

The U.S. Supreme Court's Rejection of the Indian Child Welfare Act of 1978

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Abstract

*Since the late 1800s there has been an organized governmental effort to remove Native American children from their families and communities and place them with strangers. This federal government effort has resulted in thousands of Native American children being displaced from their roots which results in issues of transracial placement. Indigenous children end up losing their parents, siblings, extended family, and cultural ties. The Indian Nations lament that their children have been stolen and that their very existence is being threatened. Tragically history does repeat itself as this governmental practice continues today. The U.S. Supreme Court granted a Writ of Certiorari in October of 2012 in the case of *Adoptive Couple v. Baby Girl*, 570 U.S. __ (2013) which everyone assumed would involve a review of the Indian Child Welfare Act of 1978 which would provide guidance to the States on the interpretation of this particular federal law. On June 25, 2013 the Supreme Court reached a decision that clearly rejected the applicability of the Indian Child Welfare Act of 1978 as it threw out the South Carolina court decision awarding custody to the Cherokee father as the highest Court in the land sided with the White adoptive couple. This paper outlines the positions of all the interested parties in the case and presents a theoretical discussion of each position as well as policy implications.*

Introduction

Sociologists have been well aware of the plight of Native Americans and the host of social ills that plague them (Kimmel and Aronson, 2012). While social problems are serious societal issues especially for minorities in the U.S., among the most afflicted are Native Americans. The literature has documented high rates of alcoholism, domestic violence, child abuse in all its forms (physical, sexual, and emotional), and high rates of mental illness have also been found in this group. Native Americans also suffer from high rates of poverty, unemployment, and under-education. There is no social problem that does not significantly impact Native Americans (Kimmel and Aronson, 2012). There is a critical social problem that all 566 of the federally recognized tribes currently face which is causing grave concern and is a topic of heated conversation and debate among Native Americans, in adoption circles, and in legal circles, this being the removal of indigenous children from their families and tribes (Lewerenz and McCoy, 2010). These Indian children are being fostered out and adopted out to White families. The tribes argue that under the Indian Child Welfare Act of 1978, that they were promised that this federal practice would end and the United States government vowed to do all it could to preserve the Native American family unit and the tribes. Native Americans charge that this vow has been broken and is one more broken promise in a long line of agreements between the U.S. government and the tribes maintain Lewerenz and McCoy, 2010.

This paper offers an in-depth examination of the recent U.S. Supreme interpretation of the Indian Child Welfare Act of 1978. All legal positions presented to the U.S. Supreme Court are thoroughly outlined in

the case of *Adoptive Couple v. Baby Girl*, 570 U.S. ____ (2013).¹ The Petitioners for the Writ of Certiorari known as the “Adoptive Couple” presented strong arguments to have “Baby Veronica” returned to them while the biological father who is biracial sought the backing of the Cherokee Nation in the Brief of Respondents. The child involved had her interests represented by an appointed Guardian ad Litem. *Amicus curiae* is a Latin term and it means there were other parties also affected by the decision who wished to preserve their interests. Interestingly, the Latham & Watkins law firm of Washington D.C. filed an amicus curiae brief on behalf of the biological mother who supported the adoptive couple. Other amicus curiae briefs were filed by the California State Association of Counties, the County Welfare Directors Association of California, the American Academy of Adoption Attorneys, the National Council for Adoption, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids. It is important to thoroughly examine all the competing interests in the case in order to educate the public and raise awareness on the issue. It is critical to examine all the interests of the parties involved in order to fully understand the implications for future policy-making.

This case has far reaching policy implications for the federal government, all the individual States, and most definitely for the Indian Nations. All of these entities must reexamine their policies on the adoption of Native American children and make critical decisions about policy revision as they must follow the latest U.S. Supreme Court’s ruling on the Indian Child Welfare Act of 1978 (ICWA). Perhaps all these interested parties can find ways to still accommodate their central concerns. An in-depth theoretical discussion of each of the legal positions which were presented to the highest Court in the land will help to expose the underlying premises of each argument and help draw contrasts among them.

Historical Treatment of Native American Children by the Federal Government

No one could have been more interested in the “Baby Veronica” case than the 22 Indian Nations of Oklahoma and the hundreds of other Indian Nations spread out all over this country. To understand this issue more fully, one has to go back to the late 1800s when a concerted federal government effort began to remove Native American children from their families and communities to place them in state run and religious based boarding schools, and with White foster and adoptive families on family farms (Burger, 1995). These foster and adoptive families agreed to take these youngsters as their hands would prove valuable on working farms. The First Nation Orphan Association (2011) has charged that since the late 1800s and well into the 70s that over 60% of all Indian children were subjected to transracial placement. As a result of being uprooted from their communities, the Indian Nations lost several generations of youth. “Split feathers” is a colloquial term for these children who lost their heritage due to being fostered or adopted out of their tribes. Those raised in boarding schools also lost their roots with devastating consequences. The National Indian Child Welfare Association contends that children who have been ripped from their families and communities experience ethnic identity confusion, self-concept formation difficulties, and adolescent rebellion which they charge lead to alcoholism, mental illness, and suicide (Earle and Cross, 2011). Some may wonder why the federal government began this practice in the late 1800s and why it has long been a federal government practice (Deloria, 1985). The federal initiative focused on Christianizing the Indian people and on assimilation efforts. Native

¹ On June 25, 2013, the U.S. Supreme court threw out the lower court’s ruling that awarded custody to the biological father and returned the case to the South Carolina court for further proceedings.

