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## ADOPTIVE COUPLE V. BABY GIRL: FROM STRICT CONSTRUCTION TO SERIOUS CONFUSION

Allison E. Burke\*

### I. INTRODUCTION

*It is much easier to become a father than to be one.*  
—Kent Nerburn<sup>1</sup>

Perhaps Justice Samuel Alito had this quote in mind when writing the majority opinion in the U.S. Supreme Court case *Adoptive Couple v. Baby Girl*.<sup>2</sup> The 2013 decision was only the second time the Court had heard a case involving the Indian Child Welfare Act (“ICWA” or “Act”)<sup>3</sup> since its inception in 1978.<sup>4</sup> *Adoptive Couple* was the modern day Baby Jessica<sup>5</sup> or Baby Richard<sup>6</sup> case with a twist—the biological father seeking to intervene in the adoption proceeding of his daughter was a member of a Native American tribe.<sup>7</sup> After a procedural and

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1. KENT NERBURN, *LETTERS TO MY SON: A FATHER’S WISDOM ON MANHOOD, LIFE AND LOVE* 173 (New World Library 1999) (1994).

2. 133 S. Ct. 2552 (2013).

3. 25 U.S.C. §§ 1901–1963 (2012); see Marcia Zug, *Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. 46, 47 (2013), available at <http://www.michiganlawreview.org/articles/em-adoptive-couple-v-baby-girl-em-two-and-a-half-ways-to-destroy-indian-law>.

4. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

5. See Michele Ingrassia & Karen Springen, *She’s Not Baby Jessica Anymore*, NEWSWEEK, Mar. 21, 1994, at 60 (discussing the story of Baby Jessica).

6. See Eric Zorn, ‘Adoptive Couple v. Baby Girl’ *Is a Case with Echoes of ‘Baby Richard,’* CHI. TRIB., (June 23, 2013), [http://blogs.chicagotribune.com/news\\_columnists\\_ezorn/2013/06/adoptive-couple-v-baby-girl-is-a-case-with-echoes-of-baby-richard.html](http://blogs.chicagotribune.com/news_columnists_ezorn/2013/06/adoptive-couple-v-baby-girl-is-a-case-with-echoes-of-baby-richard.html) (discussing the story of Baby Richard).

7. *Adoptive Couple*, 133 S. Ct. at 2559 n.2.

custodial roller coaster, the case made it to the Supreme Court.<sup>8</sup> Though the Court in *Adoptive Couple* upheld the ICWA as constitutional, it determined that the appellee, Dusten Brown, the biological father of the child (“Veronica”), could not actually invoke § 1912(d) and § 1912(f) of the ICWA because he failed to establish a custodial relationship with Veronica prior to the birth mother placing her for adoption.<sup>9</sup> In such a highly contested and emotional case, it is no surprise that the bench was split, with only five Justices in the majority.<sup>10</sup>

Although the decision is clear as to what provisions may not be invoked when a non-custodial Indian parent attempts to intervene in the adoption of a biological child by non-Indian adoptive parents, the holding is far from simple. First, by placing such an emphasis on the Indian parent needing to establish a prior custodial relationship before invoking § 1912(d) and § 1912(f), many unwed Indian fathers who may have been actively involved in the child’s life, but who never obtained actual custody of the child, will be excluded.<sup>11</sup> Second, the Court left the door open as to whether or not the ICWA can still be applied in the scenario above with regard to the placement preference provision found in § 1915(a).<sup>12</sup> The Court implied that the placement preference could still be invoked.<sup>13</sup> Such a conclusion, however, creates a slippery slope. It potentially allows the unwed, non-custodial Indian father—whom the Court specifically excluded from the heightened protections of the statute—to prevail in ultimately adopting the child by simply triggering the placement preference provision. After the Court’s ruling, the legislature must take action to amend the ICWA to ensure its consistent and logical application.

## II. THE BIRTH OF THE INDIAN CHILD WELFARE ACT

The ICWA was created in 1978.<sup>14</sup> The Act was a federal government response to the high percentage of Indian children being removed from their Indian parents and placed into foster homes with non-Indian foster parents.<sup>15</sup> Studies conducted in 1969 and 1974 revealed that in states with the highest percentage of Indian population,

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8. *Id.* at 2558-59.

9. *Id.* at 2557.

10. *Id.* at 2556.

11. *See id.* at 2559-64.

12. *See id.* at 2557, 2564-65.

13. *Id.* at 2557.

14. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2012).

15. *See* Michelle L. Lehmann, Comment, *The Indian Child Welfare Act of 1978: Does It Apply to the Adoption of an Illegitimate Indian Child?*, 38 CATH. U. L. REV. 511, 514-18 (1989).

