IN THE SUPREME COURT OF THE STATE OF ALASKA

NATIVE VILLAGE OF TUNUNAK, Appellant, vs. STATE OF ALASKA, OCS, and H.S. and K.S. Appellees.	)	Supreme Court No. S-14670
	)	Superior Court No.3AN-11-2236PR

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE FRANK A. PFIFFNER, JUDGE

SUPPLEMENTAL BRIEF OF APPELLEES H.S. AND K.S.

KENNETH C. KIRK
3401 DENALI ST., STE. 203
ANCHORAGE, AK 99503
(907) 279-1659
ALASKA BAR NO. 8711091
ATTORNEY FOR APPELLEES

BY: _____
Kenneth C. Kirk

FILED IN THE SUPREME COURT
OF THE STATE OF ALASKA THIS
____ DAY OF NOVEMBER, 2013.

BY: _____
DEPUTY CLERK

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

AUTHORITIES PRINCIPALLY RELIED UPON

AS 47.05.065(5). Legislative Findings Related to Children.

(5) numerous studies establish that

(A) children undergo a critical attachment process before the time they reach six years of age;

(B) a child who has not attached with an adult caregiver during this critical stage will suffer significant emotional damage that frequently leads to chronic psychological problems and antisocial behavior when the child reaches adolescence and adulthood; and

(C) it is important to provide for an expedited placement procedure to ensure that all children, especially those under the age of six years, who have been removed from their homes are placed in permanent homes expeditiously.

25 U.S. Code section 1911(a) Indian Tribe Jurisdiction Over Indian Child Custody Proceedings.

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S. Code section 1912(e-f) Pending Court Proceedings.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f)No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

25 U.S. Code § 1915(a) Placement of Children.

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Indian child's tribe; or

(3) other Indian families.

Issue Briefed Herein

In an order dated October 7, 2013 in which it also set oral argument, this Court invited the parties to brief the specific issue of the effect of Adoptive Couple v. Baby Girl, 133 S.Ct.2552(2013) on this case. This brief is submitted by the adoptive parents, H.S. and K.S. in response to that invitation.

In summary, the adoptive parents believe that the result of Adoptive Couple is that 1) the Superior Court must be affirmed because there is no qualified contesting placement; and alternatively that 2) Native Village of Tununak v. State OCS, 303 P.3d 431 (Alaska 2013) should be overturned, with the result that the Superior Court must be affirmed.

LAW AND ARGUMENT

This case is the second in a pair of closely related appeals. In the Child in Need of Aid case, parental rights were terminated in September 2011,[1] and in November 2011 the trial court declined a request by the maternal grandmother for placement[2]. The placement decision was appealed as S-14562. In March 2012 the trial court granted an adoption petition over objections of the tribe,[3] which is the subject of the present appeal.

On June 21, 2013 this Court issued its decision in the CINA appeal, S-14562, which will be referred to here as Tununak I to avoid confusion between the two cases. This Court remanded to the trial court on the basis that 25 U.S. Code section 1915(a) implicitly requires that a finding of good cause for placement outside of the listed preferences, must be made by clear and convincing evidence, not just by a preponderance of the evidence.

Only four days later, on June 25, 2013, the U.S. Supreme Court issued the Adoptive Couple decision. The case has a major impact on this adoption case.

---

[1] *Tununak I, supra* at 435.

[2] Id. at 440.

[3] Exc. 33-5.

1. The Grandmother Does Not Have Preference

The most directly applicable portion of Adoptive Couple is Part IV of the decision,[4] in which the Court addresses the same subsection, 25 U.S. Code section 1915(a), which this Court interpreted in Tununak I. The U.S. Supreme Court found that the preferences in that section do not apply in cases where no other party has formally sought to adopt the child. It made this same point repeatedly, and explicitly:

> Section 1915(a)'s preferences are inapplicable where no alternative party has formally sought to adopt the child.[5]
>
> In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court.[6]
>
> Biological Father is not covered by section 1915(a) because he did not seek to *adopt* Baby Girl [emphasis in original].[7]
>
> Nor did other members of the Cherokee Nation or "other Indian families" seek to adopt Baby Girl, even though the Cherokee Nation had notice of - and intervened in - the adoption proceedings.[8]
>
> Nor do section 1915(a)'s rebuttable adoption preferences apply when no alternative party has

---

[4] *Adoptive Couple*, *supra*, at 2564-5 (All citations to this case, in this brief, are to the Supreme Court Reporter).

[5] Id. at 2557.

[6] Id. at 2564.

