MARGARET KELLY*

A Mother's Domicile in the Indian Child Welfare Act: *In re Adoption of B.B.*

INTRODUCTION

> I cried aloud, shaking my head all the while until I felt the cold blades of the scissors against my neck, and heard them gnaw off one of my thick braids. Then I lost my spirit. . . . In my anguish I moaned for my mother, but no one came to comfort me. Not a soul reasoned

* J.D. Candidate, 2023, University of Oregon School of Law; B.A., 2019, Brigham Young University; Articles Editor, *Oregon Law Review*. This Note would not have been possible without the guidance of Professor Howard Arnett and the wonderful editors at *Oregon Law Review*.

> quietly with me, as my own mother used to do; for now I was only one of many little animals driven by a herder.[1]

Zitkala-Sa's famous account of her time in an Indian[2] boarding school represents just one of the countless stories of trauma Native American children faced when they were taken from their homes and forced to leave their families, languages, and traditions behind. While this account focuses on one of the hundreds of thousands of Native American children taken into boarding school from the 1860s to the 1960s,[3] the removal of Native American children from their families has taken many forms throughout American history.[4] These include the U.S. government supporting the establishment of Christian schools on tribal land and terminating tribal recognition, which has helped perpetuate high rates of removal of Native children from reservations and adoption by non-tribal members.[5]

In 1978, Congress acknowledged the detrimental effect of the systemic removal of between 25% and 35% of Native children from their homes by state social workers and adoption agencies.[6] This led Congress to pass the Indian Child Welfare Act (ICWA).[7] Congress explained that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[8] To that end, ICWA provides that tribal courts are more competent than state courts to evaluate adoption proceedings involving Native children and establishes a series of placement preferences that aim to keep Native children in Native communities.

While state judiciaries must be aware of several issues regarding ICWA, where a case is tried is a threshold issue of ICWA. When faced with a jurisdictional question, the court assesses the domicile[9] of

---

1 ZITKALA-SA, AMERICAN INDIAN STORIES 55–56 (1921).

2 "Indian" is the legal term used to describe Native people and will thus be used throughout this Note in addition to the terms "Native" and "Native American."

3 *US Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/education/us-indian-boarding-school-history/ [https://perma.cc/C44J-GH28].

4 *See generally* Vivien Olsen, *The Indian Child Welfare Act: History, Reflections, and Best Practices*, J. KAN. BAR ASS'N, Sept./Oct. 2021, at 40, 40–41.

5 *Id.*

6 H.R. REP. NO. 95-1386, at 9 (1978).

7 *Id.* at 1.

8 *Id.* at 9.

9 "Domicile" is defined as "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Domicile*, BLACK'S LAW DICTIONARY (11th ed. 2019).

the parties. Domicile is an essential part of ICWA because it often determines which court—tribal or state—will decide the fate of an Indian child in an adoption proceeding. In cases involving newborn babies, for example, the determination of a child's domicile focuses on the child's parents, namely the mother. In recent years, some courts have used relaxed domicile standards that are inconsistent with congressional intent in order to give the state jurisdiction and deny tribes the power to adjudicate.

The Utah Supreme Court case of *In re Adoption of B.B.* represents this worrying trend.[10] There, the court made the troubling determination that a biological mother was domiciled in Utah instead of her reservation, despite evidence to the contrary.[11] To come to this conclusion, the Utah Supreme Court used a relaxed standard to determine the biological mother's domicile, going directly against congressional intent and guidance from the U.S. Supreme Court.

This Note uses *In re Adoption of B.B.* to examine an Indian mother's domicile in relation to ICWA. It argues that Congress's concern about the state-sanctioned removal of Native American children from their homes and tribes must remain part of the consciousness of judges who determine the fate of Native American children. Further, judges must consider other factors when determining domicile, such as the plain interpretation of ICWA and United States Supreme Court precedent. The lenient standard of domicile adopted by the Utah Supreme Court is harmful to Indian families, tribal longevity, and tribal culture.

I
HISTORY AND PURPOSE OF THE INDIAN CHILD WELFARE ACT

ICWA addressed Congress's concern that government and private parties were displacing Indian children from their native homes at high rates. During hearings before the Subcommittee on Indian Affairs in 1974, Congress noted that non-Indian communities could expect one in fifty-one children to be put in adoptive homes or in foster care.[12] In actuality, state agencies and adoption groups removed Indian children

---

[10] *In re* Adoption of B.B., 469 P.3d 1093 (Utah 2020).

[11] *See id.* at 1096.

[12] *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affs. of the Comm. on Interior and Insular Affs.*, 93d Cong. 1 (1974) [hereinafter *1974 Hearings*] (statement of Sen. James Abourezk).

at a rate five to twenty-five times higher.[13] This rate, at the time of the hearings, accounted for state agencies removing at least twenty-five percent of Indian children from their homes.[14] Government and private agency officials took Indian children at these high rates and placed them into foster homes, adoptive homes, or boarding schools.[15]

Congress noted that the widespread discrimination against Indian families was a large reason for the displacement.[16] This discrimination was prevalent in many of the policies the federal government enacted before the passage of ICWA.

The infamous phrase "[k]ill the Indian in him, and save the man" by Captain Richard Henry Pratt[17] is the perfect embodiment of how many Americans historically felt about Native Americans. Pratt first stated this phrase in a speech promoting Indian boarding schools, which were an attempt to assimilate Native Americans into the mainstream "civilized" culture of the United States.[18] Government actors used the idea that Native Americans were not civilized and needed to be "saved" to justify the high removal rate of Native children from their families and tribes. Congress acknowledged this years later when they explained that "public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian."[19] The result was both the physical taking of children into boarding schools and a deep-seated belief that Native American parents were unfit to raise children.