25% to 35% of Indian children were separated from their Indian families.<sup>16</sup> For example, in Michigan, by the 1970s, one out of 8.1 Indian children were adopted out of their communities, which was a 370% higher rate than that of non-Indian children.<sup>17</sup> A clear response to this epidemic was the creation of the ICWA. The legislative intent of the law is made clear in § 1902:

[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 for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .<sup>18</sup>

Although a comprehensive analysis of the Act is beyond the scope of this Idea, a discussion of several provisions is paramount to understanding the perplexity of its application, specifically as it pertains to the *Adoptive Couple* decision.

Generally speaking, if a male meets the definition of a legal father, his child cannot be adopted, either without his consent, or without a proceeding whereby his parental rights are terminated after a hearing before a court with jurisdiction to hear the matter.<sup>19</sup> Under § 1912(f), however, Indian parents are afforded a higher level of protection with regard to the standard of proof needed to terminate parental rights.<sup>20</sup> The Act requires a showing “beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”<sup>21</sup> Further, § 1912(d) places a high burden on social service agencies in working with the Indian parent toward reunification by requiring the agency to use active efforts in providing remedial services, and offering rehabilitative programs “designed to prevent the breakup of the Indian family.”<sup>22</sup> In addition, there must be evidence that the remedial efforts were unsuccessful.<sup>23</sup> Most state statutes are less protective with regard to termination of parental rights proceedings involving non-Indian parents.

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16. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (discussing studies conducted by the Association on American Indian Affairs).

17. Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History* (Apr. 10, 2009) (Mich. St. U. C. L. Indigenous Law & Policy Ctr. Occasional Paper), available at <http://www.law.msu.edu/indigenous/papers/2009-04.pdf>.

18. 25 U.S.C. § 1902 (2012).

19. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVICES, *RIGHTS OF UNMARRIED FATHERS 3-4* (2010) [hereinafter *RIGHTS OF UNMARRIED FATHERS*].

20. 25 U.S.C. § 1912(f) (2012).

21. *Id.*

22. § 1912(d).

23. *Id.*

The burden of proof in many states is a lower one, and can require a showing by clear and convincing evidence that a parent's actions or inactions warrant a termination of his parental rights.<sup>24</sup> Further, the social service agency is usually required to show it made diligent or reasonable efforts to work with the parents toward reunification.<sup>25</sup> Clearly, the ICWA provides more protection for Indian parents than they would receive in most states had they not been a member of an Indian tribe. In addition, under the ICWA, there is a placement preference provision in § 1915(a).<sup>26</sup> This provision ensures that an extended family member, another Indian family, or even the Indian tribe the birth parent is a member of, can intervene in an adoption proceeding, and should be given preference as a placement for the Indian child in the absence of any good cause shown.<sup>27</sup> All of these provisions are in accordance with the legislative intent.

### III. TO BE OR NOT TO BE (A CONSENT FATHER)

As more non-traditional family arrangements have evolved in the United States, the question of what rights an unwed father possesses has become a complex one, specifically in the context of a proceeding where the birth mother has placed her child for adoption with a pre-adoptive couple. Typically, a man with full parental rights would have to either consent to his child being adopted, or, there would have to be a termination of his parental rights.<sup>28</sup> These types of fathers are often referred to as "consent" or "legal" fathers.<sup>29</sup> Not all states have identical definitions of what makes a man a legal father. There are, however, some common characteristics throughout the states that provide clarity to the definition. Many states require an unwed father to have either lived with the birth mother and child for a period of time prior to the

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24. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 & n.2 (2013) [hereinafter GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS] (noting the Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), whereby the Court held that the standard in termination of parental rights proceedings involving allegations of permanent neglect must be clear and convincing).

25. *Id.*

26. 25 U.S.C. § 1915(a) (2012).

27. *Id.*

28. See GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS, *supra* note 24, at 1-2.

29. See, e.g., *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559, 560 & n.19 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013) (discussing the requirements that an unwed father must consent to adoption under state law as opposed to the requirements for an unwed father to establish paternity under federal law); RIGHTS OF UNMARRIED FATHERS, *supra* note 19, at 1-3 (discussing how parental status may be relinquished or, for that matter, gained through a father's consent).

child's placement, or contributed financially to that child's needs.<sup>30</sup> Even if an unwed father cannot meet the criteria to be a consent father, in some states, he may still be entitled to notice of a proceeding whereby the child is going to be adopted. Depending on the state, providing notice gives the father an opportunity to appear and be heard by the court, but his consent to the child being adopted still may not be required.<sup>31</sup> A comprehensive comparison of state laws is also beyond the scope of this Idea, however, the provisions dictating what defines a legal father in South Carolina are worthy of discussion—had Mr. Brown not been a member of the Cherokee tribe, his relief would have been dictated by the laws of that state.<sup>32</sup>

Under South Carolina law, Mr. Brown would not have been considered a legal parent whose consent to Veronica's adoption was required. As a result, the family court would not have needed his consent to proceed with the adoption of Veronica by the Capobianco family, nor would a termination of his parental rights have been necessary.<sup>33</sup> South Carolina's definition of a father, whose consent to the adoption of a child would be required, is found in section 63-9-310(A)(5) of the South Carolina Annotated Code.<sup>34</sup> Under the law, unwed fathers of children placed for adoption at age six months or less are not consent fathers unless:

- (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
- (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in

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30. See, e.g., N.Y. DOM. REL. LAW § 111 (McKinney 1988) (providing an example of factors whereby an unwed male of an illegitimate child may only fall within the provisions of a person entitled to notice, as opposed to a person whose consent to the child's adoption is required); RIGHTS OF UNMARRIED FATHERS, *supra* note 19, at 2-3 (stating that approximately twenty-three states have a presumption of fatherhood when, inter alia, the male provides support to the mother and child and/or the male has lived with the child).

