7-23-2013

Solomon's Child: How Baby Veronica Came to Be Returned Home After a Long Legal Battle

Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Verdict
JULY 23, 2013 | JOANNA L. GROSSMAN

Solomon's Child:

How Baby Veronica Came to Be Returned Home After a Long Legal Battle

At the ripe old age of three-and-a-half, Baby Veronica will now make her third transition to a new home. At birth, her biological mother placed her for adoption with adoptive parents, Matt and Melanie Capobianco, who live in South Carolina. When Baby Veronica was twenty-seven months, however, a court ordered that she be taken from the Capobiancos and given to her biological father, whose rights, the court said, had not been adequately protected in the adoption process. And now, almost two years later, she will be returned to the Capobiancos, who took their fight for her all the way to the U.S. Supreme Court.

The legal complications surrounding Baby Veronica's custody arose from an apparent conflict between the federal Indian Child Welfare Act (ICWA), a 1978 law designed to reduce improper removals of Indian children from their parents and their placement with non-Indian families, and South Carolina's rules regarding the rights of unwed fathers. The U.S. Supreme Court ruled, in ***Adoptive Couple v. Baby Girl*** **(http://supreme.justia.com/cases/federal/us/570/12-399/)** , that the ICWA did not apply to Veronica's case, a holding which paved the way for the South Carolina Supreme Court to terminate the parental rights of her birth father, and order her immediate return to her adoptive parents.

Baby Girl Veronica's Early Years

When Veronica's mother learned that she was pregnant, she was engaged to Veronica's father. (For confidentiality reasons, the key players in the case are referred to in court

documents as Biological Father, Birth Mother, Adoptive Couple, and Baby Girl.) Birth Mother, a Hispanic woman, and Biological Father, a member of the Cherokee Nation, lived four hours apart from each other, but both in Oklahoma, and planned to marry at some indefinite point in the future. When Biological Father learned of the pregnancy, however, he asked to set an earlier wedding date and said that he would not provide any financial support until after they had married.

By the time Baby Girl was born in September 2009, the couple had broken up and called off the engagement. During the last trimester of her pregnancy, Birth Mother texted Biological Father to ask whether he would rather pay child support or relinquish his parental rights. He, also via text message, chose the latter option.

With the end of the adult relationship, Birth Mother began to explore adoption. While still pregnant, she met with an attorney to begin the process. Because she believed that Birth Father had some Indian heritage, her lawyer contacted the Cherokee Nation to ascertain his membership status. Due to a typographical error, however, the Cherokee Nation responded erroneously that it could not verify Biological Father's enrollment in the tribe.

Birth Mother selected Adoptive Couple, a Caucasian couple living in South Carolina, to adopt her as-of-yet-unborn baby. Adoptive Couple was present at Baby Girl's birth in an Oklahoma hospital; Adoptive Father cut the umbilical cord. Birth Mother signed the forms the morning after the delivery, relinquishing her parental rights and consenting to the adoption. A few days after Baby Girl's birth, Adoptive Couple took her to their home in South Carolina, but after that, they allowed Birth Mother to visit and communicate with Baby Girl.

Throughout the pregnancy and during the first four months of Baby Girl's life, Biological Father admittedly made no effort to provide financial support for Birth Mother or Baby Girl, nor did he make any other efforts to assume parental responsibility or to assert parental rights. His interest was triggered, however, by service upon him of a notice of adoption when the baby was four months old. Upon receipt of the notice, he signed the papers indicating that he had been notified of the pending adoption and had no objection. But he did indeed object and thus he contacted a lawyer the following day to see whether he could block the adoption. During the early part of those proceedings, he had his paternity verified with a DNA test, and made clear that he did not consent to the placement with Adoptive Couple. To the contrary, he wanted custody of the girl himself.

The Indian Child Welfare Act and the Controversy Over Transracial Adoption

When Baby Girl was two, a trial regarding her status took place in family court in South Carolina. The key issue was whether Biological Father's parental rights could be terminated under ICWA, which imposes heightened burdens on attempts to terminate parental rights to an Indian child, and imposes adoption preferences designed to maximize ties with relatives and/or an Indian tribe.

