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Recommended Citation

57(10) Advocate 33 (2014)

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It's Worth the Hassle Part II: How Does the *Baby Veronica* Case Impact Cases Involving Indian Children?

Prof. Elizabeth Barker Brandt

In July 2013, the U.S. Supreme Court issued its second-ever decision interpreting the Indian Child Welfare Act¹ – *Adoptive Couple v. Baby Girl*.² The majority opinion was authored by Justice Alito, who was joined by Justices Roberts, Kennedy, Thomas and Breyer. Justices Thomas and Breyer also each filed separate concurring opinions. Justice Sotomayor filed a strongly worded dissenting opinion and was joined by Justices Ginsberg and Kagan. Justice Scalia joined in part in the dissent. The decision in this case is enigmatic as one might guess from the unusual alignment of the court with Justice Scalia joining Justice Sotomayor's dissent. The impact of the decision on family law and child welfare practice in cases involving Indian children is not clear.

The Adoptive Couple Decision

Adoptive Couple v. Baby Girl involved an Indian child, Veronica, from Oklahoma who was placed by her biological mother through a private adoption agency with a couple in South Carolina. When Veronica's biological father, a member of the Cherokee Tribe, was served notice of the pending adoption, he sought custody of Veronica. The South Carolina Family Court, relying on the Indian Child Welfare Act (ICWA), denied the adoptive couple's adoption petition and awarded custody to the Indian father. The South Carolina Supreme Court affirmed.

The adoptive couple successfully petitioned for certiorari with the U.S. Supreme Court. The Court's majority held that some provisions of ICWA did not apply. Instead, the

The Court reasoned that there had never been a custodial relationship of any kind between the father and child, and that, therefore, there was no "continuing relationship" and the "continued custody" provision of ICWA did not make sense.

Court, focusing on three provisions of the statute, concluded that ICWA does not apply to the narrow circumstance where a non-Indian parent with sole custodial rights, voluntarily initiates a private adoption proceeding. The Court remanded the case to South Carolina and ordered the child removed from her father's custody and returned to the adoptive couple.

First, the Court found that section 1912(f)³ — which bars termination of a parent's rights unless there is a showing of serious damage to the child from the parent's "continued custody" — does not apply when the parent never had physical or legal custody of the child. Although Veronica's parents had been engaged to be married, at the time she was born they were no longer in a relationship. Her father was in the military awaiting immediate deployment to Afghanistan. Although he must have known of the child's birth, he did not contact Veronica's mother, provide any support for medical care for the mother or his child, and he had had no contact with the child during the first months after Veronica was born. Focusing on the term "continued custody," the Court reasoned that there had never been

a custodial relationship of any kind between the father and child, and that, therefore, there was no "continuing relationship" and the "continued custody" provision of ICWA did not make sense.

Second, the Court found that section 1912(d)⁴ — which bars termination of a parent's rights without a showing that active efforts have been made to prevent the "breakup of the Indian family" does not apply when the parent never had a relationship with the child. The Court focused on the term "breakup" in this section. As with section 1912(f), the Court reasoned that the absence of any kind of actual custodial relationship between the father and the child meant that such a relationship could not be "broken up" under the normal understanding of that term.

Finally, the Majority found that section 1915(a)⁵ — which establishes placement preferences for the adoption of Indian children — does not bar non-Indians from adopting an Indian child when no other eligible candidates have sought to adopt the child.⁶ In *Adoptive Couple*, the birth mother of the child arranged an adoption through a private, out-of-state agency. The Court rejected the notion that in such a situation,

she or the agency should be required to demonstrate that she had invited and explored alternative adoptive placements for the child that complied with the ICWA placement preferences.

Critique of the decision in *Adoptive Couple*

The Court's decision in the *Adoptive Couple* case has been the subject of intense scrutiny and its impact is not yet completely clear. While on its face, the Court's reasoning appears to grapple with the situation in a practical, and common-sense way, the Majority is actually somewhat myopic and fails to grapple with the entirety of the statute or with the larger family law context of the case.

First, the Court majority ignored the statutory interest of the Cherokee Tribe when interpreting the statute. ICWA's jurisdiction provisions are the core provisions of the Act protecting tribes from the continuing outplacement of Indian children.⁷ Pursuant to these provisions, a tribe has the right to intervene as a party in a child custody case involving an Indian child who is a member of or eligible to be a member of the tribe in question. Tribes also may try to seek the transfer of such cases to tribal court and, in some situations, may exercise exclusive jurisdiction over Indian child custody cases. A tribe's right of intervention is mandatory and the tribe may exercise the right at any point in the proceeding. This right of intervention was included in ICWA to not only protect the best interests of Indian children by ensuring that state courts consider tribal cultural and social norms, but also to enable tribes to ensure compliance with ICWA to protect their continued existence and integrity.⁸ Thus a tribe's right to intervention under ICWA reflects Congress's

concern that the Indian child's parents might not be in a position to adequately protect the child's interest in maintaining familial connections with the tribe or the tribe's interest in protecting its children.

