

THE INDIAN CHILD WELFARE ACT: DOES IT COVER CUSTODY DISPUTES AMONG EXTENDED FAMILY MEMBERS?

I. INTRODUCTION

*A.B.M. v. M.H.*¹ involved an adoption dispute between a child's biological mother and members of the child's extended family.² Since family members were the only parties in the proceeding, the prospective adoptive parents maintained that the proceeding was not within the ambit of the Indian Child Welfare Act (the Act).³ The Supreme Court of Alaska rejected this argument on the grounds that the Act did not expressly or implicitly except adoption proceedings involving only members of the extended family from its coverage.

The court's construction of the Act in *A.B.M. v. M.H.* directly conflicts with the Montana Supreme Court's construction in *In re Bertelson*.⁴ The Montana case involved a custody dispute between a child's mother and paternal grandparents. The court held that the Act was inapplicable to a dispute among members of the same extended family because "[t]he Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture [*sic*] values under circumstances in which an Indian child is placed in a foster home or other protective institution."⁵ In *A.B.M. v. M.H.*, the Alaska Supreme Court flatly rejected the Montana court's analysis.⁶ The Montana analysis, however, more closely follows traditional rules of statutory construction.

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1. 651 P.2d 1170 (Alaska 1982), *cert. denied*, 103 S. Ct. 1893 (1983).

2. The Indian Child Welfare Act defines an "extended family member" for purposes of the Act as follows:

"extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Indian Child Welfare Act, 25 U.S.C. § 1903(2) (Supp. V 1981).

3. 25 U.S.C. §§ 1901-1963 (Supp. V 1981).

4. — Mont. —, 617 P.2d 121 (1980).

5. *Id.* at —, 617 P.2d at 125.

6. 651 P.2d at 1173 n.6.

This note will apply traditional rules of statutory construction to the Indian Child Welfare Act. It will argue that the Alaska Supreme Court should have found that the Act exempts from its coverage custody disputes among extended family members. Finally, the implications of the court's decision will be analyzed in light of the United States Supreme Court's denial of certiorari.

II. FACTS

A.B.M. gave birth to R.H. on February 16, 1980. Prior to the birth, A.B.M. arranged to have the child adopted by her sister and brother-in-law, the H.'s. On April 9, 1980, a master held the voluntary termination of rights hearing required by the Act.⁷ At this hearing, the master advised A.B.M. that under the terms of the Act, she could revoke her consent to the adoption at any time before the superior court entered the final adoption decree.⁸ The superior court entered R.H.'s final adoption decree on September 5, 1980. A.B.M. made no attempt to revoke her consent prior to this final order.

In November 1980, the State Department of Health and Social Services, Division of Family and Youth Services (the Department), discovered that the H.'s had failed to notify it of R.H.'s adoption proceeding as required by Alaska law.⁹ Accordingly, the Department had no opportunity to investigate the suitability of R.H.'s prospective home prior to the final adoption decree. As a result of this shortcoming in the adoption proceeding, the superior court vacated its decree. At this point A.B.M., as permitted by the Act,¹⁰ formally petitioned the court for custody of R.H.

In June 1981, the superior court conducted hearings to determine the future custody of R.H. A.B.M. filed a motion for summary judgment to establish that the Act controlled the outcome of the custody suit. The court denied this motion and applied state law to the custody issue. Concluding that the interests of R.H. would best be served by granting the adoption by the H.'s, the court denied A.B.M.'s petition to withdraw her consent.

7. See 25 U.S.C. § 1913(a) (1982).

8. See *id.* § 1913(c).

9. ALASKA STAT. § 25.23.100(a) (Supp. 1983) (originally enacted as ALASKA STAT. § 20.15.100(a)) provides in pertinent part that:

After filing of a petition to adopt a minor, the court shall fix a time and place for hearing the petition. At least 20 days before the date of the hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the petitioner to (1) the department, unless the adoption is by a stepparent of the child. . . . The notice to the department shall be accompanied by a copy of the petition.

10. See 25 U.S.C. § 1916(a) (Supp. V 1981).

On appeal, A.B.M. argued that the Act entitled R.H., as an Indian child, to "the procedural safeguards accorded Indian children."¹¹ The H.'s countered that the Act did not control the outcome of the case because Congress had not intended the Act to apply to disputes between the parents and other members of an extended family. They submitted instead that the Act sought only to regulate the "removal of Indian children from their families."¹² Since the instant case concerned a "voluntary placement within the family,"¹³ the H.'s argued that the Act was inapplicable. The supreme court rejected this argument and awarded A.B.M. custody.

