UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

No. 20-6295

FIRST NATION of ARCADIA and ERIC ZEHR, Plaintiffs-Appellants-Cross-Appellees, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV, and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants-Appellees-Cross Appellants, and KHRIS and TIANNA GARCIA, Intervenors-Defendants-Appellees-Cross-Appellants.	Case No. 19:05-cv-7032 Appeal from the United States District Court for the District of Arcadia The Honorable Robyn Lopez, District Judge

Docketing Notice

Appellants First Nation of Arcadia and Eric Zehr having filed a Notice of Appeal on August 13, 2020, from the Judgment of the United States District Court for the District of Arcadia entered August 1, 2020; and Cross-Appellants Drea, Arcadia DCS, and Garcia having filed their Notice of Cross-Appeal on August 24, 2020; and the appropriate Docketing Fee having been paid and Docketing Statement filed, along with statements of representation by all parties; the Court hereby gives notice, pursuant to Federal Rule and Circuit Rule 12 of Appellate Procedure, that this appeal has been docketed as of today's date.

SO ORDERED:

/s/ *Tarek Hassan*
Tarek Hassan
Clerk of the Court

DATED: September 3, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARCADIA

FIRST NATION of ARCADIA and ERIC ZEHR; Plaintiffs, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants and KHRIS and TIANNA GARCIA, Intervenor-Defendants.	Case NO. 19:05-cv-7032-AKL

DOCKET [excerpted]

Item #

12. Defendants' Notice of Cross-Appeal – August 24, 2020

11. Plaintiffs' Notice of Appeal – August 13, 2020

11. Judgment – August 1, 2020

10. Memorandum Decision – July 31, 2020

9. Plaintiffs' Opposition to Abstention and Summary Judgment – June 27, 2020 [omitted]

8. Defendants' Motion to Abstain and for Summary Judgment -- June 11, 2020 [omitted]

7. Defendants' Answer – July 3, 2019 [omitted]

6. Plaintiffs' Complaint -- June 7, 2019[omitted]

5. ADCS ICWA Procedures and ADCS Report of K.Z. -- December 9, 2019

4. Deposition of Eric Zehr -- January 19, 2020

3. Report of Arcadia Department of Child Services -- January 28, 2019

2. Investigative Reporting on the ICWA in Arcadian Courts -- August 15, 2020

1. Randolph County Local Family Court Rules

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARCADIA

FIRST NATION of ARCADIA and ERIC ZEHR, Plaintiffs, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants, and KHRIS and TIANNA GARCIA, Intervenor-Defendants.	Case NO. 19:05-cv-7032-AKL

NOTICE OF CROSS-APPEAL

Defendants Judge Grayson Drea and Arcadia Department of Child Services and Intervenors Khris and Tianna Garcia, by counsel Preeda Lim, respectfully appeal to the United States Court of Appeals for the Fourteenth Circuit from the Judgment of this Court entered August 1, 2020, insofar as it incorporates the Court's denial of their motion to abstain as set forth in the Memorandum Decision of July 31, 2020.

Respectfully submitted,

/s/ *Preeda Lim*
Preeda Lim

Attorney for Defendant-Appellants

Dated: August 24, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARCADIA

FIRST NATION of ARCADIA and ERIC ZEHR, Plaintiffs, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants, and KHRIS and TIANNA GARCIA, Intervenor-Defendants.	Case NO. 19:05-cv-7032-AKL

NOTICE OF APPEAL

Plaintiffs First Nation of Arcadia and Eric Zehr, by counsel Zachary Rahman, respectfully appeal the Judgment of this Court entered August 1, 2020, to the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

/s/ *Zachary Rahman*
Zachary Rahman
Attorney for Plaintiff-Appellants

Dated: August 13, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARCADIA

FIRST NATION of ARCADIA and ERIC ZEHR, Plaintiffs, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants, and KHRIS and TIANNA GARCIA, Intervenor-Defendants.	Case NO. 19:05-cv-7032-AKL

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, Judgment is hereby entered in favor of Defendants and against Plaintiffs, in accordance with the Court's Memorandum Decision of July 31, 2020. This action is dismissed with prejudice.

/s/ *C. Perron*
C. Perron, Clerk of the Court

Date: August 1, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARCADIA

FIRST NATION of ARCADIA and ERIC ZEHR, Plaintiffs, v. JUDGE GRAYSON DREA, Randolph County Circuit Court IV and ARCADIA DEPARTMENT of CHILD SERVICES, Defendants, and KHRIS and TIANNA GARCIA, Intervenor-Defendants.	Case NO. 19:05-cv-7032-AKL

MEMORANDUM DECISION

Plaintiffs First Nation of Arcadia, a federally recognized Indian tribe, and Eric Zehr, a member of that tribe, filed this action under 42 U.S.C. § 1983 alleging that the State of Arcadia has violated their due process rights by failing to enforce a regulation promulgated by the United States Bureau of Indian Affairs pursuant to the Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963. Defendants[1] have filed a motion for abstention and, in the alternative, for summary judgment. Their motion presents two issues:

(1) Should this Court abstain, under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), from hearing this action; and

[1] The Garcias agreed to have their interests joined with the State and are represented by the same attorney.

(2) Have Defendants violated the Plaintiffs' rights under ICWA by disregarding a federal regulation that attempts to do away with the so-called Existing Indian Family Exception?

For the reasons set forth below, Defendants' motion to abstain is denied, but their motion for summary judgment is granted.

FACTS

This case stems from the efforts of Intervenor-Defendants Khris and Tianna Garcia to adopt a child, K.Z., who is eligible for membership in a federally recognized Indian tribe.[2] The facts below, including those in articles and links cited in the text or in footnotes, and in the documents listed in the docket sheet and appended to this decision, were established by affidavits and exhibits designated in support of or opposition to the parties' respective motions without objection; the parties stipulate that these facts are undisputed.

The Families

In June 2014, Alaina Vera ("Alaina") gave birth to K.Z., after being in an on-and-off relationship with Eric Zehr ("Eric"). Eric is a member of the First Nation of Arcadia ("First Nation"), a federally recognized tribe. Alaina is not Indian.

Eric's relationship with his tribal family is strained and complicated. As a young child, Eric was raised on the reservation but moved off-reservation when his parents divorced. Eric was not close with his indigenous family members after the divorce.

