



August 17, 2016

Honorable Tani Cantil-Sakauye, Chief Justice,
And Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *In re: Matter of A.P.*, No. S236462

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Goldwater Institute (“GI”) respectfully files this letter as amicus curiae pursuant to Rule 8.500(g) of the California Rules of Court in support of the Petition for Review in the above-referenced case.

I. INTEREST OF AMICUS CURIAE

GI was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files amicus briefs when its or its clients’ objectives are directly implicated.

GI has experience with the constitutional issues relating to the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* (“ICWA”). GI attorneys are currently attorneys of record in a federal lawsuit challenging ICWA’s constitutionality, *Carter v. Washburn*, No. 2:15-cv-01259-PHX-NVW (D. Ariz., filed July 6, 2015), and in a proceeding in the Arizona Court of Appeals on the same issue. *Gila River Indian Cmty. v. Dep’t of Child Safety*, 2016 WL 4249676 (Ariz. App., Aug. 11, 2016). GI has also participated as amicus curiae in other cases involving ICWA, including *In re. Adoption of T.A.W.* (Wash. No. 92127-0, pending), and submitted a letter brief at an earlier stage of this case. GI staff have also published groundbreaking investigative research on the application of ICWA. See Mark Flatten, *Death on A Reservation*, July 7, 2015.¹ GI believes its public policy and litigation experience will provide this Court with a valuable and unique perspective on the issues raised in the Petition for Review.

¹ Avail. at https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/14/Final%20Epic%20pamphlet.pdf.

The Petition asks this Court to consider whether ICWA and affiliated state statutes, including Calif. Welf. & Inst. Code §§ 361.31, 361.7, are constitutional. These are matters of pressing importance nationwide, and particularly in California, where lack of guidance from this Court has led to substantial uncertainty as to the constitutionality and applicability of ICWA’s race-based double standards for adoption, foster care, and other child welfare matters—standards that deprive Indian children of the legal protections afforded to all other children.

GI supports the Petition because this case raises important questions of constitutional law, not just for the more than 723,000 Native American Californians,² but for the literally countless other Californian children who are “eligible for membership” in a tribe—and thus subject to ICWA’s disadvantageous mandates, 25 U.S.C. § 1903(4)—on the basis of even a tiny fraction of Indian ancestry.

II.

ICWA SUBJECTS CHILDREN OF ONE PARTICULAR RACE TO A SEPARATE AND DISADVANTAGEOUS SET OF LEGAL RULES

This case presents a vivid and heart-rending example of the ways that ICWA “put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). The disadvantageous set of rules ICWA imposes on children like Lexi solely as a consequence of their genetic ancestry is literally a form of segregation, which cannot be allowed to persist.

A. How The ICWA “Penalty Box” Works

ICWA establishes a separate and unequal system of law for children deemed “Indian children,” which means, children who are either members of a tribe or who are “eligible for membership” in a tribe, and whose parents are members. 25 U.S.C. § 1903(4); Cal. Welf. & Inst. Code § 224.1(b).

Eligibility, meanwhile, is almost universally determined by biological ancestry. *See, e.g.*, Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code tit. 1 § 701.

This means that “Indian child” status under ICWA is triggered solely by a child’s biological ancestry.³ A child who is fully *culturally* affiliated with a tribe, but lacks sufficient blood percentage and is therefore not eligible for membership—for example, the historical figure

² *See* U.S. Census Summary Data, 2010 at 7, <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>. Though it may seem obvious, it bears emphasizing that *all Indian children are citizens of the United States at birth*, 8 U.S.C. § 1401(b), and are just as entitled to the protections of the Constitution as are children of any other ethnic background.

³ It is important to recognize, as this Court recently did in *In re Abigail A.*, No. S220187, 2016 WL 3755924, at *6 (Cal. July 14, 2016), the difference between *tribal membership*, which is exclusively a matter of tribal law—and “Indian child” status under federal law. While tribes are free to grant citizenship to whomever they please, the federal and state governments are bound by the principle of equal protection, and accordingly cannot treat people differently on the basis of biology, as ICWA’s definition of “Indian child” does.

Sam Houston, who was adopted into the Cherokee tribe at the age of 16—is *not* subject to ICWA solely because of his biology, whereas a child like Lexi—whose only connection to the tribe is biological, not cultural, *is* an “Indian child” and consequently is subject to ICWA’s separate standards.

