Adoptive Couple V. Baby Girl, State ICWA Laws, and Constitutional Avoidance

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One of the thorniest questions facing attorneys who practice adoption law is determining whether and how the Indian Child Welfare Act applies to voluntary adoption proceedings, especially cases where the birth mother, whether Indian or not, wishes to consent to adoption and the father does not otherwise have standing or any rights under state law. A raft of questions arise. Does ICWA apply? Does the unwed father have standing? Does the tribe have the right to notice? Does the father have the right to demand a termination trial and remedial efforts before an adoption may proceed? Does a fit birth mother have the right to place her child with non-Indians? Most of these issues were addressed in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), a landmark case decided by the United States Supreme Court on June 25, 2013, which dramatically reshapes adoption practice, and casts new doubt on the constitutionality of states' laws which attempt to expand ICWA beyond its original reach.

The Facts[2]

While Birth Mother was pregnant with Biological Father's child, their relationship ended and Biological Father (a member of the Cherokee Nation) agreed to relinquish his parental rights. Birth Mother put Baby Girl up for adoption through a private adoption agency and selected Adoptive Couple, non-Indians living in South Carolina. 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. About four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to the adoption. Following a trial, which took place when Baby Girl was two years old, the South Carolina Family Court denied Adoptive Couple's adoption petition and awarded custody to Biological Father. At the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met. The State Supreme Court affirmed, concluding that the ICWA applied because the child custody proceeding related to an Indian child; that Biological Father was a "parent" under the ICWA; that §§ 1912(d) and (f) barred the termination of his parental rights; and that had his rights been terminated, § 1915(a)'s adoption-placement preferences would have applied.

In a 5-4 decision, the United States Supreme Court reversed, holding: (1) the Indian Child Welfare Act (ICWA) section conditioning involuntary termination of parental rights for Indian child on a showing regarding merits of continued custody of child by parent does not apply where Indian parent never had custody; (2) ICWA section providing that party seeking to terminate parental rights to Indian child under state law shall satisfy court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family and that these efforts have proved unsuccessful does not apply where Indian parent abandoned Indian child prior to birth and child had never been in Indian parent's legal or physical custody; and (3) ICWA section providing placement preferences for adoption of Indian children does not bar a non-Indian family from adopting an Indian child when no other eligible candidates have sought to adopt the child.

Unpacking *Adoptive Couple*:
when does a "parent" have standing under ICWA?

In adoption proceedings, where paternity timelines in most states are so short to promote early permanence for children, is a "late" custody claimant a "parent" with the full panoply of ICWA rights? Adoptive Couple had argued in the South Carolina Supreme Court that the birth father was not a "parent" with any rights under ICWA. The definition of parent matters, for nearly all of ICWA's protections hinge on who is and is not a "parent" with standing to assert ICWA rights. Critical in *Adoptive Couple* was the issue of whether ICWA's termination of parental rights provision, 25 U.S.C. § 1912 (f), with its stringent requirements of "proof beyond a reasonable doubt", "qualified expert witness" testimony, and proof of "serious emotional or physical harm", applies to a putative father who has not timely established paternity under state law.

Under ICWA, " 'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Adoptive Couple argued that by using the terms "acknowledged or established," Congress intended to defer to state law on paternity establishment since there was no body of federal law on paternity, citing the unanimous view of state courts that such matters are the subject of state law. One state supreme court concluded that Congress intended to exclude from ICWA "unwed fathers who have not taken affirmative steps to ensure that their relationship with their child would be recognized." *In the Matter of the Adoption of a Child of Indian Heritage,* 543 A.2d 925, 935 (N.J. 1988).

The definition of "parent" in *Adoptive Couple* was pivotal, because under South Carolina law, the birth father had not taken the required "affirmative steps" to acquire rights to consent (or to withhold consent and block the adoption). This is because birth father had failed to provide support, which under South Carolina law was defined as a "fair and reasonable sum, based on the father's financial 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." S.C. Code § 63-9-310(A)(5)(b). South Carolina's law may at first blush seem strict, but it is not at all uncommon. Indeed, under Minnesota law, a putative father has no right to notice or consent for failure to provide "*substantial* support" to the child. Minn. Stat. § 259.49, subd. 1(2).[3] In short, Adoptive Couple argued that if a birth father has no rights under state law, what specifically is it in ICWA that accords him *greater* federal rights? The South Carolina Supreme Court brushed this argument aside, holding the birth father had "established" paternity through a DNA test — without examining what it means to "establish or acknowledge" paternity.