Congress enacted ICWA in 1978 amid a swirling controversy about transracial adoptive placements, particularly the placement of black children with white families and the placement of Indian children with non-Indian families. Until the 1950s and 1960s, such adoptions were rare or non-existent. Children were placed exclusively with adoptive families who shared their traits and even their religions, in keeping with a style of adoption that encouraged secrecy and the passing off of adoptive children as biological ones. But transracial adoptions became more common as the number of healthy white infants placed for adoption declined, due to a complex combination of increased access to birth control and abortion; a decline in the stigma regarding unwed and single mothering; and increased economic independence for women, who became more likely to be able to support a child alone than they had been in the past.

As they became more common, transracial adoptions generated controversy. The Native American adoptions were condemned as a form of genocide. Investigations in the 1970s revealed awful practices. One in four Native American children spent time in a foster home or in a boarding home run by the Bureau of Indian Affairs. Tribal representatives decried the rampant "child stealing" and lobbied for the passage of ICWA to regulate adoptions of Native American children by non-Native Americans.

ICWA was designed to prevent the dissolution of Indian families. Under the Act, tribes were given jurisdiction to resolve custody disputes between tribal members. More relevant to this case, the Act also made it more difficult to place a child for adoption with non-Indian parents. Prospective placements were ranked in order of priority. A child's extended family was given first choice, then members of the child's tribe, then "other Indian families," even if those families were members of a different and distant tribe. The idea behind ICWA was rooted in a kind of "pan-ethnicity": the idea that the native peoples, despite differences in culture, religion, language, and ways of life, have some sort of overarching unity. Placement of an Indian baby with any non-Indian family, it was thought, would force a type of assimilation that would challenge the very survival of the Indian way of life.

In adoption law, ICWA is unique in its focus on the rights and well-being of an ethnic or racial group as a whole, rather than on the best interests of individual children. It did have a dramatic impact on adoption practices. Removals for neglect and foster care placements declined, and more Indian children in foster care were ultimately placed in

Indian homes. By 1986, the adoption rate for Indian children was similar to that of non-Indian children.

Also during the 1970s, a similar controversy arose, regarding the placement of black children with white adoptive families. In a 1972 position paper, the National Association of Black Social Workers (NABSW) took a "vehement stand against the placement of black children in white homes for any reason." The association argued that transracial adoption constituted a kind of cultural genocide; and that black children who are adopted by white families suffered psychological and physical harm. "Only a black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a black child's survival in a racist society," NABSW argued.

NABSW's opposition did have an effect, significantly reducing the number of transracial adoptions. But so-called "race-matching" had its own problems, sometimes resulting in significant delays in finding an adoptive placement, or in placing black children in unsuitable black homes. The law, ultimately, did not support NABSW's position. Over a period of years, with various amendments to the governing statutes, federal law began to prohibit all considerations of race in adoptive placements that were accomplished through public agencies. Congress also changed the law to put more pressure on states to speed up decisions about children in foster care – to either reunite them with their birth parents, or put them up for adoption more quickly. This change in the law, too, makes transracial placements more likely.

ICWA is thus unique in its emphasis on race in adoptive placements.

ICWA's Role in Baby Veronica's Case

Every state has rules for determining when an unwed father qualifies as a legal parent with the right, among others, to refuse consent to the child's adoption. Under the law of South Carolina, the state in which Adoptive Couple petitioned to adopt Baby Girl, an unwed father's consent to adopt is required only if (i) the father lived openly with the child or the child's mother for six months immediately preceding the adoption, or held himself out to be the child's father during that period; or (ii) the father contributed, commensurate with his financial ability, to the expenses of pregnancy or birth. In this case, Birth Father clearly did not satisfy either of these prongs of the necessary legal showing and, thus, Baby Girl could be placed for adoption without his consent under state law.

