Understanding the Supreme Court's Decision in *Ad*

The U.S. Supreme Court decision in *Adoptive Couple v. Baby Girl* addressed some fundamental questions about the rights of birth parents and families in the context of the attempted adoption of an Indian child by a non-native family. Only the second Indian Child Welfare Act (ICWA) case ever decided by the Court, the case will affect interpretations of the ICWA by federal and state courts for many years. As demonstrated by the decision on remand, there is a great potential for the case to be misinterpreted by lower courts and careful analysis of the Court's opinion is vitally important.

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Adoptive Couple v. Baby Girl

In 2013, the U.S. Supreme heard only the second case involving the Indian Child Welfare Act (ICWA) since its enactment in 1978—*Adoptive Couple v. Baby Girl*,[2] the so-called Baby Veronica case. This case involved the attempted adoption of Baby Veronica, the daughter of a non-Indian mother and Cherokee father, by a non-native couple in South Carolina. The case attracted national attention from media outlets such as the "Dr. Phil Show" and "Anderson Cooper 360." Unfortunately, most of the coverage was misleading and presented an inaccurate and one-sided picture of the case, limited largely to the perspective of the prospective adoptive parents. Subsequent to the decision, many of the descriptions of the Court's holding were not entirely accurate, suggesting that the Court held that the ICWA does not apply in its entirety to cases like the Baby Veronica case, an overstatement of the Court's holding that failed to take into account the important nuances in the decision. The subsequent misreading of the decision by the South Carolina Supreme Court on remand granting the adoption of Baby Veronica by the non-Native couple without requiring any consent by the father nor a hearing to determine the best interests of Baby Veronica is a particularly tragic example of the potential for this decision to be misinterpreted. This goal of this article is to ensure that attorneys who deal with the ICWA have a fuller understanding of the case and limitations of the Court's decision, as well as the appropriate application of the ICWA and state laws pertaining to Indian children in future cases where a parent may not have had prior physical or legal custody.

The Legal Proceedings

As noted, *Adoptive Couple* involved a non-native couple in South Carolina seeking to adopt a young Cherokee girl (Veronica) over the objections of her Cherokee father, who asserted the primacy of his own parental rights. The child was initially placed with the family by the birth mother in September 2009. Hearings were held before the South Carolina Family Court, which applied the ICWA and transferred physical and legal custody of Veronica to her father in December 2011. The South Carolina Supreme Court affirmed in July 2012.

The U.S. Supreme Court, in a 5-4 decision written by Justice Samuel Alito, reversed the South Carolina Supreme Court decision in June 2013 and remanded the case for further hearings to determine who should have custody. In so doing, it held that ICWA provisions on active efforts to prevent the breakup of an Indian family[3] and heightened burden of proof for termination of parental rights[4] did not apply to this private adoption proceeding. It also held that the section of the act that deals with adoptive placement preferences[5] did not preclude adoption by prospective non-Indian adoptive parents where no individuals within the act's placement preferences had formally sought to adopt the child.[6] Aside from finding that these sections were not applicable to this adoption, the Court did not otherwise specify the law to be applied on remand. The South Carolina Supreme Court held that an order be issued finalizing the adoption, and an adoption decree was entered shortly thereafter. Following additional proceedings before the Oklahoma and Cherokee Nation courts involving jurisdictional and enforcement issues, Veronica was returned to the adoptive parents in September 2013 by her father, pursuant to court orders issued at that time.

This case raises fundamental questions about the U.S. adoption system and the rights of birth fathers and their families vis-à-vis those of prospective adoptive parents. Although this case specifically deals with the attempted adoption of an Indian child covered by ICWA, the circumstances of this adoption are not unique to Indian children, fathers, and families and raise larger issues of legal policy. The remainder of this article will discuss the legal ramifications of the U.S. Supreme Court decision for future cases and attempt to provide some context for the decision.

Factual Background

In understanding this case, one must first consider the variance between the factual emphasis of the U.S. Supreme Court and the more comprehensive description of the facts in the initial South Carolina Supreme Court, as the two decisions present significantly different pictures of the underlying facts of the case.

As Summarized in the U.S. Supreme Court Opinion

Baby Veronica's non-Indian mother and her father (Dusten Brown), a member of the Cherokee Nation, were engaged to be married. When he learned of the pregnancy, the father sought to move up the date of the marriage. The mother refused, at which point the relationship deteriorated and the engagement was broken off. Shortly thereafter, the mother sent Brown a text message asking if he would relinquish his parental rights, and he sent her a text message agreeing to do so.