After the closure of many boarding schools in the 1950s, the United States Government turned to adoption as an alternative means of removing Native American children from their homes. In fact, the Bureau of Indian Affairs partnered with the Child Welfare League of America to establish the Indian Adoption Project in 1959.[20] An article

---

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *"Kill the Indian in Him and Save the Man": R.H. Pratt on the Education of Native Americans*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/teach/kill-indian-him-and-save-man-r-h-pratt-education-native-americans [https://perma.cc/4HE9-C82V].

18 *Id.*

19 *1974 Hearings*, *supra* note 12, at 1–2 (statement of Sen. James Abourezk).

20 *Adoptions of Indian Children Increase*, U.S. DEPT. OF THE INTERIOR INDIAN AFFS. (Apr. 14, 1966), https://www.bia.gov/as-ia/opa/online-press-release/adoptions-indian-children-increase [https://perma.cc/C2QB-MJUH] (stating that the project started seven years earlier).

written by the director of the Indian Adoption Project, Arnold Lyslo, further perpetuates stereotypes about Native Americans.[21] In it, Lyslo broadly states that Native American children lack "the security of family life," that Native American children are largely born to unwed mothers, and that many Native American children are left "loose on the reservation without proper care or supervision."[22] While the Indian Adoption Project accounts for a small percentage of all the Native American children who were adopted out of their families, the article illustrates the popular belief that Native American children were raised in subpar conditions and needed rescuing from their families and their reservations.

During this adoption era, government agencies removed Native American children from their homes for any number of reasons, such as visiting the hospital for a rash or family members practicing traditional religious ceremonies.[23] Many children who were adopted out of their tribes lived with a sense of missing identity, and the families who were left behind felt helpless in preventing the adoptions, professing that they had "no rights."[24] One woman, who was a product of removal and adoption, stated, "All of us, who have been taken away from our homes as children, still as adults, we don't feel like we have a place where we belong."[25]

Although the widespread removal of Native American children from their homes was abhorrent because it separated families and had a negative impact on the lives of children, it was also devastating to tribes culturally. During the congressional hearings regarding ICWA, legislators referred to this vast removal as "cultural genocide."[26] The foster care and adoption of Native American children to families outside their tribes "led to the break-up of American-Indian families

---

21 Arnold Lyslo, *The Indian Adoption Project*, CHILD WELFARE, May 1961, at 4, 4–5.

22 *Id.*

23 Stephanie Woodard, *Native Americans Expose the Adoption Era and Repair Its Devastation*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/native-americans-expose-the-adoption-era-and-repair-its-devastation#:~:text=The%20Indian%20Adoption%20Project%20was,Churches%20were%20also%20involved [https://perma.cc/4HMV-G934].

24 *Id.*

25 Anna Bressanin, *Native Americans Recall Era of Forced Adoptions*, BBC NEWS (Nov. 21, 2012), https://www.bbc.com/news/av/world-us-canada-20404764 [https://perma.cc/X2XB-8CV9].

26 *1974 Hearings*, *supra* note 12, at 2 (statement of Sen. James Abourezk).

and ultimately to the loss of future tribal members."[27] Commentators described the removal of Native American children as the "most tragic and destructive aspect of American Indian life."[28] Removing children from their families and their tribes was so devastating because it meant that tribes had no way of carrying on their cultures and traditions. In addition, the continued high rate of removal would likely have meant the disappearance of some tribes altogether. ICWA is evidence of Congress's desire to rectify their past inactions[29] and to follow through on the promise established long ago that the federal government has the responsibility of taking care of Indian tribes.[30]

When describing the dire situation of Native Americans to Congress, Chief Isaac of the Mississippi Band of Choctaw Indians stated:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[31]

Chief Isaac's quote illustrates the desperate situation that many Native American tribes were facing as a result of removal policies. He illustrates that, in addition to the detrimental effect of taking a child away from their families, it is important to consider the wider effect that removal has on tribal life and tribal culture.

---

27 Thomas R. Myers & Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, MICH. BAR J., 19, 19 (2004).

28 *1974 Hearings*, *supra* note 12, at 15 (statement of William Byler, Executive Director, Association of American Indian Affairs).

29 *1974 Hearings*, *supra* note 12, at 2 (statement of Sen. James Abourezk) (Congress admitting that it had not acted while dealing with the issue of Indian child removal).

30 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (originating the trust responsibility doctrine, stating that Native American nations are considered "domestic dependent nations" looking to the United States Government for protection); *see also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220 (Rennard Strickland et al. eds., 1982 ed.) [hereinafter COHEN HANDBOOK] (outlining the development of the trust responsibility doctrine).

31 *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearings Before the Subcomm. on Indian Affs. and Public Lands of the Comm. on Interior and Insular Affs. H. of Reps.*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief, Mississippi Band of Choctaw Indians).

A. The Statute

As stated above, ICWA was passed to remedy past injustices made upon Native American tribes across the country. The act was a response not only to the issue of families being separated but also as a means for tribes to preserve their culture. As such, ICWA establishes certain jurisdictional and adoptive preferences that favor the Indian child's family and tribe.[32]

To benefit from ICWA, a child must first be considered an "Indian Child."[33] Congress stated that an Indian Child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[34]

Next, in an effort to resolve the issue of bias in the welfare system toward Indian families, Congress included specific instructions about when a tribal court has jurisdiction over the proceedings.[35] When a child resides or is domiciled in an Indian reservation, the tribal court automatically has jurisdiction over the child.[36] This is true except in the rare instance where federal law gives a state jurisdiction over the

---

[32] This Note was written pending the United States Supreme Court's decision in *Haaland v. Brackeen*, which challenges the constitutionality of ICWA. In 2021, the Fifth Circuit rejected the argument that the "Indian child" classification in ICWA violates the equal protection clause in the United States Constitution. Brackeen v. Haaland, 994 F.3d 249, 337–38, 340 (5th Cir. 2021). The court reasoned that tribal eligibility does not primarily turn on the issue of race but is rather the result of a political classification. *Id.* at 334, 337–38. The United States Supreme Court granted certiorari on *Brackeen v. Haaland* and consolidated its review of the case with two other similar cases on February 28, 2022. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted*, Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, Texas v. Haaland, 142 S. Ct. 1205. Oral argument was scheduled for November 9, 2022. SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2022 (Oct. 14, 2022), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2022.pdf [https://perma.cc/V78K-9RC7]. Although *Brackeen* does not specifically involve the issues of domicile covered in this Note, the Supreme Court's decision could be detrimental to ICWA and therefore the larger concerns of protecting Indian families, tribal communities, and tribal culture.