But when the adoption case first went to the South Carolina Supreme Court, the court ruled that ICWA trumped state adoption law. Because Baby Girl was 3/256 Indian, it held that she qualified as an "Indian child" under the statutory definition because she is

an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of Indian tribe." (Although there was initially confusion about Birth Father's Tribe membership, the Cherokee Nation eventually confirmed his membership and intervened in the proceeding to enforce the tribe's rights under ICWA.) The court also deemed Biological Father a "parent" under ICWA.

Three provisions of ICWA were deemed relevant—and not satisfied—by the South Carolina Supreme Court. First, the court held that under section 1912(f) of ICWA, a court must find that Baby Girl would suffer serious emotional or physical damage if custody were given to Biological Father. Second, Adoptive Couple did not prove, as ICWA requires they must under section 1912(d), that "active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent breakup of the Indian family." Finally, even if Biological Father were not eligible to have custody of Baby Girl, the adoptive placement preferences would have applied—leaving Adoptive Couple at the bottom of the list. Based on these conclusions, the court affirmed the family court's denial of the adoption and the award of custody to Biological Father. At twenty-seven months old, Baby Girl was transferred from Adoptive Couple to her Biological Father, whom she had not yet met.

The U.S. Supreme Court's Ruling in *Adoptive Couple v. Baby Girl*

The issue before the U.S. Supreme Court was whether the South Carolina court had correctly interpreted ICWA in this case. The Court assumed without deciding that Biological Father qualifies as a "parent" under ICWA, but held that even if he was, the other provisions of ICWA still were not violated by this particular adoption.

With respect to section 1915(f), which governs the involuntary termination of parental rights in the case of an Indian child, the Court held that the heightened burden of showing actual harm was not applicable in a case, such as this, in which the parent in question never had custody of the child in the first instance. The provision speaks of harm from "the continued custody of the child by the parent." Justice Alito, writing for the majority, concluded that the heightened showing is not required when the parent contesting the adoption has only prospective custody of the child in question. Because Biological Father never had custody of Baby Girl at the time when he contested the adoption—indeed, he had never met her—he did not qualify for protection under this provision. The majority found support for this interpretation in the dictionary meaning of "continued" (the dictionary is one of Justice Alito's favorite go-to sources, as reflected in numerous other opinions, including a recent one on sexual harassment discussed **here (https://verdict.justia.com/2013/06/25/the-power-to-harass)**) and in the purpose of ICWA – to stem "the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." (Emphasis in

original.) This provision thus does not apply to a parent who never had legal or physical custody of the child.

With respect to section 1912(d), which requires that any party seeking to adopt an Indian child prove that active efforts were made to "prevent the breakup of the Indian family," the Supreme Court reached a similar conclusion. For a family to be broken up, it must have been intact preceding the effort to terminate parental rights. (Back to the dictionary again here, for the meaning of "breakup.") If, the majority wrote, an "Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinue[d]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights." In other words, as the majority explained, none of the provisions that were applied by the South Carolina Supreme Court "creates parental rights for unwed fathers where no such rights would otherwise exist." Those provisions, instead, only protect existing parent-child relationships within Indian families. The burden is not, as the South Carolina court suggested, on the adoption agency to "stimulate" an unwed father's desire to be a parent in the first instance.

Having eliminated these two statutory obstacles, the U.S. Supreme Court majority concluded that ICWA served as no bar to the involuntary termination of Biological Father's parental rights. But what about ICWA's adoption preferences, which prefer relatives or any Indian family over a non-Indian family? The majority held that those "preferences" only apply when multiple parties have sought to adopt the same child. Since Adoptive Couple was the only party seeking to adopt Baby Girl, that couple's relatively low rank is irrelevant. And although Biological Father himself outranks Adoptive Couple, he sought to avoid termination of his parental rights, not to *adopt* Baby Girl. No other relative, nor any other Indian family, sought to adopt Baby Girl even though the Tribe intervened in the case, and had ample notice of the adoption proceedings.

The majority's conclusion makes clear its unwillingness to give ICWA a broad reach. It cautions against an interpretation that would allow a biological Indian father to "abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then [to] play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests."

