Carter, et al. v. Washburn, et al.
No. 15-CV-1259, U.S. Dist. Ct. for the Dist. of Arizona

BACKGROUND

Executive Summary

Alone among American children, children with Indian ancestry who end up in state protective custody are treated not in accord with their best interests but given separate, substandard treatment solely because of their race. This separate, unequal treatment results from a well-intentioned but a profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act.[1] The Goldwater Institute is challenging certain provisions of the Act in order to vindicate the constitutional rights of off-reservation children of Indian ancestry[2] in Arizona, and their foster and prospective adoptive parents. The civil rights class action is based on the fundamental principles of equal treatment under law, respect for individual rights, and federalism embedded in the federal Constitution.

The Problem

By honoring the moral imperatives enshrined in our Constitution, this nation has successfully shed much of its history of legally sanctioned discrimination on the basis of race or ethnicity. We have seen in vivid, shameful detail how separate treatment is inherently unequal.[3] There can be no law under our Constitution that creates and applies pervasive separate and unequal treatment to individuals based on a quantum of blood tracing to a particular race or ethnicity. This country committed itself to that principle when it ratified the Fourteenth Amendment and overturned *Dred Scott v. Sandford*,[4] and when it abandoned *Plessy v. Ferguson*.[5] Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*.

In 1994 and again in 1996, Congress recognized that race and ethnicity should play no role in state-approved adoptions when it enacted the Multiethnic Placement Act[6] and the Interethnic

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1 Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069 (1978), *codified at* 25 U.S.C. §§ 1901-1963.

2 The Act defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" 25 U.S.C. § 1903(4). Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See* Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code § 701; Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (February 25, 2015) ("New Guidelines"). Consequently, ICWA's definition of "Indian child" is based solely on the child's race or ancestry. Some of the tribes consider individuals with only a tiny percentage of Indian blood to be Indian, even if they have little or no contact or connection with the tribe. *See, e.g.*, Cherokee Nation Const. art. IV, § 1.

3 *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

4 *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

5 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

6 Pub. L. 103-382, §§ 551-553, *codified at* 42 U.S.C. § 5115a (1994).

Placement Act,[7] which forbid discrimination in adoptions and foster care placements. However, these anti-discrimination protections do not prevent discrimination against children of Indian ancestry. Instead, the Indian Child Welfare Act prioritizes tribal interests over a child's welfare based solely on the child's race.

The Law

At every turn, a different and substandard set of legal provisions is applied to children with Indian ancestry than those applied to all other children.

Burdens of Proof

For example, for Native American children, when the state child protective services takes a child into protective custody because the child is abused, abandoned, or neglected, it has to show "by clear and convincing evidence" that there likely will be "serious emotional or physical harm to the child."[8] In contrast, under Arizona law, when the Department of Child Safety (DCS) takes a non-Native American child into protective custody because the child is abused, abandoned, or neglected, DCS has to show only that there are "reasonable grounds," "probable cause," "reasonable efforts," or "preponderance of evidence" to believe that protective custody will "protect the child from suffering abuse or neglect."[9] Consequently, the Indian Child Welfare Act's higher burden of proof requires DCS to disregard to a greater extent the safety and security of children with Indian ancestry. Put differently, children with Indian ancestry have to be more obviously abused, neglected, or abandoned, before they can be taken into protective custody.

Similarly, in a proceeding to terminate parental rights of children with Indian ancestry, "evidence beyond a reasonable doubt" is required to prove that the child will face "serious emotional or physical damage" if the parental rights are not terminated.[10] Under Arizona law, in contrast, parental rights can be terminated by establishing the best interests of the child by a preponderance of evidence.[11] Thus, the Indian Child Welfare Act explicitly does not take into account the best interests of the child and places greater burdens on children with Indian ancestry than does Arizona law uniformly applied to all other children. This separate, unequal treatment of children with Indian ancestry is based solely on the child's race.