III. THE COURT'S ANALYSIS

To reach this result, the supreme court employed two lines of analysis. The court first noted that the Act specifically excludes from its coverage custody disputes resulting from divorce proceedings between parents, and the placement of Indian children resulting from juvenile delinquency actions.¹⁴ The court reasoned that since the Act does not expressly exclude disputes between parents and members of the extended family, Congress must have intended the Act to cover these disputes. The court found "no compelling basis for implying"¹⁵ exceptions other than those enumerated.

In a second line of reasoning, not clearly articulated in the opinion, the court considered the possibility of an implied exception to the Act's coverage for disputes involving members of the child's family.¹⁶ The H.'s argued that such an exception should be implied from the Act's purpose to regulate only the "removal of Indian children from their families."¹⁷ Assuming that such an exception existed, the court then considered whether the H.'s case would come within it. Although the exception would seemingly exclude all disputes among family members from the Act's coverage, the court found no language in the Act or in the legislative history to indicate that Congress intended the definition of "family" to include extended family members.¹⁸ In fact, the court maintained that Congress purposefully distinguished between "family" and "extended family members" when

11. 651 P.2d at 1172.

12. *Id.*

13. *Id.* at 1173.

14. *Id.* The Act, 25 U.S.C. § 1903(i), (iv) (Supp. V 1981) provides: "[The term 'adoptive placement'] shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody, to one of the parents."

15. 651 P.2d at 1173.

16. *Id.*

17. *Id.*; see 25 U.S.C. § 1902 (Supp. V 1981).

18. 651 P.2d at 1173.

it expressly defined "extended family member" for purposes of the Act.¹⁹ Based on this analysis, the court defined the word "family" by its most common meaning: parents and children. This construction of "family" led the court to reject the H.'s contention that the Act was inapplicable to their proceeding. The court reasoned that removing R.H. from the H.'s custody by allowing A.B.M. to withdraw her consent would not constitute a removal from her "family." Rather, the removal would reunite her with her "family."²⁰

IV. CRITIQUE OF THE COURT'S ANALYSIS

The court's first line of analysis²¹ was based on the general rule of statutory construction that when a statute provides for stated exceptions, a court should not imply others.²² Although this rule is widely accepted,²³ it is also widely accepted that a court should not follow this rule if the result conflicts with the statute's underlying purpose,²⁴ or leads to injustice, oppression, or absurd

19. *Id.* For the definition of an "extended family member," see *supra* note 2.

20. The court explained its decision as follows:

[The H.'s] submit that the Act does not apply to the instant case as it instead concerns a voluntary placement within the family. This reasoning is faulty, however, since it improperly assumes that the terms "family" and "extended family" are congruent. We find no language in the Act or its legislative history to indicate that Congress accorded the word "family" anything more than its most common meaning. We are hesitant to conclude that Congress intended that the Act only apply when a child was being removed from his or her extended family in the absence of explicit language to that effect.

651 P.2d at 1173.

21. See *supra* text accompanying notes 14-15.

22. See *Insurance Co. of N. Am. v. Sullivan*, 56 Wash. 2d 251, 258, 352 P.2d 193, 197 (1960).

23. See, e.g., *Haffing v. Inlandboatman's Union of Pac.*, 585 P.2d 870, 875 (Alaska 1978); *In re Babcock*, 387 P.2d 694, 696 (Alaska 1963); *Mid-South Chem. Corp. v. Carpentier*, 14 Ill. 2d 514, 519, 153 N.E.2d 72, 74 (1958); *State ex rel. Read v. Farmers' Irrigation Dist.*, 116 Neb. 373, 378, 217 N.W. 607, 609-10 (1928); *In re Monks Club, Inc.*, 64 Wash. 2d 845, 849, 394 P.2d 804, 807 (1964); *Insurance Co. of N. Am. v. Sullivan*, 56 Wash. 2d 251, 258, 352 P.2d 193, 197 (1960); *Sandona v. City of Cle Elum*, 37 Wash. 2d 831, 837, 226 P.2d 889, 892 (1951).