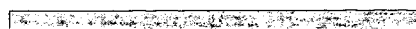
In *Adoptive Couple*, the Majority never considers the tribal role in the private adoption proceeding. Rather it focuses exclusively on the father's lack of early custodial and financial involvement with Veronica. The "continued custody" and "active efforts" requirements of ICWA were interpreted as if the fathers' interest was the only interest being protected by the Act, and without regard to the distinct interests of the Cherokee Tribe. As a result, the Court renders the tribe's intervention rights meaningless and nullifies the importance of the intervention provisions of ICWA in many private adoption cases.

Likewise, the Court makes assumptions about state family law that are not consistent with developments in the field. Most importantly, it concludes that the father had "relinquished" his custodial rights and that he had "abandoned his child" because of his failure to make contact with the child or provide financial support during the mother's pregnancy or after Veronica's birth. The Court proceeds based on this purported "relinquishment" as if the father has absolutely no cognizable rights vis-à-vis the child.

Yet the father's rights had not been terminated. Although much controversy exists regarding the due process requirement for terminating the parental rights of an unwed father, it remains clear that some official action is required. The unwed father may or may not be entitled to participate in the process depending on his own conduct. But, without consent, until a parental termination or adoption order is entered based on a constitutional putative father statute, or until grounds for parental termination case are proved, the father has, at minimum, inchoate legal custody rights. In the *Adoptive Couple* case, the father was clearly angry at the breakup of his relationship with Veronica's mother and his attention was pulled away by the demands of his ensuing deployment. His angry, informal communications with the mother simply cannot, by themselves, serve as the basis for the termination of his parental rights. Beyond his informal communications, no official action terminating his parental rights was ever entered except in the case in which he appeared and objected and which was appealed to the Supreme Court.

Finally, the Court ignored the provisions of ICWA that impose substantial procedural requirements on the "voluntary termination of parental rights." In effect, the Court treated the father's inaction as akin

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to a voluntary termination of his parental rights and did not require compliance with the process requirements of ICWA. One of the primary purposes of ICWA is to make the voluntary placement of Indian children more difficult. The provisions of the Act were a direct response to evidence in the legislative record establishing that Indian parents had often been subjected to threat, pressure and trickery to induce them to “voluntarily” consent to the termination of their parental rights.⁹ Thus, ICWA requires that voluntary consents to parental termination must be “executed in writing and recorded before a judge,” and that the judge must certify that the “terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . .”¹⁰

The facts of the father’s “relinquishment” of his parental rights in *Adoptive Couple* evoke images of the exact practice ICWA was intended to prevent. In addition to angry personal texts to his former fiancé, the father was approached by a process server in a shopping mall parking lot just days before his deployment to Afghanistan. Believing he was relinquishing his custodial rights to the child’s mother, he accepted service and signed a “relinquishment” document of some sort. Although he immediately had second thoughts about signing, the process server refused to allow the father to review the papers or reconsider his signature.

Application of *Adoptive Couple*

1. The existing Indian family doctrine

A number of commentators have speculated that the effect of the *Adoptive Couple* decision is to validate the “existing Indian family” exception to ICWA. This excep-

tion, crafted by state courts and not based on the language of the statute, holds that ICWA does not apply at all when a child is not removed from an existing Indian family. While the U.S. Supreme Court has never directly considered this exception to ICWA, it appears to have rejected the exception in dicta in *Mississippi Band of Choctaw Indians v. Holyfield*.¹¹ The Court did not reference this exception in *Adoptive Couple*.