The United States Supreme Court declined to rule on the issue of whether the birth father had standing as a "parent", holding, [w]e need not — and therefore do not — decide whether Biological Father is a "parent." fn 4. Rather, *assuming* for the sake of argument that he is a "parent," we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights." *Adoptive Couple,* 133 S. Ct. at 2560 (emphasis added). In footnote 4, the Court explained, "if Biological Father is not a "parent" under the ICWA, then § 1912(f) and § 1912(d) — which

relate to proceedings involving possible termination of "parental" rights — are inapplicable. Because we conclude that these provisions are inapplicable for other reasons, however, we need not decide whether Biological Father is a "parent."" *Id.* at fn. 4. (These "other reasons" are discussed below).

The Court's decision in *Adoptive Couple* to pass on determining what makes a father a "parent" under § 1903(9) disappointed many adoption attorneys, as it leaves some critical issues in ICWA practice unresolved — chief among them is whether the birth father has the right to notice in ICWA proceedings. A "parent" is entitled to notice of "involuntary" foster care or termination proceedings under ICWA. 25 U.S.C. § 1912. Does a noncustodial father — who, under *Adoptive Couple* has no right to a termination trial under 1912(f) — still have the right to notice? Under the Minnesota Fathers Adoption Registry, a putative father must register within 30 days of birth in order to have the right to notice. Minn. Stat. § 259.52. What if the Indian father files late? Does a non-custodial putative "parent" under ICWA have to provide his consent to adoption in court under 25 U.S.C. § 1913? Future litigation may tell.

Adoptive Couple: existing Indian family doctrine left unresolved

Also unresolved in *Adoptive Couple* is the viability of the "existing Indian family doctrine." In the South Carolina Supreme Court, Adoptive Couple waived invoking the existing Indian family doctrine, a judicial construction of ICWA which conditions ICWA's application on the sufficiency of a custodial Indian parent's ties to his or her tribal heritage. *See, e.g., Hampton v. J.A.L.,* 658 So. 2d 331, 336-37 (La. Ct. App. 1995); *In re Adoption of Crews,* 825 P.2d 305, 310 (Wash. 1992). Courts that have rejected the existing Indian family doctrine have criticized the propriety of examining whether a preexisting Indian family is "Indian" enough to merit protection under ICWA. *In re A.J.S.,* 204 P.3d 543, 551 (Kan. 2009); *In re D.A.C.,* 933 P.2d 993, 999 (Utah Ct. App. 1997); *see also* Minn. Stat. § 260.771, subd. 2 (rejecting EIF by statute). Rather than invoking this doctrine, Adoptive Couple simply argued there was no preexisting family, period — consisting of Father and Baby Girl. Thus whether an Indian child would be raised in an "Indian-enough" environment was not relevant. Adoptive Couple did not question the birth father's cultural ties. Despite not even briefing the Court or arguing the existing Indian family doctrine, the South Carolina Supreme Court rejected it. *Adoptive Couple v. Baby Girl,* 731 S.E.2d 550, 558 fn 17 (S.C. 2012) reversed on other grounds, *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552 (2013).

While the United States Supreme Court failed to rule on the validity of the EIF, which it did not even discuss, the Court did clearly hold that ICWA applied: "Baby Girl is an "Indian child" as defined by the ICWA because she is an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," § 1903(4)(b). … It is also undisputed that the present case concerns a "child custody proceeding," which the ICWA defines to include proceedings that involve "termination of parental rights" and "adoptive placement," § 1903(1)." *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552, 2557, fn 1 (2013).

Adoptive Couple: when are § 1912(d) active efforts required?