[2] This Court understands and respects the historical problems and controversies surrounding the term "Indian" as it refers to Indigenous Americans. The term "Indian" is used throughout the opinion to minimize confusion, because the regulation and statutes at issue in this case all consistently use the term "Indian." For why this term is a problematic ethnic identity label, *see* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 Am. Indian Q. 1 (1999); Amanda Blackhorse, *Blackhorse: Do you prefer "Native American" or "American Indian"? 6 Prominent Voices Respond*, Indian Country Today (May 22, 2015) https://indiancountrytoday.com/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPJqIGU6X3FTVdMi9EQ.

Eric and Alaina met while attending the same General Educational Development (GED) night program. Both worked during the days while studying to pursue higher education. The two had an inconsistent relationship until Alaina became pregnant with K.Z. Alaina and Eric were not dating when K.Z. was born, but Eric subsequently signed a paternity affidavit. Both Eric and Alaina were nineteen at the time of K.Z.'s birth.

Alaina and K.Z. lived in Alaina's apartment in Arcadiapolis, where Alaina worked several jobs. After K.Z. was born, Alaina dropped out of the GED program. Alaina and Eric resumed their relationship not long after K.Z.'s birth. Eric sometimes babysat K.Z., but Alaina remained K.Z.'s primary caregiver. Eric lived with Alaina and K.Z. for six months, while K.Z. was four months old to tenth months old, but eventually Alaina and Eric's relationship soured. Eric moved out of Alaina's apartment but continued to babysit K.Z. occasionally.

Meanwhile, Eric pursued a community college education and was eventually admitted to the Kellogg School of Management at Northwestern University. In the summer of 2015, Eric left to pursue his business degree at Northwestern, and Alaina remained in Arcadiapolis to care for K.Z.

While at Northwestern, Eric maintained a minimal level of contact with Alaina and K.Z. After leaving Arcadiapolis in 2015, Eric talked over Skype with Alaina and K.Z. on five occasions between August 2015 and August 2018. Eric sent birthday cards, Christmas cards, and presents to K.Z. in 2015, 2016, 2017, and 2018. Although Alaina never sought a court order against Eric for child support, Eric sent Alaina some of his student loan money over the course of three years—about $1200 total.

The Adoptive Couple

In November 2016, Alaina started working at Vinny's, a restaurant owned by Khris and Tianna Garcia. Khris and Tianna own several restaurants in Arcadiapolis. The Garcias quickly became friends with Alaina and took an interest in helping her with K.Z. The Garcias provided free childcare for K.Z. while Alaina resumed her GED course at night. The couple also helped Alaina pay for her college applications. In October 2018, Alaina was accepted with a full scholarship to Washington University's Early Admission program, where she planned to study to become a Nurse Practitioner.

The Garcias, having developed an affinity for childcare after helping with K.Z., entertained the idea of fostering and adopting children. After much consideration, Alaina made the difficult decision that K.Z. would have a better future if the Garcias continued to raise the child as their own. The Garcias accepted. Alaina and the Garcias planned to pursue an open adoption so Alaina and K.Z. could continue to have a relationship.[3]

The Adoption Proceedings

The Garcias, with Alaina's consent, filed an adoption proceeding in Randolph County Circuit Court. In December 2018, the court held a hearing to establish a pre-adoptive placement plan for K.Z. and the Garcias. Having determined that Eric's consent to the adoption was not needed in this case,[4] the court proceeded with the pre-adoptive placement of K.Z.

---

[3] The Garcias have agreed to also provide open adoption benefits to Eric, should he want to have some involvement with K.Z.

[4] Determined under Arc. Code Section 15-4-3-2, which provides:

Consent to a child's adoption by a non-custodial parent is not necessary if the parent:
(1) has abandoned the child for a period of at least nine months immediately prior to the placement proceeding;

Furthermore, Arcadia courts have determined that "only tenuous and token efforts made to communicate or support the child, the court may declare the child abandoned." *In re Adoption of G.R.*, 781 A.C. 41, 52 (2016). The parties do not contest the state court's determination that Eric's consent was not necessary.

In preparing for the pre-adoptive placement with the Garcias, the Randolph County Circuit Court followed the necessary steps to determine if it was an appropriate temporary placement. Following Randolph County local family court rules, Judge Drea ordered an investigation by the Arcadia Department of Child Services ("ADCS") on the validity of the K.Z. adoption, which included an inquiry into whether (1) the child's parent is a member of a federally recognized Indian tribe, and (2) if that parent has had continued custody of the child. If ADCS finds either condition is not met, then termination of the Indian parent's parental rights need not comply with the procedure laid out in § 1912 of ICWA.

After its investigation with Alaina, ADCS issued a report to the court stating that Eric was a member of First Nation. Upon learning this, Judge Drea ordered further investigation into Eric's custody of K.Z. and whether K.Z. had ever been in the custody of a tribal family member. Finding that neither Eric nor any other First Nation member had physical custody of K.Z., Judge Drea concluded that ICWA protections did not extend to Eric's termination of parental rights, nor was notice to First Nation required.

The pre-adoptive placement of K.Z. was approved on February 12, 2019. K.Z. has been living with the Garcias ever since. A final adoption hearing has not taken place.

Eric Contests

In May 2019, Eric graduated from the Kellogg School with a business degree and obtained a job shortly thereafter working for First Nation's governmental affairs office. Eric moved back to the Reservation to live closer to the office. He has since become very happy there and testified below that he has found much comfort being reunited with his extended family and the members of his tribe.

While in school, Eric met his fiancée, Paula Baker. Paula obtained a joint Master's Degree in Education and Business from Northwestern and works in First Nation's school administration system as a Vice Principal. The primary education system in First Nation includes courses on the tribe's customs and history.

When Eric moved back to the area, he reached out to Alaina to reconnect with K.Z. and be a part of her life. When Alaina told Eric about the pending adoption, he was upset that he had not found out this was happening earlier. Upon speaking with more members of First Nation and, eventually, the legal officers that work for First Nation, Eric believed that his parental rights were unfairly terminated under ICWA. Eric is asking this Court to vacate the court's decision to terminate his parental rights and facilitate K.Z.'s adoption in accordance with 25 C.F.R. § 23.103 (the "Final Rule").