[33] *See* 25 U.S.C. § 1902 (declaring a new national policy to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes[]").

[34] 25 U.S.C. § 1903(4).

[35] *See* 25 U.S.C. § 1911; *see also* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 514 n.5 (4th ed. 2020) (explaining that ICWA's provisions about tribal jurisdiction are consistent with caselaw proceeding the passage of ICWA).

[36] § 1911(a).

child.[37] In addition, ICWA states that an Indian child who is not domiciled on the reservation should still have their proceeding transferred to tribal court if there is no objection from either parent.[38] Congress also gave the child's tribe and the Indian custodian of the child the power to intervene at any point in the proceeding.[39] Section 1911 illustrates that, in general, ICWA favors the transfer of an Indian child custody proceeding to a tribal court.[40] This general preference illustrates the congressional intent to have tribes more involved in the fate of the children of the tribe and is a clear attempt by Congress to make the proceedings more equitable to tribes and Indian parents.

In addition to jurisdiction, Congress established adoptive placement preferences for Indian children.[41] Section 1915(a) of ICWA provides that in state law proceedings, an Indian child up for adoption has the preference to be placed first with a member of the child's extended family, then a member of the child's tribe, and lastly with another Indian family.[42] These preferences illustrate Congress's belief that it was important for an Indian child to be placed with an Indian family, and preferably a member of the child's own tribe. Once again, this preference stems from years of Indian children being placed with non-Indian families, thereby threatening to destroy tribal culture and tradition.

Further evidence of Congress's desire to maintain the cultural traditions of Indian tribes can be found in section 1915(d) of ICWA.[43] That section states that "[t]he standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community."[44] Therefore, if a tribe has a specific standard for something like membership that differs from the norm, the state court must abide by that standard, even if it does not necessarily agree with the standard or understand it. Here, Congress is again going to great lengths to preserve tribes' way of life and respect their traditions.

---

37 *Id.*; *see also* KELLY GAINES-STONER ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK 8 (3d ed. 2018) (discussing Public Law 280 as the exception to giving tribal courts exclusive jurisdiction).

38 § 1911(b).

39 *Id.* § 1911(c).

40 GAINES-STONER ET AL., *supra* note 37, at 8.

41 *See* 25 U.S.C. § 1915.

42 *Id.* § 1915(a).

43 § 1915(d).

44 *Id.*

B. Domicile

The appropriate determination of a person's domicile is a tantamount issue in ICWA because it often determines whether an ICWA case is tried in a state or tribal court. More generally, domicile also affects general civil procedure issues, meaning there is ample case law and established precedent on the subject.

The Supreme Court stated that "[r]esidence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile."[45] In addition, the Supreme Court explained that while a person's own statements about their residence should be considered when determining domicile, these statements must be coupled with a person's real attitude and intention to make the location in question their domicile.[46] This attitude and intention can be determined through a person's "entire course of conduct."[47]

Courts have also explained that simply changing a residence is not enough to change a person's domicile.[48] To create a change in domicile, one must be removed from their former residence, rather than simply having the appearance of being removed.[49] Essentially, courts agree that domicile is more than a person stating they moved or a simple change of address. Rather, domicile reflects a clear intent to make a new home permanent.

C. Statutory Interpretation

When interpreting and applying a statute, the court must look at the congressional intent of the act. For example, the Supreme Court stated that the object and policy of a law should be considered when interpreting a statute.[50] In other words, understanding the intention of the act and then using that intention as a guide to interpret the statute is the proper method of statutory interpretation.[51] While it is important and necessary to look at the congressional intent and object of the

---

45 Texas v. Florida, 306 U.S. 398, 424 (1939).

46 *Id.* at 425.

47 *Id.*

48 *In re* Newcomb's Estate, 84 N.E. 950, 954 (N.Y. 1908) ("Residence without intention, or intention without residence, is of no avail.").

49 Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972).

50 Mastro Plastics Corp. v. Nat'l Lab. Rels. Bd., 350 U.S. 270, 285 (1956).

51 United States v. Boisdore's Heirs, 49 U.S. 113, 122 (1850).

statute, the court should also look at the plain text of the statute to aid in interpretation.[52]

In addition, courts have a heightened responsibility to tribes when interpreting statutes involving Indians.[53] To resolve issues in treaties where Indian tribes could be taken advantage of by the United States Government, canons of construction were established to protect the rights of Indians.[54] The canons of construction require courts to liberally construe treaties to favor Indians, resolve ambiguities in favor of tribes, and construe treaties as Indians would have understood them.[55]

While the canons of construction apply explicitly to tribal treaties, the *Handbook of Federal Indian Law* provides three important canons of construction also applicable to statute. First, "[s]tatutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights."[56] Second, "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed . . . in favor of the Indians."[57] Third, "doubtful expressions" should also be resolved in favor of the tribe, rather than the more powerful federal government.[58] While the first two canons of construction apply to statutes, the third does not because statutes are not a bilateral transaction in the same way that treaties are.[59] Therefore, the canons of construction do not require that the courts construe statutes as Indians would have understood them.

