

Seminal Choices: the Definition of “Indian Child” in a Time of Assisted Reproductive Technology

by
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I. Introduction

There is no DNA test that can prove if someone is Native American.¹ Who asks the question and how it is answered can impact tribal membership and individual identity. Assisted reproductive technology (“ART”) introduces new considerations for tribes defining their tribal membership and carries with it many implications. Therefore, it is important to donor conceived children, donors, and intended families that policy and decision makers consider the intersection of ART and who is considered an “Indian child” by a federally recognized tribe.² These issues are complex and varied, but center around the tribal membership of three individuals: the birth mother, the biological mother, and the biological father.³ When taken together, these individuals re-

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¹ Linda Geddes, *There Is No DNA Test to Prove You’re Native American*, NEW SCIENTIST (Feb. 5, 2014), <https://www.newscientist.com/article/mg22129554-400-there-is-no-dna-test-to-prove-youre-native-american/>.

² An example of the complicated intersection of the Indian Child Welfare Act and ART in a known donor is discussed in a recent podcast. Jennifer White & Helen Trachman, *I Want to Put a Baby in You*, Episode 1, (2018), <https://soundcloud.com/iwtpabiy/3-assisted-reproductive-technology-stories-an-interview-with-amira-hasenbush>, (last visited May 27, 2018).

³ This is itself a limited list since it does not take into consideration whether a child is presumed to be the child of married parents when the child is born of a marriage. This article will leave that consideration for another time.

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present the greatest likelihood that a child is eligible for citizenship in a federally recognized tribe.

There are 573 federally recognized American Indian tribes in the United States.⁴ Each of these tribes has the sovereign authority to self-governance over its members.⁵ Tribes adopt constitutions, form legislative bodies, hold elections, and pass laws on topics ranging from natural resources to assault.⁶ Tribes also create justice systems to interpret the laws.⁷ Laws concerning tribal enrollment, a crucial aspect of this self-governance, differ among tribes and depend on a number of factors, some of which have been challenged in the past decade.⁸ Tribes can change their enrollment criteria as needed, though it is relatively difficult to do. Any changes to enrollment laws, though, impact the tribe's definition of "Indian child" under the Indian Child Welfare Act ("ICWA").⁹

⁴ See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017) (listing 567 tribes); Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (Jan. 29, 2018) (recognizing six additional tribes).

⁵ 31 U.S. 515 (1832).

⁶ For a list of tribal laws, see Tribal Court Clearinghouse, *Tribal Codes or Statutes*, <http://www.tribal-institute.org/lists/codes.htm> (last visited Mar. 1, 2018).

⁷ For a list of tribal courts, see Tribal Court Clearinghouse, *Justice Systems of Indian Nations*, <http://www.tribal-institute.org/lists/justice.htm> (last visited Mar. 1, 2018).

⁸ See James Dao, *In California, Indian Tribes with Casino Money Cast Off Members*, N.Y. TIMES (Dec. 12, 2011), <https://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html>; Susan Field, *Tribal Judge to Issue Opinion in Disenrollment Appeal*, MORNING SUN NEWS (Sept. 12, 2017), for recent news articles regarding the decision of tribes to disenroll tribal members; Brooke Jarvis, *Who Decides Who Counts as Native American*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html>.

⁹ 25 U.S.C. § 1903 (4) ("'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.").

The technology to create human life is also part of a changing societal landscape.¹⁰ The possible scenarios for this technology, ART, are numerous and stretch across racial, ethnic, and socio-economic lines all over the world. The scenarios also vary in complexity depending on the various types of ART, such as surrogacy, insemination, and in vitro fertilization, and the ethical, religious, and cultural implications. Even before the scenarios are contemplated (or at the same time) there is more basic question of decision and oversight. Who gets to be a gamete (i.e. egg or sperm) donor? Who gets to be a gamete recipient? How?

This article will begin by discussing what it means to be a federally recognized tribe, both for tribes and individual tribal members. Next, the article will discuss the ICWA and what it means to be considered a tribal citizen. The following sections of the article will focus on the intersection of ART and the ICWA including how cryobanks play a part in this discussion. Finally, the article will conclude by focusing on the need to preserve the ICWA and offer suggestions on next steps.

II. Tribal Federal Recognition

Forty years ago, the U.S. government established the current process to federally recognize American Indian tribes.¹¹ Prior to 1978, the U.S. government passed a number of laws to diminish tribal citizenship. These laws included restrictive blood quantum requirements, meaning a degree of connection to full blood members of the tribe.¹² Although the blood quantum requirements continue to exist in tribal enrollment laws today, tribes are now in more control and have the ability to change the tribal laws as they see fit. American Indian people continue to stay connected to traditional teachings, culture, and languages passed down from generation to generation.

The recent federal recognition of six Virginia tribes illustrates the struggle of tribes to gain recognition. On January 29,

¹⁰ See Pam Belluck, *In Breakthrough, Scientists Edit a Dangerous Mutation from Genes in Human Embryos*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/science/gene-editing-human-embryos.html>.

¹¹ Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L. REV. 944, 960 (2016).

¹² Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011).

2018, President Trump signed H.R. 984, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 into law.¹³ Efforts to gain federal recognition for these tribes began in the 1990's with the first legislation being introduced in 2002.¹⁴ These tribes were already recognized by the state of Virginia between the seventeenth century and 1989.¹⁵ Following the federal recognition, the six tribes were eligible to apply for funding through grants and contracts.¹⁶ These tribes now have a government-to-government relationship with the United States, which includes an acknowledgement of the tribes' inherent sovereignty.¹⁷

Citizenship in a federally recognized tribe is one way individuals establish an American Indian identity. Some individuals may identify as having heritage without a clear idea of where the heritage originates. A person's sense of American Indian heritage may be complete folklore or it may be complicated due to a disconnection with family due to adoption, historical trauma, relocation, etc.¹⁸ While someone can be an American Indian without being enrolled in a federally recognized tribe, the ability to be recognized by a tribe that is recognized by the U.S. government is important for several reasons.

To be enrolled in a tribe means a person is part of a family that was indigenous to the United States of America. It means

¹³ Vincent Schilling, *And Now There Are 573! Six VA Tribes Get Federal Recognition as President Signs Bill*, INDIAN COUNTRY TODAY (Jan. 30, 2018), <https://indiancountrymedianetwork.com/news/politics/now-573-six-va-tribes-get-federal-recognition-president-signs-bill/>.