During the pregnancy, the birth mother decided to put her infant up for adoption without informing the father. She arranged for a private adoption with a South Carolina couple. Because the mother knew of the father's Cherokee heritage, her attorney contacted the Cherokee Nation to determine if the infant was eligible for membership in the tribe, but misspelled the father's name and had the wrong birthdate for him. Based upon that information, the Cherokee Nation responded that it could not verify the father's membership. Once it received accurate information, it later affirmed that the father was a member of the nation and that Veronica, his newborn daughter, was eligible for membership. The infant was placed with a South Carolina couple at birth, and an adoption petition was filed a few days later. The father was served with the adoption papers four months after the petition was filed. During those four months, he had no contact with the birth mother or child. When he was served, he signed for papers presented to him by a process server, believing he was relinquishing his rights to the birth mother. Almost immediately he determined that was not the case, and the next day he consulted an attorney, challenged the adoption, and sought a stay of the proceedings. He also had a paternity test done that confirmed he was Veronica's father.[7]

Almost two years later, the South Carolina Family Court applied the ICWA, denied the adoption, and returned Veronica to her father. The South Carolina Supreme Court affirmed the family court's decision.

Additional Facts from the South Carolina Supreme Court Decision

When the father texted that he would relinquish his rights, he did so believing that he was doing so to the mother and did not know that she was planning to place the child up for adoption. He testified that had he known, he would have never relinquished his rights.

Because the child was born in Oklahoma, it was necessary for the child to be placed in South Carolina through the Interstate Compact on the Placement of Children (ICPC), a compact signed by all 50 states and the District of Columbia that is recognized under federal law as the mechanism for transferring custody of a child across state lines. The ICPC form signed by the mother did not reveal that Veronica was Native American. If that document had been accurate and the Cherokee Nation properly alerted to the child's status, the South Carolina couple would never have received permission to remove the child from Oklahoma and transport her to South Carolina.

The father was a soldier in the U.S. Army, and the delayed notification of the adoption to him (four months after the case was filed) took place only days before he was scheduled to deploy to Iraq. The reason for the delay in the court proceedings, decision on the adoption petition, and father's objection to the adoption was his year of service in Iraq that commenced almost immediately after he was given notice of the adoption.

When the father returned from Iraq, the South Carolina Family Court held a hearing to resolve whether the proposed adoption should proceed. While the court did utilize the ICWA in making its decision, it also found that, "Father, despite some early indications of possible lack of interest … not only reversed course at an early point but has maintained that course despite … active opposition [from the prospective adoptive parents]." The court also found that Mr. Brown "was a good father who enjoyed a close relationship with his other daughter" and that "he and his family have created a safe, loving, and appropriate home for [Veronica]." The court also found "no conflict" between recognizing the father's parental rights and the best interests of Veronica.[8] Thus, this was not a case where the Family Court viewed ICWA as mandating an outcome inconsistent with Veronica's best interests.

None of these facts were included in the U.S. Supreme Court's decision. Similarly, the majority opinion also did not reference the family court finding, cited in Justice Sonia Sotomayor's dissent,[9] that the birth father was "a fit and proper person to have custody of his child", who "has demonstrated [his] ability to parent effectively" and who possesses "unwavering love for this child."

The U.S. Supreme Court Decision in *Adoptive Couple v. Baby Girl*

The U.S. Supreme Court granted *certiorari* to address two questions: (1) The rights of a noncustodial parent under ICWA in the context of a voluntary adoption and (2) whether the term "parent" in ICWA requires an unwed father to comply with state law rules to attain legal status as a parent. By a 5-4 vote, the Supreme Court ruled in favor of the prospective adoptive parents, based upon an interpretation of the ICWA that narrowed the application of 25 U.S.C. § 1912(d), requiring active efforts to prevent the breakup of an Indian family; § 1912 (f), providing standards to be applied in termination of parental rights cases; and § 1915(a), adoptive placement preferences. Some parties will likely reference the broad terms used in some of the majority's holdings in an attempt to apply more expansively the Court's limitations upon the application of ICWA. One of the five justices in the majority, Justice Stephen Breyer, however, filed a concurring opinion explaining the opinion as a very narrow decision deciding "no more than is necessary."[10] This tension between the majority decision and that of one justice whose vote was necessary to constitute a majority will be further explored later in this article. Of note, the Court did not adopt arguments challenging the constitutionality of ICWA based upon an assertion that its application here would be race-based, thereby triggering strict scrutiny review, although it did suggest (without any explanation) that a contrary result here would "raise equal protection concerns."[11]