II
BACKGROUND OF *IN RE ADOPTION OF B.B.*

In *In re Adoption of B.B.*, both the mother and father of the child in question were Cheyenne River Sioux.[60] Both the mother and father resided on the reservation for the first six months of pregnancy.[61] While residing on the reservation, the mother decided to place her unborn

---

52 *See, e.g.*, Richards v. United States, 369 U.S. 1 (1962).

53 *See* COHEN HANDBOOK, *supra* note 30, at 221–25.

54 *Id.* at 221–22.

55 *Id.* at 222.

56 *Id.* at 224.

57 Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918).

58 Choate v. Trapp, 224 U.S. 665, 675 (1912) (explaining that tribal nations are "weak and defenseless," which requires that the United States act in "good faith" toward Native Americans).

59 COHEN HANDBOOK, *supra* note 30, at 224 n.60.

60 *In re* Adoption of B.B., 469 P.3d 1093, 1097 (Utah 2020).

61 *Id.*

child up for adoption.[62] At that time she contacted a Utah adoption agency, Heart to Heart.[63] After the biological mother contacted the adoption agency, she moved to Utah, where she resided when she gave birth to her child at the end of August 2014.[64] In September 2014, only a month after giving birth, the mother moved back to the Cheyenne River Sioux reservation.[65]

Throughout the pregnancy and adoption process, the biological mother repeatedly lied about essential facts relating to her intentions and the child's father.[66] The Utah Supreme Court decision states that the mother told the child's biological father that she would move to Utah with the intent that he would follow her later.[67] However, once the mother moved to Utah, she stopped direct communication with the biological father and told him, through family members, that she would return to the reservation "soon."[68] More seriously, the biological mother lied about the identity of her child's biological father throughout the adoption process.[69] She falsely stated that her brother-in-law was her child's biological father.[70] In addition, she had her brother-in-law consent to the adoption and relinquish his parental rights.[71] The biological mother also falsely stated that the child's biological father was not a member of a Native American tribe and was not eligible to be a member.[72]

When the biological mother moved back to the reservation, she informed the biological father that she had given birth and placed the child up for adoption.[73] The biological father responded by moving to intervene in the adoption proceedings.[74] The district court denied the biological father's motion, which the Utah Supreme Court reversed and remanded.[75] Both the biological father and the Cheyenne River Sioux

---

62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*

Tribe attempted to transfer the proceedings to tribal court on remand.[76] The district court granted this request by determining that the child was domiciled on the reservation because the biological mother was domiciled on the reservation.[77]

The Utah Supreme Court, however, reversed the district court's ruling.[78] It reasoned that a short absence from a former home can be sufficient to change a person's domicile if the person intends to make that new place their home.[79] That move is sufficient even if a person lives in their new domicile for only a short time.[80] Under that reasoning, the Utah Supreme Court determined that the biological mother (and therefore the child) was domiciled in Utah, despite the short time the mother spent in Utah and the misrepresentations she made in court.[81]

III
CASE ANALYSIS

A. Plain Interpretation

A plain reading of the facts in *Adoption of B.B.* yields the conclusion that the biological mother, and therefore her child, was domiciled in the Cheyenne River Sioux Reservation. This presumption stems from the biological mother living on the reservation, moving to Utah only for a short time, contacting an adoption agency, and moving back to the reservation.[82]

While the biological mother admittedly stated that she moved to Utah for other reasons, namely "to be closer to friends and family" and to obtain employment,[83] it appears that the Utah Supreme Court relied solely on the biological mother's affidavit and did not closely examine the biological mother's actions when determining whether she truly intended to be domiciled in Utah. In addition to the biological mother's affidavit, the court relied on a statement by the biological father. There,

---

76 *Id.*

77 *Id.*

78 *Id.* at 1110.

79 *Id.* at 1099–1100.

80 *Id.* at 1099 (quoting Gardner v. Gardner, 222 P.2d 1055, 1057 (Utah 1950)).

81 *Id.* at 1110.

82 *Id.* at 1097.

83 *Id.*

he stated that the plan was for the biological mother to move to Utah with the idea that he would join her when she got settled in.[84]

At first glance, this corroborating evidence seems to be convincing, but here it is insufficient. First, the biological mother repeatedly lied to the court when she stated that her brother-in-law was the child's father and that the child's father did not belong to an Indian tribe.[85] Furthermore, once the biological mother moved off the reservation, she ceased communication with the biological father.[86] She also stated, while in Utah, that she would "soon" return to the reservation.[87] These actions overwhelmingly suggest that the biological mother was not domiciled in Utah because she abandoned her plan with the biological father and explicitly stated that she would soon return to the reservation. Here, it appears that the Utah Supreme Court relied solely on the biological mother's statements rather than examining her entire history of conduct to help determine her real attitude and intention—a longstanding precedent in determining domicile.[88]

Expectant mothers often have an incentive to move near an adoption agency to receive financial help with their pregnancy. For example, the adoption agency the biological mother used, Heart to Heart,[89] offers to pay expectant mothers not only for the costs associated with pregnancy and delivery but also to cover "housing help, utilities, groceries, travel expenses, and all legal fees related to the adoption."[90] Thus, the adoption agency's incentives led the birth mother to move to Utah to place her child up for adoption. Additionally, the birth mother potentially moved to Utah with the motivation to avoid resistance from the birth father when she confronted him about the adoption. This concern proved to be prescient, as the birth father intervened in the proceedings upon finding out about the adoption.[91]

The Utah Supreme Court should have considered the lack of honesty when determining the biological mother's domicile. Instead of

---

84 *Id.* at 1100.

85 *Id.* at 1097.

86 *Id.*

87 *Id.*

88 *See* Texas v. Florida, 306 U.S. 398, 424 (1939).

89 *In re Adoption of B.B.*, 469 P.3d at 1097.

90 *See How We Can Help You*, HEART TO HEART ADOPTIONS, https://hearttoheartadopt.com/im-pregnant-form/ [https://perma.cc/L2VP-ZA6D].