24. For example, although the court in *Haffing v. Inlandboatman's Union of Pac.*, 585 P.2d 870 (Alaska 1978), adopted the general rule, it did not follow it blindly. Rather, the court followed the rule of statutory construction that all statutes relating to the same subject matter be read together as a whole so that a total scheme evolves. *Id.* at 878. In effect, the court achieved its desired result without violating the underlying purpose of the implied exception rule. Also, the court in *In re Babcock* held that a "proviso should be interpreted consistently with the legislative intent" unless a court can ascertain the legislative intent only by construing the proviso itself. 387 P.2d 694, 696 (Alaska 1963). See *Greek-American Produce Co. v. Illinois Cent. R.R.*, 4 Ala. App. 377, 381, 58 So. 994, 995 (1912) ("Any other con-

consequences.²⁵

It is obvious that the administration of justice requires something more than the mere application of the letter of the law, designed for some particular class of ordinary cases, to all others, however modified by accident or withdrawn by extraordinary circumstances from the spirit of its enactment. It follows that general terms should be limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. *The reason of the law in such cases should prevail over its letter.*²⁶

When ascertaining whether it should imply an exception, a court must bear in mind the fundamental premise of traditional statutory construction that the legislature intends to incorporate a definite purpose in every enactment.²⁷ A court's primary objective in analyzing a statute is to ascertain and implement that legislative intent.²⁸ A court should imply an exception if one is needed to further this intent.²⁹

The starting place for a court in analyzing whether it must imply an exception to the body of the statute is the statutory language itself.³⁰ When the language of the statute is unclear, confusing, inconsistent, contradictory, or otherwise does not reveal the legislative intent, proper rules of statutory construction direct a court to the leg-

struction of the statute would lead to the most absurd consequences, [and] defeat the obvious purposes of the legislature in calling it into existence.”)

25. *State v. Standard Oil Co.*, 188 La. 978, 1054, 178 So. 601, 626 (1937) (reh'g denied) (per curiam) (1938); *accord*, *In re Alteration of Lines*, 171 Pa. Super. 642, 647, 92 A.2d 241, 243 (1952).

26. *Null v. Staiger*, 333 Pa. 370, 375-76, 4 A.2d 882, 885 (1939).

27. 2A J. SUTHERLAND, *STATUTES & STATUTORY CONSTRUCTION* § 46.05, at 57 (C. Sands 4th ed. 1973).

The United States Supreme Court recently affirmed this premise. *See Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981).

28. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Shields v. United States*, 698 F.2d 987, 989 (9th Cir.), *cert. denied*, 104 S. Ct. 73 (1983).

29. *Read v. Farmers' Irrigation Dist.*, 116 Neb. 373, 378, 217 N.W. 607, 609 (1928). *See, e.g., In re Monks Club, Inc.*, 64 Wash. 2d 845, 849, 394 P.2d 804, 807 (1964).

The United States Supreme Court recently applied a similar rule: “[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

30. *See, e.g., City & Borough of Sitka v. International Bhd. of Elec. Workers Local 1547*, 653 P.2d 332, 336 (Alaska 1982) (“[A] statute itself affords the best means of its exposition, and if the legislative intent can be ascertained from the provisions of the statute that intent will prevail.”); *Mid-South Chem. Corp. v. Carpentier*, 14 Ill. 2d 514, 518, 153 N.E.2d 72, 74 (1958).

islative history for insight.³¹ The Alaska Supreme Court has often acknowledged this framework for ascertaining and analyzing legislative intent.³²

In determining whether the Act excludes disputes between parents and members of the extended family, the Alaska Supreme Court, therefore, should have begun by analyzing the language of the Act:

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation 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 to Indian tribes in the operation of child and family service programs.³³

Congress reiterated this policy of protecting Indian values, culture, and heritage throughout the Act. Recently, the Kansas Supreme Court summarized the sections of the Act which refer to this policy:

Included in the congressional findings to support the Act is § 1901(4) to the effect "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them . . ." Section 1911(a) provides exclusive jurisdiction in the Indian tribe "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation . . ." Section 1912(d) provides that efforts should be made to prevent the breakup of the Indian family while subsections (e) and (f) refer to "the continued custody of the child by the parent or Indian custodian" and the potential for emotional or physical damage to the child. Section 1914 again refers to the removal of the child from the parent or Indian custo-

31. *See, e.g.*, *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981). The Supreme Court recently applied this maxim:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Watt v. Alaska, 451 U.S. 259, 266 n.9 (1981) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

32. "Although the starting point in construing a statute is the language of the statute itself, reference to the legislative history may provide insight that is helpful in determining the statute's meaning." *City & Borough of Sitka v. International Bhd. of Elec. Workers Local 1547*, 653 P.2d 332, 336 (Alaska 1982); *see also* *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 540 (Alaska 1978).

