Charleston Adoptive Couple Impacts Federal Adoption Law

Supreme Court of the United States Clarifies Parental Rights Under ICWA

By Robert S. "Trey" Ingram III

For only the second time in the 35-year history of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (ICWA), the Supreme Court of the United States has issued an opinion clarifying the requirements for an adoption of an "Indian child."[1] While this heartbreaking—and ongoing—saga began in Oklahoma, its legal origin hails from Charleston, South Carolina.

This article seeks to assist the South Carolina family law practitioner to understand the impact of *Adoptive Couple* on parental rights under ICWA and the South Carolina Adoption Act (Adoption Act). What follows first is a brief overview of the facts of *Adoptive Couple*, then a review of the Adoption Act and ICWA as interpreted by *Adoptive Couple*, and finally, practical guidance for South Carolina lawyers on the current status of parental rights under the Adoption Act and ICWA.

Adoptive Couple v. Baby Girl

This South Carolina case captured the heart and attention of the nation when on December 31, 2011, at the age of 27 months, the child at the heart of this case (Baby Girl) was removed from the custody of her prospective adoptive parents (Adoptive Couple), whom her biological mother (Birth Mother) personally selected for purposes of adoption and with whom Baby Girl had lived since birth, and was then placed into the custody of her biological father, a member of the Cherokee Nation (Biological Father), whom she had never met. The following is a brief account of those facts particularly significant for South Carolina lawyers to be able to identify in practice.

In December 2008, Biological Father, a military service member stationed at Fort Sill, Oklahoma, and Birth Mother, who lived approximately four hours away in Bartlesville, Oklahoma, became engaged to be married.[2] At no time did the two ever live together.[3] Their relationship deteriorated shortly after learning of Birth Mother's pregnancy in January 2009 and in fact the engagement was called off by May 2009.[4]

"It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so."[5] Birth Mother, who testified that she was financially struggling as the single parent of two children already, decided to make an adoption plan for Baby Girl.[6] Through an adoption agency, Birth Mother selected Adoptive Couple, residents of Charleston who were married in 2005 and have no other children, as the prospective adoptive parents for Baby Girl.[7] Adoptive Couple met Birth Mother in August 2009 and began providing financial assistance to her.[8] Baby Girl was born in September 2009 in Oklahoma with Adoptive Couple even present in the delivery room.[9]

Believing that Biological Father

PHOTO BY GEORGE FULTON

was of Cherokee heritage, Birth Mother's attorney (hired at the expense of Adoptive Couple) inquired with the Cherokee Nation pursuant to ICWA to determine if Biological Father was an enrolled member.[10] However, this notice misspelled Biological Father's name ("Dust*in*" instead of "Dust*en*") and incorrectly stated his birthdate.[11] Based upon this inaccurate information, the Cherokee Nation responded that Biological Father was not a member. Adoptive Couple thereafter received approval pursuant to the Interstate Compact on Placement of Children (ICPC)[12] and brought Baby Girl home to Charleston, South Carolina.[13]

Three days after Baby Girl's birth, Adoptive Couple filed a petition for adoption in the Family Court, Charleston County. The summons and complaint was hand-delivered to Biological Father in January 2010, at which time he signed an "Acceptance of Service and Answer of Defendant" stating he did not contest the adoption.[14] However, less than one week later, Biological Father filed his own custody action in Oklahoma and contested the South Carolina adoption proceedings, along with the Cherokee Nation, which ultimately intervened as a party pursuant to ICWA.