Through Eric's inquires, First Nation also became aware that K.Z.'s pre-adoptive placement was approved without First Nation receiving notice from the Randolph County Circuit Court. First Nation contends that, if the court found K.Z. was a child subject to ICWA and provided First Nation notice of the proceedings, the tribe would have had a foster family interested and available to take custody of K.Z. Further, First Nation claims pre-adoptive and adoptive placements occur regularly in Arcadia, and the tribe wants to ensure Arcadian Courts will follow the Final Rule in these proceedings moving forward so they may have the opportunity to implement placement preferences under ICWA.

Upon the filing of this action, Judge Drea stayed the final adoption hearing pending the outcome of this case.

DISCUSSION

First Nation and Eric filed this lawsuit under 42 U.S.C. § 1983, which allows suit against anyone who, under color of state law, causes "any citizen of the United States or other person within the jurisdiction" to be deprived "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Federally recognized tribes can sue under § 1983 through rights guaranteed to them from ICWA. *See, e.g.*, *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018). State agencies, and state officials acting in their official capacities,[5] may be sued for injunctive and declaratory relief under § 1983.ǁ *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

§ 1914 of ICWA allows a petition to invalidate a state court termination of parental rights action on the grounds that it violated §§ 1911–13 to be brought in any court of competent jurisdiction. Thus, federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints alleging a violation of one of those sections.

This lawsuit alleges that, by failing to enforce the Final Rule, the defendants effectively deprived Eric and First Nation of the notice to which they were entitled under ICWA. Had they received timely notice of the adoption proceeding, they argue, they would have had an opportunity to challenge it, and either for Eric to assert his interest in remaining K.Z.'s father, or for the tribe to find a suitable Indian family to adopt K.Z.

---

[5] After the suit was filed, the Garcias sought and were granted the right to intervene, on the side of the defendants, in order to defend their adoption of K.Z. The Garcias' attorney also then assumed representation in this case of the State defendants, with whose interests they saw theirs as aligned. Thus the Garcias' counsel now represents all Defendants.

Defendants filed a motion asking this Court to abstain from hearing this matter, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971)[6] or, in the alternative, to grant summary judgment against Plaintiffs' claim on the merits, arguing that the Plaintiffs had no right to, in effect, seek enforcement of a federal regulation that was in conflict with the authorizing statute and the case law of the United States Supreme Court.

I. *Younger* Abstention

The Defendants' motion argues that this Court should refrain from hearing the present case under the doctrine initially crafted in *Younger* to preclude intervention in state criminal proceedings, but later expanded to other types of state actions.

Federal courts have a "virtually unflagging" obligation to exercise federal subject matter jurisdiction given to them by Congress and the Constitution. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Thus, federal courts should only apply abstention doctrine in limited circumstances. *Id.*

Defendants argue that abstention under *Younger* is appropriate here because *Younger* instructs federal courts to abstain from "exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004). Thus, *Younger* abstention is necessary when adjudicating in federal court would interfere with "central sovereign functions of state government." *Grieve v. Tamerin*, 269 F.3d 149, 152 (2d Cir. 2001).

[6] Abstention under *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (informally known as *Rooker-Feldman* doctrine) does not apply here because neither the original Plaintiffs nor Defendants were parties to the original adoption proceeding. The "domestic relations" exception does not apply here either because the parties are not requesting a determination over who has custody of the child—only that the methods employed by the State of Arcadia to make that determination violate the Final Rule and the ICWA, which presents a federal question. *See Atwood v. Fort Peck Tribal Court Assinboine*, 513 F.3d 1103 (9th Cir. 2008). Neither party disputes these facts.

After nearly forty years of expansion, the Supreme Court recently narrowed the applicability of *Younger* abstention in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). *Sprint* identified three categories of cases to which *Younger* abstention applies—(1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings warranting abstention; and (3) pending civil proceedings involving certain orders that are uniquely in furtherance of the state court's ability to perform their judicial functions. *Sprint,* 571 U.S. at 78.

Defendants argue that this case clearly falls under the third *Sprint* category. We disagree. This case does not present "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint*, 571 U.S. at 70 (citing *New Orleans Pub. Servs., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989)).

A. State Core Judicial Functions

Defendants concede, and we agree, that this case is neither an ongoing state criminal proceeding or a civil proceeding akin to a criminal proceeding. Thus, the question is whether the decision in this case interferes with the state court's ability to perform its judicial functions. We hold that it does not.

The third *Sprint* category applies when a case would interfere with a state's ability to administer its judicial system or enforce its courts' judgments. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 6–7, 14 (1987) (holding that *Younger* abstention was warranted where federally imposed injunction against Texas judgment lien and appeal bond provision would prohibit the Texas state court from compelling compliance with its judgment); *see also Juidice v. Vail*, 430 U.S. 327 (1977) (holding abstention appropriate where challenge to New York civil contempt proceedings would interfere with the state courts' legitimate ability to enforce their orders).

Although the Supreme Court has yet to address the issue, some courts have found state courts' methods for determining custody fall within the realm of "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Pub. Servs.*, 491 U.S. at 368. For example, the Second Circuit held that abstention was warranted in a custody action when an attorney was appointed to represent the child's interests in a divorce proceeding, and the father challenged the New York law permitting the court to appoint the attorney and requiring Father pay the child's attorney fees. *Falco v. Justices of the Matrimonial Parts of the Supreme Court of Suffolk Cty.*, 805 F.3d 425 (2d Cir. 2015). The *Falco* court determined *Younger* abstention was warranted because the father's lawsuit "implicate[d] the way that New York courts manage their own divorce and custody proceedings—a subject in which 'the states have an especially strong interest.'" *Id.* (citation omitted).

However, when the underlying question is not the process itself, but instead the validity of a code or provision, other courts have found that *Younger* abstention does not apply. *See, e.g. Cook v. Harding*, 879 F.3d 1035, 1041–42 (9th Cir. 2018) (holding *Younger* abstention not warranted in case challenging California statute legalizing gestational surrogacy contracts because plaintiff was challenging the constitutionality of the statute, not the process by which California courts compel compliance with it).

