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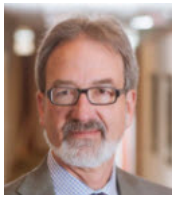
Adoptive Couple v. Baby Girl

by Alan C. Eidsness and Jaime Driggs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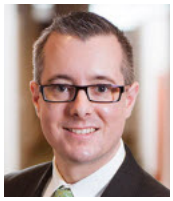
Jaime Driggs

A very divided United States Supreme Court recently issued its second and eagerly anticipated decision addressing the Indian Child Welfare Act ("ICWA"). The case, *Adoptive Couple v. Baby Girl*, 570 U.S. (2013), involves difficult issues of race, fathers' rights, adoption placement, and Indian rights and generated national attention among a wide-range of stakeholders, many of whom submitted amicus briefs. While the case had the potential to provide a meaningful exposition on ICWA's scope, the result was a rather narrow decision that arguably may be confined to its facts, which are both complex and tragic.

After learning that his fiancé ("mother") was pregnant, father, a member of the Cherokee Nation, sought to move up the wedding date and he refused to provide financial support to mother unless she agreed. Their relationship quickly fell apart and mother sent a text message to father asking whether he wanted to pay child support or give up his rights. Father responded by text stating that he relinquished his rights. Unknown to father, mother, while still pregnant, decided to work through a private agency to give up the child for adoption by a South Carolina couple. Through counsel, mother attempted to provide notification to the Cherokee Nation but her letter misspelled father's name and gave an erroneous birth date. Adoptive couple supported mother during her pregnancy and was present at the child's birth in Oklahoma. Father provided no financial support to mother during her pregnancy and made no attempt to be involved in any way before or after the child's birth.

Four months after the birth, adoptive couple served father with notice of the pending adoption and father signed a consent to the adoption. The next day he contacted a lawyer and challenged the adoption, contending that he had thought he was relinquishing custody to mother, not agreeing to the adoption of his child. Litigation ensued and the trial court denied the petition for adoption and granted father custody of the 27-month old daughter he had never met. The South Carolina Supreme Court affirmed based upon three provisions of ICWA.

Subsection 1912(d) requires the party seeking to involuntarily terminate parental rights to an Indian child to show 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."

Subsection 1912(f) prohibits an involuntary termination of parental rights to an Indian child "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

Subsection 1915(a) mandates that when evaluating adoptive placements for an Indian child "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; or (3) other Indian families."

The South Carolina Supreme Court held that adoptive couple failed to make the requisite showings under §1912(d) and §1912(f) and that even if father's rights were terminated, the placement preferences of §1915(a) would have applied.

Justice Alito, joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Breyer, reversed, with Justices Thomas and Breyer each writing concurring opinions. Justice Sotomayor wrote a dissenting opinion, in which Justices Ginsburg and Kagan joined and in which Justice Scalia joined in part but also wrote his own dissenting opinion.

Beginning with §1912(f), the majority concluded that the phrase "continued custody" in that subsection showed it was not intended to apply to situations where the Indian parent never had custody of the Indian child. Because mother had sole legal and physical custody of the child by operation of the statutes of Oklahoma and South Carolina (she also would have had sole custody under Minn. Stat. § 257.541, subd. 1), §1912(f) was inapplicable. The majority

noted that its interpretation of §1912(f) was consistent with ICWA's main purpose, preventing the inappropriate removal of Indian children from Indian families by state social workers.

The majority applied a similar analysis to §1912(d). In situations where the Indian parent has never had custody of the Indian child and has abandoned the child, there is no intact Indian family to seek to preserve. And since mother had sole legal and physical custody of the child by operation of law and father had abandoned the child, §1912(d) was inapplicable.

Finally, the majority held that the preferences of §1915(a) are inapplicable when no alternative party has attempted to adopt the child. Because father was defending the termination of his parental rights and had never sought to adopt the child, adoptive couple was the sole candidate for adoption and §1915(a) did not apply.

Justice Breyer's concurrence states that the holding should not be applied beyond the facts of the case, such as circumstances involving unwed noncustodial fathers who had visitation rights, paid child support, were deceived about their child's existence, or were prevented from supporting their child.

Justice Thomas joined the majority in the interests of constitutional avoidance but concurred to express his view that ICWA was unconstitutional as applied to the case because the Indian Commerce Clause permits the regulation of commerce with Indian tribes, and this adoption proceeding had nothing to do with either commerce or Indian tribes.

The dissent criticized the majority for grounding the rationale for its entire approach in its own interpretation of the phrase "continued custody," which is not defined by ICWA. Under the dissent's view, custody made no difference under either §1912(f) or §1912(d) because father, an ICWA "parent" was facing a "termination of parental rights," which is broadly defined by ICWA to include "any action resulting in the termination of the parent-child relationship." When read in conjunction with other portions of the statute, "the phrase 'continued custody' is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA "parent" has with his or her child." *Adoptive Couple v. Baby Girl*, 570 U.S. (2013). Similarly, the dissent interpreted break-up of Indian families in §1912(d) broadly to encompass the severance of the relationship established through biology between father, an ICWA "parent," and his child. Since the dissent would have affirmed based on its reading of §1912, it did not address the adoption placement preferences of §1915(a) except to comment that the majority's holding did not, and could not, prevent the child's paternal grandparents or other members of the Cherokee Nation from petitioning to adopt the child.

Although the decision appears to except noncustodial ICWA "parents" from the protections of §§1912(d) and (f), the decision was so intensely fact-specific that its impact may prove to be quite limited. While the majority's holding was based upon father's lack of legal and physical custody under state law, father's abandonment of mother and the child was a crucial fact in the analysis and mentioned expressly as part of the holding regarding §1912(d). It is clear from Justice Breyer's concurrence that he was uncomfortable extending the holding beyond the facts of the case, and his opinion will certainly be the focal point of future litigation over the decision. Almost any slightly different set of facts would provide an opportunity to attempt to distinguish the decision, with lower courts not having much guidance on what degree of involvement a noncustodial ICWA "parent" must have—short of total abandonment—to obtain the protections of §§1912(d) and (f).

Despite the finality of the decision, the fate of Veronica, the "Baby Girl" (who is no longer a baby and turned four in September) remains uncertain. Post-decision rulings by the South Carolina Supreme Court denying father's request for a hearing on best interests and approving adoptive couple's petition prompted the Native American Rights Fund to file a federal civil rights lawsuit on Veronica's behalf. Proceedings relating to the case also have been commenced in Cherokee Nation District Court and Oklahoma state court. Mother has filed her own lawsuit in federal court seeking to declare the adoption placement preferences of ICWA unconstitutional. Additionally, after father, who is participating in mandatory National Guard training, did not attend a meeting ordered by the South Carolina trial court as part of its transition plan, the court rescinded the plan and ordered that Veronica be immediately transferred to adoptive couple. As of this writing, that transfer has not occurred and father's attorneys have been ordered to disclose their knowledge of Veronica's whereabouts.

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