What the Court Held

As noted, the Court interpreted three sections of ICWA: §§ 1912(f), 1912(d), and 1915(a). The first two sections were the substantive standards applied by the South Carolina courts when they ruled that Veronica should be returned to her father (i.e., the courts found that active efforts had not been made and that the legal standards for termination of parental rights under the ICWA could not be met). The last section provides that the preferred adoptive preferences for an Indian child are with her extended family, other tribal members, or other Indian families, absent good cause to the contrary.

Termination of Parental Rights

Section 1912(f) provides that termination of parental rights cannot be ordered unless there is a finding beyond a reasonable doubt, supported by the testimony of qualified expert witnesses, that *continued custody* of an Indian child by a parent or Indian custodian is likely to result in serious emotional or physical harm to the child. This is a stricter standard of proof than is found in most state statutes.[12] In its decision, the majority focused upon the language "continued custody" in the statutory provision. It interpreted that language as meaning that a parent must have had either physical or legal custody of the child at some point (which the Court determined by referencing state law) to invoke the protections of this section, or in other words, that it does not apply "when the Indian parent *never* had custody of the Indian child."[13] It supported its interpretation of the ICWA by emphasizing that the act primarily addresses the unwarranted removal of Indian children from Indian families. The Court opined that this purpose was not advanced, in the context of a voluntary adoptive placement, by applying this section to a parent who never had a physical or legal custodial relationship with the child.[14] In so doing, it minimized the importance of the statutory provisions and legislative history emphasizing congressional intent to protect the rights of birth parents, extended families, and tribes and their relationships with their children.

In his concurrence, Justice Breyer limited his agreement with these statements (and again his joinder was necessary to achieving the five-vote majority). He stated that this case does not involve a father with visitation rights or who has paid his child support obligation, been misled about the existence of the child, or was prevented from supporting the child. He asserted that the Court "need not, and in my view does not" now decide how this section applies where those circumstances are present.[15] He did not attempt to explain how this view is consistent with the majority opinion's language about § 1912(f) being inapplicable when a father has never had custody.

Thus, at a minimum, it is clear that in a case that involves an attempted voluntary adoption of an Indian child by a birth mother where a birth father has not had prior legal or physical custody nor (in the court's view) made an effort to establish a relationship with the child by a certain point in time (and what point in time is not exactly clear), the protections of § 1912(f) will not apply. Instead, as suggested in the dissent, the rights of fathers (and their families) will differ by state, as there are a wide variety of approaches in state law, with some focused more on protecting unwed biological fathers' rights and others (such as South Carolina) reflecting pro-adoption policies that "hew to the constitutional baseline" and make it much easier to terminate a father's rights.[16] This is a result inconsistent with the general thrust of ICWA that was designed to address the inability of many state courts to deal appropriately with Indian children and families by creating one set of federal requirements to be applied in all state court child welfare and adoption cases involving Indian children.

Whether the Court's limitation on the application of § 1912(f) will apply in full force in the context of a totally involuntary proceeding (as opposed to a private adoption that started as a voluntary proceeding) will depend upon whether courts focus upon the analysis by the U.S. Supreme Court of the continued custody language in this section of ICWA or Justice Breyer's concurrence where he attempted to limit the scope of the Court's holding to the factual circumstances presented in the case. Of note, support for a narrow reading of the Court's ruling, as suggested by Justice Breyer—one that would limit its application to termination petitions filed in the context of contested private adoption proceedings—might also be derived from the Court's overall analysis in the case, which was based almost entirely upon its unique factual circumstances (i.e., a dispute that arose in the context of an attempted prior adoption as opposed to a removal of a child by a nontribal governmental authority). Similarly, whether § 1912(f) will still apply to some subsegment of noncustodial parents, as Justice Breyer suggested when he enumerated certain circumstances where the act may apply that would not necessarily involve prior custody, or exclude all parents who have not had prior custody based upon language in Justice Alito's opinion, will be a question for courts that interpret this decision in the future.