31. See § 111(3)(b); RIGHTS OF UNMARRIED FATHERS, *supra* note 19, at 1-2.

32. See *Adoptive Couple*, 133 S. Ct. at 2556-57, 2559 (discussing how the baby in that case was Cherokee, and therefore, the ICWA applied); Nina Totenberg, *S.C. Court Orders 'Baby Veronica' Adoption Finalized*, NPR (July 24, 2013, 5:29 PM), <http://www.npr.org/2013/07/24/205224853/s-c-court-orders-baby-veronica-adoption-finalized> (describing Baby Veronica's case through the South Carolina courts up to the Supreme Court of the United States).

33. See S.C. CODE ANN. REGS. § 63-9-301(A)(3)-(4) (2010); *Adoptive Couple*, 731 S.E.2d at 555-56, 569 n.19.

34. § 63-9-301(A)(5)(a)-(b).

connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.<sup>35</sup>

In *Adoptive Couple*, the majority recognizes that it was undisputed that had Veronica not been Cherokee, Mr. Brown would not have had a right to object to her adoption by the Capobiancos under South Carolina law.<sup>36</sup> This was also noted by the South Carolina Supreme Court in its initial decision.<sup>37</sup> Had Mr. Brown not been a member of the Cherokee Nation, he would have been restricted to the state laws which, at best, would have only required that he be provided notice of the child's adoption, had he been determined by the state court to be her father, or, had he registered with the state's Responsible Father Registry.<sup>38</sup>

#### IV. BABY STEPS (AND PERHAPS MISSTEPS) TOWARD A FINAL DECISION

The procedural and custodial history of *Adoptive Couple* is a tumultuous one. Prior to May 2009, Veronica's biological mother and Mr. Brown were engaged.<sup>39</sup> In May 2009, when Veronica's biological mother was at least four months pregnant, the couple broke off the engagement.<sup>40</sup> Mr. Brown was aware of the biological mother's pregnancy.<sup>41</sup> She requested child support from Mr. Brown, and when he declined, she asked him if he wanted to relinquish his parental rights at which time he stated that he did.<sup>42</sup> On September 18, 2009, the Capobiancos, who Veronica's biological mother found through the Nightlight Christian Adoption Agency in June 2009, filed for adoption of Veronica in South Carolina.<sup>43</sup> Approximately four months after the adoption petition was filed with the court, the Capobiancos sent a notice of the adoption to Mr. Brown, who was residing in Oklahoma.<sup>44</sup> In January 2010, Mr. Brown was served with the notice, and he signed papers entitled "Acceptance of Service and Answer of Defendant."<sup>45</sup> Not long after signing the papers, Mr. Brown had second thoughts about the content of the papers he signed, at which time he sought legal

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35. *Id.*

36. *See Adoptive Couple*, 133 S. Ct. at 2559.

37. *Adoptive Couple*, 731 S.E.2d at 560 n.19.

38. *See* RIGHTS OF UNMARRIED FATHERS, *supra* note 19, at 76-77.

39. *Adoptive Couple*, 133 S. Ct. at 2558.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553, 555 (S.C. 2012).

44. *Id.* at 555.

45. *Id.*

assistance.<sup>46</sup> As a result, Mr. Brown filed a stay of the adoption proceeding in South Carolina.<sup>47</sup> He also filed a petition to establish paternity in Oklahoma District Court.<sup>48</sup> In addition, the Cherokee Nation identified Mr. Brown as a registered member of its tribe.<sup>49</sup> It was at this point that an already complicated situation became incredibly complex.

Since Mr. Brown was a member of the Cherokee Nation, he invoked the ICWA in order to intervene as a party to the adoption proceedings.<sup>50</sup> In November 2011, the South Carolina Family Court found that the ICWA applied, and that Mr. Brown had not voluntarily consented to termination of his parental rights or to the adoption.<sup>51</sup> Further, the court determined that the Capobiancos had not met the required showings under § 1912(f) by proof beyond a reasonable doubt.<sup>52</sup> As a result, on December 31, 2011, Mr. Brown was granted custody of Veronica, who had been in the care of the Capobiancos for over two years.<sup>53</sup> The decision was affirmed on appeal. On October 1, 2012, the Capobiancos petitioned for a writ of certiorari filed with the Supreme Court, which was granted on January 4, 2013.<sup>54</sup>

#### V. THE SUPREME COURT'S FIRST ENCOUNTER WITH THE INDIAN CHILD WELFARE ACT

As previously noted, the Court has grappled with the ICWA once before. In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>55</sup> the Court held that the Indian tribal court had exclusive jurisdiction over a proceeding involving illegitimate Indian twin babies, whose two Indian parents had moved 200 miles off of the reservation for the twins' birth, and who then voluntarily consented to their adoption by non-Indian

46. *Adoptive Couple*, 133 S. Ct. at 2558-59.