¹⁴ Vincent Schilling, *Six VA Tribes Slotted for Federal Recognition as Senators Warner & Kaine Secure Bill Passage*, INDIAN COUNTRY TODAY (Jan. 16, 2018), <https://indiancountrymedianetwork.com/news/politics/six-va-tribes-slotted-federal-recognition-senators-warner-kaine-secure-bill-passage/>.

¹⁵ Secretary of the Commonwealth, *Virginia Indians*, <https://commonwealth.virginia.gov/virginia-indians/> (last visited Feb. 19, 2018).

¹⁶ U.S. Government, *Federally Recognized Indian Tribes and Resources for Native Americans*, <https://www.usa.gov/tribes> (last visited Feb. 19, 2018).

¹⁷ JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE (2004).

¹⁸ See, e.g., Stephanie Woodward, *Native Americans Expose the Adoption Era and Repair Its Devastation*, INDIAN COUNTRY TODAY (Dec. 6, 2011), <https://indiancountrymedianetwork.com/news/native-americans-expose-the-adoption-era-and-repair-its-devastation/>.

the individual is connected, typically by genetics, to a centuries old story that involved tradition and resilience. While it may be common for people to believe all citizens of a federally recognized tribe receive money from their tribes, it is the connection to tradition and culture that more universally unites members of tribal nations. For instance, not every tribe has a casino.¹⁹ When a tribe is able to distribute dividends or per capita checks, the financial support varies widely in amount and frequency and is not free of challenges.²⁰ Support may be once a month, a quarter, semi-annually, or annually. Citizens may receive checks from the time they were born or not until they are considered an elder. Some tribes are able to provide funds for their young citizens to go to college and some colleges are able to provide scholarships for members of federally recognized tribes. Just as citizenship in the United States means different things to different people, so does tribal citizenship.

The citizens of each federally recognized tribe may be eligible for services depending on their tribes' resources. These services include access to health care with Indian Health Services, which provides a variety of health care assistance, depending on location, to members of federally recognized tribes.²¹ They also include access to college scholarships, both at the undergraduate and graduate level at a range of institutions from community colleges to Ivy League schools.²² Additional services may be provided by federal agencies ranging from Agriculture to Energy.²³

¹⁹ Dwanna L. Robertson, *The Myth of Indian Casino Riches*, INDIAN COUNTRY TODAY (Apr. 19, 2017), <https://indiancountrymedianetwork.com/news/opinions/the-myth-of-indian-casino-riches/>.

²⁰ Dean Rhodes, *Community Meetings Slated to Discuss '21 Money'*, SMOKE SIGNALS (Feb. 28, 2017), <http://www.grandronde.org/news/smoke-signals/2017/02/28/community-meetings-slated-to-discuss-21-money/#sthash.IFjwK0RO.dpbs>.

²¹ Indian Health Services, *Eligibility About IHS*, <https://www.ihs.gov/aboutihs/eligibility/> (last visited Apr. 3, 2018); Indian Health Services, *Health Care for Patients*, <https://www.ihs.gov/forpatients/healthcare/> (last visited Mar. 1, 2018).

²² See The American Indian College Fund, <http://collegefund.org/> (last visited Feb. 19, 2018), for an example of resources provided to American Indian students.

²³ U.S. Dep't of the Interior, *Benefits and Services*, <https://www.doi.gov/tribes/benefits> (last visited Feb. 19, 2018).

These services are in addition to, as opposed to replacing, benefits and services afforded to all citizens of the United States.²⁴

III. The Indian Child Welfare Act and Tribal Citizenship

The ICWA is a federal law designed to prevent the breakup of Indian families and to keep tribal communities together.²⁵ Indian children are vital to the continued existence of tribal communities, culture, and tradition. The ICWA protects this existence and applies when an Indian child is removed from his or her home by a state and the Indian parent is not able to regain custody without a formal proceeding. Under the ICWA, an “Indian child” is a child who is a member of a federally recognized tribe or eligible for membership.²⁶ It is the federally recognized tribe that determines whether the child is an Indian child for purposes of the act.²⁷

The future of any nation depends on children and tribal nations are no exception. Under the federal version of the ICWA, “‘Indian child’ means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”²⁸ The federal law, passed by Congress in 1978, addresses the removal of Indian children from their homes by both state and federal governments.²⁹ Four years before the passage of the ICWA, Congress heard story after story about state agency employees removing children from Indian reservations without first providing services to families to

²⁴ *Id.*

²⁵ National Indian Law Library, *Introduction – A Practical Guide to the Indian Child Welfare Act; Native American Rights Fund*, <https://narf.org/nill/documents/icwa/ch1.html> (last visited Feb. 19, 2018).

²⁶ 25 U.S.C. § 1903 (4). *See also* National Indian Child Welfare Association, *For Families and Service Providers*, <https://www.nicwa.org/families-service-providers/> (last visited Feb. 19, 2018).

²⁷ *Id.*

²⁸ 25 U.S.C. § 1903 (4).

²⁹ National Indian Child Welfare Association, *About ICWA*, <https://www.nicwa.org/about-icwa/> (last visited Feb. 19, 2018).

prevent removal.³⁰ Even now, forty years after the passage of the ICWA, American Indian children are disproportionately represented in the foster care system.³¹ Tribal leaders and advocates continue to echo the need for state courts and agencies to adhere to the “gold standard” approach to child welfare cases involving tribal member children.³²

As sovereign nations, tribes each have different criteria for tribal citizenship.³³ While some tribes require a certain blood quantum of citizens, other tribes require no minimum blood quantum, although individuals must show a lineal descendancy (a genealogical connection) to a set of census rolls from the mid 1800’s.³⁴ In addition, tribes may open and close enrollment at different times.³⁵ Tribes also differ on the ability for citizens to vote, hold office, or access services or benefits.

Tribal citizenship eligibility requirements are typically located in a tribe’s constitution, and amendments are possible, though amendments present various degrees of difficulty and expense. Certain tribes are required to hold secretarial elections, which involve the Bureau of Indian Affairs in administering the

³⁰ Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, Mich. St. College of Law Indigenous Law and Policy Center Occasional Paper Series, 1-14, 4-5 (Apr. 10, 2009), <https://www.law.msu.edu/indigenous/papers/2009-04.pdf>.

³¹ Children’s Bureau, *Racial Disproportionality and Disparity in Child Welfare*, Issue Brief (Nov. 2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

³² National Indian Child Welfare Association, *Setting the Record Straight: The Indian Child Welfare Act Spreadsheet* (Sept. 2015), <https://www.nicwa.org/wp-content/uploads/2017/04/Setting-the-Record-Straight-ICWA-Fact-Sheet.pdf>.