This point bears emphasis, because although the court below referred to Lexi’s “connection to...her *cultural* identity,” *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Cal. Ct. App. 2016) (emphasis added), it is undisputed that Lexi has no *cultural* Choctaw affiliation. She has only a *biological* affiliation. Only thanks to ICWA is she presumed to have such a “cultural” connection exclusively as a consequence of *genetics*. But as Chippewa author David Treuer observes, “you can’t measure culture by percentages of blood.” David Treuer, *Rez Life* 279 (2012).

Put together, ICWA’s separate standards create the “ICWA Penalty Box”⁴: a set of rules that only apply to children of this particular ethnicity, but not to children who are white, black, Hispanic, Asian, or descended from any other race or mix of races. Being placed in this box means a child is:

- *Denied the protection of the “best interests of the child” standard.* ICWA requires courts, “in the absence of good cause to the contrary,” to place children subject to ICWA with the child’s extended family, with other members of the tribe, or with “other Indian families”, of whatever tribe. 25 U.S.C. § 1915(a). Bureau of Indian Affairs (BIA) regulations make clear that “[t]he good cause determination *does not include an independent consideration of the best interest of the Indian child* because [ICWA’s] preferences reflect the best interests of an Indian child in light of the purposes of the Act.” 80 Fed. Reg. 10146-02, 10158, F.4(c)(3) (emphasis added). Indian children are denied the individualized assessment of their needs that all other children receive.⁵
- *Deprived of any individualized determination of her fate.* ICWA requires courts to presume that it is in a child’s best interests to be placed with a tribal member or an Indian family, except in rare circumstances. This means custody, foster, placement, and adoption decisions are based on factors that are irrelevant to a child’s individual needs and circumstances. This despite what the Ninth Circuit has called the “basic principle[]” that “[o]nce the state assumes wardship of a child, the state owes the child, as part of that person’s protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to *the age and circumstances of the child.*” *Lipscomb by & through DeFehr v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (emphasis added).

⁴ See Appendix A (tabulating the bullet points below).

⁵ The court below purported to evaluate Lexis’ individual best interests, but it envisioned a different—a separate but equal—type of “best interests” test for Indian children as opposed to children of other races. “When the best interests of an *Indian child* are being considered,” it declared, courts “should take an Indian child’s best interests into account as *one of the constellation of factors.*” *In re Alexandria P.*, 204 Cal. Rptr.3d at 634 (emphasis added). For children of all other races, by contrast, the child’s best interest is the *paramount* consideration. *In re Marriage of Wellman*, 104 Cal. App. 3d 992, 998 (1980); *In re Robert L.*, 21 Cal. App. 4th 1057, 1068 (1993).

- Given less protection against abuse and neglect. Shockingly, although ICWA purports to protect the “welfare” of children, it actually makes it more difficult to protect children subject to it from abuse or neglect. For example, 25 U.S.C. §1912(f) forbids the termination of parental rights unless the likelihood of abuse is established “beyond a reasonable doubt” by “expert witnesses.” Children of all other races are subjected to the lower standard of “clear and convincing evidence.” See *In re Angelia P.*, 28 Cal. 3d 908, 921 (1981). This inevitably makes it harder to protect Indian children from abusive families than children of any other race. Likewise, the “active efforts” requirement makes it exceptionally difficult to separate Indian children from abusive families—essentially meaning that *Native American children must be more severely and obviously abused* before the state can rescue them. See, e.g., *In re Interest of Shayla H.*, 855 N.W.2d 774 (Neb. 2014) (requiring return of children to father for “active efforts”—which resulted in further physical and sexual abuse).
- Subject without notice or choice to the personal jurisdiction of Indian tribal authorities anywhere in the nation. A tribe is authorized under 25 U.S.C. § 1911(b) to intervene in foster care and parental rights proceedings *anywhere in the United States* if that child is an “Indian child”—without any regard to whether such jurisdiction satisfies the requirements of fair play and substantial justice. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).
- Deprived of freedom of association rights. Children have First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Yet ICWA strips children of their freedom of association by assigning them to tribal custody in an effort to compel their association with a tribe, without consideration for their wishes, and often against the wishes of their loving caretakers. See, e.g., *In re. M.K.T.*, 368 P.3d 771, 776 (Okla. Feb. 1, 2016) (father’s effort to resign from the tribe to avert application of ICWA defeated by tribal intercession). Indeed, California law requires officials to obtain tribal membership for the child if the child is not already an enrolled tribal member. *In re Abbigail A.*, No. S220187, 2016 WL 3755924, at *7-8 (Cal. July 14, 2016).