American children were taken from their families and communities and placed in boarding schools to better effect full assimilation. Some schools were state run while others had a religious affiliation but practices were similar in that Indian children were separated from siblings, they were banned from speaking their native tongues, and they were not allowed to practice their religious beliefs. Brutal beatings were administered with straps and whips. Some children were handcuffed to trees and some made to kneel on sharp rocks as punishments for minor acts of disobedience (Deloria, 1985). There were many of these boarding schools such as St. Mary's School for Indian Girls at Springfield, South Dakota which was run by the Episcopalian Church, the Carlisle Bureau of Indian Affairs Boarding School was state run, the Intermountain School near Provo, Utah was run by the Mormon Church, there were many other schools such as the Chillicothe Indian School in Oklahoma, the Saint Labra Catholic School for Indian Children in Montana, and the Todd County High School in Mission, South Dakota which all had scandals involving the physical and sexual abuse of indigenous children (Adams, 1995). Whether the school was run by the missionaries or the Bureau of Indian Affairs, the primary mission was to expunge all Indian customs in the children.²

The American Indian Movement (AIM) held many demonstrations in the 1970s to protest the removal of Indian children from their families and they decried the molestation and brutal physical abuse which was common at the boarding schools (Harjo, 1999). As a result of the outcry, the federal government passed the Indian Child Welfare Act of 1978 P.L. 95-608, 25 U.S.C. 1901 as the primary purpose of this law was to protect Indian children by preserving the family unit. The central purpose of this Act was to halt the removal of Native American children from their communities through the common practice of fostering and adopting them out to White families. The high rate of removal of indigenous children was intended to be addressed under this Act which gave the tribes the ability to establish guidelines for child placement that would take precedence over state policies. In Congressional hearings in the late 1970s it was learned that the adoption rate for Indians was eight times that for non-Indians and that 90% of the adopted Indian children were subjects of transracial placement (H.R. Rep. No 95-1386, 1978). Congress acknowledged that this government practice harmed Indian families and that "the tribes themselves" were harmed (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989)). Unfortunately, many tribes failed to establish a safety net by setting forth firm guidelines to allow Native American children to remain in their own families or with extended family members, or in placements in their own communities before even considering outside placement (Mannes, 1993). Many tribes have not had the resources to develop placement services within the boundaries of their reservations so children do not have to be fostered and adopted out to White families (Jones and Gillette, et al., 2000). Indian families living off the reservation and non-Indian mothers of Indian children may have their children swept up by public welfare agencies and private adoption agencies because social workers and other professionals do not know enough to ask if the child is a member of a tribe or qualifies to be a member of an Indian nation. Many of these biracial children do not have typical Indian features and when they are caught up in the child protective system the professionals may fail to inquire if the Indian Child Welfare Act protects that Indian child and Indian family from State or federal intrusion that threatens to tear the child from their family and tribe (Jones and Gillette, et al., 2000).

² See Peter Fark's book for more details on the treatment of Native American children in the missionary schools (Man's Rise to Civilization: As Shown By the Indians of North America From Primeval Times to the Coming of the Industrial State, 1968).

Contradiction Among The States In Interpreting the Indian Child Welfare Act of 1978

Prior to the 2013 U.S. Supreme Court's hearing of the "Baby Veronica" case there was a great deal of dissension among the States as to the interpretation of the Indian Child Welfare Act of 1978. This federal law serves to protect the rights of Indian children and of the Indian community by keeping indigenous children in their society. The order of preference in the placement of Indian children is provided for under the Indian Child Welfare Act; Indian children are to be placed: 1) with a member of their nuclear family; 2) with other members of the extended family; 3) or with an Indian family in the tribe (Tucker, 2009). Eleven states have interpreted the ICWA as not allowing a non-custodial Indian father to block an adoption if he had never established paternity nor asserted his parental rights when the baby had never been a part of an existing Indian family. In the case of *S.A. v. E.J.P.*, 571 So.2d 1187 (1990), the Alabama Court ruled that the Act does not apply when a baby has never been a part of an Indian family unit. Many states were split on how the ICWA should be applied (Brief for Amicus Curiae for National Council for Adoption, filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). States were in contradiction on how to proceed in cases when an Indian child is voluntarily given up for adoption by a non-Indian mother with custody. Alabama, Indiana, Kentucky, Louisiana, Missouri, Nevada, and Tennessee applied the ICWA only when a child was being removed from an Indian parent who had custody. South Carolina, Alaska, Arizona, Colorado, Idaho, Illinois, Kansas, Michigan, Montana, New Jersey, New York, North Dakota, Oregon, and Utah held that the ICWA applied even when the child had never lived as part of an Indian family.