At a minimum, it is clear that in a case that involves an attempted voluntary adoption of an Indian child by a birth mother where a birth father has not had prior legal or physical custody nor (in the court's view) made an effort to establish a relationship with the child by a certain point in time, the protections of 1912(f) will not apply.

Of note, if under state law an unwed father obtains presumptive legal custody at birth, then §§ 1912(f), and 1912(d), as explained below, should still apply. This is because the court acknowledged that either legal *or* physical custody was sufficient to trigger this section of the ICWA.

Active Efforts to Prevent the Breakup of the Indian Family

The South Carolina courts also rested their decision in favor of the birth father on § 1912(d). This section provides that any party seeking a foster care placement or termination of parental rights must undertake active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, a stricter standard that the "reasonable efforts" standard generally applicable under federal and state laws.

In its decision, the U.S. Supreme Court focused upon the language in § 1912(d), emphasizing that the "breakup of the Indian family" is the harm to be avoided. It reasoned from this observation

that § 1912 does not apply when an Indian parent abandons a child prior to birth and the parent has never had prior physical or legal custody. The majority supported its holding by emphasizing that the purpose of § 1912(d) was to prevent the breakup of Indian families, and not to create parental rights where none would otherwise exist. It also suggested that applying this requirement in these circumstances would "place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home … " because of the obligation that it would place upon prospective adoptive parents.[17] This was a curious rationale, as it is the state that has the obligation to make active efforts before an involuntary termination of parental rights can be granted under § 1912(f), not a prospective adoptive couple. In her dissent, Justice Sotomayor argued that this particular observation, among others, illustrated that the Court's holding was really based upon a policy disagreement with Congress' decision in ICWA to make the adoption of Indian children by non-Indian families less likely, rather than a straightforward statutory construction as asserted by the Court.[18]

In reaching its holding, the Court clearly characterized the actions of the father here as abandonment of the child, although it never defined that term exactly. It will undoubtedly be the subject of future cases because, as the dissent pointed out, the definition of abandonment varies greatly from state to state.[19]

Much of the analysis of § 1912(d) seems to be based upon the particular facts of this case, especially the voluntary adoption context from which it arose. In this regard, Justice Breyer's questions about the appropriateness of applying the Court's holding to a litany of other circumstances support an interpretation that the scope of the holding in terms of § 1912(d) should be viewed narrowly, especially since his observations align with the Court's inclusion of abandonment as one of the elements that must be shown before a court can waive the application of § 1912(d). Of note, while the dissent disagreed with the analysis of the Court, it "welcomed" the "limitation" on the Court's holding reflected by its inclusion of the abandonment requirement in its interpretation of this section.[20]

As the dissent also pointed out, other federal laws and the statutes of all 50 states that implement that law have a similar requirement that reasonable efforts must be made to preserve and reunify families before a foster care placement or removal of a child from the home.[21] The Court did not address this point in its opinion, nor attempt to explain whether or how this requirement might be applicable to the birth father in this case or similar cases—perhaps a reflection of the Court's inexperience with family law cases, which are generally the prerogative of states and tribes.

Finally, it should be noted that there is nothing in the opinion that would *preclude* a state or private agency from making active efforts to keep an Indian child with her natural family in any child welfare case, even one where there has been no prior custody and legal abandonment of a child by a parent. The Court's holding was only that it is not *required* in certain circumstances.

Adoptive Placement

The final issue in the case was whether the placement preferences in ICWA would prevent the attempted adoption from becoming final even if the father's rights were terminated. Section 1915(a) provides that in the absence of good cause to the contrary, adoptive placements of Indian children must be made in the following order of preference: (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families. The U.S. Supreme Court held that this did not prevent adoption of Veronica by the non-native prospective adoptive parents who fit into none of the preference categories because no alternative party had formally sought to adopt the child. Thus, the preferences were inapplicable. In a footnote, however, the Court suggested that a reformed biological father whose rights have been terminated might re-enter the pool of preferential placement options. In his concurrence, Justice Breyer makes a similar point but uses the term "absentee father." This could occur under a tribal placement preference order based upon § 1915(c), which requires the application by a state court of tribally established placement preferences in lieu of the placement preferences in § 1915(a) when a tribe has adopted its own standard. Although the Court raised the possibility that such a scenario could happen, it left open the question of how to decide such a case if it were presented.[22]

General child welfare statutes are moving in the direction of the ICWA placement preferences, requiring extended families to be informed of the opportunity to serve as a placement for a child that will be placed in foster care and providing that the state must consider giving preference to an adult relative over a nonrelated caregiver.

