In re. JPC. – BACKGROUNDER

Executive Summary

The Indian Child Welfare Act is a federal law that creates a separate and substandard set of rules for protecting children in need, if those children have Native American ancestry. Most decisions involving child welfare—whether it be foster care, adoption, or rescuing children from abusive or neglectful families—are made according to the "best interests of the child" standard. Arizona courts have said that judges have an "overriding obligation" to decide cases according to the child's best interests.[1]

But the rules are different for children of Native American ancestry. Thanks to the Indian Child Welfare Act, courts must decide cases involving them by applying a different set of standards—ones that are often detrimental to the child's welfare, and even contrary to the wishes of parents themselves. Even though these children are American citizens entitled to full constitutional protection, they are subjected to literal racial segregation in cases involving their future. Most remarkably, this law can even be invoked by non-Indians to prevent Indian parents from making decisions about their own children's welfare.

As part of the Goldwater Institute's Equal Protection for Indian Children (EPIC) project, we've taken on a series of challenges to provisions in the Indian Child Welfare Act that harm America's most vulnerable citizens. That's why the Goldwater Institute is representing Justine, the mother of an 8-year-old boy we'll call John (not his real name). Justine is married to Gabriel, and she wants Gabriel to adopt John legally as his son. After all, they already have a daughter together. In most cases, it would be a simple matter of paperwork for Gabriel to adopt John. But because Justine is a member of the Tohono O'odham Nation, a separate set of rules applies—rules that make it practically impossible for that adoption to take place.

Background

Stepparent adoption is among the oldest family arrangements known to man: A parent remarries, and her new spouse adopts her children as his own. Stepparent adoption is one of the many ways that families come together and that parents can ensure that their children get the best opportunities out of life.

That's what Justine had in mind when she filed papers with an Arizona court asking the court to allow Gabriel to adopt John. John's birth father, Jorge, was recently released from prison after serving a seven-year sentence for participating in a drive-by shooting. Years ago, Justine ended her relationship with Jorge, and John has only met him once. She and Gabriel have been married for three years, and she and her husband have a little girl. Now they want to complete the circle through adoption. "We're already a family," she says. "It's only right that the law recognize that."

Under the law in Arizona, as in most states, a step-parent adoption begins with a "termination of parental rights" (TPR) proceeding, in which a court declares that the birth parent no longer has legal rights over the children,

and that the children are cleared for adoption. The second step is the adoption itself, which is normally approved by a court if it finds that adoption would be in the child's best interest.

Justine believes it's clearly in John's best interests to be adopted by Gabriel. "My husband loves my children, and they love him," she says. "We want the state of Arizona to say that he's John's father." And if this case involved children of any other racial background, that's just what would happen.

But Justine's children aren't like other children. Justine is a member of the Tohono O'odham Nation, an Indian tribe of about 25,000 people, many of whom reside on reservation land in southern Arizona. That means her two children qualify as "Indian children" under the Indian Child Welfare Act, a federal law passed in 1978 that sets different rules for adoption cases involving children of Indian ancestry.

The Indian Child Welfare Act

Passed in 1978, the Act was supposed to prevent abusive practices whereby state child welfare workers often removed Native American children from their parents without sufficient justification and placed them with non-Indians in an effort to terminate the existence of Indian tribes. But while well-intended, the Act was clumsily designed and made compromises between children and the interests of tribal governments that often harm Native American kids.[2]

The part of the Act relevant to Justine's case is a provision that governs TPR proceedings in state court. That provision imposes a higher legal standard and requires courts to receive testimony from expert witnesses in TPR cases—rules that would not apply in cases involving black, white, Hispanic, or Asian children. Thus in a TPR case involving a non-Native child, the court must find "clear and convincing evidence" that termination of the birth parent's rights would be in the child's best interests. But in a TPR case involving an Indian child, the court must find "beyond a reasonable doubt" that termination is necessary to prevent severe harm to the child—and it must base that finding on testimony by expert witnesses who are experts in tribal culture. This is a higher standard than applies even in criminal law cases. That means it is literally easier to send a defendant to death row than it is to clear a Native American child for adoption.

Even more astonishingly, the Act overrides the wishes of parents in many situations. That's because the Act was designed—as the Supreme Court put it in a 1989 case—to put tribal governments on "a parity with the interest of the parents."[3] That case involved a couple in Mississippi who tried to prevent the Act from applying by driving 200 miles off their reservation to give birth. They had chosen an adoptive family for their baby and wanted to ensure that the adoption would go through without interference by tribal officials. But the tribe intervened anyway, and the Supreme Court held that it had authority to veto the parents' choices.

The Act isn't just limited to reservations. It applies to all children who are either tribal members, or who are eligible for membership in a tribe and whose parents are members. Since virtually all tribes define eligibility in terms of biological descent, that means children qualify as "Indian" under the Act regardless of where they live, and even if their last full-blooded Indian ancestor was several generations ago. In one recent case, a tribal government used ICWA to remove a child from the couple with whom she had lived for four of her six years of life and send her to live in another state—even though her last full-blooded Indian ancestor was her great-great-great-great grandparent, and she had never lived on a reservation.[4] In one ongoing case, the Gila River Tribe in Arizona is seeking to have an Ohio child removed from his foster parents and sent to live in Arizona even though he and his birth parents live in Ohio and he has never even visited a reservation. In still another case, a tribe in Oklahoma tried to use ICWA to block the adoption of a newborn whose parents did not live on a reservation and whose last full-blooded Indian ancestor lived in the time of George Washington's father. The Supreme Court prevented that from happening, observing that ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."[5]

ICWA is a complicated law that includes many different provisions and a variety of constitutional concerns. But in Justine's case, the question is simple: Should she have the right to make the decisions that are best for her family?

