BACKGROUNDER

FIGHTING FOR EQUAL PROTECTION FOR NATIVE AMERICAN CHILDREN

Fisher et al. v. Cook et al. (Arkansas)

Executive Summary

The Indian Child Welfare Act (ICWA)[1] 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 in Arkansas are made according to the best interest of the child standard. But the rules are different for children of Native American ancestry.

These ICWA standards are detrimental to the child's welfare, and even contrary to the wishes of their parents. Even though these children are American citizens entitled to full constitutional protection, they are subjected to literal racial or national-origin based segregation in cases involving their future.

As part of the Goldwater Institute's Equal Protection for Indian Children (EPIC) project, we've taken on a series of challenges to ICWA. In this case, the Goldwater Institute is partnering with Keith Morrison of Wilson & Associates, and Chad Pekron of Quattlebaum, Grooms & Tull PLLC, both of whom are attorneys in our American Freedom Network (AFN). AFN is a network of attorneys nationwide that provide pro bono representation to individuals in civil-rights cases.

As co-counsel, we represent the Fishers: Erin Fisher, her husband Richard Fisher, and Erin's ten-year-old son, A.C. (name masked for privacy). Richard is A.C.'s step-father, and he wants to adopt A.C. as his legal son. Under Arkansas law, that should be a relatively simple matter. The parental rights of A.C.'s birth father (Jason Cook) would be terminated by a court, and the court would finalize Richard's adoption of A.C. But because A.C. is classified as an "Indian child" under ICWA, a different set of standards apply—rules that make it practically impossible for that adoption to take place. The Fishers have therefore asked a federal court to decide whether that violates their constitutional rights.

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[1] 25 U.S.C. §§ 1901–1963.

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 their children get the best opportunities out of life.

That's what Erin and Richard Fisher had in mind when she filed papers in an Arkansas court asking the court to allow Richard to adopt A.C., her son from a previous relationship with Jason Cook. Richard and Erin want Richard to be officially recognized as A.C.'s legal father—which he already is in every other way. The Fishers are a loving family, like millions of others in the nation. Richard taught A.C. how to swim and how to ride a horse. A.C. calls Richard his father. There's no reason the law shouldn't recognize that.

And under Arkansas law, that wouldn't ordinarily be hard to do. As in most states, a stepparent adoption case in Arkansas 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 child and that the child should be cleared for adoption by the stepparent. The second step is the adoption itself, which is normally approved by a court.

But A.C. isn't like other children. He is a member of the Cherokee Nation of Oklahoma, a federally-recognized Indian tribe. That means A.C. is an "Indian child" under ICWA, a federal law that sets different rules for the adoption cases involving children of Indian ancestry.

The Indian Child Welfare Act

Passed in 1978, ICWA was supposed to prevent abusive practices whereby state child welfare workers allegedly 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-intentioned, the Act was clumsily designed and made compromises between children and the interests of tribal governments that often harm Native American kids.

The parts of the Act relevant to the Fishers' case are two provisions governing TPR proceedings in state court: the "active-efforts" provision,[2] and the provision that establishes the burden of proof in TPR cases.[3] Those rules impose more requirements on the Fishers than would ordinarily apply. For example, ICWA requires state courts to receive testimony from expert witnesses in TPR cases—which is not required in cases involving other children. Also, in an Indian child's TPR case, the court must find that "active efforts" were made to "prevent the breakup of the Indian family," and that those efforts were unsuccessful. This, too, is not required in cases involving other children; for children of other races, a less-burdensome "reasonable efforts" requirement applies,

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2 25 U.S.C. § 1912(d).

3 25 U.S.C. § 1912(f).

and even that would not apply in a case of parental abandonment as in A.C.'s case. Also, ICWA requires that a court find beyond a reasonable doubt that TPR is necessary to prevent harm to the child, and it must base that finding on testimony of experts in tribal culture. This is a higher standard than applies even in criminal law cases—meaning that it is literally easier to send a defendant to death row than it is to clear a Native American child for adoption, even adoption by a stepparent.

Even more astonishingly, ICWA overrides the wishes of birth parents like Erin Fisher. That's because it 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."[4] That case involved a couple in Mississippi who tried to prevent ICWA 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 Indian Child Welfare 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 who have a biological parent who is a member. That is crucial, because it means that the Act applies solely on the basis of *biology*. Since virtually all tribes define eligibility for membership in terms of biological descent, 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 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]

The second part of ICWA relevant to the Fishers is the adoption placement preferences provision,[6] which requires the Fishers to prove that there is good cause to grant stepparent adoption. The Act absurdly prefers that A.C. be adopted by another "Indian"—regardless of tribe—before his stepdad can adopt him. Of course, if A.C. were not qualified—based solely on biology—for membership in the Cherokee Nation, the rule would be different. Then, only Erin Fisher's consent would be needed for her husband to adopt her son.