In short, children subject to ICWA are more likely than others to be taken away from a caring foster home, or to be denied placement with a loving adoptive family that happens to be white, black, Hispanic, Asian, or another race. See *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996), *cert. denied*, 519 U.S. 1060 (1997). Because ICWA requires courts to treat children of Native American ancestry differently from those of other races, “the number and variety of adoptive homes that are potentially available” to these children are “more limited than those available” to others. *Id.* The law thus creates a major disincentive to people who would otherwise be willing to provide safe, permanent homes to Indian children in need.

B. ICWA Imposes A Race-Based Classification, Not A Political Classification

It is sometimes claimed that ICWA is not *racially* discriminatory because under *Morton v. Mancari*, 417 U.S. 535 (1974), and *United States v. Antelope*, 430 U.S. 641 (1977), statutes that treat Indians differently from non-Indians are political rather than racial classifications. But those cases involved laws that hinged on tribal membership—and the Court expressly declined to

address whether a law that, like ICWA, treats people differently because of their *genetic eligibility* for membership, would be constitutional. *See Mancari*, 417 U.S. at 553 n. 24 (statute constitutional because it “is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to *members* of ‘federally recognized’ tribes”); *Antelope*, 430 U.S. at 646 n. 7 (statute at issue “[did] not apply to ‘many individuals who are racially to be classified as ‘Indians,’” and parties were “enrolled members of the...Tribe.”).

ICWA does not just apply to children who are *members* of tribes—it applies to children who are *biologically eligible* for membership. A child lands in the ICWA “Penalty Box” solely as a consequence of her racial background.⁶ No case has ever held that a law that treats people differently because their racial background makes them *eligible* for tribal membership is a merely “political” as opposed to “racial” classification. *Cf. Baby Girl*, 133 S. Ct. at 2565 (noting that the racial element of ICWA “raise[s] equal protection concerns.”). Nor have courts ever held that laws that treat Indians differently from non-Indians are categorically exempt from strict scrutiny. *See Malabed v. North Slope Borough*, 335 F.3d 864, 868 n. 5 (9th Cir. 2003) (rejecting such a reading of *Mancari*); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (same); *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) (same).

Remarkably, ICWA has even been used—and is being used here—in a manner that does not even achieve its purported objective of preserving tribal integrity.

In *Baby Girl*, *supra*, a tribal member who fathered a child relinquished his parental rights before the child was born. But four months after her birth, when a couple sought to adopt the child, the father asserted rights to intervene under ICWA, and custody was awarded to him when she was more than two years old, despite her having never met him before. 133 S. Ct. at 2558-59. The Court described this as the father “play[ing] his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests.” *Id.* at 2565.

An Oklahoma case, *In re Adoption of J.R.D.*, (Okla. Civ. App. No. 113,228) (unpublished) (Apr. 21, 2015),⁷ involved a Cherokee mother and a non-Indian father. The couple separated in 2006 after two years of marriage, and in 2008, the mother ended visits between the father and child because of the father’s drug use. Two years later, she remarried, to a non-Indian, who sought to adopt her child legally—whereupon the tribe intervened pursuant to ICWA to object to the adoption. Against the will of the Indian mother, and despite evidence that the birth father “did not want a parental relationship with [the] Child,” *id.* at 11, the Oklahoma Court of Appeals denied the adoption and ordered that the birth father be granted custody.

In a case now pending in Washington, *In re Adoption of T.A.W.*, 354 P.3d 46 (Wash. App. 2015), *rev. granted*, (No. 92127-0 (pending)), an Indian mother divorced the non-Indian birth father due to the father’s drug addiction. She later remarried and her new husband sought to legally adopt the child. *Id.* at 48-49. At that point, the *non-Indian* birth father invoked ICWA to stop what would otherwise have been a routine stepparent adoption. Far from preserving

⁶ Note that the Multi-Ethnic Placement Act (codified as amended at 42 U.S.C. § 1996b(1)), which makes it illegal to deny or delay an adoption proceeding on the basis of race, contains one express exception: children subject to ICWA do *not* enjoy the protections of the Multi-Ethnic Placement Act. 42 U.S.C. § 1996b(3).

⁷ See Appendix B.