On November 25, 2011, the family court denied Adoptive Couple's adoption petition finding that "Adoptive Couple had not met the heightened burden under [ICWA] of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody."[15] On July 26, 2012, the S.C. Supreme Court affirmed the family court's decision, holding: (1) ICWA applies, (2) Biological Father is a "parent" under ICWA, (3) ICWA bars the termination of Biological Father's parental rights, and (4) ICWA commands placement preference for an Indian parent.[16] Writing for the majority, Chief Justice Toal noted in particular that the Court was "constrained" by ICWA, that it affirmed the family court order only "with a heavy heart," and further opined that "[a]ll of the rest of our determinations flow from this reality [that ICWA applies and confers conclusive custodial preference to Biological Father]."[17]

On June 25, 2013, the Supreme Court of the United States issued its decision which agreed that ICWA applies and accepted for the sake of argument that Biological Father fits the definition of "parent" under ICWA; however, it reversed the ruling of the S.C. Supreme Court and held that the termination of parental rights provisions under ICWA are inapplicable to a non-custodial Indian parent and that the placement preference under ICWA does not prevent placement with a non-Indian family when no other eligible candidates have sought to adopt the child.[18] Following the Supreme Court's ruling, the S.C. Supreme Court has since further remanded the case to the Family Court "for the prompt entry of an order approving and finalizing Adoptive Couple's adoption of Baby Girl, and thereby terminating [Biological] Father's parental rights," and transferring custody of Baby Girl to Adoptive Couple.[19]

The South Carolina Adoption Act

To understand the Supreme Court's holdings in *Adoptive Couple*, a brief overview of the Adoption Act and ICWA is in order. The Adoption Act provides the statutory framework for adoption proceedings in South Carolina. As is pertinent to *Adoptive Couple*, greater attention is given to unwed biological fathers who must proactively seek to maintain and protect their natural parental rights. As adoption attorney James Fletcher Thompson has coined it: the Adoption Act embraces the "biology plus action" concept.[20] The Adoption Act follows constitutional precedent that a "biological connection … offers the natural father an opportunity" only that he must then proactively "grasp" in order to "enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."[21] As demonstrated below, an unwed father's actions determine whether his biological child may be adopted without his consent or even his notice of the proceedings.

Whose consent to an adoption is required? (South Carolina Adoption Act, § 310)

Under the Adoption Act, certain persons must consent to an adoption. Practitioners should clearly differentiate between determining whether a person's consent is required under the Adoption Act and whether legal grounds exist to otherwise terminate parental rights. [22] When consent *is not* required, the court may grant an adoption over the objection of that person—and the final decree will have the same effect as terminating parental rights.[23] Alternatively, if consent *is* required, then petitioner must prove grounds for terminating parental rights.

The consent of the adoptee is required for children over 14, with limited exceptions.[24] Likewise, the consent of the adoptee's mother, if living, is almost always required.[25] The sole exceptions are found in § 320 which does not require the consent of a parent (a) whose parental rights have been terminated, (b) who is mentally incapable of providing minimally acceptable care, or (c) whose criminal sexual conduct or incest led to the child's conception. If both parents are deceased or their parental rights have been terminated or relinquished, then the legal guardian/custodian, child placing agency or person facilitating the adoption must consent.[26]

As for the consent of the adoptee's father, the rules differ depending upon whether the adoptee was conceived or born during the marriage of the child's parents. If so, then the consent of the living father is required.[27] If not, then the rules further depend upon when the child is physically placed with the prospective adoptive parents.[28]

For children placed with prospective adoptive parents *more than* six months after birth, then the consent of the unwed biological father is only required if he has "maintained substantial and continuous or repeated contact with the child …"[29] The Adoption Act expressly deems such "substantial and continuous or repeated contact" to exist where the father: "openly lived with the child for a period of

six months within the one-year period immediately preceding the placement of the child for adoption, and who during the six-months period openly held himself out to be the father of the child. . . ."[30] Otherwise, an unwed father must demonstrate such "substantial and continuous or repeated contact" through (a) the payment of "fair and reasonable" financial support; and either (b) visitation at least monthly or (c) regular communication with the child.[31]