It is unclear to what extent the Court's analysis of § 1915(a) will apply outside the private adoption context. While its holding is stated in general terms such that it could be argued that it has a broader application to all adoptions, the Court seemed particularly focused upon private adoptions and Justice Breyer's limiting comments may be particularly relevant to an argument that the holding should not be interpreted to apply more broadly.

Of note, the decision did not address the provision of the Bureau of Indian Affairs' ICWA guidelines that requires a diligent national search of potential adoptive families within the preference placement order, nor how that requirement would apply in any other case (although it did cite the guidelines with approval elsewhere in its opinion). In fact, other federal laws require state agencies to diligently recruit foster and adoptive families "that reflect the racial diversity of children in the State for whom foster and adoptive homes are needed"[23]—a requirement that the Court's decision did nothing to change.

It should also be noted that general child welfare statutes are moving in the direction of the ICWA placement preferences, requiring extended families to be informed of the opportunity to serve as a placement for a child that will be placed in foster care and providing that the state must consider giving preference to an adult relative over a nonrelated caregiver.[24] Similarly, some existing case law under ICWA has required, in involuntary cases, notice to extended family members who might be a placement resource for an Indian child.[25] None of this was addressed by the Court.

At a minimum, then, the Court's holding is a clear signal to indi-

viduals within the placement preferences who may want to adopt (even if that intent is contingent upon whether parents' rights are terminated) to formally file for adoption if there are other pending petitions for adoption by individuals who are not preferred placements. In terms of agency activities, however, there are still many requirements in place with regard to diligent searches for preferred placements, particularly relative placements, in federal and state laws, regulations, tribal–state agreements, and other documents. Thus, the impact of the Court's interpretation of § 1915(a) outside of the private adoption context may ultimately be limited in practice.

The Decision's Potential Impact on Other Sections of ICWA

As is often true, the interpretation of a U.S. Supreme Court case in factual and legal contexts that are related to, but different than, the issues determined by the Court can be vitally important in determining the long-term impact of the case. In this respect, two key questions will almost certainly be considered by courts in the aftermath of this case: (1) whether this decision impacts the interpretation and application of other sections in ICWA, and (2) how the decision affects state laws and policies that specifically provide protections to Indian children, parents, and families.

Existing Indian Family Exception

Contrary to some reports, the Court did not adopt the Existing Indian Family doctrine (EIF) in the *Baby Girl* decision. The EIF, which has been followed by a small minority of states, provides that the act does not apply when, in the opinion of the court, the child has not previously been part of an existing Indian family unit. The Court held only that specific sections of the act do not apply in a voluntary adoption proceeding under ICWA, including the involuntary termination of the noncustodial father's parental rights, when the father has not had previous legal or physical custody. However, the Court also noted the dissent's observation that "'numerous' ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody." The provisions of the act mentioned in the dissent were 25 U.S.C. § 1911(b) (transfer to tribal court); § 1913(a) and (c) (governing procedures for a parent of an Indian child to consent to adoption); § 1912(a) (notice); § 1912(b) (right to counsel); and § 1912(c) (access to court documents).[26] The fact that the majority referenced the dissent's analysis, without rejecting it, indicates the majority's acquiescence with the dissent's position that these protections continue to apply to biological fathers even in the absence of a previously existing Indian family.

This reading of the *Adoptive Couple* decision is also supported by the Court's apparent confirmation of the holding as to when the ICWA applies in *Mississippi Band of Choctaw Indians v. Holyfield*,[27] the only other Supreme Court case interpreting the ICWA. In *Holyfield*, the Court held that the statute as a whole is triggered when an Indian child is the subject of a child custody proceeding. The Court in *Adoptive Couple* referenced this holding and noted that it was undisputed that both elements were present in this case.[28] Thus, although fathers without custody may be denied the protections of certain provisions of the ICWA due to the decision in *Adoptive Couple*, the rest of the act, the remaining rights of fathers, and the rights of the child and tribe should still apply. If at least part of ICWA is triggered anytime an Indian child is involved in a child custody proceeding, this is the antithesis of the EIF, which would preclude the application of any part of ICWA in a circumstance where a court has determined there was not a prior Indian family.