The South Carolina Supreme Court held that Adoptive Couple had failed to provide "active efforts" to the father by "attempting to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." *Adoptive Couple v. Baby Girl*, 398 S.C. at 640, 731 S.E.2d at 563. 25 U.S.C. § 1912(d) provides in part that any party who seeks "a foster care placement" or the "termination of parental rights" to an Indian child must prove 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." Adoptive Couple had argued that since birth father had never had legal or physical custody of the child, he had never parented the child, and there was simply no Indian family to "break up." They also argued that § 1912(d) by its own terms does not apply in adoptive placement proceedings.

The United States Supreme Court agreed, holding that that the "active efforts" requirement in § 1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights under 1912(f). As Justice Samuel Alito, explained, Justice Alito: "Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child." He added, "[o]ur interpretation of § 1912(d) is also confirmed by the provision's placement next to § 1912(e) and § 1912(f), both of which condition the outcome of proceedings on the merits of an Indian child's "continued custody" with his parent. That these three provisions appear adjacent to each other strongly suggests that the phrase "breakup of the Indian family" [within 1912(d)] should be read in harmony with the "continued custody" requirement." *Id.* at 2563.

Adoptive Couple: when is a § 1912(f) termination trial required?

Adoptive Couple had also argued that where the father had no established rights under state law, there was no parent-child relationship to be terminated under 25 U.S.C. §1912(f). While birth father had a *biological* parent-child relationship, that relationship is incapable of severance — and that is not the kind of parent-child relationship ICWA was designed to protect. Rather, Adoptive Couple argued § 1912(f) protects a pre-existing *custodial* relationship — whether legal or physical — between a parent and child.

The ICWA provides at 25 U.S.C. §1912(f) that no "termination of parental rights may be ordered" unless 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." The rationale of 1912 (f) is that serious emotional, physical damage to the child will occur if the child is separated unnecessarily from the custodial parent. That § 1912(f) does not create rights out of whole cloth, but instead protects existing custodial rights, is not new or novel under Minnesota case law. The Minnesota Court of Appeals held nearly 20 years ago that § 1912 (f) does not apply to terminate the rights of an Indian father who fails to establish paternity under state law: "[father's] paternity action is not an action that can result in the termination of the parent-child

relationship. If [father's] action is unsuccessful, the parent-child relationship between [father] and [child] will not be terminated, *it will simply never be established." J.A.V. v. Velasco*, 536 N.W.2d 896 (Minn. App. 1995)(emphasis added), *aff'd, Matter of Paternity of J.A.V.,* 547 N.W 2d 374 (Minn. 1996).

The Supreme Court agreed. Justice Alito wrote, "[u]nder our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. As an initial matter, it is undisputed that Biological Father never had physical custody of Baby Girl. And as a matter of both South Carolina and Oklahoma law, Biological Father never had legal custody either." *Id.* As a result, § 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child." *Id.* at 2562.

Thus while the Court did not directly address the validity of the existing Indian family doctrine, as discussed above, it did adopt a version of it, albeit "EIF lite"[4] , by applying ICWA's most stringent procedural protections to a father, based not upon the child's genetic connection to him or the tribe alone, but based upon the father's actual physical or legal custody of the child. In this sense, what Adoptive Couple did not get through its first argument — denial of "parent" standing to a father who had stepped forward to establish or acknowledge paternity under state law— it got in its second argument: that regardless of whether the father timely stepped forward and was a "parent", if the father had never established physical or legal custody, nothing in ICWA would allow him to block an otherwise lawful adoption under state law. This means that a noncustodial putative father is not entitled to a termination trial under ICWA. Thus an adoption proceeding based upon the birth mother's consent may now be considered a purely voluntary proceeding for which tribal notice is not required under ICWA. *See* 25 U.S.C. § 1912(a). *But see* Minn. Stat. § 260.671, subd. 6 (requiring tribal notice in voluntary adoption proceedings). Other provisions of ICWA will apply, however, such as the in-court consent requirements found in 25 U.S.C. § 1913.