In *Pennzoil* and *Juidice*, by contrast, parties challenged the methods state courts used to enforce final orders.[7] A decision in this case would not affect how Arcadian courts enforce final adoption orders; rather, it would affect the rule state court judges and child services agencies must use when conducting an adoption investigation. Nor would it threaten the court's ability to

[7] Defendants claim that *Younger* may also be applied to pretrial hearings. *See, e.g.*, *Lozano v. Superior Court of Maine*, No. 2:20-cv-00281-LEW, 2020 WL 5106590 (D. Me. Aug. 31, 2020). We do not disagree with this possibility. However, we still find *Younger* abstention is inapplicable here.

keep running. Instead, we are confronted with a genuine question of law about the validity of the underlying Final Rule.

B. *Middlesex* Elements and *Younger* Abstention

Before *Sprint*, courts faced with requests for *Younger* abstention frequently evaluated the request using the elements set out in *Middlesex County Ethics Committee v. Garden State Bar Association*: whether there was: (1) "an ongoing state judicial proceeding," that (2) "implicate[d] important state interests," and (3) provided "an adequate opportunity . . . to raise [federal] challenges." 457 U.S. 423, 432 (1982).

In *Middlesex*, the Court found that only if all three of these conditions were present, was *Younger* abstention was warranted. Defendants argue now that the *Middlesex* elements provide a basis for exercising *Younger* abstention here that survives *Sprint*. We disagree.

Defendants first argue that the type of intervention sought here would injure state courts. They seek support for their argument by citing the Ninth Circuit's holding in *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). While the Ninth Circuit did apply the *Middlesex* factors post-*Sprint*, it still required that the case fall under one of the three *Sprint* categories before *Younger* abstention applied. *Id.*

Next, Defendants urge this Court to follow the lead of several district courts and a circuit court applying *Younger* abstention to claims brought under ICWA, all relying on *Middlesex* elements.[8] However, the expansion of *Younger* in this manner is clearly in opposition to the Court's decision in *Sprint*.

[8] *See Thomas v. Disanto*, 762 F. App'x 770, 773 n.4 (11th Cir. 2019); *Duke v. Or. Dep't of Justice*, No. 6:16–cv–01038–TC, 2016 WL 6126969, at *3–4 (D. Or. July 19, 2016); *In re Petition of Nowlin*, No. 17–CV–666–TCK–JFJ, 2018 WL 840760, at *4 (N.D. Okla. Feb. 12, 2018); *Bishop v. Ware*, No. 4:17-CV-886, 2019 WL 1275336, at *3 (E.D. Tex. Mar. 20, 2019).

Finally, Defendants describe, in detail, why the facts of this case contain all *Middlesex* elements.[9] This Court does not contest that all *Middlesex* elements have been met; we only hold that, after the Supreme Court's holding in *Sprint*, the satisfaction of these factors alone is insufficient to warrant *Younger* abstention.

Abstention in this case would prevent Plaintiffs from seeking the particular relief in federal court that Congress intended to provide through ICWA. Plaintiffs allege violations of a federal statute and a federal regulation, and as both Plaintiffs' and Defendants' motions show, our decision affects Indian tribes and state courts beyond the State of Arcadia. Cases in which a child's custodial environment is at stake need swift determinations. *See, e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (overturning adoption under ICWA where a child's first three years of life were spent with a non-native adoptive couple).

Younger abstention does not apply to this case. The facts do not match the rule laid out by the Supreme Court in *Sprint*, and policy demands a swift determination on the merits.

II. ICWA Claim and Existing Indian Family Exception

Plaintiffs argue that their rights were violated under 42 U.S.C. § 1983 when the ADCS failed to give notice of pending adoption proceedings to the First Nation as required by ICWA. Plaintiffs claim that the ADCS procedure—which resembles the "Existing Indian Family"

---

[9] Defendants' brief lays out the following:
1) There are currently ongoing adoptions in Arcadia State Court where ADCS is determining whether ICWA applies to that particular child. *See Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018) (stating that hearings need not be in session at the precise moment a federal court abstains or grants relief in order for hearings to be considered "ongoing");
2) These proceedings involve Arcadian adoption, custody, and family law matters, all issues best left to the determination of state courts and involve state interests. *Shahrokhi v. Harter*, No. 2:20-cv-01019-APG-VCF, 2020 WL 4933695, at *1 (D. Nev. Aug. 18, 2020) (citing *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000)) ("Family law matters are 'precisely the type of case suited to *Younger* abstention.'"); and
3) The Plaintiff tribe in this case could bring their claims—that DCS and the State are in violation of the ICWA—in state court. *See, e.g.*, *Dep't of Human Servs. v. J.G.*, 317 P.3d 936 (Or. Ct. App. 2014).

(EIFE) exception, described below—used to determine whether ICWA applies to a given case is prohibited under the Final Rule, 25 C.F.R. § 23.103(c). Defendants respond that the ADCS procedure is a permissive interpretation of ICWA.

Section 1983 provides a cause of action to any party deprived of any federally guaranteed right by a person acting under the color of state law. Here, Plaintiffs argue Defendants' refusal to carry out a relatively new federal regulation—that, in effect, restrains states from using the EIFE to take a case outside ICWA's ambit—deprived Plaintiffs of their rights under § 1912(a) of ICWA. Defendants respond that in fact EIFE is implicitly authorized both by ICWA itself and by *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). To examine these opposing contentions, it is necessary to briefly review the history of ICWA.

A. Historical Context

In the late 1960s and early 1970s, Congress identified a growing national problem: mass removal of Indian children from their homes and tribes.[10] Calvin Isaac, the Tribal Chief of the Mississippi Band of Choctaw Indians, testified during congressional hearings on ICWA that

> [c]ulturally, 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.

Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior & Insular Affairs, 95th Cong. 193 (1978). ICWA was enacted because, among other reasons, "an alarmingly high percentage of *Indian families* are broken up by the removal, often unwarranted, of their children from them by nontribal

[10] The House cited studies conducted by the Association of American Indian Affairs, indicating that between 25–35% of all Indian children at that time had been removed from their homes by state agencies. H.R. Rep. No. 95-1386, p. 9 (1978). The report also stated that 85% of these children were now living outside of their Native families and communities. *Id.*

public and private agencies." 25 U.S.C. § 1901(4) (emphasis added). To ensure the tribe has ample means of participating in adoption proceedings, a child's tribe must be given notice under ICWA. *Id.* § 1912(a).