Nonetheless, it must also be recognized that the Court in *Adoptive Couple* supported its reading of the language of § 1912(f) by using a rationale (albeit *in dicta*) similar to that in some of the state court EIF cases. Specifically, one of the reasons supporting its ruling was that failure to apply the three sections at issue in the context of an adoption initiated by a non-Indian parent, where the Indian parent has never had legal or physical custody, would not impede "the ICWA's primary goal of protecting the unwarranted removal of Indian children and the dissolution of Indian families." In comparison, the *Holyfield* Court discussed at length the importance of the tribal interests protected in ICWA and acknowledged the importance of the extended family to an Indian child. The dicta in *Adoptive Couple* leaves room for more expansive arguments about the meaning of the Court's decision in regard to the application of the EIF.[29]

This is undoubtedly an area that will be the subject of future litigation, including whether the Court's analysis extends beyond the context of voluntary adoptions and how the sections of the act that do apply fit in with those that do not. For example, § 1913 requires that certain procedures be followed for any consent to relinquish an Indian child for adoption to be valid. Assuming that this section still applies, this would seem to preempt state law that might remove the need for consent. Yet, a hearing pursuant to § 1912(f) might not be available to the parent as a remedy, and a court will need to decide how to proceed—whether the remedy would be a fitness hearing under state law or something else.[30]

Definition of Parent

As noted earlier, one of the *certiorari* questions was how the definition of the term "parent" in 25 U.S.C. § 1903(9) should be interpreted. The specific issue was the meaning of the language indicating that the term excludes an unwed father who has not acknowledged or established paternity. The prospective adoptive parents argued that the key terms "acknowledgment" and "establishment" should be defined by state law because they believed that the father had not acknowledged or established paternity under South Carolina law (although this interpretation was highly questionable). The Court did not decide the issue, but simply assumed, for the purposes of the case, that the father was a parent under the act. The dissent asserted that the terms should be defined by federal law in accordance with the precedent set in *Holyfield* and noted that it is "unsurprising, although far from unimportant" that the majority opinion assumed the father was a parent under ICWA.[31] Of note, the father did acknowledge his paternity in the family court proceedings and established paternity through a DNA test. The majority opinion did not explicitly address whether these actions constituted "acknowledgment or establishment" of paternity for purposes of ICWA.

Foster Care Provisions

25 U.S.C. § 1912(e) applies to the foster care placement of Indian children. It uses the same continued custody language as in § 1912(f). Of all of the provisions not at issue in this case, this is the section whose interpretation is most likely to be affected by the Court's analysis due to the similarities in language between this section and § 1912(f), the termination section at issue in this case. Nonetheless, Justice Breyer's limiting comments may be particu-

larly relevant to an argument that the Court's holding should not be interpreted to apply outside of the specific private adoption context of this case and that § 1912(e) should still apply to all foster care placements.

25 U.S.C. § 1915(b) provides for placement preferences in the context of foster care placements similar to those in § 1915(a). There are strong arguments that this Court's interpretation of § 1915(a) should not affect the implementation of § 1915(b), however, given the different practical and legal context of foster care. A foster care placement by definition is temporary, and foster families generally do not file for placement or even come forward. Rather, children are placed with families by the child custody agency, and theoretically, the entire universe of qualified families would be included in the potential placement pool; the idea of a particular foster family needing to trigger the placement preference by taking a certain action makes little sense in the foster care context. Further, as noted previously, the Court's holding on § 1915(a) seems to be largely based upon the private adoption context of this case, and it provided little explanation for its holding that the section is inapplicable until a preferred placement files a petition for adoption. For all of these reasons, it does not seem likely that the Court's § 1915(a) holding will be extended to § 1915(b).

It is worth noting again that non-ICWA federal law and case law contain placement preference and notice provisions for extended family and require diligent recruitment of ethnically diverse foster homes. These provisions can be reinforced in the context of Indian children through state law, policy, and tribal–state agreements. For these reasons also, the application of 25 U.S.C. § 1915(b) should generally be unaffected by the Court's decision.