91 *In re Adoption of B.B.*, 469 P.3d at 1097.

determining domicile based on objective evidence,[92] the court based its ruling solely on the affidavit of the biological mother and father.[93] But, as mentioned earlier,[94] domicile should not be determined by an individual's statements alone, but should be coupled with a person's real attitude and intent toward their domicile, which is often shown through a holistic view of the person's conduct.[95] The relaxed standard of domicile adopted by the Utah Supreme Court is concerning because domicile is an essential aspect of ICWA. Domicile is essential because, as previously stated, if a child is domiciled on a reservation, then jurisdiction is exclusive to that Indian tribe.[96]

B. Congressional Intent

The Utah Supreme Court's relaxed standard of domicile goes directly against the congressional intent of ICWA. First, the plain language of the statute clearly expresses the intent to have Indian children's fate decided by their own tribe, especially when they are domiciled on the tribe's reservation.[97] Throughout ICWA, Congress created several ways for an adoptive child's Indian tribe to be involved in the adoption proceedings. For example, Congress gives exclusive jurisdiction to the tribal court when a child is domiciled on the tribe's reservation.[98] This provision signals not only Congress's desire to have Indian children's adoptive fate decided by that child's tribe but also its trust in tribal courts. If Congress did not believe that tribal courts could adequately decide where Indian children are domiciled, Congress would not have included section 1911(a) in ICWA.

Furthermore, Congress gives the adoptive child's tribe other ways to assist in determining where the child should be placed. In situations where a child is not domiciled or residing on a reservation, Congress

---

92 *See, e.g.*, Gordon v. Steele, 376 F. Supp. 575, 577 (W.D. Pa. 1974) (listing the "indicators pointing for and against acquisition of a new domicile").

93 *In re Adoption of B.B.*, 469 P.3d at 1099–100.

94 *See supra* Section I.B.

95 Texas v. Florida, 306 U.S. 398, 425 (1939).

96 25 U.S.C. § 1911(a).

97 *Id.*; *see also* § 1911(b) (stating that even if a child is not domiciled or residing on a reservation the court must transfer the proceeding to the tribe absent an objection from either parent); § 1911(c) (stating that the tribe has a right to intervene in an adoption proceeding at any point); 25 U.S.C. § 1915(a) (stating that preference in adoption will be given to families on the tribe's reservation).

98 § 1911(a).

still makes it possible for tribal courts to decide the case.[99] In cases decided by state courts, Indian tribes are also able to intervene in the case at any time.[100] Finally, Congress endeavored in ICWA to apply tribal social and cultural standards where relevant.[101] These provisions clearly illustrate Congress's preference and intent to have tribes as involved as possible in the adoptive proceedings of Indian children. The Utah Supreme Court's low standard of domicile clearly cuts against congressional intent.

Congressional hearings on ICWA also clearly demonstrate how inapposite Utah's domicile interpretation is to Congress's intent. Throughout the hearings, Congress and various witnesses expressed the importance and necessity of having tribes involved in the fate of Indian children who are removed or voluntarily adopted out of their homes. Congress clearly identified that perceived cultural differences are one of the root issues that place Indian children outside their tribe.[102] As a solution, Congress expressed its desire to have tribes play a larger role in determining the fate of Indian children. The Utah Supreme Court has consequently frustrated congressional intent by establishing a new standard of domicile—one that does not account for the facts surrounding a person's new domicile. This again proves that the Utah Supreme Court's determination about the biological mother's domicile is antithetical to the congressional intent of ICWA.

Congress also sought to avoid prejudice found in state courts by allowing ICWA cases to transfer to tribal courts. Congress's attempt to avoid this prejudice is clear because it went to great lengths to ensure proceedings stay in tribal courts in various situations. As stated above, a tribal court automatically gains jurisdiction over an Indian child when the child resides on the reservation, when the child is domiciled on the reservation, or when there is no objection from either parent.[103] Additionally, Congress granted tribes and either biological parent the

---

99 § 1911(b) (stating that if neither biological parent objects to the proceedings and if there is no good reason to have the case before the state court, then the state court should transfer the proceedings to tribal court upon the request of the tribe or either parent).

100 § 1911(c).

101 § 1915(d) (stating that the standards for adoptive preference requirements should be the cultural and social standards of the specific Indian tribe).

102 *1974 Hearings*, *supra* note 12, at 2 (statement of Sen. James Abourezk) (observing that before the passage of ICWA, government officials "would seemingly rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered"); *see also id.* at 4 (statement of William Byler, Executive Director, Association on American Indian Affairs).

103 § 1911(a)–(b).

power to intervene in an adoption at any point in the proceeding.[104] The fact that Congress grants so much deference to tribal courts illustrates that Congress has a vested interest in making sure tribal courts have every opportunity to try cases involving tribal members.

Congress clearly states that its intent to have cases tried in tribal courts is an attempt to resolve the prejudice of individual social workers, who do not reside on the reservation. When passing ICWA, Congress admitted that many social workers were not familiar with Native American cultures and values and that those social workers made "decisions that [were] wholly inappropriate in the context of Indian family life."[105] For example, ignorant social workers often concluded that practices such as leaving a child with extended family members for prolonged periods of time were neglectful and legitimate reasons to terminate parental rights.[106] Both social workers and the general public perpetuated the idea that differing tribal social norms were inferior and dangerous. This cultural bias is illustrated in the language used by individuals such as the director of the Indian Adoption Project when he expressed concern for Native American children "left to run loose on the reservation without proper care or supervision."[107] The director's concern reflects a general belief that tribal members are less equipped to raise children than non-tribal individuals who reside outside a reservation.

