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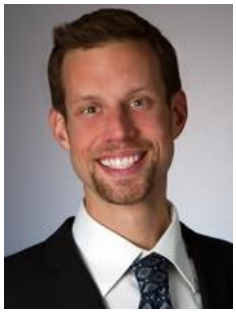
New Indian Child Welfare Act Challenges On The Horizon

By **Rob Roy Smith and Claire Newman**
November 8, 2017, 3:37 PM EST



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Two types of challenges to the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., now feature prominently: equal protection challenges and challenges based on the "intrafamily dispute" exception to ICWA. A petition for a writ of certiorari to decide both issues is currently pending in one such case: S.S. v. Stephanie H. S.S. notwithstanding, tribal attorneys and ICWA practitioners must now be prepared to address both types of challenges in the near future.

ICWA was enacted in 1978 to address a child welfare crisis characterized by the "alarming rate" of removal of Native American children from their families and the resulting devastating consequences to Native American children, their families and tribes. At the time of ICWA's enactment, between 25 and 35 percent of all Native American children had been separated from their families and placed in foster care and adoptive homes, 90 percent of which were non-Native American homes.[1] Congress keenly understood that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[2] Nearly four decades after ICWA's enactment, overrepresentation of Native American children in foster care and adoption demonstrates the continuing need for the safeguards the statute provides.[3]

Equal Protection Challenges

Equal protection challenges to ICWA are almost as old as the statute itself. Numerous courts resolved these challenges according to an equal protection analysis, resting on Morton v. Mancari,[4] United States v. Antelope[5] and a seminal pre-ICWA child welfare case, Fisher v. District Court,[6] that goes like this: Congress has plenary power over Native American affairs; special treatment of Native Americans under ICWA is based solely upon the sovereign nature of tribes and is rationally tied to the fulfillment of Congress's trust responsibility to Native Americans; and the legislative goal of the ICWA, to preserve Native Americans families and their connection to tribes and tribal culture, place Native American children in a different situation than non-Native American children for the purpose of child welfare.[7]

But equal protection challenges assumed a different tenor after two cases decided by the California Court of Appeals, In re Bridget R.[8] and In re Santos Y[9]. In these cases, courts held that while

protecting tribes' interest in their children and preserving tribal culture is a compelling governmental interest, that interest serves no purpose when applied to children of Native American descent whose parents are "fully assimilated Indian." Therefore, the federal government's compelling interest does not outweigh a child's fundamental right to a permanent home — i.e. remaining with the child's foster or pre-adoptive placement. Courts in these cases further hold that "[a]bsent social, cultural, and political relationships, or where the relationships are very attenuated, the only basis for applying ICWA rather than state law in dependency proceedings is the child's genetic heritage."[10] Thus, according to these courts, ICWA constitutes invidious race discrimination. Not only are these decisions untethered from the text of ICWA, but a determination that a parent is insufficiently connected to their tribe or tribal culture made by a state court regardless of its familiarity with the unique political, cultural, and familial traditions of the tribe is suspect.[11]

The theory that Native American children are harmed by ICWA was tested on a new scale in A.D. by Carter v. Washburn, as part of the Goldwater Institute's "Equal Protection for Indian Children" initiative.[12] In this class action lawsuit, filed on behalf of children with Native American ancestry living off reservation and their foster and pre-adoptive parents, plaintiffs alleged that the children's equal protection rights were violated by a delay in their placement into foster care or adoptive homes and placed at an increased risk of harm as a result of ICWA's active efforts requirement, heightened evidentiary standards, and placement preferences.[13] The District Court for the District of Arizona recently dismissed the case. Unlike courts before it finding that ICWA's treatment of Native American children is based on the sovereign status of tribes and does not constitute race discrimination, the court held that plaintiffs lacked standing because they failed to show injury attributable to ICWA.[14] Thus, while the court properly dismissed the constitutional challenge it neither denied nor affirmed the constitutionality of ICWA's core provisions. The decision is now on appeal to the Ninth Circuit.