Application of State ICWAs and Tribal–State Agreements

The Court's decision did not involve or affect either 25 U.S.C. § 1921 or § 1919, both of which provide mechanisms by which existing or future state laws and policies might be utilized to ameliorate the impact of the U.S. Supreme Court case, or in some instances even make it inapplicable. Section 1921 requires that where any federal or state law provides greater protection of the rights of a parent or Indian custodian, that law shall apply. Thus, the Court's decision did not overturn state Indian Child Welfare Acts (or their equivalent), which provide greater protections to noncustodial parents. Of course, how state courts interpret such laws will be critical. This will depend, in large part, upon whether a unique state intent can be ascertained because the wording of the state statute differs from the federal law or because there is legislative history, a regulatory interpretation, or other evidence that demonstrates that the interpretation of the state's version of ICWA should deviate from the federal ICWA, as it has now been interpreted. In addition, the Court's decision does not preclude the enactment of future state ICWAs or amendments to state ICWAs designed to change the Court's interpretation because of the authority that § 1921 provides to states.

Section 1919 authorizes states and tribes to enter into agreements pertaining to the care and custody of Indian children, including the orderly transfer of jurisdiction on a case-by-case basis. These agreements have often been accompanied by the adoption of state regulations, policies, and procedures that are relevant to some of the issues addressed by the Court in this case—for example, they may require active efforts in all cases—something that the Supreme Court did not preclude. In view of the continued efficacy of this section, it is possible that it could be the source of administrative procedures that would in a *de facto* sense mitigate some of the impacts of this case.

The Case on Remand

In her dissent, Justice Sotomayor specifically stated that "the majority does not and cannot foreclose the possibility that, on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation" may petition for her adoption and that they would be entitled to consideration under the placement preferences in section 1915(a). Justice Breyer, in his concurrence, also noted that § 1915(a) may be relevant in cases of this kind.[32] No relatives of Veronica had filed for adoption at the time of the decision, and the Cherokee Nation had not brought forward a proposed alternative adoptive placement when it intervened, almost certainly because all concerned were focused on obtaining custody for the father. Nonetheless, when the case was remanded, the South Carolina Supreme Court, by a 3-2 vote, refused to allow any other petitions for adoption to be filed based on the theory that the U.S. Supreme Court intended to "foreclose successive § 1915 petitions." In addition, although the U.S. Supreme Court did not interpret or change the substance of the consent provisions in § 1913, the South Carolina Supreme Court on remand held that the father's consent was not required based on state law. It also, without any explanation and over the objection of the dissent, did not require a hearing on the best interests of the child.[33] By so doing, the court decided the placement and fate of an almost 4 year old girl without hearing any evidence about her current status or well-being, the impact of a transfer of custody, or the current fitness of the birth father or adoptive parents. This result was strongly criticized, even by a law professor who had filed an *amicus* brief in support of the prospective adoptive parents.[34]

Conclusion

The South Carolina Supreme Court's interpretation highlights the dangers of state courts interpreting and expanding upon the U.S. Supreme Court decision in ways that can be detrimental to Indian children and families. While the Court's actual decision simply provided that three sections of ICWA should not be applied to this case, the South Carolina Supreme Court interpreted the decision to authorize it to totally bar the father, extended family, and Cherokee Nation from having any further meaningful role in the Court's decision on remand and in Veronica's life, in general, absent voluntary extra-judicial actions by the adoptive parents. While it is true that the U.S. Supreme Court used some sweeping language in parts of its decision, the context of the case and Justice Breyer's concurrence suggest that *Adoptive Couple* was not meant to establish an absolute bar to the participation of the father, extended family and Cherokee Nation on remand nor to create a sweeping and wide-ranging precedent beyond the type of factual circumstances presented in the case. Attorneys who are handling future ICWA cases—particularly those who are representing Indian tribes, children, the parents of Indian parents or their extended families—should be prepared to explain to courts the limitations inherent in the Court's decision.

In addition, practitioners should be aware that state laws, in particular state Indian Child Welfare Acts, may provide additional protections to birth parents and families above and beyond the

federal statute as interpreted by the U.S. Supreme Court. Moreover, although they cannot alter the applicable law, tribal–state agreements may establish procedures that will minimize the likelihood that the issues that were the subject of the *Adoptive Couple* case will become the subject of litigation.[35]

Finally, it is worth considering questions that this case raises in the broader adoption context. Adoption may often be the best option *if* the natural parents truly consent or are unfit and no extended family or other members of the child's community are available to provide a permanent and loving home for the child. Where a parent or extended family member is willing and fit to raise a child, however, there is a strong argument that the child's birth family is the appropriate place for that child. It is well worth asking the question whether some states, like South Carolina, are so eager to promote adoption that they promote bad public policy and outcomes for children by creating multiple obstacles for unwed fathers and their families who want to assert their rights and maintain relationships with their children. ⊙

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Endnotes

[1]This article is based in part on an unpublished "Guide to the Supreme Court Decision in *Adoptive Couple v. Baby Girl*," co-written by the author of this article and Addie Smith, attorney at the National Indian Child Welfare Association, which can be found at www.indian-affairs.org and www.nicwa.org.