Placement preferences

Likewise, the Indian Child Welfare Act requires state child protective services to follow the Act's foster care placement preferences and expressly directs state agencies and state courts to not independently consider the best interests of the child to attempt to deviate from the placement

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7 Pub. L. 104-188, § 1808, *codified at* 42 U.S.C. §§ 671(a), 674(d), 1996b(c) (1996).
8 25 U.S.C. § 1912(e).
9 See A.R.S. §§ 8-821(A)-(B), 8-824(F), 8-843, 8-844.
10 25 U.S.C. § 1912(f).
11 *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 (Ariz. 2005) (interpreting A.R.S. §§ 8-533, 8-537).

preferences.[12] Under Arizona law uniformly applied to all other children, Arizona courts look at whether foster care placements are in the child's best interest.[13]

The Indian Child Welfare Act, similarly, states that a child with Indian ancestry can only be adopted by Native American families.[14] If a loving non-Native American family with whom a child has bonded tries to adopt the Native American child, state authorities are expressly instructed by federal law to not take into account bonding, attachment, and best interests of the child – factors the authorities consider in finalizing adoptions of all other children – and instead allow the desires of the tribe to trump the best interests of the child.[15]

Children with Indian ancestry that live off-reservation, who sometimes spend their entire lives with a non-Indian foster family, are often shipped to strangers by operation of the federal law.

The Active Efforts Provision

Under the active efforts provision,[16] DCS is required to treat a child as an Indian child unless proven otherwise.[17] Thus, even children who ultimately don't qualify for ICWA eligibility are singled out for different treatment because the child is suspected to be Indian. Not only that, DCS is required to obtain membership in a tribe for a child who is eligible for membership even in situations where the child's parents themselves are not members or protest such enrollment.[18] DCS is required to identify, notify and invite representatives of the Indian child's tribe in order to expose the child to the tribe's prevailing social and cultural conditions, to assure that the child has cultural connections with the tribe, and employ all available culturally appropriate family preservation strategies.[19] Such treatment is based solely on the stereotypical assumptions about race and racial conformity.

Under Arizona law, DCS is required to engage in "reasonable efforts" to try to reunite a child with the child's family.[20] Under ICWA, DCS is required to engage in "active efforts," which the BIA interprets as "more than" reasonable efforts, to reunite the child not only with the child's family but also with the child's tribe.[21] Consequently, DCS is sometimes required to continue to expose children who are abused, neglected or abandoned, to abusive and neglectful adults. Psychological and emotional trauma to children with Indian ancestry resulting from the active efforts to return them to abusive caretakers is substantial. Under Arizona law, all other children, thankfully, do not have to face this predicament.

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12 25 U.S.C. § 1915(b); New Guidelines, 80 Fed. Reg. at 10158, F.4(c)(3).
13 *Antonio M. v. Ariz. Dept. of Econ. §*, 214 P.3d 1010, 1012 (Ariz. App. 2009).
14 25 U.S.C. § 1915(a).
15 New Guidelines, 80 Fed. Reg. 10158, F.4.
16 25 U.S.C. § 1912(d), New Guidelines, §§ A.2, A.3, B.1, B.2, B.4, B.8, D.2.
17 New Guidelines, § A.3.
18 New Guidelines, § B.4(d)(3).
19 New Guidelines, § A.2.
20 A.R.S. §§ 8-513, 8-522, 8-825, 8-829, 8-843, 8-845, 8-846, 8-862
21 *Compare* A.R.S. §§ 8-513, 8-522, 8-825, 8-829, 8-843, 8-845, 8-846, 8-862, *with* New Guidelines, § A.2

The Jurisdiction-Transfer Provision

For example, the Act requires state courts to transfer foster care placement or termination of parental rights proceedings to the jurisdiction of the tribe if it meets the statutory criteria for transfer.[22] The Guidelines, however, require transfers of not only foster care and termination of parental rights proceedings but also preadoptive and adoptive placement proceedings to tribal courts. Children with Indian ancestry who have never set foot on a reservation, whose parents have never lived on the reservation, whose non-Indian foster parents have never been on a reservation, are hauled into tribal courts based solely on the child's race.

Supreme Court precedent under the Due Process Clause has required minimum contacts between the litigant and the forum for the litigant to be amenable to suit in that forum.[23] In plain English, this amounts to saying that a life-long resident of Arizona who is in a car accident with a life-long resident of Arizona, in Phoenix, Arizona, cannot be hauled into a Maine court in the resulting personal injury lawsuit. Such a purely race-based jurisdiction-transfer provision is patently unconstitutional.