³³ National Indian Law Library, *Tribal Enrollment Research*, <https://www.narf.org/nill/resources/enrollment.html> (last visited Feb. 19, 2018); U.S. Dep’t of the Interior, *Tribal Enrollment Process*, <https://www.doi.gov/tribes/enrollment> (last visited Apr. 3, 2018).

³⁴ See, e.g., Bay Mills Indian Community, *Constitution and Bylaws of the Bay Mills Indian Community*, <http://www.baymills.org/tribal-constitution.php> (last visited Feb. 19, 2018); Cherokee Nation, *About Citizenship*, <http://www.cherokee.org/Services/Tribal-Citizenship/Citizenship> (last visited Apr. 4, 2018).

³⁵ Sault Ste. Marie Tribe of Chippewa Indians, *Tribal Enrollment*, <https://www.saulttribe.com/membership-services/tribal-enrollment> (last visited Mar. 2, 2018)(stating “In February 1998, the membership rolls for the Sault Ste. Marie Tribe closed to all adults.” And “[o]n November 4, 2014, the Tribal Membership Ordinance was amended to allow biological children of full bona fide members under the age of 21 to apply for membership.”).

election and certifying the results.³⁶ In 2015, the Bureau of Indian Affairs changed the rule related to this time consuming and complicated process. However, the removal of Secretarial approval still requires one last Secretarial election.³⁷ Just as citizens of states are required to register to vote, citizens of tribes are also required to register and meet the tribe's voter requirements. Additionally, tribal citizens must also register to vote for Secretarial elections even if they are registered to vote in tribal elections because a Secretarial election is a federal election.³⁸ While changes to citizenship requirements are possible from a constitutional standpoint, due to the complicated process, it is more likely a change that happens in an ordinance.

A tribe's constitution sometimes refers to an enrollment or membership ordinance in defining membership.³⁹ Then, a tribe's enrollment or membership ordinance may offer several ways individuals are either eligible or ineligible for tribal membership through adoption into the tribe. In some cases, if someone "applies for adoption for the sole purpose of obtaining financial benefit from the tribe," for instance, that person is ineligible.⁴⁰ A tribe may also recognize an individual's right to gain membership as an adult, even if their parents relinquished membership for the family when the individual was a minor.⁴¹ This acknowledgement of rights allows individuals to make decisions about citizenship separate from choices made by their parents and provides the opportunity to regain the connection with the tribe through citizenship.

Tribes use enrollment ordinances to codify blood quantum requirements and methods of determining blood quantum.⁴² When a father is not available or known, this determination may

³⁶ See 80 Fed. Reg. 63094 (Oct. 19, 2015), <https://www.federalregister.gov/documents/2015/10/19/2015-26176/secretarial-election-procedures>, which gives background of and details into the Secretarial election process.

³⁷ *Id.*

³⁸ *Id.* at 80 Fed. Reg. 63100.

³⁹ An example available on the tribe's website is NEZ PERCE CONST., art. IV, § 1, <http://www.nezperce.org/official/PDF/GC/Constitution&ByLaws.pdf>.

⁴⁰ 6 NEZ PERCE CODE § 6-1-2 (c) (3) (Apr. 10, 2018), <http://nezperce.org/~code/pdf%20convert%20files/2018-04-10%20amended%20code%20-%20%20%204-6-6.pdf>.

⁴¹ *Id.* at § 6-1-2 (c) (1).

⁴² *Id.* at § 6-1-4.

be especially difficult. Tribes have turned to the science of DNA tests and allowed those results to factor into the enrollment decision.⁴³ The use of DNA demonstrates a reliance on a scientific genetic determination for a very specific purpose. Unlike popular DNA testing tools with broad results of ethnic and national origin, DNA for enrollment purposes is used to establish a link to a specific person. However, use of DNA tests in tribal communities is complicated and debated because of, at least in part, its potentially exclusionary effects on established community members.⁴⁴

Citizenship requirements vary in both blood quantum and tribally specific lineage. While all tribes require some kind of lineal descendency connection, they vary on whether there is a blood quantum requirement. In addition, tribes vary on whether the blood quantum requirement consists of any Indian blood (i.e. any tribal affiliation) or must be associated with the tribe in which the individual wishes to enroll. This distinction is made by tracing ancestry back to particular census rolls, which will be listed in a tribe's constitution. In some instances, several different rolls may be listed and in others, tribal citizens must trace their ancestry back to one set of names.

Some tribes with blood quantum requirements allow for other tribal ancestry to factor into the decision of enrollment. If someone is a specific degree of Indian blood and has a close relative who is a tribal member, they may be eligible for membership in their parent's or grandparent's tribe.⁴⁵ This means that the majority of the individual's genetic connection to tribal communities could come from other tribes as long as a familial connection exists with the enrolling tribe. A child born of a father who is $\frac{1}{2}$ blood quantum from tribe A and a mother who is $\frac{1}{4}$ blood from

⁴³ *Id.*

⁴⁴ See generally KIM TALLBEAR, *NATIVE AMERICAN DNA, TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE* (2013).

⁴⁵ See, e.g., SALT RIVER PIMA-MARICOPA INDIAN CMTY. CONST. art. II § 1 (c), <http://www.srpmic-nsn.gov/government/ordinances/files/Constitution.pdf> (allowing membership for "Any biological lineal descendent of an original Salt River allottee who meets all of the following: (1) Is at least one-fourth ($\frac{1}{4}$) degree Indian blood; and (2) Is the biological child or biological grandchild of an enrolled member of the Salt River Pima-Maricopa Indian Community; and (3) Is a United States citizen; and (4) Is not enrolled in any other federally recognized tribe; and (5) Has never relinquished enrollment from any other federally recognized tribe (with exception to Article II, Section 2).").

tribe B and $\frac{1}{4}$ from tribe C, for instance, would be $\frac{1}{2}$ Indian blood quantum, but only $\frac{1}{8}$ tribe B and still be eligible for citizenship in tribe B. It is likely that individual's ancestor's names would be on more than one census roll in this case.