47. *Adoptive Couple*, 731 S.E.2d at 555.

48. *Id.*

49. *Adoptive Couple*, 133 S. Ct. at 2559 n.2; see NAT'L INDIAN CHILD WELFARE ASS'N, *Timeline of the Baby Veronica Case*, [http://www.nicwa.org/babyveronica/documents/BabyVeronicaTimeline\\_merged.pdf](http://www.nicwa.org/babyveronica/documents/BabyVeronicaTimeline_merged.pdf) (last visited Nov. 23, 2014).

50. *Adoptive Couple*, 133 S. Ct. at 2559 & n.2.

51. NAT'L INDIAN CHILD WELFARE ASS'N, *supra* note 49; see *Adoptive Couple*, 133 S. Ct. at 2559 (restating the South Carolina Family Court's decision to apply the ICWA, and finding in favor of the biological father).

52. See 25 U.S.C. § 1912(f) (2012) ("No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt . . ."); *Adoptive Couple*, 731 S.E.2d at 562-63 ("[W]e agree that Appellants have not satisfied their burden of proving that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt.").

53. See *Adoptive Couple*, 133 S. Ct. at 2559.

54. *Id.*; see *Adoptive Couple v. Baby Girl*, SCOTUSBLOG, <http://scotusblog.com/cases/cases/adoptive-couple-v-baby-girl> (last visited Nov. 23, 2014).

55. 490 U.S. 30 (1989).

parents.<sup>56</sup> Prior to the Court hearing the matter, the Mississippi Supreme Court found that the Indian tribe did not have exclusive jurisdiction over the adoption proceeding.<sup>57</sup> The Mississippi Supreme Court based its ruling on the language used in the ICWA, which states that an Indian tribe shall have exclusive jurisdiction over a custody proceeding involving any “Indian child who resides or is domiciled within the reservation of such tribe.”<sup>58</sup> Since the twins were not born on the tribe’s reservation, they were not residing, nor were they domiciled, there. The Court overturned that decision and held that the fact that both of the Indian twins’ parents were previously domiciled and resided on the Choctaw tribal reservation prior to the twins’ birth, the twins should be considered to be domiciled there, as well.<sup>59</sup> As a result, the ICWA applied, giving the Choctaw tribe exclusive jurisdiction to hear and determine the legitimacy of the adoption by the non-Indian adoptive couple.<sup>60</sup> Interestingly, the Court did not think it was relevant that both Indian parents were voluntarily consenting to the twins’ adoption by non-Indian parents.<sup>61</sup> Instead, the Court noted that the “removal of Indian children from their cultural setting seriously impacts a long-term tribal survival,” and the result can have a “damaging social and psychological impact on many individual Indian children.”<sup>62</sup> What is particularly noteworthy is that the Court also emphasized the traditional presumption that an illegitimate child is deemed to be domiciled where the mother is (which did not affect its ruling since the mother, like the father, was previously domiciled on the tribal land).<sup>63</sup>

## VI. SURPRISE AND SPECULATION

With such a precedent set for the stability of the ICWA, some scholars were surprised that the Court granted certiorari to hear *Adoptive Couple*.<sup>64</sup> In her article, *Adoptive Couple v. Baby Girl: Two-and-a-Half Ways To Destroy Indian Law*, Associate Professor Marcia Zug argued that the two questions which would be addressed by the Court in its

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56. *Id.* at 37-38, 53.

57. *Id.* at 38-40.

58. 25 U.S.C. § 1911(a) (2012); see *Miss. Band of Choctaw Indians*, 490 U.S. at 39-40.

59. *Miss. Band of Choctaw Indians*, 490 U.S. at 41, 48-49.

60. *Id.* at 53.

61. *Id.* at 49.

62. *Id.* at 50 (quoting S. REP. NO. 95-597, at 52 (1977)).

63. *Id.* at 48. If one were to apply the Court’s reasoning regarding how an illegitimate child’s domicile is determined as set forth in *Mississippi Band of Choctaw Indians* and *Adoptive Couple*, it could be argued that the child, Veronica, would be domiciled where her mother resided, and, therefore, the ICWA would not apply.