***Adoptive Couple*: but what about those placement preferences?**

Adoptive Couple had argued in the South Carolina Supreme Court that once the birth father's rights were at their end under state law for his failure to provide support, the child was free for adoption. They argued that ICWA's placement preferences allowed for adoption of an Indian child by non-Indians with the birth mother's consent. 25 U.S.C. § 1915(a) provides: "[i]n 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." Adoptive Couple relied on numerous decisions in other states, which hold that a birth parent's preference is sufficient to establish good cause. *See, e.g., In re N.N.E.*, 752 N.W.2d 1, 7-8 (Iowa 2008) (citing cases). The South Carolina Supreme Court ignored the argument that mother's preferences may constitute good cause, and instead held that "bonding, standing alone, should [not] form the basis for deviation from the statutory placement preferences." *Adoptive Couple v. Baby Girl*, 731 S.E.2d at 657.

The Supreme Court reversed the judgment of the South Carolina Supreme Court on this

score as well, holding "*§ 1915(a)'s preferences are inapplicable* in cases where no alternative party has formally sought to adopt the child. This is because there simply is no "preference" to apply if no alternative party that is eligible to be preferred under § 1915(a) *has* come forward." *Adoptive Couple*, 133 S. Ct. at 2564. The Court noted that neither the birth father, nor any other family members, nor any other Cherokee families had sought to adopt Baby Girl. *Id.* On remand to the South Carolina Supreme Court, birth father argued he had the right to petition to adopt. The South Carolina Supreme Court rejected this petition and ordered the family court to finalize the adoption by Adoption Couple, holding "[o]ur original and erroneous decision was premised on the applicability of ICWA to the Birth Father. As a result, the Birth Father's rights, if any, are determined by the law of the state of South Carolina. While this Court was in error concerning the applicability of ICWA, we have consistently held that under state law, the Birth Father's parental rights (because of his irrefutable lack of support, interest and involvement in the life of Baby Girl) would be terminated. Therefore, under state law, the Birth Father is precluded from challenging the adoption." *Adoptive Couple v. Baby Girl*, 404 S.C. 490, 492, 746 S.E.2d 346, 347 (S.C. 2013).

While birth father then sought to bar enforcement of the South Carolina adoption judgment ordered on remand, this legal gambit ultimately failed when the Oklahoma Supreme Court dissolved its stay of enforcement, thus freeing Baby Girl to be returned to Adoptive Couple on September 24, 2014 — this, roughly four years after the child's birth. *See Brown v. DeLapp*, 312 P.3d 918 (Okla. 2013).

While the Court's holding that the preferences are inapplicable might appear a dramatic setback to tribes, the Court's holding is far more limited — for the fact remains that in voluntary adoption proceedings based upon the consent of a fit parent, under no circumstances may an adoption be granted without the consent of the parent. *See, e.g.*, Minn. Stat. § 259.24, subd.1(a) Therefore, there *cannot* be a competing adoption petition filed for the simple reason that the birth parent's consent to specific adoptive petitioners precludes other persons from invoking the preferences. The Court's holding finally clarifies that a birth parent's selection of specific adoptive petitioners, whether Indian or not, may no longer be denied by courts under § 1915 as that section is inapplicable.

Some critics of *Adoptive Couple* note the decision did not address the provision of the Bureau of Indian Affairs' ICWA Guidelines that requires a diligent national search of potential adoptive families within the preference placement order, or how that requirement would apply in any other case. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594, F.3 (a)(iii) (November 26, 1979). Yet the specter of requiring a fit birth parent, or an adoption agency acting on her behalf, to conduct a national search for an Indian adoptive family, when the mother has already selected a couple to her liking, raises troubling due process concerns and ignores the holding of the case. It has long been established that parenthood and child-rearing fall within the most basic and fundamental liberties protected by substantive due process. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). The Court endorsed this argument, holding "[a]s the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to *override the mother's decision* and the child's best interests… Such

an interpretation would raise equal protection concerns." *Adoptive Couple*, 133 S. Ct. at 2565 (emphasis added). In the voluntary adoption context, this paternalistic search requirement cannot be applied without trampling on Indian birth parents' freedom to choose who will raise their children.

Adoptive Couple: straight statutory construction or constitutional avoidance?

Attorneys, judges, and legislators seeking to apply *Adoptive Couple* — and to know what it permits — first have to know *how* the Supreme Court got to its result. Thankfully, the Court left a clear trail. Delivering the opinion for the 5-4 majority, Justice Alito wrote,

"[t]he Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the 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. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. 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. *Such an interpretation would raise equal protection concerns,* but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context."