The end result is that there has existed confusion on this federal law across the nation and this state of affairs created an inconsistent application of the law so that Indian children were not guaranteed permanency in placement. The Indian Child Welfare Act of 1978 was passed by Congress to protect Indian children from being involuntarily separated by welfare agencies and adoption organizations according to the ruling in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). The ICWA provides that minimum federal standards and guidelines must be followed before indigenous children are removed by non-tribal agencies. These provisions apply to any Indian child who is unmarried and under 18 years of age, and who is a member of a tribe, or who is the biological child of a member of a tribe. The U.S. Census of 2010 found there were 5.2 million Americans who self-identified themselves as having some Indian heritage so potentially many children of mixed-Indian heritage could have been affected by the outcome of the Baby Girl case (Norris, et al., 2010). In the law review article of 2010 written by D. Lewerenz and P. McCoy, they discussed the eventual rejection of the Indian Child Welfare Act of 1978 as more and more states have joined in the consensus against the doctrine. Since 2000, another 5 states rejected the preferential treatment given Indian parents simply based on race or ethnicity. The states of Alabama, New York North Dakota, Kansas and Colorado have all interpreted the ICWA as not being applicable in cases where a custodial non-Indian mother who never lived in an Indian family unit with her child decides to give up her baby for adoption. Lewerenz and McCoy (2010) have predicted the demise of the doctrine altogether. The U.S. Supreme Court decided in the "Baby Veronica" case that the time had come to clarify some of the circumstances when the Indian Child Welfare Act of 1978 applies and when it is not applicable.³

³ There is still the possibility that in the future the Supreme Court may provide a thorough and complete interpretation of the Indian Child Welfare Act of 1978 or that it may do away with this federal law altogether.

Petition for Writ of Certiorari by Adoptive Couple

The case involved Baby Veronica, the birth father who was Cherokee and White, the Hispanic birth mother, and the White couple who adopted her at birth (Petition for Writ of Certiorari by Adoptive Couple, filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). The couple was present at the birth in Oklahoma and they immediately took possession of the baby and took her to their home in South Carolina. The case had the Indian Nations in an uproar not just in Oklahoma but all over the country (Stemple, 2013). The case was widely followed in the media in stories such as one by Bill Mears (2013) of CNN News which highlighted the biological father's allegation that he was only notified of the adoption when the infant was 4 months old. The South Carolina Supreme Court affirmed the decision of the lower court as they also ruled that the baby had to be returned to her biological father from their interpretation of the ICWA. This decision was reached by a bare majority yet the justices admitted that the adoptive couple had provided a loving and stable family environment for the infant. The Supreme Court of South Carolina ruled that they had to uphold the Indian Child Welfare Act of 1978 as under federal law the baby belonged with the biological father in Oklahoma's Cherokee Nation. Regardless of the circumstances the majority interpreted the federal law as mandating the return of the child. The decision was termed a tragedy by the dissenting justices as they argued that the best interests of the child should supersede all other interests including tribal interests. The dissenting justices acknowledged that clarification was needed in this area of federal law. The White adoptive couple argued that the provisions of the ICWA applied only to Indian parents and was not applicable in situations where an unwed Indian father had not established paternity.

The couple relied heavily on the case of *Lehr v. Robertson*, 463 U.S. 248 (1983), as the Court pointed out that in assuming parental responsibilities one is also assuming parental rights. An unwed father who never acknowledges any parental responsibility such as providing financial, physical, or emotional care of an infant or its mother then has no parental rights to assert. The couple argued that the ICWA was never violated as in this case no Indian family experienced a removal of an Indian child as the Cherokee father had abandoned the non-Indian fiancé when she was pregnant. A family unit had never been formed. The Petitioners argued that the Cherokee father had never even bothered to assert his parental rights until 4 months after the adoption (Petition for Writ of Certiorari of Adoptive Couple, filed Oct. 31, 2012). The couple petitioned the U.S. Supreme Court to address the constitutional question of whether an Indian father can invoke preferential custodial rights based on his blood heritage having failed to establish his parental rights until after the adoption. The couple argued that under the Act, Congress can only protect the parental rights of an unwed Indian father who has already been recognized as a "parent" under traditional State law. Another case that was heavily relied on by the Petitioners was *Rice v. Cayetano*, 528 U.S. 495, 514 (2000), in which the Court ruled that discriminatory treatment based on "ancestral" classification violates equal protection principles. So, the couple argued that the biological father had never established his parental rights in a State court as required, that the Act was not applicable as there had never been an Indian family unit that involved "Baby Veronica," and that simple blood heritage should not be the overriding interest in the case. The Supreme Court's decision in the case sealed the fate of Baby Veronica as well as thousands of other indigenous children.

Discussion

This case involved child custody and while federal law overrides state law the root of the problem was how State courts had been interpreting the Indian Child Welfare Act of 1978. The Supreme Court of South Carolina protected the interests of the biological father and the Cherokee Nation because they felt that was the correct interpretation of the Indian Child Welfare Act of 1978. This Act, after all, had been passed to address the removal of Indian children from the Indian Nations in order to preserve their heritage and the survival of the tribes. Yet, the decisions of both the lower court as well as the highest Court in South Carolina were not in the best interests of the child as the dissenting justices on both courts lamented their rulings as a tragedy. The infant had been raised for 2 years in a loving and stable home before she was returned to her biological father. It was with a heavy heart that the child was returned to Oklahoma and it is clear that even the majority on the South Carolina Court wished for the U.S. Supreme Court to take on the issue and resolve the confusion among the States. The time was overripe for the U.S. Supreme Court to address the confusion of 35 years on the interpretation of the ICWA. Family courts and juvenile courts commonly make their decisions on the best interests of the child rather than the interests and desires of the adults involved in such cases. Clearly the Supreme Court ruling in the “Baby Veronica” case was made on the basis of what was in the best interests of the child and not on the desires of the biological father or even the substantial interests of the Cherokee Nation. The U.S. Supreme Court sided with the White adoptive couple as they had taken on the responsibility for the biological mother and the fetus by paying expenses for the mother while pregnant and by forming a close relationship with the birth mother. The clear message from the highest Court in the land was that one cannot be a father when one has never asserted parental rights and taken on the responsibilities of fatherhood. Tucker (2009) has noted that not providing financial support is a form of abuse of both mother and child. The ruling in the “Baby Veronica” case will concern thousands of biracial children all over the country. In making this ruling, the clear message to prospective non-Indian couples who wish to adopt and make a home for an Indian child is that the provisions of the ICWA will not be applicable when an Indian parent has failed to provide the basic necessities of life for an infant as that is a critical responsibility of parenthood. To have ruled for the Cherokee father in this case would have resulted in the potential disruption of countless lives as then other Indian fathers could have years after the fact challenged adoptions to non-Indian parents simply on the grounds of their blood heritage and ancestral classification. If the Indian Nations want to protect their interests they must create policies that will keep Indian infants and children in their communities.