Like any other political systems, tribes differ from one another depending on a variety of factors ranging from culture to economic opportunity, but tribal enrollment is an intragovernmental decision on which the U.S. court system defers to the tribe. The landmark case is *Santa Clara v. Martinez* in which a citizen of Santa Clara Pueblo sued the Pueblo because her children were refused citizenship due to the fact she had married outside of the tribe.⁴⁶ This was not a condition placed on the male citizens of the Pueblo and Martinez used the Indian Civil Rights Act (ICRA) to sue for discrimination in federal court.⁴⁷ The case went to the U.S. Supreme Court, which held the ICRA did not subject tribes to federal court jurisdiction and the doctrine of sovereign immunity precluded civil actions on the topic.⁴⁸

Today, for the most part, federal courts continue to recognize the authority of a tribe to make its own enrollment decisions and to hear challenges in tribal court. The Ninth Circuit recently affirmed a decision of the federal government not to intervene in the disenrollment of members by the Pala Band.⁴⁹ The court found the Bureau of Indian Affairs did not act "arbitrarily and capriciously when it concluded that, according to tribal law, it had no authority to intervene in a tribal membership dispute, in which more than 150 people were disenrolled from the Pala Band of Mission Indians (Pala Band or Band)."⁵⁰ Last year, the Supreme Court denied the petition to hear the case.

⁴⁶ 436 U.S. 49 (1978). Thirty years after the case was decided, the tribal citizens voted to change the membership criteria at the center of the case (patrilineal). *Santa Clara Pueblo Votes to Change Membership Rule*, Indianz.com (May 1, 2012), <https://www.indianz.com/News/2012/05/01/report-santa-clara-pueblo-vote.asp>.

⁴⁷ 25 U.S.C. § 1301 The Indian Civil Rights Act (ICRA) of 1968 is a federal law that applies to tribes and tribal members. See Matthew L.M. Fletcher, *Indian Bill of Rights*, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=899222.

⁴⁸ 436 U.S. 58-59 (1978).

⁴⁹ *Aguayo v. Jewell*, 827 F. 3d 1213 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 832 (2017).

⁵⁰ *Id.*

This is just a small glimpse into the topic of tribal citizenship and how the criteria can change. It is up to a tribe and its traditions and government to decide who is granted citizenship, what kind of citizenship, and what that means for the individual. For those people who have questions, it is sometimes possible for individuals to inspect the current membership rolls of a tribe.⁵¹ Some tribal constitutions make it the responsibility of the business or enrollment committees to maintain and make the rolls available for inspection at reasonable times.⁵² Other times, this responsibility lies with the tribal court. While enrollment criteria may be clear to the tribe, non-tribal members may need to rely on the information for reasons of their own, namely for purposes of determining their own eligibility for citizenship.

IV. Assisted Reproductive Technology and Citizenship

In 1953, the *New York Times* reported a story from University of Iowa professors about the pending birth of the first ever child conceived by frozen sperm.⁵³ The technology was a modified version of animal research, which had been taking place in the state for decades.⁵⁴ Kara W. Swanson's article *The Birth of the Sperm Bank* offers a comprehensive look into the history of sperm banks, including events leading up to the frozen sperm conception.⁵⁵ The article also discusses the history of the condemnation of the practice and highlights the reality of donor sperm being more successful than a husband's sperm when treating infertility.⁵⁶ It was a world of competing practices, beliefs,

⁵¹ See, e.g., COMANCHE CONST. art. VI, § 7, <https://www.narf.org/nill/constitutions/comanche/index.html>; FT. SILL APACHE TRIBE OF OKLAHOMA CONST. art. VII (a), https://www.narf.org/nill/constitutions/fort_sill/.

⁵² *Id.*

⁵³ *Baby from Frozen Sperm Expected in Three Months*, N.Y. TIMES (Dec. 4, 1953), <http://www.nytimes.com/1953/12/04/archives/baby-from-frozen-sperm-expected-in-three-months.html>.

⁵⁴ *The Surprising Birthplace of the First Sperm Bank*, ATLANTIC (Apr. 28, 2014), <https://www.theatlantic.com/technology/archive/2014/04/how-the-first-sperm-bank-began/361288/>.

⁵⁵ Kara W. Swanson, *The Birth of the Sperm Bank*, 71 STATE HIST. SOC'Y OF IOWA 241 (Summer 2012).

⁵⁶ *Id.*

and standards susceptible to the changing climate of the times. The article illustrates the changing world of ART and how people focused on different aspects of ART at different points in time.

The AIDS epidemic of the 1980's made it a preferable practice to use frozen sperm as opposed to fresh sperm because of the ability to test and retest the donor prior to use of the sperm to treat infertility.⁵⁷ The field of assisted reproductive technology has continued to adapt to scientific and social changes while continuing to help provide individuals and couples with the ability to have babies. It is then not unreasonable to consider ART adapting to established and important federal laws, such as the Indian Child Welfare Act, which requires deferring to tribal governments to determine whether someone is a citizen of a tribe.

U.S. immigration law establishes requirements of U.S. citizenship where ART is involved.⁵⁸ The Dvash-Banks family is a same-sex couple who used an egg donor and a surrogate and each donated sperm that produced a child.⁵⁹ One of the men was a U.S. citizen, the other was an Israeli citizen, and the couple was married in Canada and lived there when their twins were born. When they decided to move to the United States, the U.S. citizen father applied for citizenship for the children. The State Department required a DNA certificate and denied citizenship to the twin who was genetically connected to the Israeli father but granted citizenship to the twin genetically connected to the father with U.S. citizenship.

The Dvash-Banks family controversy illustrates how a child born through ART either derives a desired citizenship status or does not. In either case, it is the U.S. government that makes the decision, something tribal governments should also have the opportunity to do even if ART is involved.⁶⁰ However, because of

⁵⁷ *Id.* at 272-74.

⁵⁸ U.S. Citizenship and Immigration Services, *Definition of Child for Citizenship and Naturalization*, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html> (last visited Mar. 2 2018).

⁵⁹ Alene Tchekmedyan, *These Twins Were Born 4 Minutes Apart. But Only One Is a U.S. Citizen*, L.A. TIMES (Jan. 27, 2018), <http://www.latimes.com/local/lanow/la-me-ln-twins-citizenship-20180127-story.html>.

⁶⁰ U.S. Citizenship and Immigration Services, *Becoming a U.S. Citizen – Chapter 2, Part A, Volume 12*, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartA-Chapter2.html> (last visited May 28, 2018) lists ways

the perceived complications of donors eligible for tribal citizenship, some cryobanks may discourage individuals from identifying membership in a tribe or instead providing warnings to clients who select donors who identify as Native American. By making it a practice to avoid investigating or revealing tribal membership, cryobanks and individual tribal member donors are effectively making a tribal enrollment decision.⁶¹ Cryobanks must rely on the individual tribal member to be honest and forthcoming with information. Any kind of avoidance of questions, research, or determination potentially denies the child born of a donor to be a tribal citizen either now or in the future.

