ADMINISTRATIVE OFFICE OF THE COURTS

JUDICIAL AND COURT OPERATIONS SERVICES DIVISION

CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Fact Sheet: *Adoptive Couple v. Baby Girl* (2013) 133 S. Ct. 2552 and Its Application Under California Law

Factual Background[1]

The case involved a voluntary private adoption of a child born to unmarried parents living in Oklahoma. The mother is a non-Indian. The father is a citizen of the Cherokee Nation. The parents were engaged when the mother learned she was pregnant. The father wanted to move up the wedding date, but the mother broke off contact with the father and later ended the engagement.

The mother arranged to give the child up for adoption at birth without informing the father of her intention. The mother's attorney sent a letter to the Cherokee Nation, but the Tribe could not verify the father's membership status because his name was misspelled and his birth date was incorrect.

Working with a private adoption agency, the mother selected a non-Indian adoptive couple living in South Carolina. The U.S. Supreme Court stated that the adoptive couple supported mother throughout the pregnancy and attended the birth.[2] The U.S. Supreme Court stated that the father had "abandoned" the mother and the child during the pregnancy, had failed to offer or provide support and had agreed (via text message) to relinquish his rights to the child rather than be liable for child support.[3] The mother relinquished her parental rights, and the adoption petition was filed in South Carolina several days after Baby Girl's birth in September 2009.

[1] Note that the facts were very hotly disputed by the parties. Father and his family alleged that they had attempted to provide mother with support throughout her pregnancy, but that she refused contact and support. Mother claimed that no support had been offered or provided. For purposes of legal analysis the facts stated here are those relied on by the majority of the Supreme Court.

[2] *Adoptive Couple v. Baby Girl* (2013) 133 S. Ct. 2552 (hereafter "decision") at 2558.

[3] *Id.* at 2557 & 2558

Approximately four months later, and just a few days before he was scheduled to be deployed to Iraq, the father was served with adoption papers. He then immediately challenged the adoption by filing a paternity action in Oklahoma and objecting to the adoption action in South Carolina. The Tribe confirmed the tribal membership of both the father and Baby Girl.

The South Carolina trial court stayed the adoption proceeding during the father's deployment. As a result, Baby Girl remained with the adoptive couple until she was 27 months old. After the father's deployment ended, the South Carolina trial court denied the adoption petition and ordered Baby Girl returned to the father on the grounds that various provisions of the Indian Child Welfare Act (ICWA)[4] precluded the involuntary termination of the father's parental rights. Baby Girl was turned over to her father in December 2011. The South Carolina Supreme Court subsequently affirmed the trial court's decision. The adoptive couple sought review by the U.S. Supreme Court.

United States Supreme Court Decision

In a 5 to 4 decision, with two concurring opinions filed by Justices Breyer and Thomas, the U.S. Supreme Court reversed the South Carolina Supreme Court decision.[5] The Supreme Court held that the ICWA provisions at issue – heightened evidentiary standards and adoptive placement preferences – did not apply in a voluntary adoption lawfully initiated by a child's biological mother where the Indian father had never had legal or physical custody of the child and no other eligible persons had filed a petition to adopt. The Supreme Court was invited to find ICWA to be unconstitutional, but refrained from doing so.

Specifically the majority held that:

- The heightened standard of proof for termination of parental rights (25 U.S.C. 1912(f)) does not apply when a parent has never had prior legal or physical custody.

- Active efforts (25 U.S.C. 1912(d)) are not required to prevent the breakup of an Indian family when a parent abandons a child before birth and has never had physical or legal custody of the child.

- Adoption placement preferences (25 U.S.C. 1915(a)) are not triggered until a party who falls within the placement preferences (i.e., a relative, tribal member, or other Indian person) seeks to adopt the child.

Some important aspects of the majority's holding are:

[4] 25 U.S.C. § 1901 *et seq.*
[5] Only those portions of the decision concurred in by all five of the majority Justices become law.

- The Supreme Court did not adopt the Existing Indian Family Exception[6]. Rather, the Court appeared to accept the dissent's view that many provisions of ICWA, such as the notice, transfer, and consent provisions, would still apply to biological fathers regardless of whether they ever had custody.

- The Supreme Court did not decide what the terms "acknowledge or establish" mean within ICWA's definition of parent or how they should be interpreted, but merely assumed for the sake of argument that the biological father was a parent under the Act.

- The Supreme Court's decision does not overturn state ICWA provisions that provide greater protections to non-custodial parents; 25 U.S.C. § 1921 still permits the application of state laws that provide greater protections to children and parents.