The ICWA only provides that minimum federal standards and guidelines must be followed before indigenous children can be removed by non-tribal agencies. This means that the Indian Nations can create stricter standards and guidelines to ensure the continued survival of the tribe and so ensure that future generations are not lost to fostering out programs and adoptions to non-Indians. To protect tribal interests there must be a better system created to track adoptions and investigate whether an infant or child belongs on the tribal rolls. This means examining every adoption since birth mothers may not be forthcoming with information, biological Indian fathers may not have knowledge of a birth, and Indian family members may also be unaware of the birth of an infant. Many Indian Nations, especially in Oklahoma, have vast enterprises in casinos, smoke shops, restaurants, gas stations, convenience stores, and hotels as well as other businesses and some of these funds might be used to create a central adoption investigative center. This Center would investigate all adoptions in the United States. Yes, it would be a big undertaking but if the Indian Nations wish to preserve their tribes they must be vigilant about not allowing Indian children to be fostered or adopted out of the tribe. The Indian Nations should request federal government assistance in ensuring that the promises made under the Indian Child Welfare Act of 1978 are being protected. Every measure must be taken to ensure that Indian children are placed on tribal rolls, that a comprehensive National Center to review adoption cases for children

with Indian blood is in place, and that a strong system for Indian foster care and Indian adoption in each tribe is created. The 2013 ruling in the “Baby Veronica” case has far-reaching policy implications for all the political entities involved as all interested parties must have a say in creating new guidelines that will address their various legal positions while still adhering to the latest Supreme Court interpretation of the Indian Child Welfare Act of 1978.

Respondents Brief for Biological Father and the Cherokee Nation

A brief in opposition was presented to the Supreme Court by the biological father of Baby Veronica and the Cherokee Nation (filed Nov. 30, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). The Respondents focused their argument on the preservation of the Indian family unit and of the Cherokee Nation. The adoption rate of Indian children has been cited as being 8 times that for non-Indians while 90% of the adoptions have been into non-Indian homes according to the National Vital Statistics Report (Martin, 2012). The Cherokee Nation had standing under the ICWA to determine placement preferences for an Indian child of the tribe and they contended that the placement of Baby Veronica was of utmost importance to tribal sovereignty and the continued existence of her tribe. Where possible the child should remain in the tribe argued the Cherokee Nation. The biological father was a registered member of the Cherokee Nation, he and the mother who is non-Indian were never married and never lived together. During the pregnancy the father was serving in the U.S. Army and he urged the mother to marry him so that she and the baby could enjoy military health coverage before and after the birth. Relations between the two became strained and the mother broke off the relationship in a text message and refused further communication. The mother then unilaterally decided to give the baby up for adoption and never notified the biological father of her decision. The adoption form was filled out by the mother but it failed to note that the father was Cherokee yet she later admitted that she knew the significance of that fact. The adoption attorney contacted the Cherokee Nation and asked if the baby was a member but he misspelled the father’s name and he gave the wrong birthday (both day and year) for the father’s birth and so the Nation responded that the child did not appear to be an Indian child. The Cherokee Nation added that any misinformation would invalidate that finding. The birth mother and the adoptive couple all signed the Oklahoma Interstate Compact on Placement of Children (ICPC) and they listed the ethnicity of the child as “Hispanic.” The Cherokee Nation contends that fraud was perpetrated in the official adoption documents by the birth mother and the adoptive couple. The Cherokee Nation and the biological father contend that if they had known of the adoption they never would have allowed the child to be removed from Oklahoma, from the Cherokee Nation, and the custody of her biological father. Four months after the adoption, the White couple served the Cherokee father with papers days before he was to be deployed to Iraq. The biological father requested help from a JAG attorney on base and he sought to stay the adoption and began the process to establish his paternity and child custody. The Family Court in South Carolina held a 4 day hearing and determined that the biological father had strong cultural ties to the Wolf Clan of the Cherokee Nation and that paternity testing had proven conclusively that he was the father of Baby Veronica (Brief in Opposition by Birth Father and Cherokee Nation, filed Nov. 30, 2012). The Family Court concluded that the biological father was a fit and proper person to take custody of the child as he had convinced the court of his love for the child. The father had contested the adoption in both Oklahoma and in South Carolina as soon as he learned that the baby was put up for adoption. At twenty-seven months (2 years and 3 months) Baby Veronica was given to her birth father so he could return with her to the Cherokee Nation to be raised in an extended Indian family. The Respondents noted that the Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974) has acknowledged having a trustee interest in protecting all members of Indian tribes. While in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court admitted that

Congress has to fulfill its obligations to Native Americans and that legislation must be passed that directly addresses their needs. The Respondents argued that the Act was passed by Congress to protect tribal interests in ensuring that future generations remain within the Indian community and that federal law mandated the return of “Baby Veronica” to her biological father and her tribe. In *Rose v. Rose*, 481 U.S. 619 (1987) the Supreme Court ruled that federal law must override state law especially when substantial federal interests would be harmed. The Congress of the United States concluded in legislative findings in late 1978 that Indian children were vital to the continued existence of the Indian tribes and that preserving Native American tribes was of substantial federal interest (Jones, 1999).