V. Cryobanks and Native American Donors

With all the various considerations that go into an enrollment in a federally recognized tribe, what happens if someone from a tribe applies to be an anonymous gamete donor or a surrogate? What if a citizen of a federally recognized tribe is looking for a donor or a surrogate? What if a non-citizen woman seeks out donor sperm to have a child who would be eligible for membership but for the fact that she is giving birth to the child? These are only a few of the question that become potential legal ques-

U.S. citizenship is derived including “persons who are born outside of the United States may be U.S. citizens at birth if one or both parents were U.S. citizens at their time of birth.” It also states “Persons who are born in the United States and subject to the jurisdiction of the United States are citizens at birth.” This seems different than tribal citizenship, which typically requires the active step of enrolling a child after they are born. However, state ICWA laws defer to tribes to define an “Indian child” for purposes of ICWA. See *Indian Child Welfare Act Manual – Minnesota Department of Human Services* 24 http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_157701.pdf (last visited May 28, 2018), stating:

Enrollment is the term commonly used to refer to the status of an Indian person as a part of a specific Indian tribe. However, while enrollment is the common means to establishing membership in an Indian tribe, it is not the only means. A person may have membership in a tribe without being enrolled according to criteria established by that tribe. These criteria may be established by tribal ordinance and may be unique to the tribe.

Therefore, it is possible for a tribe to have jurisdiction over a child at birth.

⁶¹ Without knowledge of a donation, there can be no knowledge of a donor conceived child being born who may be eligible for membership depending on the membership criteria of the tribe and the membership status of the donor.

tions if the gamete donation is used, a child is born, and someone has reason to know of the genetic connection with a federally recognized tribe. However, these are important ethical considerations as well, posing questions of political, cultural, and racial identity in a climate of changing technology.

These considerations involve both donors and clients and range from recruitment of donors to agreements signed by clients. The top concerns of cryobanks are the quality and safety of donor sperm.⁶² When it comes to applying the ICWA to third party reproduction, concerns arise of the loss of privacy and anonymity for which the donors and intended parents have contracted and on which they rely.⁶³ When clients are searching for donors though, websites are the places to start and offer limited profiles of hundreds of donors. Search options vary among cryobanks, but may offer several search criteria from which to choose, including race and ethnicity.

At the time of writing this article, one cryobank's site lists eight egg donors having American Indian ethnic origin and an ethnicity of Native American or American Indian.⁶⁴ The same bank lists four as having American Indian ethnic origin and American Indian as an ethnicity, four as having American Indian ethnic origin and Native American ethnicity, six as ethnic origin blank and American Indian ethnicity, and four as ethnic origin blank and Native American ethnicity.⁶⁵ While overlap exists with these donors, there is one donor in particular who appears only when the ethnic origin is left blank and American Indian is chosen as an ethnicity. This donor is also the only one who lists only two race/ethnicities while the others list at least four.⁶⁶ Another cryobank lists twenty-five sperm donors having Native American ethnic background, which is not a selection for ancestry, but

⁶² Interview with anonymous cryobank source and subsequent feedback, (Oct. 26, 2017 and May 24, 2018).

⁶³ *Id.* "Plenty of people utilize "known" donation, where the donor is a friend or family member of the intended parent(s); however, many people come to the sperm bank specifically because they want privacy and legal certainty about each party's rights and obligations to the donor-conceived child."

⁶⁴ The Northwest Cryobank was used as an example, <https://www.nwcryobank.com/view-egg-donors/> (last visited Jan. 2018).

⁶⁵ *Id.*

⁶⁶ *Id.*

twenty-five is the result when “any” ancestry is selected and changes to three when “multi” is chosen as an ancestry.⁶⁷

These varied results reflect the need for a standardized approach to gathering information and assuring consistency between information shared in certain categories. Someone who identifies as American Indian or Native American as an ethnicity should also select the same when it comes to ethnic background or ancestry. Some respondents may answer questions to stand out from others, which could be discouraged if more detailed questions or an additional form was necessary for those answering “American Indian” or “Native American.” There should be a way to incorporate a tribal affiliation or desendancy, even if it is only recorded by the cryobank. To the best of the author’s knowledge, currently, ethnicity of donors is typically self-reported and not checked or verified. Upon contacting cryobanks via email, some cryobanks indicated they will ask follow-up questions about tribal enrollment, but there is no communication beyond that point, only record keeping.⁶⁸ Also, some cryobanks will accept sperm donors who know of a family history of tribal citizenship, but they may turn away egg donors who offer the same answer.⁶⁹

At first glance, adding an extra layer of verification may seem like an onerous process, but upon surveying those who answer Native American as an ethnicity or ethnic background (or some combination of those or similar terms) the numbers are low. Another argument against this additional verification is the slippery slope argument. Suddenly any declarations of ethnicity would have to be questioned and the cryobanks would have to

⁶⁷ Fairfax Cryobank was a second site explored, <https://fairfaxcryobank.com/search/> (last visited Jan. 2018). Ancestry choices are Any, Asian, Black, Caucasian, Latino, or Multi Donor.

⁶⁸ Emails asking about self-selection of ethnic categories and follow-up were sent to several cryobanks around the country with most of them responding. None of them reported any follow-up communication around self-reported American Indian ethnicity with anyone but the donor.

⁶⁹ The reason for this is likely the Supreme Court’s 2013 case *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), which held a non-custodial absent father lost his rights to the child. However, it is questionable whether a court would see this the same way depending on how a tribe decided to write laws regarding children genetically connected to tribal members but born to a non-member.

entirely change the way they approach the screening process. However, there is a clear distinction between ethnic background and eligibility for citizenship.

Cryobanks place language in contracts with donors waiving all parental rights to children born of donated gamete.⁷⁰ However, under the ICWA, it is possible a judge could interpret a donor to fit the definition of “parent.” In addition, it is also possible a tribe could intervene in adoption proceedings. The central concern and the reason to look to the ICWA is to acknowledge the interests of the tribe and the child versus the interest of the donor and the cryobank.⁷¹ Even if a donor is expected to relinquish parental rights by signing a piece of paper, a tribe should not be expected to relinquish the ability to enroll any child born of a gamete donation. Even though the ICWA would not apply to a donation itself, it is possible for cryobanks to notify tribes using the ICWA notice provisions as an example. This would allow a tribe to either communicate a policy already in place or to make a decision about the future enrollment options for a donor conceived child. It is even possible a hypothetical inquiry could be made from the cryobank without any identifying information about the potential donor. If, for instance, the donor knew they were a tribal member, knew information such as blood quantum, and supposed a child born of their donation would also be eligible, information could be shared generally.