64. See, e.g., Zug, *supra* note 3, at 47.

grant of certiorari regarding *Adoptive Couple* had already been answered by the *Holyfield* decision and the clear language of the ICWA.<sup>65</sup> According to Professor Zug, the first question to be addressed was whether or not a “non-custodial parent can invoke [the] ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.”<sup>66</sup> In *Holyfield*, as discussed by Professor Zug, the Court already answered that question with a confident “yes,” when it allowed not only a non-custodial parent, but the tribe itself, to block the adoption of an Indian child voluntarily and lawfully initiated by two Indian parents.<sup>67</sup> The second question for the Court to determine was whether the definition of a parent found in § 1903(9) included an unwed biological father who would not meet the state requirements with regard to his consent to a child’s adoption being required.<sup>68</sup> Professor Zug argued that the clear language of the statute itself leaves no room for any interpretation other than that this type of father would be considered a parent.<sup>69</sup> Since both of these questions already had definitive answers, Professor Zug offered speculative reasons as to why the Court may have nevertheless granted certiorari.<sup>70</sup>

Professor Zug proposed several possible predictions as to why the Court chose to hear *Adoptive Couple*.<sup>71</sup> One reason offered was so that the Court could determine whether or not the ICWA should apply to a case regarding a child who has never been exposed to her Indian family or the tribal practices.<sup>72</sup> According to Professor Zug, despite many years of conflicting opinions by state courts, the recent trend followed by a majority of states has favored recognizing such a child to be connected to the Indian tribe, and her adoption subject to intervention by the tribe.<sup>73</sup> A second possibility was for the Court, over twenty years later, to reverse its own decision in *Holyfield* and limit the reach of the ICWA over state custody proceedings involving Indian children.<sup>74</sup> The potential explanation for such a limitation may be to address an abuse of the Commerce Clause in Congress’s enactment of the ICWA as part of its powers despite the Tenth Amendment, which enables individual states to

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65. *Id.*

66. *Id.*

67. *Id.* at 47, 49.

68. *Id.* at 47.

69. *Id.*

70. *Id.* at 47, 49.

71. *Id.* at 47.

72. *Id.*

73. *Id.* at 47-48.

74. *Id.* at 48-49.

create laws regarding the adoption of children.<sup>75</sup> In her article, Professor Zug argues against such a determination by noting the far-reaching effect such a ruling would have on Indian laws in general.<sup>76</sup> Contrary to all of this speculation, when the Court rendered its decision in *Adoptive Couple*, it did not base its holding on either of these premises.<sup>77</sup> If it had, although arguably drastic, such a ruling would have been clear-cut and definitive. Instead, the Court's decision was crafted in such a way that makes reform of the ICWA by the legislature a necessary step in avoiding a multitude of complicated outcomes in proceedings involving the adoption of Indian children like Veronica.

## VII. THE SUPREME COURT AND THE INDIAN CHILD WELFARE ACT ARE REUNITED

After a long journey through the judicial system, *Adoptive Couple* came before the U.S. Supreme Court on April 16, 2013.<sup>78</sup> The Court rendered its decision on June 25, 2013.<sup>79</sup> The bench was split five to four, and the majority opinion was delivered by Justice Alito.<sup>80</sup> Surprisingly, the Court did not address the specific requirements of what raises an unwed male to the status of a legal father. Although there was some basis for the argument that Mr. Brown did not fit the definition of a legal father, the Court chose not to address or make its own determination as to Mr. Brown's status.<sup>81</sup> Instead, the Court assumed that Mr. Brown was a legal father.<sup>82</sup> In doing so, the Court afforded Mr. Brown more protection than he would have received in the state court where the matter would have been litigated.<sup>83</sup> The Court even recognized that, in South Carolina, the state's requirements would have excluded Mr. Brown as a legal father, and therefore, his consent to Veronica's adoption by the Capobiancos would not have been required.<sup>84</sup>

The ICWA's definition of a parent is found in § 1903(9), which defines a parent as "any biological parent . . . of an Indian child."<sup>85</sup> This provision excludes any "unwed father where paternity has not been

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75. *Id.* at 50-54.

76. *Id.*

77. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013).

78. *Id.* at 2552.

79. *Id.*

80. *Id.* at 2556.

81. *Id.* at 2559-60.

82. *Id.*

83. *Id.* at 2559.

84. *Id.*

85. 25 U.S.C. § 1903(9) (2012).

acknowledged or established.”<sup>86</sup> The definition does not clarify whether the adjudication of an unwed father must occur before the time that an adoption petition for an Indian child has been filed, or if as long as the adjudication occurs before the adoption, the unwed father will be recognized as the parent. In any event, the Court was not basing its decision on that determination; therefore, it assumed Mr. Brown was the parent without actually determining that he was. This recognition of Mr. Brown’s status as the legal father of Veronica—whose consent to her adoption would be required, and would necessitate a termination of his parental rights before an adoption could occur—is why the Court’s next two findings created an inconsistent and perplexing precedent, as argued by Justice Sonia Sotomayor in her dissent.<sup>87</sup>