Discussion

South Carolina sided with the Cherokee father as he attained legal status as a father by taking the DNA test and because he contested the adoption as soon as he learned it had occurred. Since he was in the armed forces serving in Operation Iraqi Freedom he had thought the infant was with the mother and she never informed him otherwise. The biological father also had a strong argument in asserting that his child was stolen from him with the use of fraudulent adoption papers. Yet, the strongest argument of the Respondents was that the Indian Child Welfare Act of 1978 was legislation passed specifically to ensure that tribal rights in indigenous children supersede State and Federal interests. Since the late 1800s it was federal policy to remove Indian children from their families and communities to such an extent that the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield* acknowledged that the practice was harmful to the Indian tribes and that Indian families were being destroyed. The Cherokee Nation forcefully argued that the Supreme Court was mandated to support their interests in the “Baby Veronica” case because to do otherwise would mean the continued decline of the tribes. The very survival of a People depends on their children and if Indian children are placed with non-Indian adoptive families they lose their heritage and the tribe has its numbers eroded. The Respondents pointed out that many agreements were made in regards to land and property exchanges between the tribes and the federal government and that all of these agreements were broken, some more egregiously than others.

To interpret the Indian Child Welfare Act of 1978 so that an Indian child is ripped away from a biological Indian father who loves her and wants to raise her and from her tribe is a gross violation of the agreement not to remove any more indigenous children from their communities. To interpret the ICWA so that “Baby Veronica” is given to the White adoptive couple clearly means that the federal government in 2013 still supports the old federal practice of removing indigenous children from their roots. Many scholars such as Earle and Cross, 2011 have enumerated the transracial placement problems for adopted and fostered out Indian children who suffer from identity confusion and a wide range of significant social ills. The biological father and her tribe can truthfully express concerns for “Baby Veronica’s” future when she learns she is an American Indian yet she does not speak Cherokee and knows nothing of her blood heritage. The plea made for a daughter by a Cherokee father and his tribe was gut-wrenching. The Respondent Cherokee father with the full backing of his tribe begged the United States Supreme Court to respect their sovereignty as a nation and as a People who border on extinction. In the *Adoption of Hallaway*, 731 P.2d 962 (Utah, 1986) the court stated that tribal interests are on parity with those of parents even though the two interests are distinct. Yet, under the ICWA tribal interests supersede all other interests. It can be argued that the Cherokee Nation failed to squarely address its responsibility to create firm guidelines to place Indian children within the tribe by finding or creating Indian placements so children are not fostered out or adopted by non-White families. Yet, the Cherokee Nation can also point a guilty finger at the federal government for failing to provide

assistance in protecting the promises made under the Indian Child Welfare Act of 1978. Firm Indian Nation child placement guidelines must be created with or without the help of the federal government to protect the future of the tribes. The federal government must stop making promises only to break them. Future federal Indian policies must protect the interests of the tribes and ensure not just their survival but their prosperity. Surely, they are owed that much.

Position of Guardian Ad Litem for “Baby Veronica”

The attorney, Ms. Prowell, appointed as Guardian ad Litem for Baby Veronica, acknowledged that the issue before the U.S. Supreme Court was an important question of federal law (Brief of Respondent, Guardian ad Litem, filed Oct. 22, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). After closely investigating the details of the case, the Guardian ad Litem concluded in her brief that it was in the best interests of the child to award custody to the adoptive parents. Ms. Prowell interviewed both the adoptive parents and the birth father to determine the best placement for the baby. She found that the birth father had never attempted to assert his parental rights or to provide in any manner for the child. The Guardian ad Litem condemned the invocation of the Indian Child Welfare Act of 1978 to block the adoption as being unconscionable. Ms. Prowell was shocked that the first time the biological father and the baby met was only after the South Carolina Family Court ordered that the baby be given to the birth father. The Guardian ad Litem argued that serious equal protection concerns were raised in this case and that the best interests of the child were being pushed aside because of the biological father’s race. Ms. Prowell insisted that strict scrutiny be given this case when a preference for custody is based simply on race.