Voluntary consent and the withdrawal of consent prior to an adoption decree by a parent both fall under the ICWA.⁷² With ART, an adoption is most likely to occur when a same sex or unmarried couple intend to parent together, especially when the “adopting” parent did not contribute the sperm or egg.⁷³ The

⁷⁰ See, e.g., California Cryobank, *CCB Sperm Donor and Parental Rights*, <http://www.spermbank.com/about/sperm-donor-parental-rights> (last visited Feb. 19, 2018).

⁷¹ The Court in *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 52 (1989), recognized that “the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.”

⁷² 25 U.S.C. § 1913 (c).

⁷³ Attorneys still advise second parent adoptions with same-sex couple even after *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), which was about marriage and not about parentage of children. If the intended parents are a married opposite sex couple, they will probably never do an adoption, as the marital presumption confers parental rights on the husband of the woman who has the

ICWA defines “parent” as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.”⁷⁴ It does not include the unwed father “where paternity has not been acknowledged or established.”⁷⁵ The biological mother is therefore always considered a parent and could withdraw consent of any biological rights prior to a decree of adoption.⁷⁶ If an egg donation leads to the birth of an Indian child for two non-biological same sex parents, and the donor learns of the birth and co-parent adoption, the ICWA may give the biological parent the ability to withdraw any consent to the adoption.

In addition, it is best practice to provide notice to tribes even in voluntary proceedings, allowing the opportunity for tribes to object early on instead of later, when they hear about it.⁷⁷ Under the ICWA, notice to tribes of proceedings involving tribal member children is only required for involuntary proceedings.⁷⁸ However, “[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”⁷⁹ Therefore, even if notice is not required, a court may feel obligated to give notice to a tribe, allowing the tribe the right to intervene in a termination of parental rights proceeding.

Tribes establish the eligibility for their own tribal citizenship and many answer questions regarding eligibility frequently for the ICWA. The U.S. government publishes a list of tribal agents by tribe alphabetically.⁸⁰ Cryobanks could use this list to assist donors to approach their tribal government’s stance or could

baby. If he is the biological parent, too, then he will certainly not do an adoption.

⁷⁴ 25 U.S.C. § 1903 (9).

⁷⁵ *Id.*

⁷⁶ See *supra* text at notes 68-69 for more explanation about the “unwed father” part of the definition of “parent” under ICWA.

⁷⁷ National Indian Law Library, *FAQ 4: Notice – A Practical Guide to the Indian Child Welfare Act; Native American Rights Fund*, <https://narf.org/nill/documents/icwa/faq/notice.html#Q16> (last visited May 27, 2018).

⁷⁸ 25 U.S.C. 1912 (a).

⁷⁹ 25 U.S.C. § 1911 (c).

⁸⁰ *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice*, 81 Fed. Reg. 10887 (Mar. 2, 2016).

work with a tribal member donor's permission, to inquire about potential tribal membership eligibility of a donor conceived child. In instances where states have "mega ICWA" statutes, this inquiry is especially important because, unlike in the federal ICWA, the definition of "Indian child" does not always require a parent to be a member.⁸¹ If a child is born and a question of eligibility for tribal citizenship arises later because the cryobank did not ask tribally specific information during the application process, did not believe it was worth the effort, or simply did not realize the implications, the result could disrupt a family unnecessarily.⁸²

Requiring more application information of a potential donor who may be eligible for tribal citizenship may help to alleviate any complications with the Indian child question in the future. Medical records, family history, etc. are already captured. However, asking a tribal member to work with their tribe for a determination on what it means for the future membership any child born of the donor's gamete does not seem to be out of line. Whether the donor does it or the cryobank makes contact with a tribe to get a copy of the law or administrative ruling, the topic will likely come up at some point. Ideally, it will be a determination made before the donation is contributed so as to prevent any awkward and potentially disruptive conversations or proceedings.

⁸¹ See, e.g., MICH. COMP. LAWS § 712B.3(k), [http://www.legislature.mi.gov/\(S\(itm4brle12sdwozwemqlps0j\)\)/mileg.aspx?page=GetObject&objectname=mcl-712B-3](http://www.legislature.mi.gov/(S(itm4brle12sdwozwemqlps0j))/mileg.aspx?page=GetObject&objectname=mcl-712B-3) (last visited May 5, 2018) (stating "Indian child" means an unmarried person who is under the age of 18 and is either of the following: (i) A member of an Indian tribe. (ii) Eligible for membership in an Indian tribe as determined by that Indian tribe). See also *2017 Michigan Indian Family Preservation Act of 2013 and Indian Child Welfare Act of 1978: A Court Resource Guide*, http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/2017_MIFPA_ICWA_Court_Resource_Guide_July2017.pdf.

⁸² While a court will likely be involved if there is an adoption, a child may inquire about their donor parents, find out the possible connection to a federally recognized tribe, and seek more information through a number of resources.

VI. Cryobanks and Native American Donor Anonymity

While it is up to a tribe to determine whether a child born of ART would be considered for tribal membership, a tribe will not automatically know whether one of its members is working with a cryobank. The individual member, in turn, is not going to know whether someone purchases their gamete donation. In addition, that tribe and individual are not going to know if a live birth results from the gamete donation. The cryobank is the only entity that will know the identity of the anonymous donor, the intended parents, and if a child was born as a result of the donation. However it is likely a cryobank, as with any other company, would resist judicial attempts to force disclosure of donor and client identity, thereby breaching a confidentiality agreement. Tribal membership is linked to census rolls and to a genetic connection to someone who is already a tribal citizen. Therefore, if someone was seeking to confirm tribal citizenship, they would need information on the parent who represents this genetic connection. Unless an alternative means of sharing information was set up, determining whether a child is an Indian child will at least partially destroy any assurance of donor anonymity.

A recent article by Maya Sabatello looks at current regulations, or lack thereof for ART in the United States and how those regulations compare with others around the world.⁸³ The article starts by posing questions that countries have addressed through legislation, such as whether a child has a right to know the identity of the gamete donor and who has the duty to tell them. The article points out the United States is unique in the commercialization of ART with no centralized record system, allowing individuals to donate at various banks.⁸⁴ The article also delves into the fact the United States values the rights of adults over the rights of children and how such values impact the treatment of information with ART.⁸⁵

⁸³ Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications* (July 28, 2015), <http://www.mdpi.com/2075-471X/4/3/352>.