The decision in this case was 5-4, with the principal dissent written by Justice Sotomayor. (The lineup of Justices here was not the typical conservative/liberal split; Justice Breyer joined the majority, and Justice Scalia dissented.) Sotomayor criticizes the majority for its open hostility to ICWA and for allowing that hostility to steer it towards

an unnecessarily narrow interpretation of the provisions that are relevant to this case. The majority in turn, worries about the effect a broad reading of ICWA will have on the desire of intended parents to adopt Indian children. However, Sotomayor argues, stemming the placement of Indian children with non-Indian adoptive parents was Congress' express purpose in enacting ICWA.

Moreover, Sotomayor argues, the majority interprets each provision as if it stands alone, without regard for the "operation of the statute as a whole." Through ICWA, she notes, Congress desired to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards" in custody proceedings involving Indian children. Without regard for this broad intent, the majority, she argues, undercuts the statute's scope by reading individual provisions narrowly. She makes a strong argument that, as a whole, the statute is designed to preserve ties between Indian children and their biological parents and their tribes. It thus makes no sense, from her perspective, to deprive a subset of parents—those who have never had physical or legal custody of a child—of the substantive protections that are designed to preserve those ties.

The same could be said of the majority's ruling on the "breakup" provision: that it should be read to protect parent-child relationships, whether or not they exist within a custodial situation. If ICWA treats Biological Father as a "parent"—a position the Court assumed without deciding that he occupied—then the parent-child relationship is deemed to exist for statutory purposes, and should be protected against disruption by an involuntary termination of parental rights. Sotomayor criticizes the majority for substituting its own sense of a "relationship" between parent and child for the one that is contemplated and defined by statute, as well as for not considering the wide range of cases in which a parent might not have the protections of ICWA, despite having asserted an interest in and supported a child.

Finally, Sotomayor argues that the adoption placement preferences are still in play. And even if the South Carolina courts were to terminate Biological Father's parental rights on remand, his parents or other members of the Cherokee Nation should be, in her view, permitted to file competing petitions for adoption.

The Swift Action Taken on Remand by the South Carolina Supreme Court

The Supreme Court expedited the transfer of jurisdiction on remand to the South Carolina Supreme Court for proceedings consistent with its opinion. In just a matter of weeks, that court issued **its ruling (http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2013-07-17-01)** . Having been overturned on the applicability of ICWA, the South Carolina court

reverted to the application of state adoption law. Under that law, Biological Father's consent to the adoption was not necessary (because of his failure to openly hold her out as his child, or to contribute financially to the pregnancy and birth). The court thus ruled that the adoption by Adoptive Couple should be finalized and that custody should be transferred immediately to them. Although the court could have remanded the case to Family Court for further consideration of the child's best interests, it thought that an expeditious ruling was better than a protracted one.

Conclusion

By the time this case reached the U.S. Supreme Court, there was no good outcome to be had. To vindicate the rights of the Biological Father would have caused Adoptive Couple to permanently lose the child they had raised from birth to 27 months. And yet, to rule against the Biological Father requires an unimaginable uprooting of an almost four-year-old girl who will move across the country to be raised by people she may or may not remember. In an ideal world, the Biological Father's rights—if he indeed has them under ICWA or state law—would have been correctly applied in the first instance, when Veronica was still a young infant. Or, the state courts would have ruled that the Biological Father didn't have any rights sufficient to prevent the adoption two years after Adoptive Couple took her home from the hospital. But there is no time machine we can call upon here, and these past transfers cannot be erased. It may well be that Veronica is better off with the adoptive parents who clearly love her dearly, as opposed to a biological father who expressed little interest in her when he had the chance, but in the name of restoring that one adoption, the Supreme Court has given ICWA an oddly narrow reading that will certainly undercut its protections in other cases. If Congress still wishes to have special rules applied to the adoption of Indian children, it should look carefully at what the Court has done to its handiwork.

Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of Inside the Castle: Law and the Family in 20th Century America (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of Gender Equality: Dimensions of Women's Equal Citizenship (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

Follow @JoannaGrossman

Posted In Family Law

Access this column at http://j.st/4drR