This separate and substandard treatment is absurd. Allowing Richard to adopt A.C. would benefit everyone—and, in fact, nothing short of adoption can ensure Richard's full legal participation in A.C.'s life. Everything from school parent-consent forms, to the ability to provide legal approval of emergency medical procedures depend on Richard having legal recognition as A.C.'s father. Under the law, his status as a non-adoptive stepfather prevents the Fisher family from obtaining

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4 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969–70 (Utah 1986)).

5 *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013).

6 25 U.S.C. § 1915(a).

the legal protections most of us take for granted. Thus, getting the adoption finalized is much more than just symbolic.

Yet another perplexing provision of ICWA gives the tribe and A.C.'s birth father authority to unilaterally annul the TPR and the adoption even if it is granted—and to do so within *two years* after the adoption is finalized.[7] That threat of invalidation will hang over the Fisher family even *after* their adoption is successful. Such an intrusion into the family life of the Fishers is unheard of in stepparent adoption cases that involve *non*-Indian kids.

ICWA is a complicated law that includes many different provisions and a variety of constitutional concerns. But in the Fishers' case, the question is simple: Should they have the right to make the decisions that are best for their 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.

Not only have courts applied ICWA 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 father to use the Act to bar the adoption arrangement that his ex-wife asked the court to approve. She had ended her relationship with him and had remarried. With the support of the child's tribe, she sought to have his parental rights terminated, so that her 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. But the Court 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.[8]

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 issues raises a number of constitutional problems.

Legal Analysis

The first problem is the way ICWA treats children differently based on their race, color, national origin, or political affiliation. It's shocking that, half a century after *Brown v. Board of Education*,

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7 25 U.S.C. § 1914.

8 *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2017).

American law still includes a literal rule of racial segregation. That's what ICWA imposes. It imposes different rules on cases involving Indian children—a term that's defined solely on the basis of genetic ancestry. And those rules 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 them loving, adoptive families when needed.

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

It is often said that ICWA isn't based on race, color, or national origin because tribal membership qualifies as a "political" classification rather than a racial classification. 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 Cherokee Nation of Oklahoma's constitution, for example, requires that members be lineal descendants of persons who signed the 1906 Dawes Rolls. No "political" considerations are involved. A child with no cultural, religious, social, linguistic, or political connection to the tribe would qualify as an "Indian" child under ICWA if he has the required genetic ancestry—and a child who lacks the required genetic ancestry would not qualify even if he were fully acculturated to the tribe, practiced a Native religion, spoke Cherokee, followed traditional religious practices, and considered himself fully Cherokee. 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.

These considerations are what led a federal judge in Texas to rule in November 2018 that ICWA violates the Constitution's prohibition on racial discrimination. Because it's triggered by a child's genetic heritage, wrote the judge, "ICWA applies to many children who will never become members of any Indian tribe."[9] And its race-based adoption rules mean that the Act doesn't preserve tribal integrity, since it requires that Indian children be adopted "by members of other tribes."[10] Such a "blanket classification" of kids means the Act discriminates on a racial, not a political, basis, and is therefore unconstitutional.[11]

In addition, the court ruled that ICWA violates the federalist system created in the Constitution—a system that leaves family law to be the virtually exclusive province of state, not federal law. 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

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9 *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 535 (N.D. Tex. 2018).

10 *Id.* at 536.

11 *Id.*

to decide family law cases that they typically refuse to do so, even when they might technically have that authority. But ICWA 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. (The Texas case is now on appeal in the Fifth Circuit Court of Appeals.)

All American Children Deserve to be Treated the Same

The Goldwater Institute has taken the Fishers' cause 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, color, national origin, or political affiliation. Native Americans have too often been subjected to injustices at the hands of federal and state courts. It's time for that to stop. 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 the Fishers in federal court with regard to the question of the applicability and constitutionality of ICWA and the federal regulations to their purely private matter. The Fishers do not seek termination or adoption in federal court because that is a matter a state court will have to decide. Rather, they primarily seek a declaration and injunction from federal court.

The Legal Team

Keith Morrison is a Partner at Wilson & Associates. He is a fellow of the American Academy of Adoption Attorneys, and has extensive experience in Arkansas family law and ICWA. A Fayetteville, Arkansas native, he actively serves his community as a director on the board of several civil institutions and by teaching at the University of Arkansas Law School.

Chad Pekron is a Member at Quattlebaum, Grooms & Tull PLLC. He has extensive trial and appellate experience. He has won important trial and appellate victories and is listed in *The Best Lawyers of America*® in the areas of Appellate Practice, Commercial Litigation, and Personal Injury Litigation–Defendants. A graduate of Yale Law School, he clerked for Judge Morris Sheppard Arnold of the U.S. Court of Appeals for the Eighth Circuit, and previously worked at the Chicago law firm of Sidley Austin LLP.

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. He has won important, precedent-setting victories for Indian children and their parents in cases such as *Gila River Indian Community v. Department of Child*

Safety, 242 Ariz. 277 (2017), and *In re C.J., Jr.*, 108 N.E.2d 677 (Ohio App. 2018). Prior to joining the Goldwater Institute, Adi worked in areas of constitutional law and immigration law.

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