The Idaho Supreme Court, in strikingly similar circumstances to those of *Adoptive Couple*, rejected the

While the U.S. Supreme Court has never directly considered this exception to ICWA, it appears to have rejected the exception in dicta in *Mississippi Band of Choctaw Indians v. Holyfield*.¹¹



existing Indian family exception in 1993 in *Indian Tribe v. Doe*.¹² In that case, the Idaho Supreme Court addressed a situation in which a non-Indian mother attempted to place her child in an adoptive placement through a private adoption agency without input from the Indian father. The Court stated that requiring an Indian child to first be part of an Indian family before ICWA applies, “would allow the non-Indian

mother to circumvent application of ICWA and the tribe’s interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family.” It concluded that such a result would “undermine the tribe’s interest in its Indian children, which the Supreme Court recognized in [*Holyfield*].”¹³

The U.S. Supreme Court’s decision in *Adoptive Couple* does not adopt the “existing Indian family” doctrine. While the decision certainly appears to have limited the scope of ICWA in certain private adoption situations, it does not create a wholesale exception to the Act. For example, under the reasoning in *Adoptive Couple*, where the Indian parent has had physical or legal custody of a child, or where the adoption is not voluntarily initiated by a parent, ICWA still applies. Thus, in the vast majority of ICWA cases, which involve situations in which a child is removed from parental custody through the child protection system, ICWA applies and *Adoptive Couple* does limit the statute.

Even though *Adoptive Couple* does not embrace the existing Indian family doctrine, it is still cause for great concern. In a concurring opinion, Justice Breyer expressed concern about the risk of the decision excluding too many “absentee Indian fathers.” He cited some examples of situations in which the decision perhaps should not apply, such as a case of a father who has visitation rights or has paid “all of his child support obligations,” a case where a father “was deceived about the existence of the child,” or a situation involving a “father who was prevented from supporting his child.”¹⁴

2. Child protection cases

The most common cases governed by ICWA are child protection

cases. The language of the statute itself makes clear that Congress was focused on governmental removals of Indian children from their families without regard for tribal family and cultural norms. The *Adoptive Couple* case will not likely change child welfare practice in cases involving Indian children for several reasons.

First, these cases are clearly “removals” — the exact focus of ICWA. Child welfare cases do not involve situations in which a parent is seeking to make a voluntary placement of her or his child.

Second, the Court’s concern in *Adoptive Couple* that ICWA would unnecessarily delay safe and loving placements for children is not directly implicated by child welfare cases. The functions and purposes of the child protection system overlap the goals and purposes of ICWA. The function of the child protection agency is to reunite a child with her or his family whenever possible. State law requires child welfare officials to make reasonable efforts to secure reunification and only permits alternative placements upon substantial showings that either reunification cannot occur or that it would pose serious danger for the child. Thus ICWA’s requirement of “active efforts” does not raise the danger that Indian children will be disadvantaged in finding a permanent and loving home.

***Adoptive Couple’s* significance for other Idaho Statutes**

In recent amendments to the adoption statute in the Idaho Code, recognition of the federal mandate of ICWA was added: “[i]f applicable, nothing in this chapter shall modify the requirements of the Indian Child Welfare Act of 1978, 25 U.S.C. 1902 et seq.”¹⁵ However, the adop-

Adoptive Couple will likely serve to limit the application of ICWA for non-custodial Indian fathers, at least in similar circumstances — private adoption, absent father.



tion statute clearly serves to limit the rights of unmarried fathers in proceedings to determine placement of a child. Thus, while ICWA is specifically addressed in the Idaho Code, the outcome in *Adoptive Couple* will likely serve to limit the application of ICWA for non-custodial Indian fathers, at least in similar circumstances — private adoption, absent father. In a voluntary, private adoption of a child, if the parental rights of an unmarried Indian father who has never had a custodial or familial relationship with his child are properly terminated under the Idaho statute, it is likely that ICWA would not apply.

One other Idaho statute, the “Safe Haven” statute,¹⁶ is in direct conflict with ICWA in that it does not require the birth mother to identify herself or the child’s father, so there is no required inquiry into whether the child is enrolled or enrollable in a federally recognized tribe.¹⁷ Should a child be delivered by a mother to safe haven, it would be possible that the child would be placed without regard to status as an Indian child. Placements under the Safe Haven statute are not voluntary in the same sense as the private adoption in *Adoptive Couple*. They are, in fact, removals in which the child is in the custody of the state and a modified child protection pro-

ceeding is employed to secure the permanent placement of the child. For that reason, these cases are not governed by the exception to ICWA carved out by *Adoptive Couple*. To the extent the Safe Haven statute is inconsistent with ICWA, it is likely pre-empted by federal law. Special care should be taken to avoid placing an Indian child through a safe haven proceeding.

It IS worth the hassle

Even in the wake of *Adoptive Couple*, and the likely narrowing of ICWA, the underlying reason for its passage — to protect Indian families and tribes from loss of their children and their culture — remains as valid today as it was in the 1970’s. Each change in the federal government’s approach to tribes, though well intentioned, had dramatic and lingering negative consequences to Indian families. The ICWA was a way to finally help fill the gaps left by these federal policies and it remains an important tool for Indian people to preserve their future — their children.