For children placed with prospective adoptive parents *less than* six months after birth, then the consent of the unwed biological father is only required if he (a) "openly lived with the child or the [mother] for [the] six months immediately [prior to placement and] openly held himself out to be the father …" or (b) "paid a fair and reasonable sum, based on [ability], for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses."[32]

Who receives notice of an adoption? (South Carolina Adoption Act, § 730)

Apart from the determination of whose consent is required is the related issue of who must receive notice of adoption proceedings. A person entitled to notice but whose consent is not required receives only the "opportunity to appear and to be heard before the final hearing on the merits of the adoption."[33] With a few exceptions, the Adoption Act requires notice of adoption proceedings to any person who: (1) has been adjudicated to be the father of the child; (2) is required to consent to the adoption; (3) has properly registered with the Responsible Father Registry[34] at the time of the filing; (4) is listed as the child's father on the birth certificate; (5) is openly living with the child or the child's mother … and who is holding himself out to be the child's father; (6) has been identified as the child's father by the mother in a sworn, written statement; and (7) is not required to consent pursuant to § 320(A)(2).[35]

Applying the Adoption Act to Biological Father

Both the Supreme Court and the S.C. Supreme Court agree that were it not for ICWA, then the Adoption Act would not have required Biological Father's consent. "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."[36] "Under state law, [Biological] Father's consent to the adoption would not have been required."[37] It is unclear from either decision whether Biological Father was entitled to receive notice under the Adoption Act.

ICWA Post-*Adoptive Couple*

With the above South Carolina framework in place, attention now shifts to the special rules and heightened burdens that come into play under ICWA, particularly as now understood in light of *Adoptive Couple*.

ICWA establishes the "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes…."[38] An "Indian child" is defined 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."[39] Baby Girl qualifies under subsection (b) through Biological Father's membership in the Cherokee Nation. Despite a great debate at the state level as to Biological Father's status as a "parent" under ICWA and its implications on the termination of parental rights provisions, the Supreme Court of the United States simply accepted arguendo that he qualified as a "parent."[40]

Termination of parental rights under ICWA, §§ 1912(d), (f))

While an adoption could have been granted under state law without the consent of Biological Father and irrespective of any state law grounds for an involuntary termination of parental rights (TPR), the effect on him would have been the same as a TPR.[41] Under ICWA, however, § 1912(d) requires the offering of "remedial services" [42] prior to any TPR:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[43]

Section 1912(f) requires a heightened burden of proof to justify the TPR:

> 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.[44]

On the basis of these provisions, the Family Court determined—and the S.C. Supreme Court affirmed—that ICWA barred the termination of Biological Father's parental rights. The Supreme Court of the United States, however, ruled that such a reading would "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian" and would give biological Indian fathers an "ICWA trump card" allowing them to abdicate parental responsibility until the eleventh hour to suddenly override the mother's decision and the child's best interests."[45]

Given the avoidance by the Supreme Court of the United States to define "parent" despite practitioners' expectations, it is ironic that the Supreme Court went to great lengths to define "continued" in § 1912(f) and "breakup" in § 1912(d).[46] After defining "continued," the Supreme Court opined that "[t]he phrase 'con-

tinued custody' [under § 1912(f)] therefore refers to custody that a parent already has (or at least had at some point in the past)."[47] Accordingly, the Court held: "[a]s a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."[48] Therefore, § 1912(f) could not bar the termination of Biological Father's parental rights simply "because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings."[49]

Similarly, after defining "breakup" as the "discontinuance of a relationship" or the "ending as an effective entity," the Supreme Court held 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' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights."[50] Thus the Court ruled § 1912(d) was inapplicable and could not bar the termination of Biological Father's parental rights because there was no Indian family to "breakup;" to the extent there ever was an Indian family, it ended long before Baby Girl's birth or the filing of the adoption petition.[51] The Supreme Court further reasoned that its interpretation was consistent with the stated purposes of ICWA to provide the "standards for the *removal* of Indian children from their families."[52]