Indian tribal integrity, the court concluded that “an Indian child’s cultural tie to a tribe is *irrelevant* as to whether ICWA applies,” *id.* at 52 (emphasis added), and allowed the non-Indian birth father to prevent the Indian birth mother from making her new family legally permanent.

And in this case, the court ordered Lexi placed with a person whose only relationship to an Indian tribe is that he was *married* to Lexi’s late grandmother. There is no evidence whatsoever that this placement will enable her to learn more about Choctaw culture. But the abrupt removal of this six-year-old child from her family of four years did traumatically disrupt Lexi’s sense of permanence—depriving her of the family stability that is so psychologically crucial to a young child—all without even reasonably advancing ICWA’s stated purposes.

III. CALIFORNIA COURTS NEED GUIDANCE REGARDING ICWA’S CONSTITUTIONALITY

These considerations are why the Court of Appeal in *In re Santos Y.*, 92 Cal. App. 4th 1274, 1314-23 (2001), concluded that ICWA violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court recognized that “ICWA unquestionably requires Indian children who are dependents of the juvenile court to be treated differently from court dependents who are not Indian children,” *id.* at 1317, and that those differences are often “disadvantageous.” *Id.* at 1308 (citation omitted).

The *Bridget R.* court sought to avoid addressing ICWA’s constitutionality by using the “Existing Indian Family Doctrine,” a theory which holds that ICWA does not apply to children who have no connection to a tribe other than biological. 41 Cal. App. 4th at 1492. But other courts of appeal have disagreed with *Bridget R.*, including the Second District in this case, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014). *See also In re Vincent M.*, 150 Cal. App. 4th 1247, 1265 (2007) (Sixth District); *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 996 (2006) (Third District); *In re Alicia S.*, 65 Cal. App. 4th 79, 88 (1998) (Fifth District). Although the Legislature evidently intended to overrule the Doctrine by statute in 1999, the *Santos Y.* court found that the statute did not cure the constitutional defects in ICWA. 92 Cal. App. 4th at 1317, 1323.

This Court has so far not resolved the question of the “Existing Indian Family Doctrine,” although Courts of Appeal have urged it to do so. *See, e.g., In re Vincent M.*, 150 Cal. App. 4th at 1265. But the *Santos Y.* decision is correct that, regardless of whether that Doctrine is adopted or rejected, it remains necessary to resolve the constitutionality of ICWA’s race-based Penalty Box. Even if a child does have an “existing Indian family,” the constitutionality of the various disadvantages that ICWA imposes on that child solely by virtue of her ancestry must be judicially resolved.

In *Baby Girl*, the U.S. Supreme Court found that it would “raise equal protection concerns” if ICWA were used to “override... child’s best interests” and take a child from a caring home “at the eleventh hour” simply “because an ancestor—even a remote one—was an Indian.” 133 S. Ct. at 2565. *This is that case.*

CONCLUSION

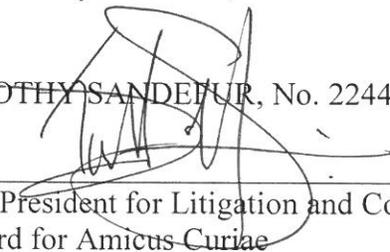
Laws that establish a separate and disadvantageous system of rules for people of a particular ancestry—that deny them the protections afforded to people of any other race—are “illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society,” and should be “struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers.” *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 548 (2000) (quoting Alexander Bickel, *The Morality of Consent* 133 (1975); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L.Rev. 775, 792 (1979)). This is especially true in cases involving children. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

Time is of the essence. Even one year is an eternity in a child’s life. Resolution of ICWA’s constitutionality has been postponed for decades. During that time, countless children have been subjected to its separate and unequal legal standards. It is “intolerable” that this “dual system” of race-based classifications is allowed to persist. *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 438 (1968).

The petition for review should be *granted*.

Respectfully submitted,

TIMOTHY SANDEFUR, No. 224436

By: 
Vice President for Litigation and Counsel of
Record for Amicus Curiae
Goldwater Institute Scharf-Norton Center
for Constitutional Litigation

DECLARATION OF SERVICE BY MAIL

I, Kris Schlott, declare as follows:

I am a resident of the State of Arizona, residing or employed in Phoenix, Arizona.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 500 E. Coronado Rd., Phoenix, Arizona 85004.