[7] Id.

[8] Id.

formally sought to adopt the child.[9]

And most tellingly, in footnote 12:

> To be sure, an employee of the Cherokee Nation testified that the Cherokee Nation certifies families to be adoptive parents and that there are approximately 100 such families "that are ready to take children that want to be adopted"... However, this testimony was only a general statement regarding the Cherokee Nation's practices; it did not demonstrate that a specific Indian family was willing to adopt Baby Girl, **let alone that such a family formally sought such adoption in the South Carolina courts.** [emphasis added; internal citations to record omitted][10]

In the case at bar, H.S. and K.S. are the only people who have formally sought to adopt Dawn. This remains true to this day, despite the fact that parental rights were terminated more than two years ago,[11] with these adoptive parents filing for adoption shortly afterwards[12]; that the adoption petition was granted more than one-and-a-half years ago[13]; and that Adoptive Couple, with its explicit statements that only those who formally attempted to adopt a child would be considered preferential placements under section 1915(a), came out nearly 5 months ago and that the requirement in question has been discussed in detail

---

[9] Id. at 2565.

[10] Id. at 2565, n. 12.

[11] Specifically, in September 2011. *Tununak I, supra* at 435.

[12] Exc. 1-5.

[13] Exc. 33-5.

in pleadings filed in this appeal. And still, no other person has applied to adopt.

It is possible the tribe will argue in response that the maternal grandmother did ask for placement. First of all, she was extraordinarily ambiguous in answering whether she actually sought to *adopt* the child. This Court noticed that in Tununak I: when asked whether the reason the grandmother was arguing for placement was just because the tribe was asking her to do so, she answered "yes and no"[14]. She focused on her *right* to adopt rather than on the child's best interests, and when specifically asked whether it was in Dawn's best interests to be moved out of her current home, she answered "That's a difficult question to ask"[15]. The trial judge found the grandmother's testimony that she wanted to adopt Dawn "less than convincing", because she had testified that the reason she wanted to adopt Dawn was because the tribe wanted her to, she had maintained almost no contact with the child, and she knew almost nothing about her life.[16]

Second, the grandmother never applied to the courts for anything. She has not asked for placement, or adoption; the tribe is the only one asking for placement with her. She has not even entered an appearance in either the CINA or adoption cases.

---

[14] *Tununak I, supra* at 438.

[15] Id.

[16] Id. at 439.

And of course even if she was asking for placement, Adoptive Couple insists upon more than that: an actual, unambiguous, formal attempt to adopt a child. As this has never happened, she is not considered a preferential placement under section 1915(a). There is nothing else upon which the tribe can support its appeal. If the grandmother is not a preferred placement, and there are no others formally seeking to adopt Dawn, there is no legal basis for objection to this adoption.

2. *Tununak I* Should Be Overruled

This Court has established a standard for overruling its own precedents: it will do so if clearly convinced that either the decision was originally erroneous, or if it is no longer sound because of changed conditions; and that more harm than good would result from overruling it.[17]

The decision was originally erroneous. It is puzzling that in a section of statutes, the Indian Child Welfare Act, which is fairly compact, and in which at numerous places the Act requires heightened standards of proof, this Court would conclude that despite the absence of a heightened standard in one particular section, the Congress intended that higher standard. ICWA is explicit when it calls for a heightened standard. It does this in several places [18]. This Court made the determination that silence

---

[17] *Tununak I, supra* at 447.

[18] 25 U.S. Code section 1912(e - f).

implies a heightened standard, in Tununak I, based on a belief that Congress intended ICWA to be broadly read in favor of Natives generally. However as Adoptive Couple demonstrates, ICWA should instead be read very specifically and literally. That decision emphasizes, throughout the case, the importance of the statutory text in making these determinations. This makes sense given that ICWA is a prophylactic law, layering additional procedural requirements on top of state laws which already provide some level of protection for biological parents in adoption cases.

One point that Adoptive Couple brings out, that Tununak I appears to have missed, is that additional requirements for adoption are a 'zero-sum game'. They are not without a serious cost, and that cost is to Native children who wish nothing more than a loving home:

> But if prospective adoptive parents were required to engage in the bizarre undertaking of "stimulat[ing]" a biological father's "desire to be a parent," it would surely dissuade some of them from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the [South Carolina] State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor - even a remote one - was an Indian.

> If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA.[19]

In this case, the vulnerable and potentially disadvantaged Native child has a face, and a name. In the briefing she is being called Dawn, not her real name, but she is a real girl. She has been living with H.S. and K.S., who she knows as her mommy and daddy [20], since she was 1 ½ years old, and she is now 5 ½.[21] To take her away from her family at this point and place her with strangers, would be to ignore the stake that Native children have in this dispute.