The Indian Child Welfare Act of 1978 was a circumstance where good words and good intentions were transformed into written law and where the actual federal policy had a

positive impact on Indian children. Chief Joseph once said:

Good words do not last long unless they amount to something. Words do not pay for my dead people. They do not pay for my country, now over-run by white men. They do not protect my father's grave. They do not pay for all my horses and cattle. Good words will not give me back my children... It makes my heart sick when I remember all the good words and all the broken promises.¹⁸

In 1978, the new federal policy of protecting Indian children from being placed in non-Indian homes, and ensuring that a cultural connection between the child and his/her tribe was considered by the courts became just such a law — good words that amounted to something. After years of federal policies that diverged from one extreme to another, ICWA was a targeted, strategic, practical policy; it has been protecting Indian children for 36 years. While it may sometimes be difficult to apply or enforce, it is indeed worth the hassle.

ICWA continues to be a tool used to address the placement of Indian children removed from their families by state child welfare authorities. Compliance with ICWA has given tribes a role in shaping the safe placement of their children. Even so, the problem of the removal of large numbers of Indian children from their tribes may remain a serious problem. In 2013, officials from several tribes in South Dakota, sued the state of South Dakota arguing that it had systematically violated ICWA. A background story by National Public Radio that led to the litigation indicated that 87% of the Indian children in foster care in

South Dakota are placed with white families.¹⁹ As this article is written, the South Dakota litigation is ongoing. To the extent the allegations in the case have even some merit, they illustrate the continuing need for the Act.

Endnotes

1. Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*
2. 133 S. Ct. 2552 (June 2013). The Court first interpreted ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
3. 25 U.S.C. § 1912(f) (“Parental Rights termination orders; ... No termination of parental rights may be ordered in such proceeding in the absence of a determination . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.”).
4. 25 U.S.C. § 1912(d) (“Any person seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”).
5. 25 U.S.C. § 1915(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; (3) other Indian families.”).
6. Summary from the Tribal Supreme Court Project, Memorandum Update of Recent Cases, June 25, 2013
7. 25 U.S.C. § 1911. *Holyfield*, 490 U.S. at 36 (recognizing that the jurisdictional provisions of ICWA are at the heart of the law).
8. Indian Child Welfare Act of 1978: HEARING ON S. 1213 BEFORE THE SUBCOMM. ON INTERIOR & INSULAR AFFAIRS, 95th Cong. 191-92 (1978); *Holyfield*, 490 U.S. at 34-35.
9. B.J. JONES, ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK 104 (2007), citing H. R. REPORT 95-1386, at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 7530.

10. 25 U.S.C. § 1913.

11. *Id.* at 9.

12. *Indian Tribe v. Doe*, 123 Idaho 464, 849 P. 2d 925 (1993).

13. *Id.* at 470-71, 849 P. 2d at 921-22.

14. *Ibid.*, *Adoptive Couple* at p. 2571.

15. Idaho Code § 16-1501(3).

16. Idaho Code § 39-8203. Interestingly, recent research indicates that Safe Haven laws have not contributed to increased infant safety. Among other things, the research indicates that these laws may encourage women to conceal pregnancies and then abandon infants who otherwise would have been placed for adoption through established legal procedures or raised by relatives. See ADOPTION NATION EDUCATION INITIATIVE, UNINTENDED CONSEQUENCES: ‘SAFE HAVEN’ LAWS ARE CAUSING PROBLEMS NOT SOLVING THEM (Evan B. Donaldson Institute, March 10, 2003).

17. ICWA, 25 U.S.C. § 1903(4) (definition of Indian child).

18. LEE MILLER, Ed., FROM THE HEART (Ed., 1996) p. 342.

19. That litigation, *Oglala Sioux Tribe v. Van Hunn*, has not yet yielded a reported decision. See reports on the situation leading to this litigation on National Public Radio (<http://www.npr.org/2013/02/06/171310945/south-dakota-tribes-accuse-state-of-violating-indian-welfare-act>).

About the Author

Elizabeth Barker Brandt is the James E. Wilson Distinguished Professor at the University of Idaho College of Law. She teaches Community Property, Family Law, Children & the Law, Domestic Violence & the Law, and Wills and Trusts. Brandt is a member of the Idaho Supreme Court’s Child Protection Committee and a past member of its Committee on Children and Families in the Courts. She is one of the authors and editors of “Protecting Children of High Conflict Divorce: An Idaho Benchbook,” and the “Idaho Child Protection Manual.”