The case of *Palmore v. Sidoti*, 466 U.S. 429 (1984) recognized a strong presumption that custody determinations based on race are unconstitutional and this case was used by Ms. Prowell to argue against the Cherokee birth father. Another case that the Guardian ad Litem placed heavy reliance on was *Roberts v. United States Jaycees*, 468 U.S. 619 (1984) in which the Supreme Court stressed that the family must be protected from unjustified interference by the state as a family unit involves “deep attachments and commitments.” The Guardian ad Litem pointed out that Baby Veronica had enjoyed just such an attachment in the first twenty-seven months of her life and that the adoptive couple had made deep and lasting commitments to her as a family unit. The Court recognized that families play a critical role “in safeguarding the individual freedom that is central to our constitutional scheme” (*Roberts v. United States Jaycees*, 468 U.S. 617 (1984)). Ms. Prowell asserted that the South Carolina Family Court and Supreme Court of South Carolina both rendered “Baby Veronica’s” best interests to be irrelevant. The Guardian ad Litem asked the Supreme Court to interpret the Indian Child Welfare Act so as to prevent it from causing trauma and tragedy in cases such as “Baby Veronica” where there was no involuntary removal of an Indian child from an existing Indian family. Ms. Prowell declared that the Act has been misapplied to cause the disruption of many lives and she appealed to the Supreme Court on behalf of the baby to protect her liberty interests in maintaining the only family relations she had ever enjoyed. The Guardian ad Litem requested that the Supreme Court provide clear guidelines in applying the ICWA so similarly situated children do not become entangled in what she declared to be a statutory mess (Brief of Respondent, Guardian ad Litem, filed Oct. 22, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399)

Discussion

Jurisdiction in family relation matters has been traditionally reserved to the States and family courts have commonly used the “best interests of the child standard” in custody cases (Brief of Respondent,

Guardian ad Litem, filed Oct. 22, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). The Guardian ad Litem (GAL) for “Baby Veronica” had to look out for the “best interests” of the infant first and foremost. In interviewing all the parties and gathering information, a Guardian ad Litem undertakes her responsibilities diligently. Yet, it is charged that at first Ms. Prowell refused to interview the birth father. Ms. Prowell ended up informing the Supreme Court that the father had neglected all his parental responsibilities and that race should not be a central issue in custody decisions. The Guardian ad Litem asked the Court to interpret the ICWA as not being applicable in the case as the birth mother had voluntarily given up the infant for adoption, no Indian family unit had ever existed, and the baby’s best interests were to be reunited with the family who had provided a loving home for her for 2 years. A Guardian ad Litem can be very helpful to a court in making custody decisions and in ensuring that a child’s best interests are fully protected so they can be raised in a safe and loving environment. Yet, a recent Boston Law Review article by Fletcher and Fort (2013) was especially critical of the performance of Ms. Prowell in the “Baby Veronica” case. These authors pointed out that Ms. Prowell had been handpicked by the adoptive couple to represent the infant even though she ended up being officially appointed as the GAL by the Court.

This Guardian ad Litem also had a business relationship with the adoptive couple’s attorney and Fletcher and Fort also pointed out that Ms. Prowell made negative remarks about the Cherokee father, the Cherokee Nation, and she even made anti-Native American remarks about their getting free lunches and free medical care. Fletcher and Fort (2013) stress the need to have GALs who are sensitive to their charge’s blood heritage and understand that in a ICWA case the goal is to represent the best interests of an Indian child. Race is then a central issue in such cases. While Ms. Prowell did make a good recommendation that the U.S. Supreme Court create guidelines to apply the ICWA in future cases, this suggestion was not followed. The Supreme Court in the “Baby Veronica” case simply left it to the Indian Nations, the public child welfare agencies, birth mothers, birth fathers, GALs, adoption agencies, adoption attorneys, and adoptive parents to figure it out on their own. The Supreme Court simply ruled that the ICWA did not apply in the “Baby Veronica” case as the Hispanic birth mother voluntarily gave up the infant, no Indian family ever existed, and it found that the father had failed to assert his parental rights in a timely manner. Federal law still overrides State law so when a court finds that the ICWA is applicable then it will override rulings in family courts and even in State Supreme Courts. Such guidelines can be created by the Indian Nations with or without the help of State and/or federal agencies. However, it would be most beneficial if all interested parties were at the table when such policies are being formulated in order to promote the interests of all. Guardian ad Litem should definitely be a part of creating ICWA guidelines and the policies needed to implement those guidelines. Yet, it is clear from the “Baby Veronica” case that the States and courts must create their own guidelines governing the requirements to be appointed a Guardian ad Litem in an ICWA case. While States are free to outline their own criteria for appointment as a GAL it would be best to appoint a Guardian ad Litem in a ICWA case who possesses legal training, cultural sensitivity training on Native American issues, specialized knowledge about the provisions of the Act, has been solely appointed by the court and has no ties to any of the parties involved, and who has no other conflicting interests in the case.

Amicus Curiae Brief on Behalf of the Birth Mother

Mr. Gregory G. Garre from the Lathan & Watkins law firm in Washington D.C. filed an amicus curiae brief on behalf of the Hispanic birth mother who supported the adoptive couple (filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). Mr. Garre argued that the Indian Child Welfare Act of