Placement preference under ICWA, § 1915(a)

Also at issue before the Supreme Court was ICWA's adoption placement preference provision:

> 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.[53]

While the S.C. Supreme Court found this statutory preference prevented placement in a non-Indian home absent good cause, the Supreme Court of the United States held that this section is entirely inapplicable where no such party is seeking to adopt.[54] "[T]here simply is no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward."[55] The Supreme Court noted that while Biological Father and the Cherokee Nation opposed the adoption petition of Adoptive Couple, neither Biological Father, his parents, the Cherokee Nation, nor any other Indian family sought to adopt Baby Girl.[56]

Adoptive Couple in practice

Adoptive Couple is truly a landmark decision in the practice of adoption law and ICWA jurisprudence. While it resolves key issues pertaining to the applicability of ICWA provisions, much remains to be further litigated—both in this case and in others. In light of *Adoptive Couple*, the South Carolina family law practitioner should keep in mind the following when presented with an adoption case involving an Indian child in which the biological Indian parent(s) does not consent. First, it is critical to determine whether the biological Indian parent ever had physical or legal custody of the Indian child. If not, then the heightened standards of §§ 1912(d),(f) will not apply and the practitioner may look to state law to determine consent, notice and TPR issues for the non-custodial Indian parent. An obvious area for concern (and for future litigation) is the case where a biological Indian parent had physical or legal custody at some point, but for a period of time less than the six months required under the Adoption Act; until resolved otherwise, the safest course of action would be to presume the applicability of §§ 1912(d),(f).

Next, it is important to be mindful that the Supreme Court did not address the applicability of § 1912(a), which requires notice of the adoption action to the "parent or Indian custodian and the Indian child's tribe." It would be unwise to determine under the Adoption Act that notice is not required and conclude that the biological Indian parent need not be served. The correct approach would be to provide the required notice pursuant to § 1912(a) and assert the inapplicability of §§ 1912(d),(f), if warranted by the facts of the case.

Practitioners should likewise be mindful that § 1915(a), which establishes a hierarchy of adoption placement preferences in favor of maintaining an Indian family, will not apply unless an eligible candidate comes forward to seek adoption or custody.[57] An adoption petition by a non-Indian family will not be thwarted under § 1915(a) absent an extended family member or other Indian-family requesting the relief of adoption or custody.

In instances involving a voluntary consent to an adoption of an Indian child, by either biological parent, family lawyers should guard against misplaced confidence in the consent document; while a properly executed consent or relinquishment is irrevocable under South Carolina law, with certain limited exceptions (e.g., fraud or duress),[58] consent under ICWA may be withdrawn at any time prior to entry of the final adoption/TPR decree.[59]

Finally, as emphasized by the S.C. Supreme Court in the majority and the dissenting opinions, family law practitioners should keep their focus on the settled principle that the "best interests of the child" are the "primary, paramount and controlling consideration of the court in all child custody controversies."[60] Note particularly, however, that controlling law remains that ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected."[61] As articulated by Justice Kittredge, "ICWA envisioned a symbiotic relationship between the additional protections of the Act and well-established state law principles for deciding custody matters in accordance with the best interests of the child."[62]

While emotions ran understandably high on both sides of the "v." in *Adoptive Couple*, the clear and concise direction from the Supreme Court of the United States will assist

seasoned adoption attorneys and general family law practitioners alike with understanding parental rights under the Adoption Act and ICWA, particularly those of a non-custodial Indian parent.

Robert S. "Trey" Ingram III practices with Smith Moore Leatherwood, LLP in Greenville.

Endnotes

[1] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (Alito, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas and Breyer, JJ., joined. Thomas, J., and Breyer, J., filed concurring opinions. Scalia, J., filed a dissenting opinion. Sotomayor, J., filed a dissenting opinion, in which Ginsburg and Kagan, JJ., joined, and in which Scalia, J., joined in part), *rev'g*, 398 S.C. 625, 731 S.E.2d 550 (2012).