The Goldwater Institute renewed its equal protection challenge in S.S. v. Stephanie H., a lawsuit filed by a Native American father to terminate the parental rights of a non-Native American mother. The Arizona Supreme Court denied review of the Arizona Court of Appeals decision applying ICWA and denying termination of the mother's rights.[15] Petitioners' petition for certiorari to the Supreme Court claims that ICWA violates the Native American children's rights under the Equal Protection Clause, yet fails to allege how the children are harmed by the statute at all. Petitioners' equal protection claim generally rests on the argument that application of the ICWA hinges solely on the children's Native American blood, ignoring numerous state supreme court cases to the contrary.[16] Nonetheless, petitioners' argument invites the court to revisit Mancari's rationale and potentially to scrutinize enrollment provisions within a tribe's constitution, which are traditionally reserved to the discretion of individual tribes and beyond the purview of state or federal courts.[17] Of course, when Native American blood is required at all, it makes an individual eligible for enrollment in a sovereign political entity, not to a racial group.

"Intrafamily Dispute" Exception to ICWA

ICWA practitioners are likely familiar with an oft-asserted exception to ICWA — the "existing Indian family" exception — under which ICWA does not apply where a court determines that termination of parental rights would not cause the breakup of an "Indian family" because the Native American parent has not had custody of the child or has not maintained sufficient ties to the tribe.[18] Over the last decade, a majority of state supreme courts have come to reject this paternalistic theory. Fewer practitioners are familiar with an exception to ICWA appearing more frequently in recent years.

Under the intrafamily dispute exception, opponents of ICWA argue that the statute does not apply when

a family member petitions for the termination of parental rights to an Native American child, rather than state child protection services. In S.S. v. Stephanie H., the Goldwater Institute, representing petitioner children, urges the Supreme Court to decide whether ICWA applies to so-called intrafamily disputes or a "private severance action".[19] Petitioners argue that Congress never intended ICWA to apply to cases such as this one, in which the father of the children sought to terminate the parental rights of the mother to facilitate their adoption by their stepmother. Thus far, no state supreme court has adopted the intrafamily dispute exception to ICWA in the context of a parent-initiated petition to terminate parental rights.

Even the most tertiary review of ICWA's text reveals ICWA's application to any action to terminate parental rights. Congress couldn't have been clearer — ICWA's legal standard for termination of parental rights expressly applies to "*[a]ny party* seeking to effect a ... termination of parental rights." § 1912(d) (emphasis added). Accordingly, under §1912(d), even a family member petitioning for termination must satisfy the legal standard for terminating parental rights including a showing that active efforts have been made to prevent the breakup of the Native American family. Likewise, Congress instructed that "*no termination* may be ordered" absent 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 Native American custodian is likely to result in serious emotional or physical damage to the child." § 1912(f) (emphasis added). Moreover, under § 1903(1), Congress carefully instructed that ICWA apply to proceedings involving out-home-placement of the child and termination of parental rights, but not to juvenile criminal proceedings or custody proceedings arising from a divorce between parents. § 1903(1). Petitioners conveniently ignore the significant difference between the loss of physical or legal custody of a child versus the permanent termination of a parent's rights to his or her child.

In a case analogous to S.S., the Washington Supreme Court, agreeing with the above analysis, held that ICWA applies to termination petitions initiated by one parent against another where a Native American child will remain with the Native American parent.[20] Quite simply, "[i]f the child at issue is an Indian child and that child is involved in a child custody proceeding, ICWA and WICWA shall apply."[21]

Tribal child welfare departments, state social services and state courts may be less experienced with the application of ICWA to petitions to terminate parental rights brought by one family member against another; however they should carefully assess the ramifications of an "intrafamily dispute" exception to ICWA. One key question is whether and why a tribe's interest in the preservation of tribal culture, tribal familial relationships and traditions are any less compromised by the termination of parental rights by another family member. While a tribe can always choose whether or not to support termination of parental rights and adoption in a particular case, advocating for an mechanical exception to ICWA which is unsupported by its text could embolden ICWA's opponents and usher in new limitations to ICWA in future cases.