1978 cannot be used to block a voluntary adoption by a non-Indian mother who had custody when the Cherokee father relinquished his parental rights before the baby was born. The birth mother insisted that since the biological father of Baby Girl refused to provide any financial assistance throughout the pregnancy that she made a difficult but loving decision to give her baby up for adoption. Mr. Garre pointed out that the birth mother was struggling to care financially for two other children from a prior relationship and as a single mother felt that she had made the best decision for Baby Girl. The birth mother sought out the Nightlight Christian Adoption agency in Oklahoma and after looking through files of prospective parents she personally selected the petitioners because of their values. A friendship developed between the prospective parents and the birth mother as they traveled from South Carolina to meet her and follow the progress of the pregnancy. The lawyer for the birth mother argued that the petitioners established a loving home that should not be destroyed. The Supreme Court in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) determined that families must be protected from undue governmental intrusion and that choices made by parents in raising children should not be disturbed. The amicus curiae brief on behalf of the birth mother, urged the Supreme Court to consider the rights of the biological mother in making a contemplative choice in selecting a permanent home for her infant and the bonding that had already occurred between the adoptive couple and Baby Girl. Mr. Garre pointed out that many adoptive agencies allow women who have selected the option of adoption to choose the family their child will be placed with and to violate that agreement would be psychologically damaging to both infant and birth mother. Mr. Garre also argued that it was not appropriate to create parental rights in a Native American father when he renounced his baby and forcefully asked the Supreme Court to support a birth mother's decision to seek a lawful adoption in the best interests of her infant (Brief of Amicus Curiae Brief of Birth Mother, filed Oct. 31, 2012).

Discussion

The United States Supreme Court in siding with the White adoptive couple also sided with the birth mother. This non-Indian woman was the custodial parent and after careful deliberation she hand-selected the couple who she thought would give her child a good life. The Court respected the birth mother's decision and her choice in the matter. For 35 years the States had been wrestling with how to interpret the Indian Child Welfare Act and the result had been an acknowledged split. Seven states would have ruled against the Cherokee father in this case as they would have interpreted the Act as allowing termination of parental rights when a non-custodial father abandons his child to the custody of a non-Indian mother. Yet, 4 states would have held that a putative father must first comply with state law to attain the legal status of "parent" in order for the ICWA to protect his rights. While the Supreme Court interpreted the ICWA as not being applicable in the case of "Baby Veronica," other issues exist.⁴ The potential for disrupting lives and creating more scenarios for Indian child removals remains so it is vital that clear guidelines and policies be created which would balance the wishes of a non-Indian birth mother and the federal promise made to the tribes.

Pro-Adoption Amicus Curiae Briefs

An amicus curiae brief was filed on behalf of the National Council for Family Adoption (NCFA) which represents a non-profit group formed to promote a culture of adoption through education on the issue,

⁴ The Supreme Court may decide to abandon the Indian Child Welfare Act of 1978 if it ever decides to adopt the best interests of the child standard presently used in family and juvenile courts today.

research, and legislative efforts (filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). The NCFA asserted in its brief that uncertainty in how to interpret the Act was producing unstable outcomes for children who deserve a permanent home so they can develop in a healthy manner. This organization asked the Supreme Court to clarify when an Indian child's heritage supersedes other factors in a placement decision. The NCFA maintained that scholars such as Marty et al., (2005) have propounded that it is the nature and quality of the interaction between parent and child rather than biological connections that are important in deciding custody cases. The NCFA also noted that in *Palmore v. Sidote*, 466 U.S. 429 (1984) the Supreme Court stated that prioritizing race in cases of child custody should be done away with as such a practice only reflects racial prejudice and does not address valid concerns. Another amicus curiae brief was offered on behalf of the interests of the American Academy of Adoption Attorneys (filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). This not-for-profit organization works to reform adoption laws and holds seminars to educate the public and professionals on ethical adoption practices. This organization of adoption attorneys urged the Supreme Court to correct the misconception that tribal rights supersede the constitutional rights of children and parents. Yet, another amicus curiae brief was filed by the California State Association of Counties (CSAC) and the County Welfare Directors Association of California (CWDA) in the case of "Baby Veronica" (filed Oct. 31, 2012, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). The mission of the CSAC is to protect children who are dependents and victims of abuse and neglect. The CWDA is a non-profit organization which represents the human services directors of each California county as their (*In re W.B. Jr.*, 281 P.3d 906 Cal.) primary mission is to administer child welfare and foster care programs for the state. These two organizations joined in filing a brief because the State of California has the largest percentage of Native Americans followed by Oklahoma (U.S. Census Bureau, 2010) and because the State has a large population of children in foster care who have had juvenile dependency appeals filed on their behalf (2012).

These two concerned California organizations joined forces to charge that the Supreme Court of South Carolina created a federal class of parents based on race and genetics which they argue is impermissible. They asked the Court to establish a national standard on how to interpret the Indian Child Welfare Act of 1978 so that courts, social service agencies, attorneys, those in the adoption community, and biological and adoptive parents can be given clear guidance. Professor Joan H. Hollinger, a leading expert on adoption law, wrote a brief representing the interests of the Center for Adoption Policy (CAP) which is a non-profit that provides research, advice, and education on current legislation and adoption practices in the U.S. and all over the world (Brief of Amici Curiae of Hollinger et al., filed on October 31, 2012). Professor Hollinger also represented the interests of the National Association of Counsel for Children (NACC) which is a non-profit child advocacy group which represents professionals who work with abused and neglected children to ensure they receive quality legal services. Lastly, Professor Hollinger also represented Advokids which is another non-profit agency which advocates for children in the foster care system. Professor Hollinger decried the fact that the ICWA weighed heavily in favor of an Indian parent and that the muddiness in the interpretation of the Act was cause for continued anguish in such cases for the children as well as adoptive and birth parents.