⁸⁴ *Id.*

⁸⁵ *Id.*

Laws governing gamete donation may change as well. Although anonymous donations are typical practice in the United States, this is not the case for other parts of the world, which have recently passed laws requiring donor registry. Contemporary scholarship examines what would happen if the United States shifted to this practice. One article examines the financial cost of ending anonymity including paying ongoing donors to have their anonymity removed.⁸⁶ Another article estimates that 29% of anonymous donors would not donate if anonymity ended.⁸⁷ The researchers examine both sides of the issue, ending anonymity and permitting it by examining costs, policies, etc. from a number of countries that prohibit anonymity including the United Kingdom and Victoria, Australia.⁸⁸ In the United Kingdom, where registries exist, not everyone can access information at any time, but donor conceived children after 2005 can access information about the donor and donor conceived siblings at age 18.⁸⁹ Victoria, Australia, however allows for information to be accessed by donor conceived child regardless of when they were conceived.⁹⁰

These recent changes, along with others, offer insight into where the United States as a country, or particular states individually, could move with laws and regulations around anonymous donations.⁹¹ Cryobanks may be preparing either to oppose legislation preventing anonymity or to comply. Whether or not laws

⁸⁶ Glenn I. Cohen & Travis G. Coan, *Can You Buy Sperm Donor Identification? An Experiment*, 10 J. EMPIRICAL LEGAL STUD. 715 (2013).

⁸⁷ Glenn I. Cohen, Travis G. Coan, Michelle Ottey & Christina Boyd, *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J. L. & BIOSCIENCES 1 (Nov. 2016).

⁸⁸ *Id.*

⁸⁹ See *Sperm Donor Anonymity Ends*, BBC NEWS (Mar. 31, 2005), <http://news.bbc.co.uk/2/hi/health/4397249.stm>.

⁹⁰ See Karen Hammerberg, *Victoria's World-First Change to Share Sperm or Egg Donors' Names with Children*, CONVERSATION (Feb. 28, 2017), <https://theconversation.com/victorias-world-first-change-to-share-sperm-or-egg-donors-names-with-children-72417>.

⁹¹ Cohen et al., *supra* note 87, at 46. See also Xavier Simmons, *Incommensurable Rights: The Dilemma of Sperm Donor Anonymity*, ABC RELIGION & ETHICS (Apr. 14, 2016), <http://www.abc.net.au/religion/articles/2016/04/14/4443586.htm>, and Brittney Sharp, *The Commercialization of Reproduction and Donor Anonymity in Canada*, Center for Bioethics and Culture (2011), http://www.cbc-network.org/pdfs/CBC_Reproduction_in_Canada.pdf, for examples

against anonymity come to fruition, and for the reasons listed above, cryobanks and attorneys should look to the Indian Child Welfare Act, not as problematic, but as a law that can provide guidance and best practices in working with tribes and individual tribal members.

VII. Preserving the Indian Child Welfare Act as Best Practices

Tribal members are using and will continue to use ART to conceive children both with known and anonymous donors for a variety of reasons and situations.⁹² Having a clear and unwavering policy and procedure on working with tribal nations could potentially address concerns of anonymous donations for those clients who currently purchase gametes and conceive children. However, the policy and procedure can also assist in providing assurances to others as well, such as those tribal members who seek to be gamete donors when their same sex partner will carry the child or those who seek a gamete to maintain the blood quantum required to ensure their children are also tribal members either now or in the future.

Under ICWA, when an Indian child is adopted, the child's tribal affiliation and biological parents are recorded and sent to the Secretary along with the final decree or order of adoption.⁹³ That information is then accessible to the individual upon turning eighteen.⁹⁴ Individuals who were adopted before the ICWA was

of countries that have either changed their laws to prevent anonymous donors or have talked about it.

⁹² CBC Radio, *When the Plan to 'Date Indigenous' Gets Complicated* (Dec. 3, 2017), <http://www.cbc.ca/radio/outintheopen/unintended-consequences-1.4415756/when-the-plan-to-date-indigenous-gets-complicated-1.4416060>.

Although this is a Canadian story of a First Nations woman, the story illustrates the situation Native American women, and men, face in the United States too.

⁹³ 25 U.S.C. § 1951(a).

⁹⁴ *Id.* at § 1951(b):

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents re-

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in place have even been able to use the law to find out their tribal affiliation.⁹⁵ Other courts have also addressed this issue and found a petitioner has a right to access the information related to a tribal connection under the ICWA.⁹⁶ While there are few cases, there are likely many other individuals who have tried to access their adoption records under 25 U.S.C. § 1951 and were able to do so.

While cryobanks are likely unfamiliar with dealing with tribal governments, the ICWA has created a government-to-government relationship between tribal and state governments and court systems. The ICWA requires judges to ask if the child is an Indian child in welfare proceedings. If there is a belief the child may be eligible for membership in a federally recognized tribe, the state's welfare agency or private adoption agency will contact the tribes to find out if the child is eligible for membership. From there, the ICWA is applied as a "gold standard" approach to the case, ensuring a heightened level of reunification efforts happen so the child can remain connected to their family and tribal community.⁹⁷

The ICWA is only applied to child custody proceedings and any adoption proceeding concerning an Indian child is part of the

questing anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

⁹⁵ See *In re Hanson*, 470 N.W.2d 669 (Mich. Ct. App. 1991).

⁹⁶ *In re Mellinger*, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996); *In re Linda J.W.*, 682 N.Y.S.2d 565 (N.Y. Fam. Ct. 1998); *In re Rebecca*, 601 N.Y.S.2d 682 (N.Y. Sup. Ct. 1993).

⁹⁷ See the National Congress of American Indians, Pledge to Defend ICWA (2015), <http://www.ncai.org/resources/resolutions/pledge-to-defend-icwa>, which states in part

WHEREAS, a coalition of leading national child welfare organizations have declared ICWA to be a "gold standard" for child welfare because as ICWA mandates, it is in every child's best interest to be protected from harm and to prevent the unnecessary trauma that occurs when children are removed from their family, culture, and community

The 18 organizations can be found in the Casey Family Programs Letter titled "18 National Child Welfare Organizations Join Supreme Court Amicus Brief in Support of Indian Child Welfare Act" (Apr. 11, 2013), <https://www.casey.org/media/ICWA-PR-FINAL-1.pdf>.

definition of “child custody proceedings.”⁹⁸ The ICWA’s definition of “parent” excludes an “unwed father where the paternity has not been established.”⁹⁹ The most recent ICWA Supreme Court case, *Adoptive Couple v. Baby Girl*, further defined who can bring a case under the ICWA to stop child custody proceedings.¹⁰⁰ In a 5-4 decision, the Court held “that § 1912(d) — which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the ‘breakup of the Indian family’ — is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child.”¹⁰¹ Gamete donors do not ever have custody of a donor conceived child, but does that mean they have “abandoned” the child?