Despite the fact that the Court—for the purpose of argument—assumed Mr. Brown was a legal father, it then found that his legal status did not automatically qualify him to invoke § 1912(d) or § 1912(f).<sup>88</sup> Therefore, the Capobiancos did not have to adhere to the heightened standard required within those provisions, and it was not necessary to terminate Mr. Brown’s parental rights in order for the adoption of Veronica to proceed.<sup>89</sup> In reaching its conclusion, the Court relied on a strict construction of the language used in those provisions in accord with the legislature’s intent in creating the ICWA.<sup>90</sup> The Court focused on several key phrases within the statute in making its decision.<sup>91</sup>

In analyzing § 1912(f), the Court placed emphasis on the words *continued custody*.<sup>92</sup> According to § 1912(f), there cannot be a termination of parental rights without a showing “beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.”<sup>93</sup> The Court, by referencing several definitions of the word “continued,” held that the legislature’s use of the terms *continued custody* in § 1912(f) “refers to custody that a parent already has (or at least had at some point in the past).”<sup>94</sup> Since Mr. Brown never had any custodial relationship

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86. *Id.*

87. *Adoptive Couple*, 133 S. Ct. at 2578-79 (Sotomayor, J., dissenting) (noting the population of unwed Indian parents involved in their children’s lives, but who have never obtained custody, on whom the majority’s holding could potentially impact).

88. *Id.* at 2557, 2560 (majority opinion).

89. 25 U.S.C. § 1912(d), (f) (2012); see *Adoptive Couple*, 133 S. Ct. at 2559-60.

90. *Adoptive Couple*, 133 S. Ct. at 2561-65.

91. *Id.* at 2561-63.

92. *Id.* at 2557, 2560.

93. § 1912(f).

94. *Adoptive Couple*, 133 S. Ct. at 2560.

with Veronica, the Court determined this portion of the statute to be inapplicable.<sup>95</sup>

The Court also reached a similar conclusion when reviewing § 1912(d).<sup>96</sup> Under § 1912(d), if a party seeks to terminate the parental rights of an Indian parent, that party must make a showing that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . .”<sup>97</sup> Looking specifically at the phrase *breakup of the Indian family*, the Court interpreted this to mean “the discontinuance of a relationship” or “ending as an effective entity.”<sup>98</sup> Since at the time the Capobiancos filed for adoption of Veronica she had never been in the legal or physical custody of Mr. Brown, there was no relationship that would be discontinued and “no effective entity that would be ended.”<sup>99</sup>

The legislative intent was also a major influence on the majority’s findings. When reviewing § 1901, which outlines the congressional findings, the Court recognized an allegiance between the events that led to the law’s creation, and the language used in § 1912(d) and § 1912(f).<sup>100</sup> Further, § 1901(4) states that “an alarmingly high percentage of Indian families are broken up by the removal . . . of their children . . . and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes . . . .”<sup>101</sup> Additionally, § 1902, which is the congressional declaration of policy, states that minimum federal standards were established regarding the “removal of Indian children from their families and the placement of such children in . . . homes which will reflect the unique values of Indian culture . . . .”<sup>102</sup> In reviewing the legislative intent, the Court determined that § 1912(f) and § 1912(d) were created to include parents with a pre-existing custodial relationship to the Indian child.<sup>103</sup>

Although it was an arguably paradoxical finding, the Court was clear that § 1912(f) and § 1912(d) were not applicable to Mr. Brown, despite the fact that he was presumed to be the legal father of Veronica.<sup>104</sup> The Court, however, implied that the placement preference located in § 1915(a) could have still been considered in this set of

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95. *Id.* at 2560, 2562.

96. *Id.* at 2562-64.

97. § 1912(d).

98. *Adoptive Couple*, 133 S. Ct. at 2562 (internal quotation marks omitted).

99. *Id.* (internal quotation marks omitted).

100. 25 U.S.C. § 1901 (2012); *Adoptive Couple*, 133 S. Ct. at 2563.

101. § 1901(4).

102. 25 U.S.C. § 1902 (2012).

103. *Adoptive Couple*, 133 S. Ct. at 2563.

104. *Id.* at 2564.

circumstances if an extended Indian family member, another Indian family, or the tribe, had applied for adoption of Veronica.<sup>105</sup> Section 1915(a) requires that in removal proceedings regarding the placement of Indian children, courts must give preference to any extended Indian family member, the tribe itself, or a non-relative Indian family who files for adoption of the Indian child, unless good cause dictates otherwise.<sup>106</sup> In his concurring opinion, Justice Stephen Breyer alludes to the potential loopholes in such a finding.<sup>107</sup> Perhaps the most important line within his opinion is the last one, in which he poses the following question: “Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court’s consideration of ‘good cause?’”<sup>108</sup> The potential difficulty with such a finding is that, although Mr. Brown was not afforded the protection of § 1912(f) and § 1912(d), had he or his tribe applied for adoption of Veronica through his membership within the tribe, he could potentially have adopted her as a result of the placement preference provision.<sup>109</sup> Surely, Justice Alito, by his powerful admonishment of Mr. Brown for attempting to “play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests,” could not have then determined it would be appropriate for Mr. Brown to achieve the same objective by using his placement preference provision card instead.<sup>110</sup>

Since no person, other than the Capobiancos, had petitioned for adoption of Veronica, the Court did not have to specifically address those circumstances, and, after rendering its decision, the matter was remanded to the state court to determine whether or not to grant the adoption of Veronica to the Capobiancos.<sup>111</sup> Ultimately, the South Carolina Supreme Court ordered that Veronica be returned to the Capobiancos, and her adoption was finalized by the family court on July 24, 2013 (although an intense series of events unfolded before Veronica was actually returned to the Capobiancos on September 24, 2013).<sup>112</sup>

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105. See *id.* at 2564-65 (citing the provisions in 25 U.S.C. § 1915(a) (2012), and stating that none of the possible parties under the statute are parties to the action).