Discussion

The Supreme Court in the "Baby Veronica" case simply connected a small piece of the puzzle as to when the ICWA is not applicable. An unwed Indian father who never asserted his parental rights and failed to provide for his child has no standing under the ICWA. The Supreme Court in *Stanley v.*

Illinois, 405 U.S. 645 (1972) found that the Due Process Clause requires a state to hold a hearing to determine the fitness of an unwed father before adjudicating the placement of children. Such a father has protected interests provided he assumed financial responsibility yet these are not the facts as they pertain to the Cherokee father. In *Quilloin v. Walcott*, 434 U.S. 246 (1978) the Court ruled that the putative father had no substantive due process rights when he had never shouldered any child rearing responsibilities. Yet, the Court supported the rights of an unwed father in *Cabam v. Mohammed*, 441 U.S. 380 (1979) as the father had supported his children and had seen them on a regular basis. A birth parent can only attain full statutory rights as a parent under state law according to *In re Zacharia D.*, 862 P.2d 751 (Cal. 1993) as the Due Process Clause can be triggered only when a putative father makes a prompt commitment to fatherhood when he discovers the mother is pregnant with his child under *In re Adoption of Michael H.*, 116 S. Ct. 1272 (1996).

Such a commitment to parenthood entails providing a financial, personal and/or custodial relationship as spelled out in *Lehr v. Robertson*, 463 U.S. 248 (1983). So, now it is clear the Indian Child Welfare Act of 1978 did not apply to the unwed Cherokee father in the “Baby Veronica” case according to the 2013 Supreme Court interpretation. The pro-adoption organizations all charged in their briefs that these most vulnerable children need permanence and stability so there is still a need to create national guidelines and policies for the interpretation of all of the provisions of the Indian Child Welfare Act of 1978. Many questions remain to be clarified and this is a vast undertaking with far reaching political ramifications that requires the cooperation of all the Indian Nations, the states, the federal government, pro-adoption organizations, and attorneys. Many of the pro-adoption organizations argued that placing undue significance on Indian heritage puts the well-being of the concerned children at risk. The Congressional Coalition Adoption Institute (2012) maintains that the adoption community agrees that all children have a right as an American to grow up in a safe home where they are cared for as this is as fundamental a right as life or liberty. The National Council for Family Adoption (2012) has urged the Supreme Court to take all factors into account when considering the placement of a child as genetics alone should not control such decisions. Yet, the Indian Child Welfare Act of 1978 is a federal promise to all the tribes that the best interests of the Indian child will be at the forefront in making placement decisions. To argue that the Act is unconstitutional or that race cannot be a primary focus in a placement decision runs contrary to the stated purpose of the federal law. The primary purpose of the Indian Child Welfare Act of 1978 must be adhered to and respected in any future guidelines and policies created to implement this federal law.

Conclusion

The case of Baby Veronica was closely watched across the country as the Supreme Court on Jan. 4th, 2013, granted the petition for a Writ of Certiorari which was filed on October 1, 2012 (U.S. Supreme Court Docket, 2013, *Adoptive Couple v. Baby Girl et al.*, No. 12-399). This case was so closely watched because it had the potential of affecting the lives of thousands of children. The National Vital Statistics Report (Martin, 2011) has revealed that 31,812 Indian children were born to unmarried parents in 2009 just like Baby Veronica. Over 40% of Indian children are biracial so conservatively over 10,000 Indian children are born to unmarried and mixed-race parents every year. The main questions to be addressed by the Supreme Court were whether the Indian Child Welfare Act should be upheld, whether portions of it should be rewritten, or whether the ICWA was even applicable at all. On June 25, 2013 the Supreme Court clearly rejected the Indian Child Welfare Act of 1978 as in a close

decision of 5 to 4, the Court found that the birth father of Baby Veronica had never assumed his parental role as he had failed to establish his parental rights.⁵ The Supreme Court threw out the South Carolina court decisions awarding custody to the father as the majority of the justices sided with the White adoptive parents. Now millions of mixed-Indian heritage children will be affected as the Indian Child Welfare Act of 1978 cannot be used to support the position of Indian parents who have failed to meet the requirements for establishing parental rights. The non-Indian birth mother of Baby Veronica was determined to be the sole custodial parent and the Supreme Court found that she voluntarily and lawfully initiated the adoption process as there was never an Indian family that was broken up and no child was ever removed from an Indian family by authorities so the Indian Child Welfare Act of 1978 was not found to be applicable. Yet, the Supreme Court failed to definitively interpret all the provisions of the Indian Child Welfare Act of 1978 so there will undoubtedly continue to be challenges to this federal law. Much work remains to be done to provide national guidelines for all the States in interpreting the Act and it will fall on the Indian tribes to demand full resolution to the many issues and questions that remain in the application of the Act. The Indian Nations feared that the federal vow to preserve Indian families and tribes would go down in history as another broken federal promise and that their children would continue to be displaced from their People. Many feel that their fears have been confirmed. The Indian Child Welfare Act of 1978 was a federal promise made to the tribes yet the latest Supreme Court interpretation has failed to buttress this important law. Due to the growing numbers of biracial children born to unwed parents every year the interpretation of the ICWA will remain a critical issue for the tribes, birth mothers, biological fathers, adoptive parents, and adoptive organizations for years to come. Only the creation of definitive guidelines and policies in the application of the Act can provide the stanchion needed to brace this law.

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⁵ Despite the return of “Baby Veronica” to the White adoptive couple there has been a voluntary and amicable agreement on visitation privileges which have been extended to the biological father and other Native American relatives in Oklahoma.

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