ADCS's new procedure clearly reflects the essence of the EIFE to ICWA, an interpretation adopted in various state jurisdictions.[11] *See, e.g.*, *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988). The EIFE originates from the Kansas Supreme Court's decision in *In re Baby Boy L.*, which interprets ICWA as being primarily "concerned with the removal of Indian children from an *existing Indian family*." 643 P.2d 168, 176 (Kan. 1982) (emphasis added), *overruled by*, *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). That decision found that ICWA's purpose of protecting Indians would not be compromised if an Indian family would not be dissolved by a nontribal adoption.

ICWA's adoption preferences and notice guarantees apply whenever a child is "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" (i.e., the tribe has sole discretion over whether a child is eligible for ICWA). 25 U.S.C. § 1903(4). Courts adopting the EIFE, however, first determine whether the adopted child is part of an "existing Indian family" before applying ICWA in an adoption proceeding. Courts use a number of factors to make that assessment including, but not limited to, the family's (a) involvement in tribal customs; (b) participation in Indian religious, social, cultural, or political events; (c) participation in tribal community affairs; (d) subscriptions to tribal periodicals; (e) contributions to tribal charities; (f) maintenance of social contacts with other members of the tribe; (g) maintenance of a relationship between the child and their Indian parents; and (h) current ties to the tribe. In jurisdictions that do not recognize the EIFE, the

---

[11] Neither party disputes that the ADCS procedure functionally implements the EIF exception into its placement determinations.

adoption preferences and notice guarantees will apply whenever a child is "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(a).

Following *Baby Boy*, several states agreed with, expanded on, or rejected the EIFE.[12] The Supreme Court has heard only two cases involving ICWA, both of which have been used to support and oppose the EIFE.

The first was *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). The *Holyfield* decision emphasizes the importance of tribal interest. The central issue in *Holyfield* was what constituted a "domicile" for purposes of venue under ICWA. The Court said, "The numerous prerogatives accorded the tribe through ICWA's substantive provision . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Id.* at 49. This language, in placing the tribe's interest over the interests of the family and child, was cited by state courts as proof that the EIFE was not intended by ICWA. *See, e.g.*, *In re Adoption of Baade*, 462 N.W.2d 485, 489–90 (S.D. 1990).

In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the Court instead emphasized the importance of the child's interest. Again, the underlying issue was unrelated to the EIFE: whether a parent who waived their parental rights and never had legal or physical custody of a child could use ICWA to stop their child's adoption. After discussing the merits of the claim, the Court added:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Courts reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—

[12] For an early history of the EIFE, see Marcia A. Zug, *The Real Impact of* Adoptive Couple v. Baby Girl*: The Existing Indian Family Doctrine is not Affirmed, but the Future of ICWA's Placement Preferences is Jeopardized*, 42 Cap. U. L. Rev. 327, 330–37 (2014).

> even a remote one—was an Indian. ....Such an interpretation would raise equal protection concerns.

Id. at 655–56. Although not explicitly in support of the EIFE, *Adoptive Couple* expresses the Court's concern that a remote ancestor will trigger ICWA—a concern the EIFE was developed to address.

Since ICWA's enactment in 1979, the Department of the Interior has refrained from publishing legally binding rules interpretating ICWA, preferring instead to publish ICWA interpretation guidelines. However, after inconsistent applications of ICWA became more rampant, the Department of the Interior, through the Bureau of Indian Affairs, published its Final Rule in 2016, which clarified which situations ICWA should affect.

B. The Existing Indian Family Exception

Plaintiffs argue that they have a right to have Arcadia apply the Final Rule, which states:

> If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

25 C.F.R. § 23.103(c).

Plaintiffs say this regulation should effectively block Arcadia courts from engaging in EIFE analysis. Defendants counter that the Supreme Court has already implicitly condoned the EIFE under its decision in *Adoptive Couple*, and thus, the regulation does not reasonably interpret ICWA itself. To determine whether the Final Rule governs Arcadia in the way Plaintiffs suggest requires this Court to determine whether the Final Rule was meant to be an express

preemption of state law.[13] Federal courts look to two factors to determine if a federal act preempts a state law:

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (alteration in original) (citations omitted). Our primary job then is to determine Congress intent in passing ICWA, and whether that intent allowed for the EIFE.

Plaintiffs make several arguments against the recognition of an EIFE, to which Defendants reply. None of Plaintiffs' arguments are availing.

First, Plaintiffs argue we give significant weight to the policy announced in *Holyfield* and place tribal interests ahead of the child's interest (or even acknowledge that the child's interests *are served* by satisfying the tribe's interests) when interpreting ICWA. The tribe does have a heavy interest in the child, but it is difficult to reconcile whose interest is greater, especially considering the Court's holding in *Adoptive Couple*. Given that the Court's more recent holding emphasized the child's interests under ICWA, we will give more weight to the holding in *Adoptive Couple*.

Second, Plaintiffs argue that because ICWA's purpose is to preserve Indian culture, a tribe should have more control in the adoption proceedings of its children. This argument has merit; however, this Court disagrees that ICWA should apply to *anyone* the tribe has listed as a member or who simply has a parent listed as a member. In the event an Indian child is adopted

[13] At oral argument, the parties agreed that the doctrines of "field" and "implied" preemption do not apply here, nor does the Court have any reason to contradict that agreement. This analysis considers only express preemption.

by a non-Indian family and the child has virtually no relationship with his tribe, there is no Indian culture to preserve because the child was never part of a true Indian family. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 720–21 (Cal. Ct. App. 2001).

Lastly, Plaintiffs claim that the legislative history surrounding ICWA militates against such an exception. In justifying the Act, Congress discussed the alarmingly high rate at which Indian children are placed into non-Indian homes and families. *See Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 93rd Cong. 3 (1974) (statement of William Byler, Executive Director, Association of American Indian Affairs).

However, if Congress wished to abrogate the EIFE, it could have done so in the last thirty years. In fact, the Senate Committee on Indian Affairs once considered and rejected an amendment to ICWA that would have required ICWA to apply, regardless of whether the child in question was part of an Indian cultural environment. *See* 133 Cong. Rec. S18532–33 (daily ed. Dec. 19, 1987).

