W.E v. State (<i>In re</i> J.W.E.)	419 P.3d 374 (Okla. Civ. App. 2018)	Choctaw	Reverse	Mother
Inquiry				
<i>In re</i> Elizabeth M.	228 Cal.Rptr.3d 213 (Cal. Ct. App 2018)	Redtail Tribe	Remand	Mother
<i>In re</i> E.R.	238 Cal.Rptr.3d 871 (Cal. Ct. App. 2018)	Apache	Remand	Mother and Father
State v. J.L. (<i>In re</i> Interest of J.L.)	428 P.3d 612 (Colo. App. 2018)	Kiowa	Remand	Mother
	433 P.3d 114 (Colo. App. 2018)	Unknown	Reverse	Father

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<i>In re</i> Interest of L.M.				
Jurisdiction				
Holly C.v. Tohono O'odham Nation	434 P.3d 598 (Ariz. Ct. App. 2018)	Tohono O'odham	Dismissed	Mother
Notice				
Crouch v. Ark. Dep't of Human Servs.	547 S.W.3d 102 (Ark. Ct. App. 2018)	Cherokee	Affirmed	Mother
Lawrence v. Ark. Dep't of Human Servs.	548 S.W.3d 192 (Ark. Ct. App. 2018)	Unnamed	Affirmed	Mother
N.G. v. S.A. (<i>In re</i> N.G.)	238 Cal.Rptr.3d 304 (Cal. Ct. App. 2018)	Cherokee	Remand	Mother
E.H. v. Sally H. (<i>In re</i> E.H.)	238 Cal. Rptr.3d 1 (Cal. Ct. App. 2018)	Tohono O'odham	Remand	Mother
<i>In re</i> Interest of M.V.	432 P.3d 628 (Colo. App. 2018)	Lakota	Remand	Mother
<i>In re</i> Interest of L.H.	431 P.3d 663 (Colo. Ct. App. 2018)	Navajo-Dine	Remand	Mother
<i>In re</i> Interest of I.B-R.	No. 17CA1534 2018 COA 75 (Colo. Ct. App. May 17, 2018)	Cherokee	Remand	Father
<i>In re</i> L.A.G.	429 P.3d 629 (Mont. 2018)	Chippewa Cree Tribe	Remand	Mother
<i>In re</i> D.E.	423 P.3d 586 (Mont. 2018)	Blackfeet Tribe	Remand	Mother
C.A. v. C.T. (<i>In re</i> C.A.)	239 Cal. Rptr.3d 493 (Cal. Ct. App. 2018)	Wichita	Affirmed	Mother and Father
<i>In re</i> A.P.	818 S.E.2d 396 (N.C. Ct. App. 2018)	Cherokee	Remand	Mother
Placement Preferences				
Day v. Ark. Dep't of Human Servs.	562 S.W. 3d 871 (Ark. Ct. App. 2018)	Cherokee Nation	Affirmed	Mother

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<i>In re</i> Interest of M.D.	920 N.W.2d 496 (S.D. 2018)	Cheyenne River Sioux Tribe	Affirmed	Father
Qualified Expert Witness				
<i>In re</i> Welfare of S.R.K.	911 N.W.2d 821 (Minn. 2018)	Spirit Lake	Affirmed in Part Reversed in Part	Mother and Father
Removal				
Alaska Dep't of Human Servs. v. Michelle P.	411 P.3d 576 (Alaska 2018)	Native Village of Tuluksak	Remand	State
Diego K. v. Alaska Dep't of Health & Social Servs.	411 P.3d 622 (Alaska 2018)	Unnamed (Asa'carsarmiut)	Remand	Mother and Father
Demetria H. v. Alaska Dep't of Health and Soc. Servs.	433 P.3d 1064 (Alaska 2018)	Native Village of Yakutat	Affirmed	Mother
Harjo v. Ark. Dep't of Human Servs.	548 S.W.3d 865 (Ark. Ct. App. 2018)	Cherokee Nation	Affirmed	Mother
Swangel v. Ark. Dep't of Human Servs.	547 S.W. 3d 111 (Ark. Ct. App. 2018)	Choctaw Nation	Affirmed	Mother
Collin E. v. H.S. (<i>In re</i> Collin E.)	236 Cal.Rptr.3d 220 (Cal. Ct. App. 2018)	Cherokee Nation	Affirmed	Mother and Father
<i>In re</i> P.T.D.	424 P.3d 619 (Mont. 2018)	Fort Peck	Affirmed	Father
<i>In re</i> A.L.D.	417 P.3d 342 (Mont. 2018)	Fort Peck	Affirmed	Father
V.D. v. Black (<i>In re</i> V.D.)	431 P.3d 381 (Okla. Civ. App. 2018)	Choctaw Nation	Affirmed	Mother
<i>In re</i> Interest of A.M.	No. 08-18-00105-CV, 2018 WL 6583392 (Tex. Ct. App. Dec. 14, 2018)	Ysleta del Sur Pueblo	Affirmed	Mother
<i>In re</i> Interest of J.L.C.	No. 07-18-00052-CV, 2018 WL 3524749 (Tex. App. 2018)	Choctaw Nation of Oklahoma	Affirmed	Mother and Father

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<i>In re</i> Interest of K.S.D.	904 N.W.2d 479 (N.D. 2018)	Unnamed	Affirmed	Father
Transfer to Tribal Court				
<i>In re</i> C.J., Jr.	108 N.E.3d 677 (Ohio Ct. App. 2018)	Gila River Indian Community	Reverse	Guardian ad Litem
J.Y. v. R.T. (<i>In re</i> J.Y.)	241 Cal.Rptr.3d 856 (Cal. Ct. App. 2018)	Pit River Indian Tribe	Affirmed	Mother
A.S. v. C.S. (<i>In re</i> A.S.)	239 Cal.Rptr.3d 20 (Cal. Ct. App. 2018)	Mesa Grande Band of Mission Indians	Affirmed	Mother and Father