Adoptive Couple 133 S. Ct. at 2565 (emphasis added).

This last sentence should give tribal attorneys pause. As a straight matter of statutory construction, the majority arguably *could* have construed the phrase "continued custody" in 1912(f) to apply to bar the termination of birth father's parental rights, despite the fact that he only had a biological relationship with the child. Indeed, Justice Scalia, dissenting, wrote that "continued" could mean "merely that initial or temporary custody is not "likely to result in serious emotional or physical damage to the child," but that continued custody is not likely to do so." *Adoptive Couple* at 2570-71. But the majority's finding that such a broader construction *would* "raise equal protection concerns" could not be a more clear invocation of the doctrine of constitutional avoidance — that the majority saw the equal protection and due process clauses as requiring the Court to hew closely to the plain language of the text. As the United States Supreme Court has held,"[I]t is a cardinal principle" of statutory interpretation … that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson,* 285 U.S. 22, 62, 52 Sc.D. 285, 76 L.Ed. 598 (1932); *See* Minn. Stat. § 645.17 (3) (presuming the legislature does not intend to violate the Constitution of the United States or of this state).

What are these "equal protection concerns"? The Court did not elaborate in detail, but the parties' briefs provide helpful context as a guide.[5] In *Adoptive Couple,* the birth father, Cherokee Nation, Solicitor, and countless *amici,* argued there were no such concerns. They argued the application of 1912(d) and (f) to the proceedings to block a valid state adoption, based upon the child's blood connection alone, did not constitute racial discrimination or run afoul of the equal

protection clause because the tribe's designation of who is a member is a political, not racial, distinction. Under Cherokee law, a child is eligible for membership in the tribe if descended from an Indian on the tribe's enrollment rolls created by the Dawes Commission in 1906. *See* CONST. OF THE CHEROKEE NATION, art. IV, § 1. In support, they cited *Morton v. Mancari*, a 1974 United States Supreme Court decision, which upheld a law granting a hiring preference for Native Americans by the Bureau of Indian Affairs. *See* 417 U.S. 535 (1974). In that decision, the Court stated that "the preference, as applied, is granted to Indians not as a discrete *racial* group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Id.* at 554. This Court has upheld preferential treatment for Indians where the differentiation is a consequence of Indians' unique sovereign status. *Morton v. Mancari*, 417 U.S. 535, 553 (1974).

Adoptive Couple argued when the preferences under Sections 1912(d) and 1912(f) are construed to protect *preexisting connections* between an Indian child and her custodial parent, there is at least the possibility that the child could be exposed to Indian culture through her Indian parent. ICWA's preferences in those circumstances at least plausibly prevent the unwarranted removal of Indian children from their families and safeguard tribal cultural and social cohesion. 25 U.S.C. § 1901.

However, Adoptive Couple argued that such differential treatment predicated solely on "ancestral" classification violates equal protection principles, citing *Rice v. Cayetano*, 528 U.S. 495 at 514, 517 (2000). Adoptive Couple argued that ICWA's legitimacy evaporates if unwed fathers with no preexisting substantive parental rights receive a statutory preference based solely on the Indian child's race. In that circumstance, "[i]f tribal determinations are indeed conclusive for purposes of applying ICWA, and if . . . a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996). When unequal treatment is predicated on a status unrelated to social, cultural, or political ties, but rather blood lineage, the ancestry underpinning membership is "a proxy for race." *Rice*, 528 U.S. at 514.

The *Adoptive Couple* majority did not hold that *Morton* constituted a "blanket shield" to any preferential treatment of Indians. Indeed, it never even mentioned the decision. For had the Court found that *Morton* shielded sections 1912(d) and (f) from equal protection scrutiny — because they were supposedly applied based upon the child's "political" as opposed to racial status — it would not have found that their application raised any "equal protection concerns." Conversely, the Court did not suggest in its analysis that Sections 1912(d) and (f) would have raised equal protection concerns when applied to a custodial parent of an Indian child.[6] For in that instance the child's connection to the tribe would have proved to be more than racial — it would have meant she was enmeshed in a real Indian family with a custodial parent. Thus at a minimum, *Adoptive Couple* stands as a clear signal from the Court that the application of ICWA, and perhaps other Indian preference statutes, cannot be based merely upon a person's lineal or blood connection with a tribe. Something more is required. In *Adoptive Couple,* it was the requirement of parental custody. What that "more" will be in other contexts will no doubt be the subject of further litigation.