If courts ignored the extent to which a family has religious, social, cultural, or political Indian connections with its tribe, ICWA could apply to a child whose only tribal connection was their inherited lineal membership.[14] Because a child's blood quantum can be a substantial factor in determining a child's tribal membership, it would effectively become the sole determinant of whether ICWA applies—which, as at least one panel has held, would inherently discriminate

[14] Although Indian tribes can develop their own membership requirements, many tribes still use some form of "blood quantum" or lineal descent to establish membership. *See Frequently Asked Questions*, U.S. Dept. of Indian Affairs, https://www.bia.gov/frequently-asked-questions (last visited Aug. 28, 2020). First Nation is one of the many tribes to use this method.

based on a child's race.[15] *See Brackeen v. Zinke*, 338 F. Supp. 514, 533–34 (N.D. Tex. 2018), *rev'd*, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *reh'g granted en banc*, 942 F.3d 287 (5th Cir. 2019).

Because the application of the EIFE is not inconsistent with ICWA, and is implicitly supported by *Adoptive Couple*, Plaintiffs' cause of action, seeking enforcement of the Final Rule that effectively cancels the EIFE, cannot survive summary judgment.

CONCLUSION

For the reasons set forth above, Defendants' motion to abstain is DENIED, and their motion for summary judgment is GRANTED. The Clerk of the Court is directed to enter judgment accordingly.

/s/ Robyn Lopez
Hon. Robyn Lopez
U.S. District Court Judge
District of Arcadia

July 31, 2020

[15] We recognize that the Supreme Court and lower courts have held that "Indian" generally denotes a political classification, not a racial classification. *See Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974); *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *reh'g granted en banc*, 942 F.3d 287 (5th Cir.).

DEFENDANT'S EXHIBIT 2

**ARCADIA DEPARTMENT OF
CHILD SERVICES**

CHILD WELFARE POLICY AND IMPLEMENTING THE ICWA

* * *

Chapter 4: Administration of Child Welfare

Section 8: Implementing the Indian Child Welfare Act (the ICWA)

* * *

<u>Procedure</u>

A Child Case Worker will

1. Interview the child (if appropriate age) and the family to determine
    a. whether the child is of Indian heritage and if the child is eligible for membership in a federally recognized tribe.
    b. whether the Indigenous parent is a member of the federally recognized tribe.
    c. If the Indian parent has custody of the child.
        i. How long the Indian parent had custody. When? Are they involved at all in the Child's life? In what capacity?
    d. Any factors indicating this is an Indian household.
2. Properly document the findings with Arcadia DCS system and with the case worker's supervisor and staff attorney.

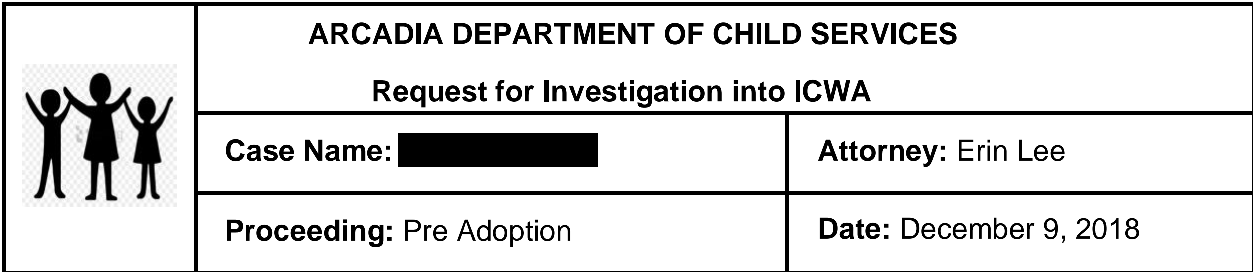
* * *

A DCS staff attorney will

1. Work with the circuit judge to ensure proper implementation of the ICWA protections for eligible children.
2. Draft reports for the judge to include in their report.
3. If the child is eligible for protections under the ICWA, the DCS staff attorney will work with the judge to ensure the Native American tribe and parent has been properly notified of the ongoing proceedings.

* * *

DEFENDANT'S EXHIBIT 2



	ARCADIA DEPARTMENT OF CHILD SERVICES **Request for Investigation into ICWA**	
	Case Name: █████	**Attorney:** Erin Lee
	Proceeding: Pre Adoption	**Date:** December 9, 2018

Attorney: Erin Lee

ID#: 885-64992

Report Type: ICWA Application

After request by Judge Drea of Randolph County Circuit Court IV, Arcadia DCS has not found that K█████ Z███ (K.Z.) is a child subject to the ICWA in the State of Arcadia.

First, Alaina Vera ("Mother") has informed the agency that Eric Zehr ("Father") is a member of the First Nation of Arcadia, a federally recognized tribe. However, Mother has told Arcadia DCS that while Father lived with the family for six months after K.Z. was born, he has not had any sort of physical custody for nearly four years. Furthermore, Mother has provided enough information for ADCS to know that K.Z. and Mother are not members of an "Indian Household," so ICWA shouldn't apply.

Because Father has not had continued custody of K.Z., K.Z. is clearly not a member of an Indian Household. Therefore, ICWA does not apply and this court may move forward with its investigations and adoption proceedings under Arcadian state law between Mother and the Garcias.

1 ABBREVIATED TRANSCRIPT OF THE
DEPOSITION OF ERIC ZEHR
2 BY PREEDA LIM, COUNSEL FOR DEFENDANT-APPELLEES/INTERVENORS 3

. . . .

4 Q: Why did you return to the First Nation reservation?

5

6 A: I had a longing to return to my roots. Growing up in the
7 reservation, it stays with you, even after you leave.

8

9 Q: And how was your experience on the reservation?

10

11 A: I loved it! It felt like I was finally returning home,
12 even if just for a little while. I could reconnect with
13 people who share the same history that I do, and that isn't
14 something you find everywhere.