33. 25 U.S.C. § 1902 (Supp. V 1981).

dian. Sections 1916(b), 1920 and 1922 also reflect the underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.³⁴

However, the language of the Act does not expressly address the question whether the Act controls the outcome of disputes within a child's extended family. Given the uncertainty created by this omission, the Alaska Supreme Court should have been directed, under proper rules of statutory construction, to the legislative history of the Act.

The Act's inception dates back to the early 1970's, when the erosion of Indian family life received extensive publicity.³⁵ Perhaps due to this nationwide exposure, congressional committees started investigating the problem. During its hearings in 1974, Congress found that state adoption officials showed insufficient deference to Indian cultural values and social norms.³⁶ This lack of deference had resulted in many unwarranted Indian child custody placements. Experts testified that these unwarranted placements formed a "pattern of discrimination against American Indians."³⁷ They argued that adoption officials routinely failed to note that in "many Indian tribes the extended family, rather than the nuclear family, [was] the norm; child care [was] traditionally the responsibility of grandparents or other relatives."³⁸ Adoption officials often misinterpreted this norm

34. *In re Adoption of Baby Boy L.*, 231 Kan. 199, 206, 643 P.2d 168, 175 (1982).

35. For example, see McDowell, *The Indian Adoption Problem*, Wall St. J., July 12, 1974, § 1, at 6, col. 3: "Indian parents and officials all across the U.S. are protesting what they describe as cultural or legal 'genocide' inflicted by county, state and federal agencies that sanction or participate in the wholesale removal of Indian children from their homes and reservations."

36. See *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 1-3 (1974) [hereinafter cited as *1974 Hearings*] (defining the specific problems that American Indian families face in raising their children and how these problems are affected by federal action) (opening statement of Sen. James Abourezk of South Dakota); see also *In re Appeal in Pima County Juvenile Action*, 130 Ariz. 202, 203, 635 P.2d 187, 188 (Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982).

The House report reiterated these findings. "In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, [made] decisions that [were] wholly inappropriate in the context of Indian family life." H. REP. NO. 1386, 95th Cong., 2d Sess. 8, 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7530, 7532.

37. *1974 Hearings*, *supra* note 36, at 2. See generally Comment, *The Indian Child Welfare Act — Tribal Self-Determination Through Participation in Child Custody Proceedings*, 1979 WIS. L. REV. 1202 (discussing the various practices which resulted in the discrimination).

38. Comment, *supra* note 37, at 1203.

In American Indian society, the role of the extended family is essentially

as parental neglect.³⁹ As a result, for decades the states removed a disproportionate number of Indian children from their homes and placed them in non-Indian homes.⁴⁰

Experts further testified that the removal of American Indian children from their families destroyed the Indian family and its way of life. By depriving these children of their tribal and cultural heritage,⁴¹ the states paralyzed the ability of the tribes to perpetuate themselves.⁴² This was "the most severe [method] of undermining retained tribal sovereignty and autonomy."⁴³ Furthermore, these discriminatory removals had serious long-term, as well as short-term emotional effects on the removed children.⁴⁴

These findings inspired Congress to enact the Indian Child Wel-

equivalent to that of a "parent" in white society. Comment, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUM. RTS. L. REV. 529, 536 (1975) [hereinafter cited as Comment, *Cultural Genocide*].

"An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H. REP. NO. 1386, 95th Cong., 2d Sess. 8, 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7530, 7532.

39. H. REP. NO. 1386, 95th Cong., 2d Sess. 8, 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7530, 7532.

40. *See* 1974 Hearings, *supra* note 36, at 1. A 1977 Joint Committee report stated, for example:

There are 28,334 Alaskan Natives under 21. Of these, 957 (or 1 out of every 29.6) Alaskan Native children has been adopted; 93 percent of these were adopted by non-Native families. The adoption rate for non-Native children is 1 out of 134.7. By proportion, there are 4.6 times (460 percent) as many Native children in adoptive homes as there are non-Native children.