Although social workers' practices and concerns are not necessarily determinative in state court adoption proceedings, they illustrate a broader issue in having child custody hearings determined outside the reservation. State courts are not shielded from the general belief that Native American parents are less equipped to raise children—a belief and bias that Congress attempted to resolve with the passage of ICWA. The preference ICWA gives to hearing adoption proceedings in tribal courts[108] was one way for Congress to fight racial biases in courts. By not allowing the adoption case to move to a tribal court, the Utah Supreme Court denied the biological father and the Cheyenne River Sioux a more favorable forum. This outcome is antithetical to ICWA's stated purpose: to view child custody proceedings in a light more favorable to Native Americans and tribes.

---

104 § 1911(c).

105 H.R. REP. NO. 95-1386, at 10 (1978).

106 *Id.*

107 Lyslo, *supra* note 21, at 4–5.

108 *See* § 1911.

The Utah Supreme Court's rejection of the court transfer not only prevented the adoption proceeding from being heard in a less prejudiced court, but it may also represent an unconscious bias in favor of Utah courts. In a practical sense, the facts of *Adoption of B.B.* favor having the adoptive parents keep the child. B.B. was born in August 2014, and the court finally resolved the case in July 2020.[109] This means that B.B. was nearly six years old by the end of the proceedings. B.B. knew only the adoptive parents, and at almost six years old, removing B.B. from the only home they knew could be traumatic. The Utah Supreme Court likely felt this concern when determining where B.B. was domiciled and, therefore, whether the case could transfer to a tribal court. By not allowing the case to transfer to a tribal court, the Utah Supreme Court made it likely that B.B. would stay with their adoptive parents, as a state court would be reluctant to take B.B. away from their adoptive family.

The U.S. Supreme Court, however, made it clear that the question of where an adopted child should ultimately live should not affect where a court decides that a mother, and therefore the child, is domiciled.[110] The Supreme Court even goes as far as to say that "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe."[111] In fact, in another ICWA adoption proceeding decided by the Utah Supreme Court, *In re Adoption of Halloway*, the justices stated that courts should trust and defer to the "experience, wisdom, and compassion" of the tribal courts.[112] In the same case, the Utah Supreme Court also expressed confidence that the tribal court would act with "careful attention" and "the utmost concern for [the child's] well-being."[113] In the case of *Adoption of B.B.*, the Utah Supreme Court should have set aside any prejudice about moving the case to tribal court and followed its earlier ruling in *Halloway*, trusting that tribal courts will act ethically and in the best interest of the child to determine the fate of the Native American child.

The court must also understand that just because the case is moving to tribal court does not mean that the child will automatically leave the custody of their adoptive parents. A tribal court makes rulings based on

---

109 *In re* Adoption of B.B., 469 P.3d 1093, 1097 (Utah 2020).

110 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).

111 *Id.* at 54.

112 *In re* Adoption of Halloway, 732 P.2d 962, 972 (1986).

113 *Id.*

available evidence and what is in the child's best interest, just as a state court would. On remand in *Mississippi Band of Choctaw Indians v. Holyfield*, for example, the tribal court determined that the children should remain with their adoptive mother because that was in the best interest of the children.[114] For ICWA to succeed, state courts must have more trust and respect for tribal courts. State courts need to understand that tribal courts are still courts of law with the authority and responsibility to act in the best interest of each child.

C. Canons of Construction

The Utah Supreme Court decision in *Adoption of B.B.* is also inconsistent with Indian Law canons of construction. Relevant here is that the canons of construction instruct courts to liberally construe statutes in favor of Indian rights and to resolve ambiguities in favor of Indian tribes.[115] Specifically, courts should "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited."[116] The Utah Supreme Court, however, failed to resolve the biological mother's domicile in favor of the Cheyenne River Sioux Tribe, even though her domicile could be considered ambiguous. Rather than transferring the case to tribal court and construing the statute to benefit tribal rights, the Utah Supreme Court construed the biological mother's domicile in favor of the State. The court concluded so with weak evidence in favor of keeping the case in a Utah court and ignored and violated the Indian Law canons of construction.

D. Effect on Public Policy

Because *Adoption of B.B.* is a Utah Supreme Court case, it is precedential for future adoption cases brought in Utah state courts. This greatly affects the future of Native Americans in Utah, especially considering the relatively high number of Native American tribes in the state. There are currently eight federally recognized tribes in the State of Utah.[117] The latest census report indicates that 1.6% of Utah's

---

114 ANDERSON ET AL., *supra* note 35, at 519 n.3.

115 COHEN HANDBOOK, *supra* note 30, at 222.

116 *Id.* at 225.

117 Recognized tribes in Utah include Confederated Tribes of Goshute, Navajo Nation, Ute Indian Tribe of the Uintah and Ouray Reservation, Northwestern Band of Shoshone Nation, Paiute Indian Tribe of Utah, San Juan Southern Paiute Tribe, Skull Valley Band of

population identifies as "American Indian and Alaska Native."[118] This equates to approximately 53,400 Native Americans living in the State of Utah.[119] The large Native American population in the state illustrates the large impact that the *Adoption of B.B.* ruling will have on Native Americans in Utah. And as *Adoption of B.B.* illustrates, Native American mothers can travel from across the country to put their children up for adoption in Utah.[120] Therefore, the court's ruling in this case has the potential to affect tribal nations across the United States.

The loose standard that the court adopts in *Adoption of B.B.* permits a mother to move off her reservation, have her child, put the child up for adoption without ICWA protocols, and then move back to the reservation. As long as the mother states that she intended to stay off the reservation permanently—without further evidence—state courts in Utah should accept her word. That is significantly broader than traditional domicile standards, which typically require extrinsic evidence to prove that a person intends to make a new area their home.

As stated above, this new standard affects Native American mothers across the country. Because *Adoption of B.B.* allows for a relaxed standard of domicile, an expectant mother can move to Utah to have her child, knowing that they will likely be able to avoid ICWA provisions.