15

16 Q: In a few words, how would you describe that experience?

17

18 A: Enlightening or inspiring. I had missed being a part of
19 that culture and community.

20

21 Q: Then why didn't you return to the reservation sooner?

22

23 A: Not returning sooner is probably one of my bigger
24 mistakes. I had goals I wanted to meet and things I wanted to
25 accomplish, and I did not want to come back without achieving

1 them. While I desired to stay connected, I also had things
2 pulling me away.
3
4 Q: I will follow up on those goals later, but for now, tell
5 me more about your drive to return. How long have you wanted
6 to return?
7
8 A: That would have to be soon after I left. Society out here
9 is different from that on a reservation. People on the
10 reservation are more community focused. People care. You know
11 everyone. People are there because they believe in preserving
12 and honoring Indian culture.
13
14 Q: Do you have similar objectives? To preserve and honor
15 Indian culture?
16
17 A: Yes, I would say so.
18
19 Q: If that is the case, why would you leave?
20
21 A: Why does anyone leave home? To see what is out there, to
22 make it alone.
23
24 Q: But do you regret having left?
25

1 A: I think despite leaving, I wish I had remained connected
2 to the community. I could have been more active while I was
3 away, but I am happy with who I have become because I left.
4
5 Q: So, is that a yes?
6
7 A: That question is quite complicated. I am happy with the
8 outcome from leaving. I have grown, and I have a newfound
9 respect for Indian culture. At the same time, were I able to
10 change my decisions, overall, I would not. I would just
11 remain more deeply connected with the tribe and community.
12 Hopefully that makes sense.
13
14 Q: Thank you, I think I understand. Earlier you mentioned
15 that you would describe being on the reservation as
16 enlightening, why is that?
17
18 A: I have been away from the Tribe for a while, so being
19 readily welcomed back into the community really resonated
20 with me.
21
22 Q: Was there anything in particular about the experience or
23 did the whole experience resonate with you?
24
25

1 A: I would say the general experience. It was about
2 reconnecting with my culture, and there are too many facets
3 to culture for me to pick any singular one over another.
4
5 Q: You refer to “my culture.” Have you always felt an
6 intimate connection to or ownership of your culture?
7
8 A: I always recognized that it was a part of me, but
9 returning to the reservation really rekindled my sense of
10 ownership. Now it can be my culture because I fully
11 appreciate it, and-
12
13 Q: Did you not fully appreciate it while you were away?
14
15 A: That is where I was going. I did not completely abandon it
16 while I was away, but I was also not faithful to it. It’s
17 harder to practice and celebrate something when you are the
18 only one in a community who understands it.
19
20 Q: Did you engage in any cultural practices while you were
21 away?
22 A: No, I did not. Given the circumstances and the length of
23 time I was away, it just never did or couldn’t happen. Like I
24 said, its easier to do things with a fellow community.
25

Q: Is being part of a cultural community is very important to you?

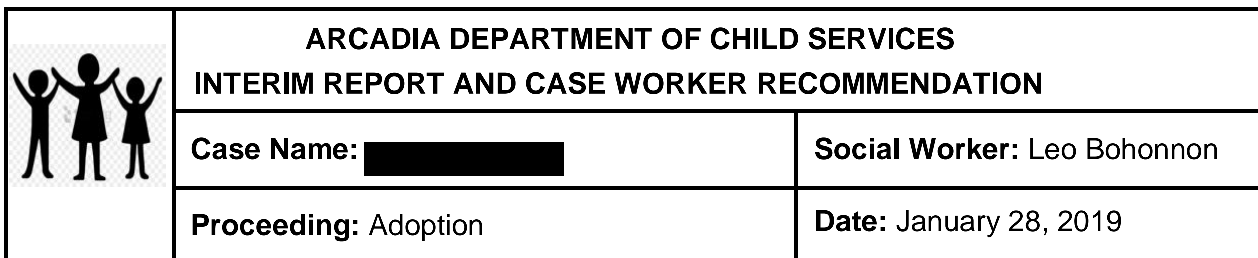
A: More so now than ever. The Tribe is a part of me and I a part of them. We share history, beliefs, and perspectives, and it is comforting to be part of that community. It is truly a shame it took me so long to come back.

Q: Was coming back always part of your plan?

A: I don’t really know, but I know it is now.

Q: Do you plan to stay connected to the tribe going forward?

A: After this experience, yes. I like being part of the Tribe and I enjoy engaging with my heritage. So, I plan to stay connected in some way.



ARCADIA DEPARTMENT OF CHILD SERVICES
INTERIM REPORT AND CASE WORKER RECOMMENDATION

Case Name: [redacted]	**Social Worker:** Leo Bohonnon
Proceeding: Adoption	**Date:** January 28, 2019

BACKGROUND

This matter came before the Court on the initial allocation of parental rights and responsibilities related to the minor child, K.Z. The pending matter is an action for adoption by a married couple, Khris and Tianna Garcia.

K.Z.'s parents were never married, but each has played a role in K.Z.'s early childhood development. K.Z.'s mother retained primary custody, though the father does have intermittent contact. K.Z. is currently four years old. The court determined K.Z.'s Father's consent was not necessary to move forward with the pre-adoption placement and adoption.

REPORT

Pursuant to Arcadia law, in advance of any third-party adoption proceeding in the state, the appointed case worker from Arcadia Department of Child Services shall conduct a home visitation. The purpose of the home visitation is to observe the interactions between the child and prospective adoptive parents to determine whether a such a placement is in the best interests of the child.

I. HOME VISIT

The home visitation took place on January 26, 2019 at the Garcia residence. K.Z., the Garcias, and the case worker were the only parties present. K.Z. appeared comfortable in the Garcias' company. When K.Z.'s mother dropped K.W. off at the Garcia residence, K.Z. walked straight into the house and knelt down in front of the Garcia's toy chest and began sifting through its contents. Mr. and Mrs. Garcia were both in the room observing K.Z., but they largely left her to her own devices. It was clear K.Z. was comfortable in their presence and their home.

After roughly twenty minutes of independent play, K.Z. approached Mrs. Garcia with a book and requested she read it to her, which Mrs. Garcia promptly did. K.Z. sat immediately to Mrs. Garcia's side on the sofa and engaged with the book, which Mrs. Garcia read three times without complaint. The book was in Spanish, which both Garcias speak fluently and which K.Z. is accustomed to using with her family in addition to speaking English.

While K.Z. was preoccupied with Mrs. Garcia, Mr. Garcia left the living room to prepare lunch. He returned with a homemade tomato soup and vegetables, which K.Z. eagerly ate. The three of then cleared the table and K.Z. conversed with the Garcias from the kitchen table as they put away the dishes. She talked about some of her friends from the neighborhood and a recent trip she and her mother took to the library.