TASK FORCE FOUR OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONG., 2D SESS., FINAL REPORT ON FEDERAL, STATE & TRIBAL JURISDICTION 81 (Comm. Print 1976) [hereinafter cited as 1976 REPORT].

41. Comment, *supra* note 37, at 1202.

42. 1976 REPORT, *supra* note 40, at 86.

43. *Id.*

44. The Indian Policy Review Commission reported:

[T]he individual child removed from his/her home environment . . . may suffer untold social and psychological consequences. Louis La Rose, chairman of the Winnebago Tribe, expressed the anger of many when commenting on the debacle of the Indian child placement situation:

"I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the [state] and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him. And if you have ever talked to an individual like that when he comes to a reservation . . . I get depressed."

1976 REPORT, *supra* note 40, at 78.

fare Act⁴⁵ in 1978. The legislative history of the Act emphasizes that its primary purpose is to maintain Indian family and culture,⁴⁶ and to set "minimum standards for the removal of Indian children from their existing Indian environment."⁴⁷ To accomplish its purpose, Congress sought to impose "strict procedural limitations" on the states' abilities to remove Indian children from their families.⁴⁸ By attempting to curb abusive state practices,⁴⁹ Congress hoped to correct the discriminatory placement of Indian children in non-Indian foster care homes and institutions.⁵⁰

The Act expressly excepts from its coverage custody disputes resulting from divorce proceedings between parents and the placement of Indian children resulting from juvenile delinquency actions.⁵¹ In considering whether it should have implied other exceptions to the Act, the supreme court first should have decided whether the express language of the Act, without implied exceptions, would have vio-

45. 25 U.S.C. §§ 1901-1963 (Supp. V 1981).

46. See 1976 REPORT, *supra* note 40, at 87-88; *Indian Child Welfare Act of 1977: Hearings on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 154 (1977) [hereinafter cited as *1977 Hearings*] (statement of National Tribal Chairmen's Association); *id.* at 218 (statement of Don Reeves); *id.* at 237 (statement of Alaska Legal Services Corporation).

47. *In re Adoption of Baby Boy L.*, 231 Kan. 199, 205-06, 643 P.2d 168, 175 (1982).

48. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1287 (1980); see the Act, 25 U.S.C. § 1902 (Supp. V 1981).

49. 1976 REPORT, *supra* note 40, at 79.

Testimony at the congressional hearings reiterated this point: "The general intent of this Bill is to establish standards for the placement of Indian children in foster care or adoptive homes, to prevent the breakup of Indian families . . ." *1977 Hearings*, *supra* note 46, at 85 (statement of the National Congress of American Indians). "S. 1214 is intended to deal with the recurrent problem of forcible and fraudulent removal of Indian children from their natural or adoptive parents, or from the homes of blood relatives, for placement with non-Indian families or institutions. . . ." *Id.* at 123 (statement of Dr. Marlene Echohawk, National Congress of American Indians).

50. H. REP. NO. 1386, 95th Cong., 2d Sess. 8, 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7530, 7532. Section 1901 of the Act lists five of the congressional findings, which include the following:

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

For an argument that these placements may be unconstitutional, see Comment, *Cultural Genocide*, *supra* note 38, at 537-46.

51. 25 U.S.C. § 1903 (Supp. V 1981).

lated the intent of Congress or led to an unjust or absurd result.⁵² Upon deciding that such a result would arise through this interpretation of the Act, the court would have been compelled to affirm the lower court's decision to grant adoption to the H.'s under Alaska law.

The sole purpose of the express exceptions is to exempt from the Act's coverage certain state practices which Congress found had not been abusive.⁵³ The intrafamily adoption at issue in R.H.'s case likewise involves no state abuse. Application of the Act to a case which involves no abusive state practice clearly violates the intent of Congress. Moreover, without the implication of such an exception, the court's result is clearly unjust, given the superior court's finding that the child's best interests would have been served by granting adoption by the H.'s.⁵⁴ To avoid violating the intent of Congress or reaching an unjust result, the supreme court should have implied an exception to the Act for intrafamily disputes.

After incorrectly determining that the Act was applicable to the H.'s case, the court, in its second line of analysis, assumed that the Act was inapplicable to intrafamily disputes.⁵⁵ The basis for the court's assumption was the H.'s argument that the Act's purpose was to regulate only the "removal of Indian children from their families."⁵⁶ To determine whether R.H. was being removed from her family, the court was required to interpret the breadth of the word "family" in the Act. Finding that the Act left the word "family" undefined, the court defined it according to its most common meaning:⁵⁷ parents and children. Since extended family members are not included within this definition, the court concluded that the Act was applicable to the dispute.