Regardless of whether the Supreme Court tackles ICWA this term, tribal child welfare departments and attorneys must be prepared to address the intrafamily dispute exception to ICWA in future cases.

***DISCLOSURE**: The authors of this article represent the Colorado River Indian Tribes in S.S. v. Stephanie H.*

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[1] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

[2] 25 U.S.C. § 1901(3).

[3] See A. Summers, Disproportionality Rates For Children of Color in Foster Care 12 (Nat'l Council of Juvenile & Family Court Judges 2015), available at https://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20D ispro%20TAB%20Final.pdf; U.S. Dep't of Health & Human Servs., Race/Ethnicity of Public Agency Children Adopted (July 2015) available at https://www.acf.hhs.gov/cb/resource/race-2014.

[4] 417 U.S. 535 (1974).

[5] 430 U.S. 641 (1977).

[6] 424 U.S. 382 (1976).

[7] See, e.g., Matter of Guardianship of D.L.L., 291 N.W.2d 278, 281 (S.D. 1980); In re A.B., 663 N.W.2d 625, 636 (N.D. 2003).

[8] 41 Cal. App. 4th 1483, 1490, 49 Cal. Rptr. 2d 507, 515 (1996), as modified on denial of reh'g (Feb. 14, 1996).

[9] 92 Cal. App. 4th 1274, 1309, 112 Cal. Rptr. 2d 692, 721 (2001).

[10] In re Santos Y., 92 Cal. App. 4th 1274, 1318 (Cal.App. 2001).

[11] See Matter of Guardianship of D.L.L., 291 N.W.2d at 281 ("Indian relations are of an anomalous and complex character, and tribal courts are better able than other forums to evaluate questions of Indian traditions") (citations omitted).

[12] Through its "Equal Protection for Indian Children" the Goldwater Institute represents Indian children and couples seeking foster care or adoptive placement of the child on the basis that ICWA provides "a separate and substandard set of rules governing child welfare." http://goldwaterinstitute.org/article/goldwater-asks-california-supreme-court-to-preserve-the-equal-protection-rights-of-native-american-children/

[13] A.D. by Carter v. Washburn, 2017 WL 1019685, at *6-12 (D. Ariz. Mar. 16, 2017).

[14] Id. at *11.

[15] 241 Ariz. 419, 388 P.3d 569 (Ct. App. 2017), review denied (Apr. 18, 2017).

[16] See, e.g., In re Baby Boy L., 103 P.3d 1099 (Okla. 2004) (rejecting In re Santos Y.); In re Vincent M., 59 Cal. Rptr. 3d 321 (Cal. App. 2007) (rejecting In re Santos Y. and In re Bridget R.); In re A.B., 663

N.W.2d 625 (N.D. 2003) (rejecting In re Santos Y.); In re Alicia S., 76 Cal. Rptr. 2d 121 (Cal. App. 1998) (rejecting In re Bridget R.); In re Baby Boy C., 805 S.2d 313 (App. Div. 2005) (rejecting In re Bridget R.).

[17] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2584–85 (2013) (Sotomayor, J., dissenting) (rejecting invitation to second-guess the membership requirements of federally recognized Indian tribes (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72, n. 32 (1978)).

[18] See, e.g., Matter of Adoption of Baby Boy L., 231 Kan. 199, 206, 643 P.2d 168, 175 (1982) overruled by In re A.J.S., 288 Kan. 429, 204 P.3d 543 (2009).

[19] 241 Ariz. 419, 388 P.3d 569 (Ct. App. 2017), review denied (Apr. 18, 2017).

[20] Matter of Adoption of T.A.W., 383 P.3d 492, 500 (2016).

[21] Id. Other cases applying ICWA to parent-initiated termination petitions include, In re Adoption of T.A.W., 383 P.3d 492, 494 (Wash. 2016); In re C.A.V., 787 N.W.2d 96, 98 (Iowa Ct. App. 2010); In re D.A.C., P.D.C., & S.D.C., 933 P.2d 993, 995–96 (1997); In re Crystal K., 226 Cal. App. 655, 662–66 (1990).