[2] *Adoptive Couple*, 398 S.C. at 660, 731 S.E.2d at 569 (Kittredge, J. dissent), *rev'd*, 133 S. Ct. 2552 (2013).

[3] *Id.*

[4] *Id.* at 661, 731 S.E.2d at 569.

[5] 133 S. Ct. at 2558.

[6] 398 S.C. at 631, 731 S.E.2d at 553.

[7] *Id.*

[8] *Id.*

[9] 133 S. Ct. at 2558.

[10] *Id.*

[11] *Id.*; *see also* 398 S.C. at 632, 731 S.E.2d at 554.

[12] *See* South Carolina Adoption Act, S.C. Code Ann. § 63-9-2000; Okla. Stat. 10, § 571.

[13] 133 S. Ct. at 2558; *see also* 398 S.C. at 633, 731 S.E.2d at 554.

[14] *Id.*; *see also* 398 S.C. at 634, 731 S.E.2d at 555.

[15] 133 S. Ct. at 2559 (citing 398 S.C. at 648-51, 731 S.E.2d at 562-64).

[16] *Id.* (*citing* 398 S.C. 625, 731 S.E.2d 550).

[17] 398 S.C. at 657, 731 S.E.2d at 567.

[18] 133 S. Ct. at 2557.

[19] *Adoptive Couple v. Baby Girl*, 2013-07-17-01 (S.C. Sup. Ct. dated July 17, 2013) (Toal, C.J., Kittredge and Hearn, JJ., for the majority. Pleicones and Beatty, JJ., dissenting) (noting the Supreme Court had "cleared the way … to finalize Adoptive Couple's adoption of Baby Girl" with "removal of perceived federal impediment" and remanding to the Family Court whose ultimate order will be sealed), *reh'g denied*, *Adoptive Couple v. Baby Girl*, 2013-07-24-01 (S.C. Sup. Ct. dated July 24, 2013) (Toal, C.J., Kittredge and Hearn, JJ., for the majority. Pleicones and Beatty, JJ., dissenting) (clarifying and reiterating that the sole remaining issue for the Family Court is to determine how to transfer physical custody of Baby Girl to Adoptive Couple in accordance with the best interest of the child), *stay denied*, __ S.Ct. __, Op.No. 13A115, 2013 WL 3967653 (Aug. 2, 2013).

[20] James Fletcher Thompson, *South Carolina Adoption Law and Practice, A Guide for Attorneys, Certified Investigators, and Families*, p.63 (2010) (*citing Lehr v. Robertson*, 463 U.S. 248 (1983)).

[21] Thompson, p. 63 (*quoting Lehr*, 463 U.S. at 262 (footnote omitted)); *see also* 398 S.C. at 676, 731 S.E.2d at 577 (Kittredge, J., dissenting) (*citing Lehr*, 463 U.S. at 261-62).

[22] *See* S.C. Code Ann. § 63-7-2570 (2008) (Grounds for TPR include: (1) abuse or neglect, (2) failure to remedy within six months the conditions causing DSS removal of child, (3) failure to visit child outside home for six months, (4) failure to support child outside home for six months, (5) presumptive father is not biological father, (6) diagnosable condition rendering parent unlikely to provide minimally acceptable care, (7) abandonment, (8) child in foster care for 15 of 22 months, (9) certain criminal domestic violence offenses, (10) murder of child's other parent, and (11) certain criminal sexual conduct resulting in conception).

[23] Thompson, p. 63 (*citing* Adoption Act, S.C. Code Ann. § 63-9-760(B)).

[24] S.C. Code Ann. § 63-9-310(A)(1) (2008).

[25] *See* S.C. Code Ann. § 63-9-310 (A)(2),(3) (2008).

[26] S.C. Code Ann. §§ 63-9-310(B),(C) (2008).