ICWA and Private Disputes between Parents

Unfortunately, ICWA is often used in ways that its drafters never envisioned. That's particularly true in cases involving stepparent adoption. The law was written to crack down on wrongful acts by state government officials, who sometimes abused their powers to take Native American children from families that were not abusive or neglectful. It wasn't written to intrude into private arguments between family members.

But not only have courts applied it in that context, they've even done so to block the wishes of Indian parents and tribes themselves. In 2016, the Washington State Supreme Court allowed an abusive, non-Indian father to use the Act to bar the adoption arrangement that his ex-wife, a tribal member, asked the court to approve. She had ended her relationship with her ex-husband as a result of his abuse, drug abuse, and extensive criminal record—and had remarried. With the support of her tribe, she sought to have her ex-husband's parental rights terminated, so that her new husband could adopt her child. But the state's high court ruled that ICWA applied, meaning that she would have to satisfy the burdensome "beyond a reasonable doubt" test, and would be required to provide remedial services to her ex-husband and obtain testimony from expert witnesses—expensive propositions. The court acknowledged that it was using the Act to override the wishes of a Native American parent, but held that that didn't matter. Any case involving a child with Indian genetic heritage, it ruled, is subject to this separate set of laws.[6] Other courts have reached the same conclusion, including one Arizona Court of Appeals, in a case called S.S., which the Goldwater Institute is currently litigating.[7]

Applying ICWA to private disputes makes no sense. The law was written in response to abuses by government agents. And federal intervention into family law raises a number of constitutional problems.

Legal Analysis

The first problem is the way ICWA treats children differently on the basis of race. It's shocking that, half a century after Brown v. Board of Education, American law still includes a literal rule of separate-but-equal—actually, separate-and-substandard—but that's exactly what ICWA imposes. It imposes different rules on cases involving Indian children—rules that make it harder to rescue Indian children from abuse or neglect, harder to place them in stable foster homes, and harder for them to find the loving, adoptive families that they need.

That violates one of the basic rules of American law: the requirement of equal protection. Etched in marble above the doors of the U.S. Supreme Court are the words "equal justice under law." But in the case of Indian children, that promise isn't a reality. ICWA treats them differently based solely on their genetics.

It's often said that ICWA isn't based on race because tribal membership qualifies as a "political," rather than a racial, classification. But while that's often true, it's not true when it comes to ICWA. The Act doesn't apply to tribal members, but to children who are eligible for membership—and eligibility depends solely on the DNA in a child's blood. Political affiliation doesn't matter. The Tohono O'odham Constitution, for example, requires that members be either direct descendants of people named on the 1937 and 1940 tribal censuses, or satisfy a blood quantum requirement. And ICWA itself lumps Indian tribes together without regard to tribal origin. For example, it requires that Native American children in need of foster care or adoption be placed with "an Indian family," even of a completely different tribe, rather than with a family of another race.

It's unjust that the government treats Native American children—who are all citizens of the United States—

differently because of their genetic ancestry. But that's the way it works.

Not only does this law violate basic principles of equality, it also violates the federalist system that leaves family law within the realm of state government, rather than the federal system. Federal courts are given limited power to decide cases, usually ones that relate to federal matters. States, by contrast, have the power to set the rules of family law. Marriages, divorces, adoption, inheritance—all of these are state matters, not federal. That's why federal judges are so reluctant to decide family law cases that they typically refuse to do so, even when they might technically have that authority.

But the Indian Child Welfare Act overrides state rules and—along with regulations issued by the federal Bureau of Indian Affairs—mandates that state judges abide by federal rules, even when that means disregarding the best interests of Native American children.

All American Children Deserve to be Treated the Same

The Goldwater Institute has taken Justine's case in order to promote a bedrock principle of our constitutional republic: Every individual deserves equal treatment—treatment as an individual—rather than being categorized by race. Native Americans have too often been subjected to injustices at the hands of federal and state courts. It's time for that to stop. As Martin Luther King, Jr., said, "Whatever affects one directly, affects all indirectly…. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds." But for too long, American Indian children have been considered outsiders. Goldwater's EPIC project is devoted to ensuring that American Indian children are given the same level of protection accorded to all other kids.

Case Logistics

The Goldwater Institute represents Tucson-area mother Justine with regard to constitutional questions. The case was filed in the Pima County Superior Court. Family law matters in the case are handled by Tucson attorney Jane Jacobs.

The Legal Team

Timothy Sandefur is the Vice President for Litigation at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, and holds the Institute's Duncan Chair in Constitutional Government.

Adi Dynar is a Staff Attorney at the Goldwater Institute. He litigates cases across the United States relating to fundamental civil rights, free enterprise, freedom of speech and association, and freedom of information, among others. Prior to joining the Goldwater Institute, Adi worked in areas of constitutional law and immigration law.

Endnotes

1 Hays v. Gama, 205 Ariz. 99, 103, 67 P.3d 695, 699 (2003).

2 For a comprehensive review of ICWA and its constitutional flaws, see Timothy Sandefur, Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children, 37 Children's Leg. Rts. J. 1 (2017), http://www.childrenslegalrightsjournal.com/childrenslegalrightsjournal/volume_37_issue_1?folio=1.

3 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989) (quoting In re Adoption of Halloway, 732 P.2d 962, 969–970 (Utah 1986)).

4 In re. Alexandria P., 1 Cal. App. 5th 331 (2016).

5 Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2565 (2013).

6 In re. Adoption of T.A.W., 186 Wash.2d 828, 383 P.3d 492 (Wash. 2017).

7 http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/ss-v-colorado-river-indian-tribes/.