In defining the word "family" by its most common meaning, the court again violated accepted rules of statutory construction. These rules recognize that a legislature formulates and adopts the subsidiary provisions of a statute in harmony with its general purpose.⁵⁸

52. See *supra* text accompanying note 27.

53. Congress desired to regulate primarily "attempts [by the states] to remove an Indian child from his or her home on grounds of the alleged incompetence or brutality of the parents." *In re* Adoption of Baby Boy L., 231 Kan. 199, 207, 643 P.2d 168, 176 (1982) (emphasis added) (citing Barsh, *supra* note 48, at 1305). The exceptions encompass state actions which are not among these abuses.

54. See 651 P.2d at 1172.

55. *Id.* at 1173.

56. *Id.*; see *supra* text accompanying notes 12-13.

57. 651 P.2d at 1173.

58. See J. SUTHERLAND, *supra* note 27, at 57.

"A statute must receive such construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its scope and object." *Ellison v. Railroad Co.*, 36 Miss. 572 [(1858)]. "The entire

All judicial constructions of specific statutory words or clauses, therefore, must be made "with reference to the leading idea or purpose of the whole instrument."⁵⁹ By according the word "family" its most common meaning, the court failed to define the word in a manner consistent with the statute's general purpose.

As stated in section 1902, the Act's general purpose is "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."⁶⁰ To effectuate the purposes of the Act, a court must define the word "family" according to Indian standards. Defining "family" by the common "White Man's" meaning works against Indian cultural preservation⁶¹ and violates the purposes of the Act.

Despite the Act's clear purposes, the Alaska Supreme Court decided that Congress distinguished in the Act between family members and extended family members when it defined "extended family

statute must be so read that the whole may have a harmonious and consistent operation." *Viriden v. Bowers*, 55 Miss. [1 (1877)]. "In the construction of a statute the object is to get at its spirit and meaning, its design and scope; and that construction will be justified which evidently embraces the meaning and carries out the object of the law, although it be against the letter and the grammatical construction of the act." *Dixon v. Doe*, 1 Smedes & M. 70 [(1843)]; *Pointer v. Trotter*, 10 Smedes & M. 537 [(1848)]; *Board of Education v. Mobile & O&R Co.*, 72 Miss., at page 239, 16 South. 489 [(1894)].

Adams v. Yazoo & M.V.R.R., 75 Miss. 275, 283, 22 So. 824, 826 (1897).

59. J. SUTHERLAND, *supra* note 27, at 56.

It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution.

Id. (citing *International Trust Co. v. American Loan & Trust Co.*, 62 Minn. 501, 503, 65 N.W. 78, 79 (1895)).

"Neither clinical construction nor the letter of the statute nor its rhetorical framework should be permitted to defeat its clear and definite purpose to be gathered from the whole act, compared part with part." J. SUTHERLAND, *supra* note 27, at 56 (citing *Adams v. Yazoo & M.V.R.R.*, 75 Miss. 275, 283, 22 So. 824, 825 (1897)).

The Supreme Court has a long history of applying this maxim. *See, e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Richards v. United States*, 369 U.S. 1, 11 (1962); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850).

60. 25 U.S.C. § 1902 (Supp. V 1981).

61. It is through the family (the parents and the extended family members) that American Indian culture is maintained and developed. Guerreo, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 76 (1979).

member" for purposes of the Act.⁶² A logical basis for the court's decision is the rule of statutory construction that one provision of a statute should not be defined in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.⁶³ The court expressed concern that if it defined family to include extended family members, it would render one of the terms meaningless. However, defining family in such a manner, and thus in harmony with the purposes of the Act, would not render either term meaningless.

The Act uses three terms when referring to elements of the Indian family unit: parents,⁶⁴ extended family member,⁶⁵ and family.⁶⁶ A logical, and consistent, reading of these terms would include the mother and father as parents and all other close relations as members of the extended family. The family, as a combination of both of these groups, would consist of all of the child's close relations. No terms would be rendered meaningless by such an interpretation. Furthermore, the congressional intent to protect Indian culture would be more fully preserved and promoted.⁶⁷

62. See *supra* note 19 and accompanying text.

63. See *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1338 (9th Cir. 1981).

This rule has been applied in other Alaska cases. See *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976) ("[E]ach section of a statute is presumed to serve some useful purpose."); see also *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir.), *cert. denied*, 442 U.S. 930 (1978); *Patagonia Corp. v. Board of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 813 (9th Cir. 1975).