The narrow issue before the Supreme Court was whether a parent who had never had physical or legal custody of the child can invoke ICWA to block a voluntary adoption initiated by a non-Indian parent under state law.[7] The Court decided that ICWA's evidentiary standards do not apply in a voluntary adoption proceeding when the parent who is objecting to termination of parental rights has never had legal or physical custody of the Indian child.[8] The Court also decided that the ICWA's adoptive placement preferences do not apply in a voluntary adoption proceeding when no preferred placement has filed a petition to adopt the Indian child.[9]

The scope of *Adoptive Couple v. Baby Girl* is thus limited to voluntary adoption proceedings involving unwed biological parents of an Indian child when the opposing parent has never had legal or physical custody of the child.[10] The Court did not hold that ICWA was inapplicable in its entirety in such cases – the Court specifically limited its discussion to the two evidentiary standards that must be met for termination of parental rights and the adoptive placement preferences, finding that these standards contain specific wording that suggests they were not intended to apply to the fact situation before the Court.

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[6] The "existing Indian family exception" is a judicially created exception to the application of ICWA which holds that the protections of the ICWA apply only if an Indian child is removed from an existing Indian family, but not to other removals that involve Indian children. See discussion at pages 6 – 9 of the *Indian Child Welfare Act* Bench Handbook [2013] http://www.courts.ca.gov/documents/ICWAHandbook.pdf Two California appellate cases decided since the enactment of SB 678 - *In re Vincent M*. (2007) 150 CA4th 1247, 59 CR2d 321 and *In re. Autumn K.* (2013) 221 Cal. App. 4th, 674, 751-752 – have held that the California Legislature intended to reject the existing Indian family exception when it enacted Welf. & Inst. Code § 224.

[7] The phrase "continued custody" therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912 (f) does not apply in cases where the Indian parent *never* had custody of the Indian child. (Decision at page 2560)

[8] 25 U.S.C. § 1912(d) and (f).

[9] 25 U.S.C. § 1915(a).

[10] The decision does not disturb the Congressional findings set out in ICWA at 25 U.S. § 1902 or the precedent the U.S. Supreme Court set in *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37, both of which recognize and affirm that the minimum standards established by ICWA protect the best interests of both the Indian child and his or her tribe.

Outcome of Decision

The U.S. Supreme Court remanded the case to the South Carolina Supreme Court "for further proceedings not inconsistent with this decision."[11] The South Carolina Supreme Court ordered the trial court to grant the adoption petition without further hearing, including any analysis of Baby Girl's best interests. The father pursued relief in the Oklahoma courts but was unsuccessful. The father's family also sought relief in the Cherokee Tribal Court but abandoned those efforts after the Oklahoma courts denied relief. The father turned Baby Girl over to the adoptive couple on September 23, 2013.

Relationship to California Law

California law differs from the state laws under consideration by the U.S. Supreme Court. Therefore the application of the *Adoptive Couple v. Baby Girl* case is different in this state. ICWA states that:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard. [12]

In 2007 California enacted legislation known as SB 678 ("Cal-ICWA"),[13] which provides greater protections to the rights of tribes, Indian children and parents than ICWA in several respects. Significantly the Legislative findings for Cal-ICWA as codified in section 224 of the *Welfare and Institutions Code* provide:

> (1) … the State of California has an interest in protecting Indian Children who are members of, or are eligible for membership in, an Indian Tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child…
> (2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, **regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding,** the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled. (emphasis added)

The California Legislature has thus recognized that the Indian child and the child's tribe have independent interests in the application of ICWA standards, regardless of the actions or custodial rights of the child's parents.

[11] Decision at 2557.
[12] At 25 U.S.C. § 1921
[13] Stats. 2006, c. 838, effective Jan. 1, 2007.

Cal-ICWA also affirms that a tribe's determination that a child is an "Indian child" constitutes a significant political affiliation with the tribe and requires application of ICWA to the proceedings.[14] Under Cal-ICWA a tribe is entitled to notice of all "Indian child custody proceedings", including a voluntary proceedings such as a voluntary adoption[15]. In addition, Cal-ICWA is unambiguous in requiring application of the evidentiary standards and placement standards in any proceeding involving termination of parental rights to an Indian child, whether voluntary or otherwise.[16]

California law also makes specific requirements for how a valid voluntary consent to adoption of an Indian child. Family Code § 8606.5 states:

> (a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to adoption given by an Indian child's parent is not valid unless both of the following occur:
> (1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge.
> (2) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.
> (b) The parent of an Indian child may withdraw his or her consent to adoption for any reason at any time prior to the entry of a final decree of adoption and the child shall be returned to the parent.
> (c) After the entry of a final decree of adoption of an Indian child, the Indian child's parent may withdraw consent to the adoption upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent, provided that no adoption that has been effective for at least 2 years may be invalidated unless otherwise permitted under state law.