After the dishes were finished, K.Z. asked to watch Paw

Patrol in the living room. When she watched, the case worker asked the Garcias some questions about their plan for K.Z. if the adoption goes through. The couple shared that they live in one of the best school districts in Arcadia and have already reached out to several schools in the area to determine whether K.Z. would be able to attend once the adoption was finalized.

Additionally, the Garcias emphasized their desire to keep K.Z.'s mother involved in her life. They had tried unsuccessfully to have a child of their own and seemed sincere about making sure K.Z.'s mother did not lose the connection with her daughter.

[Additional remarks redacted.]

II. RECOMMENDATION

Based on observations and conversation with the Garcias, it is the opinion of the case worker that the Garcias' petition for adoption of K.Z. be granted. First, this course of action is in line with what K.Z.'s mother, her sole parental guardian, wants. Second, the child clearly has a comfortable relationship with the family. Most importantly, the Garcias demonstrated that they are prepared to take on the burden of caring for and raising K.Z. as their own child.

Given the Mother's hesitancy about keeping K.Z., adoption by the Garcias is a fine option to ensure the child has some stability. This will be a comfortable transition for the child, who already has an established relationship with the couple.

AUGUST 15, 2020 / / ISSUE# 243

ARCADIA TIMES

Local Indian Tribe Forced to Fight for Heritage in Court

An Illegal Exception

KYLE MARLEY

The First Nation Tribe has continued to be the victim of the federal judiciary. The Tribe, which has been a critical component of Acadia for centuries, has been repeatedly abandoned by the federal courts who continue to rely on an exception that Bureau of Indian Affairs has explicitly declared to be an illegal interpretation.

Local judges have been applying the defunct, minority exception that utilizes the "existing Indian family" exception – which makes the ICWA inapplicable to children who are not considered part of an existing Indian family. However, this alleged exception is clearly unlawful for at least **three** different reasons.

First, the exception clear undermines congressional intent surrounding the ICWA. Accordingly, Congress meant for ICWA to ensure that tribunals who truly understand the importance of tribal customs and a community that statistically is best for the mental health of the Indian child. Secondly, the Bureau of Indian Affairs has clearly disavowed this exception in their recent regulations. The agency has stated that courts may NOT take into account the connection between the Indian child and the existing tribal community, culture, or the child's blood percentage. Instead, the exception embraces the racist stance of saying that the child is not 'Indian enough' for the courts simply because they don't look or act sufficiently Indian for the judiciary. Lastly, even the Kansas Supreme Court–who initially created the exception–decided that the law needed to be overruled. The court stressed that the majority of the states have rejected the exception and that the wisest future course is to abandon the racist and unlawful Indian family doctrine.

Yet, despite all of this, our own courts believe that they are above the law and above the overwhelming consensus around the backwards nature of the family exception. The First Nation tribe and a few of the local politicians continue to call on the courts to follow the law and drop the exception–but most remain doubtful.

Picture Above: Local First Nation of Arcadia courthouse

Will Judge Abandon ICWA?

KAREN STERN

In 1979, the United States Congress passed the Indian Child Welfare Act (ICWA) to not only protect Indian children and prevent the breakup of Indian families but also to bring an end to the inclinations of the white-dominated judiciary to put Indian children into 'more traditional American homes.' The congressional record is clear that ICWA was passed to remove authority from the federal government due to their "unfamiliar[ity] with, and often distain[] of Indian culture and society" and to grant Indian tribes their rightful say in the goal to place "Indian children in foster or adoptive homes which will reflect the unique values of Indian culture."

However, recent cases in Arcadia have made it clear that the federal judiciary has decided that their beliefs on adoption and Indian tribes is sufficient to supplant the will of Congress. In a recent case, local Judge Talloway – in revealing his true emotions about ICWA – stated that the silly restrictions of the law forced him to give a child to an Indian family over a white family with a "nice big house in the suburbs" and a wife that stays at home. Not only does Judge Talloway's stance on modern homelife reveal his dated stance on mothers, but also that he clearly believes that the ICWA is an unnecessary law that he would prefer to avoid applying if at all possible. And to his luck, his wish was granted. In *First Nation v. Davidson*, Judge Talloway was faced with a clear choice of either sending an adoption case to the First Nation tribunal or placing the child with a wealthy, well-educated white family in the city. Here, Talloway's bias rang through when he ruled against the First Nation Tribe. Many commentators argue that we shouldn't be surprised with this Judge's line of thinking – because after all, America has a history of abandoning its promises made to the Indian population.

Now as other ICWA cases bubble up, the local tribes wait with baited breathe to see if they will once again be stripped of their federal protections. Will we see the judges remain true to the intent behind ICWA or will we once again see the United States adandon the tribal culture in exchange for an Anglo-Saxon household?

SPECIAL ISSUE

LR24-FL-1100

Randolph County Family Law Rules

Rule 11.6 Determining Indian Child Status

* * *

3. The court must inquire on the record as to whether the child may be an Indian Child. This inquiry should be made at the first court hearing involving the child. Reliance on information in a Report of Preliminary Inquiry or another written document is inadequate.

4. For a child to be subject to ICWA provisions, the Court must find the child:

a. **Is a member of a federally recognized tribe; or be eligible for membership and have a parent that is a member of a federally recognized tribe; and**
b. **Is a part of an Existing Indian Family as determined by ADCS and the court.**

then ICWA provisions apply to the child.

25 U.S.C. § 1903; *see Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); *In re. Baby A.*, 274 Arc. 161 (2018).

5. If the child might be an Indian child, the court shall request an investigation by Arcadia Department of Child Services to determine the factors set forth above.

6. Should the ADCS investigation reveal that the child is protected by ICWA, the court shall notify the identified Tribe, the U.S. Bureau of Indian Affairs, and the U.S. Department of the Interior. Notice shall be sent by certified mail. Arc. Code section 15-12-4-4.

* * *

(a) involvement in tribal customs; (b) participation in Indian religious, social, cultural, or political events; (c) participation in tribal community affairs; (d) subscriptions to tribal periodicals; (e) contributions to tribal charities; (f) maintenance of social contacts with other members of the tribe; (g) maintenance of a relationship between the child and their Indian parents; and (h) current ties to the tribe.