On August 17, 2016, true copies of GOLDWATER INSTITUTE'S AMICUS CURIAE LETTER BRIEF IN SUPPORT OF PETITION FOR REVIEW were emailed and mailed postage prepaid via U.S. Postal Service to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of August, 2016, at Phoenix, Arizona.



Kris Schlott

APPENDIX A

ICWA PENALTY BOX

ARIZONA LAW	ICWA
State Court	Transfer to tribe, absent good cause (25 U.S.C. § 1911 (b))
Reasonable efforts to reunify	Active efforts to reunify (25 U.S.C. § 1912 (d))
Reasonable grounds / Probable cause / Preponderance of the evidence	Clear and convincing evidence (25 U.S.C. § 1912 (e))
Clear and convincing evidence / Best interest by preponderance	Beyond a reasonable doubt (25 U.S.C. § 1912 (f))
Reasonable evidence / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. § 1915 (b))
Reasonable evidence / Significant relationship / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. § 1915 (a))

Jurisdiction

Foster care / Termination of parental rights - Efforts to reunify

Foster care burden of proof

Termination of parental rights burden of proof

Foster / Preadoptive placement preferences

Adoption placement preferences

APPENDIX B

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

APR 21 2015

IN THE MATTER OF THE ADOPTION OF)
J.R.D., A MINOR CHILD:)

MICHAEL S. MOORE
CLERK

DERICK PRICE HASSELL,)

Appellant,)

vs.)

Case No. 113,228

JUSTIN RYAN DUKE,)

Appellee,)

and)

THE CHEROKEE NATION,)

Intervenor/Appellee.)

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE DAVID SMITH, TRIAL JUDGE

AFFIRMED

Nancy Nesbitt Blevins,
Paul E. Blevins,
Emily Blevins McLean,
BLEVINS LAW OFFICE, INC.,
Pryor, Oklahoma,

For Appellant,

William G. LaSorsa,
Bradley J. Brown,
JONES, GOTCHER & BOGAN, P.C.,
Tulsa, Oklahoma,

For Appellee,

Robert Garcia,
ASSISTANT ATTORNEY GENERAL,
Tahlequah, Oklahoma,

For Intervenor/
Appellee.

OPINION BY BRIAN JACK GOREE, PRESIDING JUDGE:

¶1 In this adoption proceeding, Petitioner, Derek Price Hassell, appeals the trial court's sustension of Respondent Father's demurrer to evidence based on its finding that Petitioner did not meet the requirements of §1912(d) and (f) of the Indian Child Welfare Act. We affirm.

¶2 This is an action for the adoption of J.R.D. (Child) brought by his stepfather, Petitioner, Derek Price Hassell. The Indian Child Welfare Act (ICWA) is generally applicable to this proceeding. 25 U.S.C. §1901-1963. Child's mother, Leia Shea Hassell (Mother) is a citizen of the Cherokee Nation. Child is a citizen of the Cherokee Nation and is an "Indian child." 25 U.S.C. §1903(4). Respondent, Justin Ryan Duke (Father), not a member of a tribe, is a "parent." 25 U.S.C. §1903(9). The adoption proceeding is a "child custody proceeding." 25 U.S.C. §1903(1)(ii),(iv).

¶3 In January 2004, Mother and Father were married, and in September 2004, Child was born. In February 2006, they divorced. Pursuant to the divorce decree, Father was ordered to pay monthly child support payments to Mother. He was granted visitation with Child supervised by Father's mother on alternating weekends and some holidays. After the first visitation, Father did not visit Child at his mother's home. Instead, Mother arranged for her and Child to meet Father for visitation once or twice a month for thirty minutes to an hour and a half.

¶4 In February 2007, Father enlisted in the Navy. Mother, Father, Child, and Father's father spent the weekend with Father in Chicago following his basic training graduation there. In June 2007, Father visited with Child twice before he traveled to his new duty station. This was the last time Father had any physical contact with Child. He sent Child gifts for Thanksgiving and Christmas 2007, and for Valentine's Day 2008.

¶5 In June 2008, Father was discharged from the Navy. Mother informed Father she would not bring Child to visit him because she believed he was using drugs and that Child would not be safe around him. She told him if he wanted to visit with Child, he would have to get a court order requiring

visitation. Father did not commence any court proceedings, nor did he request visitation with Child.