Legal Claims for Relief

States cannot disregard a child's unique background in making an individualized and race-neutral, foster, preadoptive or adoptive assessment, and in terminating parental rights. But the states cannot also turn a blind eye to the child's safety, security and best interests based solely on the child's or the adult's race, for such action is necessarily based on inherently demeaning, stereotypical assumptions about an individual's race or culture. In 2013, the U.S. Supreme Court in the Baby Veronica case rejected a particular application of ICWA where a birth father who never had custody of Baby Veronica could not use ICWA to gain custody over her.[24] A core premise of that decision was that ICWA cannot force a child to create a racially-conforming relationship and that a child should not be made to sever an existing relationship in order to create new racially-conforming ones.

A constitutional challenge to all the foregoing provisions is based on the principle of equal protection under the law. We also challenge the foregoing provisions as violating the due process guarantee of the federal Constitution. Every child and adult deserves an individualized, race-neutral determination under uniform standards when courts make foster/preadoptive and adoption placement decisions.[25] Any determination regarding removal of a child from home, termination of parental rights, foster care placement, or adoption placement must take into account the child's

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22 25 U.S.C. § 1911(b); New Guidelines, §§ C.1, C.2, C.3.

23 *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicoptores Nationales de Colombia v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

24 *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S. Ct. 2552 (2013).

25 *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977); *In re Santos Y.*, 92 Cal. App. 4th 1274, 1314-1317 (Cal. App. 2001); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1503-1504 (Cal. App. 1996); *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994).

best interests. The failure of ICWA as applied by the BIA guidelines to adequately consider the child's best interests deprives children with Indian ancestry of liberty without due process of law.

Also, as a threshold matter, it is counterintuitive that Congress claimed its power to legislate in the field of domestic relations of those with Indian ancestry is derived from the Indian Commerce Clause.[26] But a child with Indian ancestry is not an item of commerce, nor an instrumentality of commerce, nor tangible personal property the possession of which by federally-recognized tribes promotes "Indian self-government."[27] Indeed, the BIA's position is that ICWA does not apply to proceedings in tribal courts.[28]

Congress also cannot commandeer state resources to achieve federal policy objectives or commandeer state officers to execute federal laws.[29] ICWA impermissibly commandeers state courts and state agencies to apply, enforce, and implement an unconstitutional federal law.[30] Child custody proceedings and domestic relations matters are a "virtually exclusive province of the States" under the Tenth Amendment upon which the federal government cannot intrude.[31] ICWA displaces inherent state jurisdiction over specified child welfare, custody, and adoption proceedings and therefore violates the Tenth Amendment.[32]

This legal challenge is not an affront to tribal sovereignty or tribal autonomy over domestic relations matters of on-reservation tribal members. Nor will it affect the ability of tribal courts to decide cases properly before such courts. This legal challenge would prevent *state courts* and *state agencies* from singling out individuals with Indian ancestry and subjecting them to separate, unequal, and substandard treatment under state and federal law.

Further, by operation of ICWA, children are forced to associate with tribes and tribal communities and subject to tribal jurisdiction against their will and/or contrary to their best interests. This forced association violates their freedom to associate under the First Amendment which encompasses the freedom not to associate.[33]

Also, to the extent BIA expanded the jurisdiction-transfer provision to apply to *all* child custody proceedings, such expansion is unlawful, in excess of statutory authority, and not in accordance with law.[34]

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[26] 25 U.S.C. §§ 1901-1902.

[27] *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

[28] New Guidelines, § A.3(e).

[29] *United States v. Printz*, 521 U.S. 898 (1997).

[30] *Dodds v. Richardson*, 614 F.3d 1185, 1195-1196 & n.3 (10th Cir. 2010); Ariz. Const. art. II, § 3.

[31] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

[32] *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2566 (Thomas, J., concurring).

[33] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Knox v. Service Employees Int'l Union, Local 1000*, __ U.S. __, 132 S. Ct. 2277 (2012).

[34] 5 U.S.C. § 706.