Adoptive Couple -v- Baby Girl

Presentation and Materials by:
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Parties

- Veronica
- Christinna Maldonado, Birth Mother
- Dusten Brown, Birth Father
- Matt Capobianco and Melanie Duncan, Adoptive Couple
- Cherokee Nation
- Jo Prowell, Guardian Ad Litem
- Tommy and Alice Brown, Grandparents
- Robin Brown, wife of Dusten Brown

Facts/Timeline

- December 2008 – Engagement
- January 2009 – Pregnancy
- April 2009 – Breakup
- June 2009 – Adoption Agency involvement
- August 2009 – Notice to Cherokee Nation
- September 2009 – Birth
- January 2010 – Father served notice
  - Cherokee Nation confirms membership
  - Father Deployed to Iraq

Facts/Timeline

- May 2010 – Temporary custody order
- September 2011 – Family Court Trial
- October 2011 – Family Court denies adoption and orders custody to father
- December 31, 2011 – Father receives custody
- April 2012– South Carolina Supreme Court
- July 2012– Opinion from South Carolina Supreme Court
- October 2012- Petition for Cert – United States Supreme Court

Facts/Timeline

- January 2013 – U.S. Supreme Court grants certiorari
- April 2013 – USSC Oral Argument
- June 2013 – USSC Opinion, reversed and remanded
- July 17, 2013 – Cherokee Nation guardianship
- July 17, 2013 – South Carolina Supreme Court Orders adoption finalized

Facts/Timeline

- July 30, 2013 – AC files in OK for registration of SC orders
- July 31, 2013 – Adoption finalized
- August 4, 2013 – Arrest warrant for Dusten Brown for "custodial interference"
- August 30, 2013 – Nowata County order transfer of custody
  - OKSC Stays the Order

Facts/Timeline

- September 23, 2013
  - Oklahoma Supreme Court lifts the stay of the Nowata County District Court Order
  - Dusten Brown relinquishes custody of Veronica

Still pending

- South Carolina
  - Criminal Charges
  - Contempt actions seeking fine of $1,000 per day doubling each day until transfer of custody up to $32,000 per day
- Oklahoma
  - AC Motion for Attorneys fee in excess of

$1 million dollars

Supreme Court of South Carolina Holding (affirming Family Court)

- ICWA applies because of Indian child and child custody proceeding as defined by ICWA
- Father is parent under ICWA definitions
- Adoptive Couple did not meet burden of ICWA 1912 (d) or 1912 (f)
- Even if Adoptive Couple met burden, ICWA placement preferences (1915) applied
  - This was not decided by Family Court
- Custody with father is in child's best interest

Whether ICWA is Constitutionally Sound (Majority)

- South Carolina Supreme Court's interpretation of ICWA would raise equal protection concerns (puts vulnerable children at great disadvantage solely because ancestor was Indian)
- Majority avoids those concerns by holding 1912(d) and 1912 (f) do not apply in this case

Whether ICWA is Constitutionally Sound (Thomas, Concurring)

- Joins in Court's opinion in full but writes to explain why constitutional avoidance requires outcome
- Domestic relations long regarded as exclusive province of states
- Constitution does not grant Congress power to enact ICWA
- Constitution only grants Congress power to enact laws regarding trade/commerce with Indian tribes

Whether ICWA is Constitutionally Sound (Sotomayor, Dissent)

- Majority opinion hints at lurking constitutional problems that are irrelevant to its own statutory analysis (blood quantum and treating Indian children differently than other children) Indian status is not a racial classification. *United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974)

Whether ICWA is Constitutionally Sound (Sotomayor, dissent)

- Points to Thomas' concurrence and indicates no party advanced that argument and it goes against precedent. *U.S. v. Lara*, 541 U.S 193, 200-201 (2004) (Congress has plenary authority over Indians)
- Particularly adverse to holding when Federal Govt. requires prerequisite to official recognition that tribes trace descent from a historical tribe. 25 CFR 83.7 (e)

Whether Father is a Parent 1903(9)? (Majority)

- Did not determine whether father is parent but assumes for sake of argument father is parent under ICWA.
- Even if father is an ICWA parent, 1912(d) and 1912(f) do not bar termination of father's parental rights

Whether Father is a Parent 1903(9)? (Sotomayor, Dissenting)

- ICWA defines parent broadly
- Paternity and has been acknowledged and established
- *Holyfield* stated that critical terms in ICWA are to have uniform federal definitions
- Unsurprising but far from unimportant, majority assumes for purposes of analysis father is parent
- As a parent, father has substantive rights under ICWA

1912 (f) and "continued custody"

"No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

1912 (f) and "continued custody" (Majority)

- Continued custody plainly refers to a pre-existing state
- 1912 (f) does not apply where the Indian parent never had legal or physical custody of the Indian child
- Reading comports with statutory purpose of ICWA as primary intent was unwarranted removal of Indian children from Indian families

1912 (f) and "continued custody" (Majority)

- Here the adoption of an Indian child is voluntarily and lawfully initiated by non-Indian parent with sole custodial rights-ICWA's purpose is not implicated
- BIA ICWA Guidelines support this reading
- Father cannot invoke 1912(f) because at time of the adoption proceedings, he never had physical or legal custody of child

1912 (f) and "continued custody" (Majority)

- State law may provide protection to these fathers and this does not undermine our analysis of the ICWA

1912 (f) and "continued custody" (Breyer, Concurring)

- We decide no more than necessary.
- This holding does not decide whether or how 1912 (f) applies to any father with a different fact pattern