106. 25 U.S.C. § 1915(a) (2012).

107. *Adoptive Couple*, 133 S. Ct. at 2571 (Breyer, J., concurring) (stating that “other statutory provisions not now before us may nonetheless prove relevant in cases of this kind”).

108. *Id.*

109. See *id.* at 2564 (majority opinion) (noting the South Carolina Supreme Court’s error in applying § 1915(a), and stating that none of the other factors in § 1915(a) apply to the present case).

110. *Id.* at 2565.

111. *Id.*

112. See Totenberg, *supra* note 32; see also Max Ehrenfreund, *Baby Veronica Returned to Adoptive Parents*, WASH. POST, Sept. 24, 2013, [http://articles.washingtonpost.com/2013-09-24/national/42342067\\_1\\_melanie-capobianco-dusten-brown-james-fletcher-thompson](http://articles.washingtonpost.com/2013-09-24/national/42342067_1_melanie-capobianco-dusten-brown-james-fletcher-thompson).

Therefore, the South Carolina Supreme Court did not have the opportunity to set any legal precedent as to how a court should apply the placement preference provision under these circumstances, and whether good cause might be found to deny adoptive placement with the extended Indian family, another Indian family, or the tribe.

### VIII. CONFUSION REQUIRES CLARITY: THE NEED FOR REFORM

The Court's decision is perplexing, not because it followed strict construction of the statute itself, but because by doing so, the majority recognized a man's legal status as a parent while simultaneously denying him the rights afforded to a parent under the same statute. Further, the Court's interpretation of the requirement that there must be a pre-existing custodial relationship for § 1912(f) and § 1912(d) to apply, will exclude some unwed fathers who had an active role in the Indian child's life prior to placement for adoption.<sup>113</sup> In addition, the decision implies that the placement preference provision under § 1915(a) will still apply, even when the unwed Indian father's rights do not need to be terminated, which may enable the unwed father to petition for adoption of the child through his tribe.<sup>114</sup> The legislature must amend the ICWA to provide the clarity that state courts will need when confronting the various scenarios that this decision has failed to secure guidance in. The decision leaves many gaps in how this law can be logically applied on a multitude of levels. As a result, the legislature will have to reform the law in several ways to avoid a series of inconsistent outcomes.

The first provision the legislature must amend is the definition of a "parent" in § 1903(9).<sup>115</sup> As it exists now, the definition does not specify whether or not a parent, although adjudicated, needs to either currently have, or have previously had, physical or legal custody of the child in order to benefit from the other provisions of the law.<sup>116</sup> Without clarification, as Justice Sotomayor notes in her dissent, a number of unwed Indian parents will be excluded from the protection of the ICWA.<sup>117</sup> Specifically, Justice Sotomayor argues that the majority's interpretation of the ICWA is much more far-reaching than applying it to an unwed father who has not taken any active role in the child's life or

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113. *Adoptive Couple*, 133 S. Ct. at 2563.

114. *Id.* at 2564.

115. *See* 25 U.S.C. § 1903(9) (2012).

116. *Id.* The statute states: "'parent' means any biological parent or parents of an Indian child . . . who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." *Id.*

117. *Adoptive Couple*, 133 S. Ct. at 2572-73 (Sotomayor, J., dissenting).

the birth mother's pregnancy.<sup>118</sup> Instead, its interpretation would exclude a biological parent who may have actively participated in the birth mother's pregnancy, or who may have even been a regular presence in the child's life, but who never obtained any legal or physical custody of the child.<sup>119</sup>

An additional change in this provision is needed. As previously noted, § 1903(9) does not specify whether or not paternity must be established by a certain point in a potential adoption proceeding in order for a putative Indian father to assert his parental rights under the ICWA. Perhaps the language in § 1903(9) should include a specific time period by which a putative father must establish paternity in order to benefit from the protections of the ICWA, unless there is good cause shown for his failure to do so. Such a revision could help avoid a situation whereby a putative, unwed Indian father, who was on notice of his potential paternal role, failed to take timely action to establish his paternity. Accordingly, he could be prevented from doing so once the Indian child has already bonded with a pre-adoptive parent and an adoption is pending. Further, although § 1911(c) states that an "Indian custodian" of the child may intervene in a state court proceeding for the termination of parental rights of an Indian child "at any point in the proceeding,"<sup>120</sup> a male who is adjudicated to be the biological father does not automatically qualify as a "custodial parent" under the statute.<sup>121</sup> Therefore, another conflict exists between the language of § 1903(9) and § 1911(c). Thus, the phrase "Indian custodian" found in §1911(c) may need to be replaced should the legislature choose to clarify the definition of a father under the ICWA. This is not the only section of the law which needs revision.