[27] S.C. Code Ann. § 63-9-310(A)(3) (2008); *cf.* ICWA, 25 U.S.C. § 1903(9) (2006) (excluding unwed fathers from definition of "parent" where paternity has not been acknowledge or established).

[28] *See* S.C. Code Ann. § 63-9-310(A)(4),(5) (2008).

[29] S.C. Code Ann. § 63-9-310(A)(4) (2008).

[30] *Id.*

[31] *Id.*

[32] S.C. Code Ann. § 63-9-310(A)(5) (2008).

[33] S.C. Code Ann. § 63-9-730(F) (2008).

[34] *See* S.C. Code Ann. § 63-9-820 (2008).

[35] S.C. Code Ann. § 63-9-730 (2008).

[36] 133 S. Ct. at 2559 (*citing* 398 S.C. at 644, n.19, 731 S.E.2d at 560, n.19).

[37] *Id.*

[38] 25 U.S.C. § 1902 (2006); *see also*, 133 S. Ct. at 2557.

[39] 25 U.S.C. § 1903(4) (2006).

[40] *See* 398 S.C. 643, 731 S.E.2d at 573; 133 S. Ct. at 2560.

[41] S.C. Code Ann. § 63-9-760(B) (2008).

[42] *Cf.*, S.C. Code Ann § 63-9-310(A)(4) (2008) (While 25 U.S.C. § 1912(d) (2006) requires "active efforts be made to provide remedial services and rehabilitative programs" as a prerequisite to TPR, the Adoption Act provides with respect to consent that "the court may not require a showing of diligent efforts by any person or agency having lawful custody of the child to encourage the father to perform the acts").

[43] 25 U.S.C. § 1912(d) (2006).

[44] 25 U.S.C. § 1912(f) (2006).

[45] 133 S. Ct. at 2565.

[46] *Id.* at 2560-62, 2562-64 (citing a combined nine sources for the various definitions of "continued" and "breakup").

[47] *Id.* at 2560.

[48] *Id.*

[49] *Id.* at 2562 (noting that the natural mother of a child born out of wedlock has sole custody under the laws of both South Carolina and Oklahoma).

[50] *Id.* at 2562.

[51] *Id.*

[52] *Id.* at 2563 (*quoting* 25 U.S.C. § 1902 (2006)).

[53] 25 U.S.C. § 1915(a) (2006).

[54] 133 S. Ct. at 2564 (*citing* 398 S.C. at 655-57, 731 S.E.2d at 566-67).

[55] *Id.*

[56] *Id.* (citations omitted) (*citing* 398 S.C. at 699, 731 S.E.2d at 590 (Kittredge, J., dissenting) (noting that the "paternal grandparents are not parties to this action")).

[57] *Id.*; *see also* 398 S.C. at 655-56, 731 S.E.2d at 566.

[58] *See* Adoption Act, S.C. Code Ann. § 63-9-350 (2008); *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000).

[59] 25 U.S.C. § 1913(c) (2006) ("the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption"); 25 U.S.C. § 1903(9) (2006) (defining "parent" to include either biological parent of an Indian child); *see also* 25 U.S.C. § 1913(a) (2006) ("Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid").

[60] 398 S.C. at 679, 731 S.E.2d at 579 (Kittredge, J., dissenting) (*citing Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103-104 (2003)); 398 S.C. at 702-703, 731 S.E.2d at 591-592 (Hearn, J., dissenting).

[61] *Id.* at 653, 731 S.E.2d at 565 (*quoting Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n.24 (1989) (citations omitted)); *cf. Id.* at 701 n.73, 731 S.E.2d at 591 n.73 (Kittredge, J., dissenting) (rejecting notion that "interests of an Indian child are always better served by placement with an Indian family").

[62] *Id.* at 673, 731 S.E.2d at 575 (Kittredge, J., dissenting) (*citing Holyfield*, 490 U.S. at 58 (citations omitted)).