¶6 In June 2010, Mother married Petitioner. On September 10, 2012, Petitioner filed his Petition for Adoption and his Application for Adoption without Consent. On March 5, 2013, the trial court granted Petitioner's Application for Adoption without Consent. It ruled:

[W]e can . . . not prevent this child from moving forward in his life. He has been put on hold for far too long while he waits for his natural father to get his life in order, and he deserves to be adopted by the man that has been put in the position of his father. Therefore, this Court grants and sustains the application that his adoption may proceed without the consent of the natural father.

¶7 The Cherokee Nation (Nation) intervened, objecting to the adoption of Child by Petitioner. On June 10, 2014, following briefing and oral arguments, the trial court determined that §1912(d) and §1912(f) of ICWA are applicable to this case. Title 25 U.S.C. §1912(d) provides:

Any party seeking to effect a foster care placement of, or termination of parental rights to an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 1912(f) provides:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by

evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

¶8 On August 25-28, 2014, trial was held to determine whether the adoption by Petitioner was in Child's best interests. The trial court granted Father's demurrer to Petitioner's evidence, ruling that Petitioner did not satisfy the requirements of §1912(d) and (f).

¶9 In its September 15, 2014 Journal Entry of Judgment, the trial court recited its previous ruling that §1912(d) and (f) are applicable to this case. In sustaining Father's demurrer to the evidence, it determined that Petitioner failed to prove the requirements of §1912(d) by clear and convincing evidence and failed to prove the requirements of §1912(f) beyond a reasonable doubt. Petitioner appeals.¹

¶10 Petitioner contends the trial court erred as a matter of law in finding that §1912(d) and §1912(f) of ICWA are applicable to this proceeding.

¶11 The determination of the applicability of §1912(d) and (f) to this child custody proceeding is a question of law. Legal questions are subject to *de novo* review. *Fulsom v. Fulsom*, 2003 OK 96, ¶2, 81 P.3d 652.

¹ Petitioner's reply brief included a motion to strike Nation's answer brief for failure to comply with Oklahoma Supreme Court Rules. Okla.Sup.Ct.R. 1.2. Petitioner's motion to strike Nation's answer brief is denied.

¶12 Title 25 U.S.C. §1902 provides the Congressional policy for enacting ICWA:

. . . 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 which will reflect the unique values of Indian culture, and by providing for assistance as Indian tribes in the operation of child and family service programs.

¶13 In *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552, 186 L.Ed.2d 729 (2013), the United State Supreme Court stated:

"The Indian Child Welfare Act of 1978 . . . was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Congress found that "an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies." §1901(4). This "wholesale removal of Indian children from their homes" prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. *Id.*, at 32, 36, 109 S.Ct. 1597. . . .

¶14 The policy of the State of Oklahoma, set forth in the Oklahoma Indian Children Welfare Act (OICWA) 10 O.S. 2011 §40.1 *et seq*, is to "ensure that the intent and provisions of the federal [ICWA] are enforced." Title10 O.S.

2011 §40.1. The OICWA, in accordance with [ICWA], applies to all child custody proceedings involving any Indian child except those arising from marriage dissolution proceedings or delinquency adjudications. 10 O.S. 2011 §40.3(A), 25 U.S.C. §1903(1). A "child custody proceeding" is specifically defined by ICWA to include: 1) foster care placement, 2) termination of parental rights, 3) preadoptive placement, and 4) adoptive placement. See 25 U.S.C. §1903(1)(I)-(iv). "Termination of parental rights" means "... any action resulting in the termination of the parent-child relationship." "Adoptive placement" means "...the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

¶15 Specifically, Petitioner submits that §1912(f) does not apply to these proceedings. He points out that in *Baby Girl*, the United State Supreme Court held that §1912(f) is applicable only to a custodial parent.² Petitioner explains that Father had legal and physical custody of Child for approximately one year and nine months between Child's birth and the divorce, but it has been more than seven years since Father has had any physical contact with Child. Therefore, the "continued custody" requirement for application of §1912(f) does not exist.

² In the *Baby Girl* case, the biological father never had legal or physical custody of the child.

¶16 In *Baby Girl*, the United States Supreme Court defined "continued custody." The meaning of "continued" includes "carried on or kept up without cessation," or "resumed after interruption." It concluded that ". . . [t]he phrase 'continued custody' therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, §1912(f), does not apply in cases where the Indian parent *never* had custody of the Indian child."