Obviously, the Court focused heavily on the language used in § 1912(f) and § 1912(d) in reaching its decision.<sup>122</sup> There is logic in the majority's interpretation, especially when combined with the congressional findings and declaration of policy found within the statute. As it currently exists, and in light of the majority's decision, the protections included in § 1912(f) and § 1912(d) will not apply to any non-custodial parent. This not only excludes an unwed Indian father who took no active role in the birth mother's pregnancy or the child's life upon birth, but it will also exclude any unwed Indian father who may have been an active participant, but who never had legal or physical

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118. *Id.*

119. *Id.* at 2573.

120. 25 U.S.C. § 1911(c) (2012).

121. *Adoptive Couple*, 133 S. Ct. at 2560-64 (majority opinion).

122. *Id.*

custody of the child. Many states will require an unwed father's consent if he provided some financial support for the child, even if that unwed father never had legal or physical custody of the child.<sup>123</sup> Therefore, although it seems that the legislature intended to provide greater protection to Indian parents through the creation of the ICWA, the restrictive language of § 1912(f) and § 1912(d) actually provides less protection to some Indian unwed fathers than they could potentially receive in state courts.<sup>124</sup>

Last, the legislature must address the defect in the majority's decision regarding the continued application of the placement preference within § 1915(a)—even in cases where an unwed Indian father is not entitled to the protections of other sections of the ICWA. If an Indian, non-custodial, unwed father cannot invoke the heightened protections outlined in § 1912(f) and § 1912(d), because he has not established any prior custodial relationship with the Indian child, to allow that same unwed father to intervene by filing an adoption petition under the umbrella of his involvement in a tribe is illogical. If the legislative intent behind the creation of the ICWA, as the Court determined, was to prevent Indian parents with pre-existing custodial relationships from being the target of unjust social service agency practices regarding removals, and to ensure that children who are removed from such parents maintain continuity with regard to the customs and practices of the tribes to which they were domiciled, then allowing § 1915(a) to stand on its own as a separate remedy when the overall circumstances do not fall within the purview of the statute's protection could result in outcomes that may not reflect the best interest of the children (or potential non-Indian mothers with whom those children may have presumptively been domiciled).

## IX. CONCLUSION

Many conflicting outcomes arose from just one single case as it navigated through the complex waters of the ICWA. The child, Veronica, spent the first two years of her life with the Capobiancos before the South Carolina court granted her biological father custody pursuant to the ICWA.<sup>125</sup> As a result, she was sent to live with her biological father, despite the two having had no pre-existing relationship, and even though, under South Carolina law, he would not

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123. See RIGHTS OF UNMARRIED FATHERS, *supra* note 19, at 1-2.

124. See *Adoptive Couple*, 133 S. Ct. at 2565.

125. See Zorn, *supra* note 6 (providing the time of Veronica's birth, and describing the adoption by the Capobianco family, and subsequent placement with her biological father).

have been considered a parent whose consent to her adoption was required.<sup>126</sup> At that point Mr. Brown, who biologically became a father in 2009, actually began being a father.<sup>127</sup> Then, almost a year and a half later, the Court determined that the South Carolina Supreme Court interpreted the ICWA incorrectly.<sup>128</sup> Ultimately, on remand, the South Carolina Supreme Court ordered the return of Veronica from her father to the Capobiancos, and the adoption was finalized.<sup>129</sup> Finally, on September 23, 2013, Veronica, then four-years-old, was reunited with her adoptive parents.<sup>130</sup>

If as a society, one of our primary goals is to act in the best interests of children, especially those involved in custody proceedings whereby their lives are full of waves of disruption, the legislature must act quickly to steady the waters and amend the ICWA. Although the Court did not render a decision that invalidated the ICWA, or call into question Congress's power to enact such a law, it did set a precedent that can still have far-reaching consequences.<sup>131</sup> The intentions that led to the creation of the ICWA in 1978 could potentially be distorted by this decision. Congress must revisit the goals that the ICWA was meant to achieve, and determine how to turn this recent confusion into clarity.<sup>132</sup>

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126. See *Adoptive Couple*, 133 S. Ct. at 2559; Zorn, *supra* note 6.

127. See *Adoptive Couple*, 133 S. Ct. at 2558 (stating that Veronica was born in September of 2009).

128. *Id.* at 2552, 2565.

129. See Ehrenfreund, *supra* note 112; Totenberg, *supra* note 32.

130. Ehrenfreund, *supra* note 112.

131. See *supra* Part VII.

132. See *supra* Part VIII.

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