[2]*Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

[3]25 U.S.C. § 1912(d).

[4]25 U.S.C. § 1912(f).

[5]25 U.S.C. § 1915(a).

[6]133 S.Ct. at 2560-2565.

[7]*Id.* at 2559.

[8]*Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 (S.C. Sup. Ct. 2012).

[9]133 S.Ct. at 2580. Both Justices Sonia Sotomayor and Antonin Scalia filed dissents in this case. The reference to "the dissent" in the body of this article refers to Justice Sotomayor's dissent.

[10]*Id.* at 2571.

[11]*Id.* at 2565. In so doing, the Court referred to a "biological Indian father" using his "ICWA trump card at the eleventh hour," but failed to recognize that the ICWA in general and termination of parental rights section [§ 1912(f)] in particular apply to both the Indian and non-Indian parents of an Indian child. In the dissenting opinion, Justice Sotomayor wrote that it is "difficult to make sense" of the Court's suggestion regarding equal protection in view of U.S. Supreme Court decisions recognizing that classifications based on Indian tribal membership are not racial classifications. *Id.* at 2584-2585. In his concurring opinion, Justice Clarence Thomas indicated that he would find the ICWA unconstitutional, holding that the Indian Commerce Clause in the Constitution is not broad enough to allow Congress to enact legislation like ICWA. *Id.* at 2565-2571.

[12]*See* "Grounds for Involuntary Termination of Parental Rights," Child Welfare Information Gateway (2013) at www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf#Page=2&view=XYZ.

[13]133 S.Ct. at 2560.

[14]*Id.* at 2560-2562.

[15]*Id.* at 2571.

[16]*Id.* at 2582.

[17]*Id.* at 2562-2564.

[18]*Id.* at 2572. 2583.

[19]*Id.* at 2576, n.3.

[20]*Id.* at 2571, 2576, n.3.

[21]*Id.* at 2580; *See,* 42 U.S.C. § 671(a)(15)(B) (establishing the federal requirement in regard to "reasonable efforts").

[22]*Id.* at 2564, n. 11. The Court noted, however, that good cause might still be a factor in determining the application of this tribal placement preference.

[23]42 U.S.C. § 622(b)(7) (mentioning the "diligent recruitment" requirement imposed on all states and tribes operating the Title IV-E foster care and adoption assistance program).

[24]42 U.S.C. §§ 671(a)(19), (29) (referring to notice and preferred placement requirements in Title IV-E of the Social Security Act).

[25]*In re M.E.M.*, 725 P.2d 212 (Mont. 1986) (discussing the ICWA notice requirement).

[26]133 S. Ct. at 2561, n.6, 2573-2575. For a summary of EIF cases, see Lewerenz and McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20, In the Matter of A.J.S. and the Last Gasps of a Dying Doctrine,* 36 Wm. Mitchell L.Rev. 684 (2010).

[27]490 U.S. 30 (1989).

[28]133 S. Ct. at 2557, n.1.

[29]*Compare id.* at 2561 with 490 U.S. at 34, 35 n.4, 52-53.

[30]In this case, the South Carolina Supreme Court on remand did not view its consent statutes as preempted, a holding discussed later in this article.

[31]133 S.Ct.. at 2559, 2574.

[32]*Id.* at 2571, 2585.

[33]*Adoptive Couple v. Baby Girl*, 404 S.C. 483, 746 S.E.2d 51 (2013).

[34]*See* Emily, Bazelon, "Send Veronica Back: A Truly Terrible Ruling in the *Baby Girl* Case" published online at www.slate.com/articles/double_x/doublex/2013/07/baby_veronica_case_the_south_carolina_court_got_it_wrong.html (last visited Jan. 22, 2014).

[35]More information about these issues may be found in the analysis co-written by the author of this article and Addie Smith, an attorney at the National Indian Child Welfare Association. This analysis is referenced in endnote 1.