Second, the conditions under which Tununak I was decided, changed dramatically four days later. One of the major considerations this Court took into account, was the desirability of uniform standards throughout the states.[22] And yet with Adoptive Couple, which limits ICWA to the specifics of its text, it is unlikely that any more states will be interpreting section 1915(a) to go beyond its own statutory terms. Therefore in order to be consistent, not only with other states but with the U.S. Supreme Court as well, Tununak I should be overruled.

---

[19] *Adoptive Couple, supra* at 2565.

[20] *Tununak I, supra* at 438.

[21] Exc. 1.

[22] *Tununak I, supra* at 448.

In determining that the intent of the Congress must have been to require a heightened standard of proof in section 1915(a), this Court looked to Mississippi Band of Choctaw Indians v. Holyfield,[23] a rare ICWA case decided by the U.S. Supreme Court. This Court may have read too much into that decision. Holyfield involved the interpretation of a potentially ambiguous term; the Court had to determine what constituted "domicile" under 25 U.S. Code section 1911(a)[24]. That Court determined that the domicile of a newborn child follows that of the mother, and since the mother was domiciled on the reservation, the tribe had jurisdiction under that section.[25] Nothing in Holyfield went beyond the letter of ICWA. It was merely a reasonable interpretation of a specific term in that statute. And nothing in that decision suggests that the Court intended state courts to go beyond the statutory language of ICWA. A mistakenly broad reading of ICWA may have resulted, however, because the U.S. Supreme Court began by laying out the legislative purpose in enacting ICWA, in order to provide context for the rest of the decision.[26] And yet Holyfield and Adoptive Couple can be harmonized once one notes the critical importance of the fact that both of them read

---

[23] 109 S.Ct. 1597(1989).

[24] Id. at 1599.

[25] Id. at 1608.

[26] Id. at 1599-1602.

provisions of ICWA literally, refusing to go beyond, or to fall short of, the statutory text.

In addition to finding either that Tununak I was originally erroneous or is no longer sound because of changed conditions, this Court would have to find that more good than harm would result from overruling it. Of course in the case of this specific child, Dawn S., no one could seriously argue at this point that it would not be harmful to dislodge her from the only family and only parents she has ever known, at the age of 5 ½, and place her with strangers in an unfamiliar village. However this Court would most likely look for broader harm before overturning precedent, and in part that can be found right in the language of Adoptive Couple. The U.S. Supreme Court expressed serious concern over the potential plight of Native children who could find it nearly impossible to be adopted, because potential adoptive parents would shy away from adopting children who might be removed from their homes in the middle of the process, and given to some other family who had been tracked down and convinced to adopt.[27] The importance of permanency for young children, which the tribe in this case has sought to minimize or ignore, is codified in this state as AS 47.05.065(5).

In addition, this Court in Tununak I noted the importance of uniform interpretation throughout the various state and federal

---

[27] *Adoptive Couple, supra* at 2565.

courts, in interpreting provisions of ICWA[28]. Following Adoptive Couple, it is increasingly unlikely that states will stretch ICWA beyond its actual terms. Thus, leaving Tununak I in place increases the likelihood that Alaska's interpretation of the law will be out of step with that of other states.

Because Tununak I was erroneously decided, because Adoptive Couple changes the legal landscape in such a way that it is no longer desirable, and because more good than harm would come from overruling it, Tununak I should be overturned. The result of that, is a necessary affirmation of this adoption case. The only issue which would potentially have survived for the adoption appeal, had Tununak I been decided in favor of the State, would have been whether the State had done enough to locate other Native families who wanted to adopt. Since Adoptive Couple makes it clear that such open-ended searches are not a requirement of ICWA [29], there is no appellate issue remaining.

---

[28] *Tununak I, supra* at 448.

[29] *Adoptive Couple, supra* at 2564-5.

CONCLUSION

Because Adoptive Couple explicitly states that an individual who did not formally attempt to adopt the child, is not a preferred placement under 25 U.S. Code section 1915(a), which the grandmother in this case did not do; and alternatively because Tununak I should be overruled; the adoption decree in this case should be affirmed.

DATED AND SIGNED this 13 day of November, 2013 in Anchorage, Alaska.

KENNETH KIRK, ATTORNEY AT LAW

Kenneth C. Kirk, ABA 8711091
Attorney for Appellees H.S. and K.S.