This loose standard of domicile permits and encourages the Utah courts to revert to practices that were permissible before Congress passed ICWA. This clearly goes against congress's intent when passing ICWA, as Congress sought to give tribes more of a voice when deciding where Native American children would be placed. Finding loopholes in ICWA also endangers tribal welfare, as a higher percentage of Native American children will be adopted out of Native American families.

Goshute, and White Mesa Band of the Ute Mountain Ute Tribe. Utah Div. of Indian Affs., *Tribal Nations*, UTAH.GOV, https://indian.utah.gov/tribal-nations/ [https://perma.cc/GX96-GXPL].

118 *Utah Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/UT [https://perma.cc/E47N-EHQG].

119 *Id.*

120 *In re* Adoption of B.B., 469 P.3d 1093, 1097 (Utah 2022) (stating that the mother in this case traveled from her reservation in South Dakota to Utah to give birth to her child).

E. United States Supreme Court Precedent

The Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield* supports the conclusion that courts must consider congressional intent when determining domicile in ICWA.[121] The *Holyfield* case has many facts similar to *Adoption of B.B.* In *Holyfield*, the U.S. Supreme Court considered whether a child born to native parents was domiciled on the reservation if the biological mother intentionally moved off the reservation for purposes of having the baby and giving the baby up for adoption.[122] The Court rejected the arguments from the trial and appellate courts, instead stating that under ICWA, the question of domicile is one of congressional intent; it is not up to debate or interpretation by the states.[123]

The Supreme Court further interpreted and explained the congressional intent behind domicile in ICWA. The Court stated that part of the purpose of ICWA was "to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings."[124] The Court further clarified that the jurisdiction of tribal courts was "not meant to be defeated by the actions of individual members of the tribe," because ICWA was not established just to protect families and individual children "but also . . . the tribes themselves."[125] The logic of *Holyfield* is clear: a biological mother does not dissolve her relationship to her ancestral domicile simply by giving birth to her child outside the reservation's boundary.

Adoption of B.B. is therefore perplexing—it acknowledges and cites *Holyfield* yet it still makes a ruling that is antithetical to its precedent. In *Adoption of B.B.*, the Utah Supreme Court is seemingly deferential to the *Holyfield* decision, correctly stating that "[u]nder well-established domicile standards followed in courts across the nation, the exclusive jurisdiction of the tribal court should have remained intact despite that temporary trip across state lines."[126] But the court then attempts to distinguish the two cases by stating that the mother in *Adoption of B.B.* was legitimately domiciled in Utah, while the mother in *Holyfield* was not domiciled outside the reservation.[127]

---

121 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

122 *Id.* at 30.

123 *Id.* at 43–44.

124 *Id.* at 45.

125 *Id.* at 49.

126 *In re* Adoption of B.B., 469 P.3d 1093, 1107 (Utah 2020).

127 *Id.*

This argument is unconvincing. The mother's "temporary trip across state lines"[128] in *Holyfield* is strikingly similar to the mother's trip in *Adoption of B.B.* Each mother left the reservation while pregnant, gave birth, and then returned to the reservation.[129] The only distinguishing factor in *Adoption of B.B.* is that the biological mother claimed she had the long-term intention of staying in Utah.[130] The Utah Supreme Court relied almost exclusively on the mother's affidavit for evidentiary support, despite the mother's lack of credibility.[131] Considering the incongruous rulings in *Holyfield* and *Adoption of B.B.*—cases that had substantial similarities—the Utah Supreme Court clearly erred.

F. Effects on Tribes

This ruling negatively affects tribes by narrowing the scope of their jurisdiction and contributing to the decline of tribal culture. First, in *Adoption of B.B.*, the Tribe had a great interest in determining the child's fate. Both of the child's parents were members of the Cheyenne River Sioux and both residents of the reservation before the mother moved off the reservation to have her child. The father and the Tribe intervened in B.B.'s adoption proceedings. Despite the facts favoring tribal jurisdiction, the Utah Supreme Court nevertheless determined that the state had jurisdiction over the case. The Tribe's lack of power in *Adoption of B.B.* is troubling and represents a threat to tribal sovereignty. If a tribe isn't granted jurisdiction over a child who was born to two tribal members who had been living on the reservation before and after the child was born then the tribal courts have a very limited jurisdiction.

Next, fewer tribal members will effectively lead to a diminishment of tribal culture. The Utah Supreme Court's decision furthers the concerns of tribes who are losing their members and consequently suffering from diminishing tribal culture. As expressed in the ICWA congressional hearings, many tribes across the United States are concerned about dwindling numbers. By not granting tribal jurisdiction over cases such as *Adoption of B.B.*, tribes will have less say over what happens to their posterity. And state courts, which are not as invested in the future of tribes, will likely not rule as favorably to tribes as tribal

---

128 *Id.*

129 *Id.*; *Holyfield*, 490 U.S. at 37.

130 *See In re Adoption of B.B.*, 469 P.3d at 1099–100.

131 *Id.*

courts. With the continued loss of Native American children, tribes will lose unique aspects of their culture because there will be fewer children to carry on the tribe's traditions.

IV
SOLUTION

In general, state courts should consider the purpose of ICWA when determining where a biological mother, and therefore her child, is domiciled. State courts must defer to Congress, which explicitly stated its desire that tribes have more power than states over the fate of children belonging to their tribes. Congress also clearly explained that the purpose of ICWA includes preventing the loss of Indian children from the tribe, preserving tribal culture, and allowing tribes to practice their sovereignty through the utilization of tribal courts.

Next, state courts should be aware of and follow the Indian Law canons of construction.[132] A strict adherence to the canons of construction would promote tribal rights and align more closely with the congressional intent behind ICWA.