1912 (f) and "continued custody" (Scalia, Dissenting)

- There is no reason "continued custody" must refer to custody in the past rather than custody in the future
- This reading is in accordance with rest of the statute

1912 (f) and "continued custody" (Sotomayor, Dissenting)

- Majority works back to front and literalness may strangle meaning
- Majority created a illogical piecemeal due to perceived parental shortcoming of father by creating a new subclass of fathers who have never had custody of children
- Majority then finds this subclass of fathers receive only procedural rights under ICWA (notice, intervene, transfer) but not substantive protections of 1912 (f)

1912 (f) and "continued custody" (Sotomayor, Dissenting)

- This newly manufactured subclass of father is overbroad and goes against ICWA's concept of protection of parent/child relationship
- What standard will courts now use for this subclass that does receive procedural protection under ICWA but not substantive protections under 1912 (f)
- State law will result in patchwork result

1912 (d) And the Breakup of Indian Family

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

1912 (d) And the Breakup of Indian Family (Majority)

- This section applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights
- When an Indian parent abandons an Indian child prior to birth and that child has never been in the legal/physical custody of the Indian parent there is no relationship to be discontinued

1912 (d) And the Breakup of Indian Family (Majority)

- This interpretation is consistent with 1912 (f) regarding the removal of Indian children from their families
- BIA Guidelines support this view

1912 (d) And the Breakup of Indian Family (Majority)

- Reviewing 1912 (d), (e) and (f) the breakup of Indian family should be read in harmony with continued custody
- These provisions do not create rights for unwed fathers where no such rights otherwise exist
- The dissent claims this reasoning extends to all Indian parents who have never had custody but we have added requirement of abandonment prior to child's birth

1912 (d) And the Breakup of Indian Family (Majority)

- Requiring remedial efforts in cases where father abandoned child prior to birth and who never had custody of the child would be bizzare and would dissuade some adoptive parents from adopting Indian children

1912 (d) And the Breakup of Indian Family (Breyer, Concurring)

- Court is not deciding whether or how 1912 (d) and (f) apply to facts other than these facts

1912 (d) And the Breakup of Indian Family (Sotomayor, Dissenting)

- Working back to front, Court finds that 1912 (d) is tainted by its association with 1912 (f)
- Court determines that a family bond that does not take a custodial form is not worth preserving from "breakup"
- The use of the word abandonment will sow confusion (term of art in family law cases and varies from state to state)

1912 (d) And the Breakup of Indian Family (Sotomayor, Dissenting)

- Reading ICWA from front to back where 1912 (a), (b), (c), (d), apply (e) and (f) apply also
- Majority disregards ICWA's sweeping definition of termination of parental rights

1912 (d) And the Breakup of Indian Family (Sotomayor, Dissenting)

- Majority states it would be unusual to apply rehabilitation requirement where parent never had custody but state child welfare authorities can and do this
- Adoptive Couple did not have to undertake these rehabilitative efforts just prove the efforts have been made

1915 Placement Preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

1915 Placement Preferences (Majority)

- FIRST COURT TO HOLD
- 1915 preferences are inapplicable in cases where no alternative party has formally sought to adopt the child
- There is no preference to apply if no party comes forward
- In this case only Adoptive Couple came forward to adopt
- Father argued that his parental rights should not be terminated

1915 Placement Preferences (Majority)

- Left open that a tribe may alter 1915 in a way to include a father whose rights were terminated but who has now reformed
  - Cherokee Nation is doing so

1915 Placement Preferences (Breyer, Concurring)

- This section is not before us
- This section allows a tribe to establish a different order of preference
- Could these preferences allow an absentee father to re-enter a special statutory order of preference with support from the tribe

1915 Placement Preferences (Sotomayor, Dissenting)

- Majority does not and cannot foreclose the possibility on remand that grandparents or other relatives may formally petition for adoption of Baby Girl

Policy Disagreement?

- References to blood quantum
- References to remote ancestor
- Hints of lurking constitutional issues
- Prioritizing Congressional purpose (Breakup of family is primary while failing to mention tribe's interest)
- ICWA was meant to put restrictions on states regarding custody cases involving Indian Children

OICWA

- 10 O.S. § 40.1
  - "It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated."
- Arguably limits 1912(d), (f) holdings of USSC decision

OICWA

- 10 O.S. § 40.1
  - "The placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act."
- Arguably limits 1915(a) holding of USSC decision

DHS Policy

340:75-19-14 - Instructions to staff

- "Continued efforts required to place child within ICWA preferences. When the Indian child is not placed in accordance with the Federal and State ICWA because of a lack of resources, the CW specialist, in cooperation with the child's tribe, continues to search for a placement that is compliant. The obligation to meet the placement preferences continues throughout the case. When a placement is located within a higher order of preference, the child is moved into that placement unless the court finds good cause to prevent the move"

DHS Policy

340:75-19-19 - Instructions to staff

- "Active efforts. Evidence that active efforts were provided to the family must be presented in any court proceeding to terminate parental rights to the Indian child. When no services have been provided to the family related to the reason for the child's removal, there may not be sufficient evidence to sustain the petition or motion for termination of parental rights."

To be determined

- Does decision apply to deprived cases at all?
- In private adoptions:
  - Support payments, visitation, putative father registry
  - Do preferred placement preferences have to "formally petition" or can they simply file some type of notice?
  - Time limitations on "legal or physical custody?"

QUESTIONS?

- Thank you.