Cryobanks do not actively engage in breaking up Indian families, but they should still look to the spirit of the ICWA because of children born who would have the legal designation of “Indian child” but for the child being born of a non-biological parent. The application of the ICWA is likely to come up with second parent adoptions when any kind of potential tribal membership flows from the gamete donor and the legal parents are non-Indian.¹⁰² The ICWA, and judges who follow the ICWA, will also be interested in a child’s connection to an American Indian tribe and the tribe’s connection to the child. Finally, if there is a reason for a state child welfare agency to become involved with the family at a later time, there is a diminished likelihood of being able to apply the ICWA to the case because the child will not be identified as an “Indian child” under the law.¹⁰³

Since the passage of the ICWA, judges created exceptions that could give some insight into possible scenarios if ART cases

⁹⁸ 25 U.S.C § 1903(1)(iv) (““adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.”).

⁹⁹ 25 U.S.C § 1903.

¹⁰⁰ 570 U.S. 673.

¹⁰¹ *Id.* at 736

¹⁰² Attorneys still advise second parent adoptions with same-sex couple even after *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), which was about marriage and not about parentage of children

¹⁰³ In this case, the court may have “reason to know” the child is an Indian child by the admission of either parent of using a donor who identified as Native American. What will be done after that point is a topic for another day.

are litigated. Courts, for instance, use the “existing Indian family” exception to deny the application of the ICWA in individual cases.¹⁰⁴ The exception gives courts the ability to determine that if an Indian child is being removed from a home that is what the court considers an “Indian home” or “Indian family” and allows more discretion and judgment than the ICWA contemplates.¹⁰⁵ While some states have passed statutes or decided cases rejecting this exception, it still is a reality in other states and is an interpretation that threatens the ICWA.

Each new judicially created exception threatens the ICWA and the tribal communities it seeks to preserve and protect. Well-funded adoption agencies and other groups look for cases involving Indian children and use those cases to challenge the constitutionality of the act.¹⁰⁶ These agencies argue the ICWA is race-based, discriminatory, and negatively affects the outcome for Indian children. In reality and in a world where nearly everyone knows someone who has been desperate to find their birth parents after being adopted, the ICWA keeps children connected to their community.

VIII. Suggested Steps and Conclusion

The American Society for Reproductive Medicine (ASRM) is a national nonprofit bringing together cryobanks, practitioners, attorneys, and others to educate and define what it means to participate in the ART market in the United States. The organization issues, and makes available on its website, ethics committee opinions on issues such as access to fertility services for LGBTQ

¹⁰⁴ Native American Rights Fund, *FAQ 1: Application – A Practical Guide to the Indian Child Welfare Act*; Native American Rights Fund, <https://narf.org/nill/documents/icwa/faq/application.html#3> (last visited Mar. 1, 2018).

¹⁰⁵ *Id.*

¹⁰⁶ Suzette Brewer, *War of Words: ICWA Faces Multiple Attacks from Adoption Industry*, INDIAN COUNTRY TODAY (July 1, 2015), <https://indiancountrymedianetwork.com/culture/health-wellness/war-of-words-icwa-faces-multiple-assaults-from-adoption-industry/>; Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, NATION (Apr. 6, 2017), <https://www.thenation.com/article/a-right-wing-think-tank-is-trying-to-bring-down-the-indian-child-welfare-act-why/>.

families and rights in gamete donation.¹⁰⁷ The organization also offers numerous topics for patients, doctors, and others indexed alphabetically.¹⁰⁸ By offering guidance on working with tribal member gamete donors and federally recognized tribes, the organization could send a message promoting proactivity and collaboration with the country's sovereign Indian nations. This relationship will benefit cryobanks and send a message to donors, clients, and tribes that they recognize the importance of members to tribal nations and vice versa.

It is possible, perhaps, for ASRM to work with a national tribal organization to coordinate an effort to reach out to tribes on the issue of ART. Some examples of these national organizations are the National Indian Women's Resource Center, the Tribal Law and Policy Institute, the Native American Rights Fund, the National Congress of American Indians and the National Indian Child Welfare Association. With over 570 tribes, it would be helpful for organizations with expertise in gamete donation to pair with organizations with expertise in working with tribes. This partnership could aid both tribal governments and cryobanks in figuring out practices and policies related to gamete donation from tribal member donors that results in donor conceived children.

While individuals can decide whether to enroll in a tribe, tribal governments ultimately decide who is eligible for membership. Tribes depend on membership for existence and therefore have the biggest stake in deciding whether donor conceived children are eligible for membership. Furthermore, tribes may also have to decide whether or not it is possible to maintain anonymity of a tribal member donor and if not, what that means for the eligibility of membership for a donor conceived child. Finally, tribes may need to consider whether they will intervene in subsequent custody proceedings (adoption, child welfare related case, etc.) following the birth of a donor conceived child. Cryobanks, in turn, may consider limiting anonymity and compiling registries specific to donor conceived children who could be eligible for

¹⁰⁷ American Society for Reproductive Medicine, *Ethical Considerations of Assisted Reproductive Technology ASRM*, <http://www.asrm.org/news-and-publications/ethics-committee-documents/> (last visited Mar. 2, 2018).

¹⁰⁸ American Society for Reproductive Medicine, *Topics Index ASRM*, <http://www.asrm.org/topics/topics-index/> (last visited Mar. 2, 2018).

membership in a federally recognized tribe either at birth or at age 18.

Enrolled tribal members will and should be able to be gamete donors or use cryobanks along with everyone else. Children born of these donors should be able to access citizenship in a tribe if they are eligible. The ICWA can be used as a model to facilitate communication between cryobanks and tribes when necessary by treating each applicant who may be eligible for tribal membership as a potential biological parent and following the ICWA's notice requirement to tribes. The federal law should be anticipated from the time someone fills out an application to be a donor and then followed if it turns out the law may apply to a child born from the donor. Tribes have the opportunity to add or change their own laws around the definition of membership and ART for when they are called upon to answer the question of whether a child born of a gamete donor is considered an "Indian child."