Adoptive Couple: impact on state ICWA laws

Many states have adopted laws that purport to expand upon or provide higher protections to Indian parents or custodians than exist under ICWA itself. Indeed, ICWA permits them to do so. Under 25 U.S.C. § 1921, [i]n any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the *rights of the parent or Indian custodian* of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard." (emphasis added). Interestingly, in § 1921 the higher standards to be applied must be applied to the parents or custodians of an Indian child — not to the child.

Minnesota adopted the Minnesota Indian Family Preservation Act (MIFPA) in accordance with § 1921. Several provisions of MIFPA raise the same "equal protection concerns" the Supreme Court sought to avoid in *Adoptive Couple*. For instance, MIFPA defines" Indian child" as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; *or* (2) eligible for membership in an Indian tribe. Minn. Stat. § 260.755, subd. 8. By contrast, the federal definition of "Indian child" under ICWA is more restrictive: "Indian child" means 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. 25 U.S.C. § 1903(4). It is now clear under *Adoptive Couple*, that while ICWA in general may apply based upon the child's eligibility for membership — *and* being the child of a member — the application of ICWA, *in toto,* based upon the child's genetic or racial connection to the tribe alone, forces the same equal protection concerns *Adoptive Couple* sought to avoid by making its stringent protections applicable to custodial parents who were tribal members.

Likewise, MIFPA makes ICWA's sections 1912(d) and (f) applicable — irrespective of whether a parent has had custody of an Indian child. Minn. Stat. § 260.771, subd. 2, provides, "[t]his chapter and the federal Indian Child Welfare Act are applicable *without exception* in any child custody proceeding, as defined in the federal act, involving an Indian child. This chapter applies to child custody proceedings involving an Indian child *whether the child is in the physical or legal custody of an Indian parent*, Indian custodian, Indian extended family member, or other person at the commencement of the proceedings." This subdivision thus squarely achieves what the Supreme Court sought to avoid in *Adoptive Couple* — reaching a result that offends equal protection by making such sections applicable on the basis of race alone. Its constitutional validity is now highly dubious.

Other states, too, have passed laws which grant the noncustodial father the right to ICWA termination trial, purportedly "exempting" them from the reach of *Adoptive Couple. See, e.g.,* California Welfare and Institutions Code Section 224(a) states: (2) ("It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled."). Application of the heightened procedural protections in Section 1912 to a father who has never had custody or parented the child, and solely on the basis of a child's racial connection to a tribe, resurrects the grave equal protection concerns the Supreme Court sought to lay to rest in *Adoptive Couple* by limiting Section 1912's application to Indian

families where a parent had custody.

ICWA was passed in 1978 with a laudable purpose. Congress found that "an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4). Under *Adoptive Couple v. Baby Girl*, the United States Supreme Court has set out some boundary lines as to how far ICWA may be extended before this laudable purpose becomes suspect and ICWA itself undermined. In that sense, the case remains an important reminder that ICWA is not a *sui generis* body of law, but rather must be understood and construed consistently with equal protection principles, respect for the due process rights of fit birth parents wishing to make decisions about the future care of their children, and ultimately the best interests of Indian children.

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[1] Mark D. Fiddler was co-counsel to the adoptive couple before the South Carolina Supreme Court and the United States Supreme Court. Editorial assistance provided by Jason Teiken, Esq.

[2] Taken verbatim from opinion. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2554-2555 (2013). No U.S. Reporter citation for this case yet.

[3] The United States Supreme Court has been clear that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr v. Robertson*, 463 U.S. 248, 260 (1983). An unwed father's parental rights are constitutionally protected only if he has "demonstrate[d] a *full commitment* to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child." *Lehr*, 463 U.S. at 261 (emphasis added).

[5] http://www.scotusblog.com/case-files/cases/adoptive-couple-v-baby-girl/

[6] The ICWA defines "Indian child" 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."* 25 U.S.C. § 1903(4).