In addition, state courts should also consider and correctly apply relevant caselaw when determining a mother's domicile. First, courts would not be able to solely rely on the statements or affidavits of a biological mother because caselaw suggests that extrinsic evidence should also be considered when making determinations of domicile.[133] Instead, the U.S. Supreme Court has emphasized that one's residence, coupled with one's real intention to make a place their home, should be considered when determining where a person is domiciled.[134] Further, *In re Adoption of B.B.* itself states that the required intent to establish residence can be proved "indirectly by circumstantial evidence."[135] If circumstantial evidence is seriously considered when determining a mother's domicile, then state courts are less likely to misinterpret a mother's domicile. Second, states courts should rely on the U.S. Supreme Court case of *Holyfield* when determining a mother's domicile. With facts similar to *Adoption of B.B.*,[136] the Court

132 COHEN HANDBOOK, *supra* note 30, at 221–25.

133 Texas v. Florida, 306 U.S. 398, 425 (1939).

134 *Id.*

135 *In re* Adoption of B.B., 469 P.3d 1093, 1098–99 (Utah 2020).

136 Both the biological mother and father were enrolled as members in the Mississippi Band of Choctaw Indians and were residents of the reservation. The mother gave birth about

emphasized that "domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."[137] State courts should consider the analysis in *Holyfield* when making determinizations about a mother's domicile.

Further, circumstantial evidence is important in cases such as *Adoption of B.B.* because they involve adoptions, and often adoption agencies. In this case, as in others, the practical reality is that adoption agencies will pay for the expectant mother's expenses, even to the point of flying them out of their state—or reservation—to have the child.[138] Because there are incentives for adoption agencies to remove expectant mothers from their reservation in order to bypass ICWA, it is especially important for state trial courts to determine whether there were any incentives provided by adoption agencies that might account for a mother leaving her reservation. Examples of evidence could include an adoption agency paying for the expectant mother's travel, housing, food, medical care, and other related expenses. If a trial court finds that an expectant mother received such accommodations, then the court should be hesitant to find that the mother is domiciled outside her reservation.

One solution to mothers seeking help from adoption agencies to have their children is to establish more resources on reservations for expectant mothers. This would include better access to food, shelter, and medical care. Although it would be helpful to have extra resources for expectant mothers on the reservation, government programs are unlikely to have the same resources as private adoption agencies, which could still entice mothers to have their children off-reservation.

Next, courts could treat, and state legislatures could codify, the domicile of an expectant Native American woman who leaves her reservation to give birth with the same strictness as the courts treat other sensitive domicile issues, such as a student receiving in-state tuition at a state university. In *Frame v. Residency Appeals Committee of Utah State University*, Utah State University required that a student

---

200 miles from the reservation, gave her twins up for adoption, and then returned to the reservation. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).

137 *Id.* at 48 (citing Texas v. Florida, 306 U.S. at 424 (1939)).

138 HEART TO HEART ADOPTIONS, *supra* note 90; *see also* Tik Root, *The Baby Brokers: Inside America's Murky Private-Adoption Industry*, TIME (June 3, 2021, 6:00 AM), https://time.com/6051811/private-adoption-america/ [https://perma.cc/5Y7L-5VNX] (explaining that adoption agencies will pay large sums of money to expectant mothers who are planning to give up their child for adoption; this money can go toward anything from food and medical expenses to maternity clothes and new car tires).

must (1) prove "by objective evidence an intent to establish a permanent domicile in Utah," and (2) live in the state of Utah for one continuous year in order to establish domicile in the state to obtain in-state tuition.[139] The Utah Supreme Court ruled that these requirements did not violate due process or equal protection, that the requirements were reasonable, and that they served a legitimate state purpose.[140] In addition, the U.S. Supreme Court explained that states do not have to classify university students as residents simply because they reside in the state.[141] State courts in general, but specifically in Utah, should adopt a similar reasoning when it comes to ICWA. While it may be difficult for a state court to adopt a specific time requirement, as in *Frame*, it is reasonable for a court to require objective evidence to prove a mother's intent to establish her domicile in a new state, which can be accomplished through clear statutory rules. The factors analyzed in *Frame* include a failure to find non-temporary employment and a failure to purchase property in Utah.[142] Other factors commonly used to determine domicile include voter registration, bank accounts, membership in community organizations, driver's license, and payment of taxes.[143] At the very least, state courts should consider basic indicators of domicile when determining where a pregnant tribal member is domiciled.

Just as state universities start with the presumption that a student who attends the institution is domiciled in the state they resided in previously, so too should state courts start with the presumption that Native American mothers who moved off the reservation while pregnant are still domiciled on that reservation. Unless there is reliable, objective evidence to the contrary, the court should adopt this stricter standard of domicile.

CONCLUSION

The plain language of ICWA, Indian Law canons of construction, congressional intent, and Supreme Court precedent all support the determination that the biological mother in *In re Adoption of B.B.* was domiciled on her reservation rather than in Utah. The Utah Supreme Court's holding that she was domiciled in Utah creates a dangerous

139 Frame v. Residency Appeals Comm., 675 P.2d 1157, 1161 (Utah 1983).

140 *Id.* at 1163.

141 Vlandis v. Kline, 412 U.S. 441, 452 (1973).

142 *Frame*, 675 P.2d at 1164.

143 Cassens v. Cassens, 430 F. Supp. 2d 830, 834 (S.D. Ill. 2006).

precedent for similar cases. To prevent state courts from misclassifying domicile in the future, courts should give more weight to objective facts in a similar way that courts determine where a student is domiciled for purposes of obtaining in-state tuition. This is an especially important consideration when a pregnant mother moves off her reservation, puts her child up for adoption, and then immediately moves back to her reservation. A mother simply stating that she intended to permanently reside in the new state cannot be enough for purposes of domicile under ICWA. Establishing this more reasonable standard of domicile in adoption cases under ICWA will honor the congressional intent of ICWA, further positive public policy, and show respect to tribal sovereignty.