¶17 Although Father has had no physical contact with Child for several years, after the divorce, he was awarded supervised visitation rights and has a standing child support order for the care and support of Child. "[A]t some point in the past," Father did have physical custody and legal custody and, following the divorce, continues to have supervised visitation rights to Child. Father has "continued custody" of Child, according to the Supreme Court's interpretation of that phrase in *Baby Girl*. Therefore, §1912(f) applies to these proceedings. *Fulsom v. Fulsom*, 2003 OK 96, ¶2. The trial court did not err in determining that §1912(f) applies to these proceedings.

¶18 Nevertheless, Petitioner urges the trial court erred in granting Father's demurrer to the evidence when it determined Petitioner failed to prove the requirements of §1912(f) beyond a reasonable doubt.

¶19 When a trial court considers a demurrer to the evidence, it must take as true all evidence (together with all reasonable inferences) favorable to the party against whom relief is sought and disregard any conflicting evidence that may favor the demurrant. A demurrer should be overruled unless there is an entire absence of proof tending to show a right to recover. In short, the demurrer must be denied if the opponent has made out a prima facie case. A reviewing court will examine the record in the light most favorable to the plaintiff (disregarding conflicts or contrary inferences) but will disturb the trial court's sustention of a demurrer only if there is competent evidence to support the material elements of the plaintiff's cause of action. *Jackson v. Jones*, 1995 OK 131, ¶4, 907 P.2d 1067.

¶20 In order to ascertain whether the trial court erred in sustaining Father's demurrer to the evidence, this Court must determine if Petitioner met his burden to prove, beyond a reasonable doubt, that the continued custody of Child by Father is likely to result in serious emotional or physical damage to Child. Evidence of this must include the testimony of a qualified expert witness.

¶21 At trial, Catherine Chalmers, a licensed marriage and family therapist and member of the Cherokee tribe, testified that she has been an expert witness many times in cases involving adoption and ICWA.

¶22 Ms. Chalmers testified that in her opinion, continued custody of Child by Father likely would result in severe emotional damage to Child.³ She based her opinion on attachment theory. She explained that because of Father's drug and alcohol abuse, Child had not attached to Father during the one year and two months Father lived with him and Mother prior to the divorce.

¶23 Ms. Chalmers testified that if the adoption were not granted, and Father were to involve himself in Child's life, Child's attachment to him would cause Child to regress to the earlier development stage in order to recoup that attachment. This regression would cause him serious damage.

¶24 Although Ms. Chalmers has never met Child, she stated that based on information provided her by Mother, she believes Child has formed healthy attachments with Mother and Petitioner. She further stated that, according to the attachment theory, the successful attachments Child already has formed will help him have more successful relationships in the future.

³ Ms. Chalmers testified it was not likely that continued custody of Child by Father would result in serious physical damage to Child.

¶25 During cross-examination, Ms. Chalmers agreed with counsel that people can and do overcome the negative effects of an insecure attachment given the right circumstances. To form attachments besides parental attachments, which Child has formed with Mother and to a degree with Petitioner, regression is not required.

¶26 Counsel stated that it had been suggested that Father is seeking "some kind of relationship" with Child. He asked Ms. Chalmers what kind of relationship a parent would be seeking if he stated he wanted "some kind of relationship."

¶27 Ms. Chalmers responded that Father did not want a parental relationship with Child, but that he wanted Child to have knowledge of him. She testified, "[Father] wanted a relationship where [Child] knew who he was, knew that he cared about him, and that he was someone who felt for him, felt love for him, and he wanted him to have that awareness is what it was expressed early on in the time line, I believe."

¶28 Counsel asked if Ms. Chalmers could state "... with any degree of certainty that establishing some kind of relationship with [Father] is going to cause [Child] to suffer a regression." She replied, "I'm uncertain about that, given both parties' willingness to do that."

¶29 After reviewing the record, this Court finds that Petitioner did not prove beyond a reasonable doubt that Father's continued custody of Child is likely to result in serious emotional damage to Child. Therefore, we find the trial court's decision sustaining Father's demurrer to the evidence as to §1912(f) to be correct. *Jackson v. Jones*, 1995 OK 131, ¶4.

¶30 Because this Court affirms the trial court's sustention of Father's demurrer to the evidence as to §1912(f), we find it is not necessary for us to consider also whether the trial court erred in sustaining Father's demurrer to the evidence as to §1912(d).

¶31 AFFIRMED.

BUETTNER, J., and BELL, J., concur.