Adoption

6/25/13

In **Adoptive Couple v. Baby Girl**, 133 S. Ct. 2552 (2013), the U.S. Supreme Court reversed the judgment of the South Carolina Supreme Court. The U.S. Supreme Court remanded the case for further proceedings not inconsistent with its opinion. Baby Girl, who was born on October 15, 2009, is classified as an Indian because she is 1.2% (3/256) Cherokee. Birth Mother, who is predominantly Hispanic, was engaged to Biological Father, who is a member of the Cherokee Nation, in December 2008. One month after their engagement, Birth Mother informed Biological Father of her pregnancy. Biological Father asked Birth Mother to move up the date of the wedding, and refused to provide any financial support until after the marriage. Birth Mother broke off the engagement in May 2009. In June 2009, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights. Birth Mother decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father had Cherokee Indian Heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The attorney's inquiry letter misspelled Biological Father's first name and incorrectly stated his birthday, and the Cherokee Nation responded that it could not verify Biological Father's membership in the tribal records. Birth Mother worked through a private adoption agency and selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. Birth Mother signed forms relinquishing her parental rights and consenting to Baby Girl's adoption by Adoptive Couple the day after Baby Girl's birth in Oklahoma.

For the duration of Birth Mother's pregnancy with Baby Girl and the first four months of Baby Girl's life, Biological Father provided no financial assistance to Birth Mother or Baby Girl even though he had the ability to do so. He made no meaningful attempts to assume his responsibility of parenthood during this period. Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. Biological Father signed papers stating that he accepted service and that he was not contesting the adoption. Biological Father contacted a lawyer the day after signing the papers, and subsequently requested a stay of the adoption proceedings. Around the same time, the Cherokee Nation identified Biological Father as a registered member and concluded that Baby Girl was an "Indian Child" as defined in the Indian Child Welfare Act (ICWA). Biological Father sought custody of Baby Girl in the adoption proceedings, and stated that he did not consent to her adoption. Biological Father also took a paternity test, which verified his biological fatherhood of Baby Girl. The Cherokee Nation intervened in the litigation.

A trial took place in the South Carolina Family Court, by which time Baby Girl was almost two years old. The Family Court concluded that Adoptive Couple had not carried the heightened burden under section 1912(f) of the ICWA, which provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence 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" (emphasis in opinion). Id. at 2560. The Family Court denied Adoptive Couple's petition for adoption, awarded custody to Biological Father, and on December 31, 2011, at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met. The South Carolina Supreme Court affirmed the Family Court's denial of the adoption petition and award of custody of Baby Girl to Biological Father. The South Carolina Supreme Court determined that the ICWA applied because the case involved a child custody proceeding relating to an Indian child and concluded that Biological Father fell within the ICWA's definition of a "parent." The South Carolina Supreme Court held that section 1912(d) and section 1912(f) of the ICWA barred the termination of Father's parental rights. Section 1912(d) conditions an involuntary termination of parental rights with respect to an Indian child on a showing that "active efforts have been made to provide remedial services...designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." The South Carolina Supreme Court also held that if Biological Father's rights had been terminated, section 1915(a)'s adoption-placement preferences for placement with a member of the child's extended family, other members of the child's Indian tribe or other Indian families applied.

The U.S. Supreme Court did not decide whether Biological Father is a "parent", but assuming for the sake of argument that he is a "parent", the Court held that neither section 1912(f) nor 1912(d) bars the termination of his parental rights. Id. at 2560. The U.S. Supreme Court said that it is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. Id. at 2559. The Court held that the phrase "continued custody of the child" in section 1912(f) refers to custody that a parent already has (or at least had at some point in the past) and does not apply where the Indian parent *never* had custody (emphasis in opinion). Id. The Court observed that this reading comports with the statutory text, which demonstrates that the ICWA was designed primarily to counteract the unwarranted *removal* of Indian children from Indian families (emphasis in opinion). Id. at 1261. The Court said that the ICWA's primary goal is not implicated when an Indian child's adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights. Id. The Court opined that section 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child. Id. at 2562.

The U.S. Supreme Court further said that section 1912(d) applies only when an Indian family's "breakup" would be precipitated by terminating parental rights. Id. at 2562. Quoting American Heritage Dictionary 235 (3d ed. 1992), the Court said that the term "breakup" refers in this context to "[t]he discontinuance of a relationship," or "an ending as an effective entity" (quoting Webster's Third New International Dictionary 273) (1961). Id. The Court said that when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" to be discontinue[d]" and no "effective entity" to be "end[ed]" by terminating the Indian parent's rights. Id. The Court

said that in such a situation, the "breakup of the Indian family" has long since occurred, and section 1912(d) is inapplicable. Id. The Court observed that this interpretation is consistent with the explicit congressional purpose of setting certain "standards for the removal of Indian children from their families" (section 1902) and with Bureau of Indian Affairs Guidelines. Id. at 1263.

The Court opined that section 1915(a)'s adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. Id. at 1264. The Court said that Biological Father is not covered by section 1915(a) because he did not seek to *adopt* Baby Girl, instead he argued that his parental rights should not be terminated (emphasis in opinion). Id. The Court noted that paternal grandparents never sought custody of Baby Girl and no other members of the Cherokee Nation or "other Indian families" sought to adopt her. Id.