Family Code § 7892.5 further restricts the ability to terminate parental rights to an Indian child:

> The court shall not declare an Indian child free from the custody or control of a parent, unless both of the following apply:

[14] Welf. & Inst. Code § 224(c); Fam. Code § 175(c); Prob. Code § 1459(c).
[15] As codified in section 170 (c) of the *Family Code*, Cal-ICWA defines "Indian child custody proceeding" to include a voluntary or involuntary proceeding which can result in termination of parental rights, or adoptive placement. Section 180(b)(3) of the *Family Code* requires notice to the tribe in all such proceedings.
[16] Welf. & Inst. Code § 224.6(b), 361.31(c), 361.7(a), 366.26(c)(2)(B); Fam. Code §§ 177 and 7892.5; Prob. Code § 1459.5(b).

(a) The court finds, supported by clear and convincing evidence, that active efforts were made in accordance with Section 361.7 of the Welfare and Institutions Code.
(b) The court finds, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as described in Section 224.5 of the Welfare and Institutions Code, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.
(c) This section shall only apply to proceedings involving an Indian child.

Nothing in the U.S. Supreme Court's decision in *Adoptive Couple v. Baby Girl* invalidates the heightened standards of Cal-ICWA.

Rights of a Biological Father Under California Law

When the adoption petition was filed in *Adoptive Couple v. Baby Girl*, the unwed biological father of Baby Girl had no custodial rights and no right to object to the adoption under either the laws of Oklahoma, where she was born, or the laws of South Carolina, where the adoption petition was filed.[17]

In contrast, in California an unwed biological father who qualifies as a "presumed father" is deemed to have legal custody of his child at birth unless and until a court decides otherwise.[18] An unwed biological father acquires "presumed father" status by attempting to marry the mother, by executing a voluntary declaration of paternity, or by publicly acknowledging paternity and receiving the child into his home.[19]

In addition, the California Supreme Court recognizes that an unwed biological father who does not qualify as a "presumed father" may still assert constitutional paternity rights to block an adoption by coming forward early in the custody proceeding and displaying a full commitment to a child.[20] Such fathers are referred to as "*Kelsey S.*" fathers.

Finally, even if the unwed biological father does not qualify as a "presumed father" or as a "*Kelsey S.*" father, the child cannot be adopted without the father's consent if the father establishes paternity and the court determines it is in the child's best interest for the father to retain parental rights.[21]

[17] "Biological Father would have had no right to object to her adoption under South Carolina law." Decision at page 2559.
[18] Fam. Code § 3010(a).
[19] Fam. Code § 7611; *In re J.L.* (2008) 159 Cal.App.4th 1010.
[20] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849
[21] *Adoption of A.S.* (2012) Cal.App.4th 188.

Analysis and Conclusion

Adoptive Couple v. Baby Girl decision was a voluntary adoption proceeding initiated by the child's sole custodial parent. In both voluntary and involuntary proceedings, there are significant differences in the applicable law in California and the laws in the jurisdictions where the *Adoptive Couple v. Baby Girl* case arose. Therefore, caution is required when applying the holding in *Adoptive Couple v. Baby Girl* to cases arising in California.

Under the express provisions and heightened standards of Cal-ICWA, the evidentiary standards of ICWA and the placement preferences apply in any proceeding to terminate parental rights, whether voluntary or not and regardless of the status of the parents' custodial rights. California law also requires tribal notice and protection of tribal rights even in voluntary proceedings. California law concerning the rights of unwed father is also significantly different than in the States where the *Adoptive Couple v. Baby Girl* case arose. Specifically, unwed biological fathers of Indian children who qualify either as a "presumed father" or as a "*Kelsey S*." father, or who are able to show that it is in their child's best interest that the father retain his parental rights, would be entitled to the protections of the ICWA when opposing a voluntary adoption of their Indian child even without Cal-ICWA.

The California Legislature has specifically recognized that the Indian child has a unique interest in establishing and maintaining a connection to his or her tribe, regardless of the nature of the relationship between the child and his or her parents. The child's tribe also has an interest in it children independent of the parents' actions or custodial rights. California's public policy recognizes these principles and that evidentiary standards and placement standards apply in any adoption proceeding because they protect the interests of the Indian child and his or her tribe.

For these reasons, the *Adoptive Couple v. Baby Girl* decision is distinguishable and California courts should continue to apply ICWA's evidentiary standards and placement preferences in all "Indian child custody proceedings" within the meaning of section 224.1(d) of the Welfare and Institutions Code, section 170(c) of the Family Code, and section 1459.5 of the Probate Code.