64. 25 U.S.C. § 1903 (Supp. V 1981) defines a parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child." The words "parent" or "parents" are used throughout the Act. See, e.g., *id.* § 1911(b) ("termination of parental rights;" objection or petition "by either parent"); *id.* § 1912(a) ("termination of parental rights," "notify the parent"); *id.* § 1913 ("parental rights").

65. For a definition of extended family member, see *supra* note 2.

The term "extended family member" is used only in section 1915 of the Act. This section provides that in any adoptive placement of an Indian child, first preference shall be given, in the absence of good cause to the contrary, to a placement with a member of the child's extended family. 25 U.S.C. § 1915(a) (Supp. V 1981). The obvious meaning of the term in this context does not include the parents, but only the other close relations of the child.

66. The word "family" is used three times in the Act. See 25 U.S.C. § 1902 ("minimum Federal standards for the removal of Indian children from their families"); § 1931(2) ("the operation and maintenance of facilities for the counseling and treatment of Indian families"); § 1932 ("family assistance" and "advice to Indian families involved in child custody proceedings").

67. The legislative history of § 1902 supports this reading of the Act by concerning itself with removal of Indian children both from their parents and their blood relatives. See *supra* note 49. The use of the word "family" in § 1902 should, therefore, include both of these groups.

V. DENIAL OF CERTIORARI

Proponents of the Alaska Supreme Court's position cannot point to the denial of certiorari by the United States Supreme Court⁶⁸ as support for the Alaska Supreme Court's position. A denial of certiorari "is not designed to reflect the Court's views . . . as to the merits of the case."⁶⁹ There may be a multitude of reasons leading to the denial of certiorari, many or all of which have no bearing on the correctness of the Alaska Supreme Court's interpretation of the Act.⁷⁰ "A denial means merely that less than four members of the court believed that the petition should be granted."⁷¹

68. 103 S. Ct. 1893 (1983).

69. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 353 (5th ed. 1978). The Court has frequently reiterated this point. *See, e.g.*, *United States v. Carver*, 260 U.S. 482, 490 (1923). For other Supreme Court cases in accord, see R. STERN & E. GRESSMAN, at 353 n.23.

70. *See* R. STERN & E. GRESSMAN, *supra* note 69, at 354.

71. *Id.*

That fact, which is so often forgotten or misunderstood, was strongly emphasized again by Mr. Justice Frankfurter in commenting upon the Court's refusal to grant certiorari to review a case involving significant issues of free speech and press:

"This Court now declines to review the decision of the Maryland Court of Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening. . . .

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of

VI. CONCLUSION

The Supreme Court's decision not to consider this case should not be regarded as an approval of Alaska's faulty statutory construction. If the Alaska Supreme Court had followed proper rules of statutory construction, it would have concluded, as did Montana's high court, that the Act was inapplicable to the H.'s proceeding under both lines of its analysis. Under the first line, an unjust result occurs unless intrafamily disputes are excepted. Under the second line, extended family members should be regarded by the court as an integral part of the Indian family — as they are by Indian culture. Thus, disputes among extended family members should be excluded from the Act's coverage because its purpose is solely to regulate the removal of Indian children from their families. Only by reversing itself could the court respect the distinct heritage, culture, and system of ethical values of the American Indian. It is to be hoped that this decision does not signal the beginning of a trend in Alaska of judicial disregard for the American Indian's distinctive cultural heritage and patterns of social and family organization. The court should respect and promote the distinct Indian culture. It should not attempt to impose the norms of the dominant "White Society" on the Indian community. The American Indians were a vital part of Alaska's history. They should be given the opportunity to remain a vital part of its future — especially since Congress has mandated no less.

Jeffrey Drew Butt

Appeals of Maryland. The issues canvassed in the opinions of that court, and which the State of Maryland has asked us to review, are of a nature which very readily lend themselves to misconstruction of the denial of this petition. The present instance is peculiarly one where the redundant becomes the necessary."

Id. at 354-55 (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-20 (1949)).