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## **In the Courts: Interpreting the ICWA in Light of *Adoptive Couple***

*By Christina Cook*

Since the issuance of the Supreme Court of the United States' opinion in *Adoptive Couple v. Baby Girl* in June 2013, state courts around the country have taken to the task of interpreting the Indian Child Welfare Act (the "ICWA") in light of this new precedent. To date, two such cases have reached their respective state's highest court, and several others have reached the state appellate level. One of the most recent cases reaching the California Court of Appeals, *In re Alexandria P.*, is illustrative of some of the continuing and novel issues that courts face in terms of the custody and adoption of Native American children.

The facts of *In re Alexandria P.*, though unique in many regards, have some parallels to those in *Adoptive Couple*. As in *Adoptive Couple*, Alexandria's biological mother was not Indian, and her biological father was an enrolled member of an Indian tribe—here, the Choctaw Nation of Oklahoma. Alexandria, similarly to Baby Veronica, was 1/64th Choctaw and met the statutory definition of an Indian child, defined as one who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Rather than requiring a specific blood quantum for membership, both the Cherokee and Choctaw Nations require that at least one direct ancestor is listed on the Dawes Final Rolls, a list of individuals who chose to enroll and were approved for membership in either the Cherokee, Chickasaw, Choctaw, Creek, or Seminole tribes between 1898 and 1906.

Unlike in *Adoptive Couple*, which involved a private adoption, Alexandria was placed in foster care at the age of seventeen months due to the state of California's concerns regarding her parents' ability to care for her. Alexandria's mother had a history of substance abuse and had lost custody of six other children prior to Alexandria's birth, and Alexandria's father had a history of substance abuse and an extensive criminal history. The court ordered reunification services for the father but denied services for the mother.

Following two failed foster placements, Alexandria entered the care of the non-Indian foster-parent petitioners in the case, who were aware of Alexandria's status as an Indian child and the biological father's continued efforts toward reunification. The Choctaw tribe agreed to Alexandria's placement with the non-Indian foster parents until she could either be reunified with her father or placed with extended relatives in Utah. After the father expressed to the Los Angeles County Department of Children and Family Services ("DCFS") that he no longer wished to continue reunification services, the foster parents expressed a desire to adopt Alexandria.

After a five-day hearing spanning three months, the trial court determined that the foster parents had not demonstrated good cause to deviate from the placement preferences outlined in the ICWA, which give first preference to a member of an Indian child's extended family, followed by other members of the Indian child's tribe, and then to other Indian families. Although it recognized the child's strong bond with foster

parents over the course of two years, the trial court ordered Alexandria's gradual transition from her non-Indian foster parents' home to her extended relative's home in Utah. The foster parents appealed.

On appeal, the foster parents argued that: (1) the adoption placement preferences listed in the ICWA were unconstitutional; (2) the tribe's consent to Alexandria's placement with the foster parents served as a waiver of the ICWA placement preferences; and (3) the court used the wrong standard of proof in assessing whether the foster parents carried their burden in proving that there was good cause to depart from the ICWA's placement preferences.

The California appellate court first found that the foster parents lacked standing to challenge the constitutionality of the ICWA placement preferences. The court stated that, as foster parents, the petitioners did not have a constitutionally protected interest in a continued relationship with Alexandria, despite petitioners' argument that they were a "de facto family" with an interest in stability and the right to be free from government intrusion. An important consideration in the court's conclusion was the fact that Alexandria did not join in her foster parents' argument that the application of the ICWA impaired her constitutional rights, as Alexandria's counsel and guardian ad litem did not challenge the ICWA's application in this case.

The court further stated that even if the foster parents had standing, their argument was without merit. In so ruling, the court rejected the application of the existing Indian family doctrine to this case and refused to expand the holding in *Adoptive Couple* "well beyond its intended scope."

The existing Indian family doctrine is a judicially-created exception to the ICWA that applies in situations where an Indian child has never been a member of an Indian home or exposed to Indian culture. The validity of the doctrine has come into question in numerous states. The appellate court here pointed out that four of California's six appellate districts had rejected the doctrine. The court decided to align with those districts, reasoning that recent California statutes, such as the Welfare and Institutions Code section 224, indicate a clear rejection of the doctrine.

The court also held that *Adoptive Couple* had no impact on this case, stating that the facts of *In re Alexandria P.* are "entirely distinguishable." In contrast to the facts of *In re Alexandria P.*, which involved a dependency proceeding in which the father had a period of substantial compliance with services and unmonitored visitation, the court stated that the adoption in *Adoptive Couple* was a private arrangement in which the father had voluntarily relinquished his parental rights. The court also pointed to the Supreme Court's lack of discussion in *Adoptive Couple* of the ICWA's constitutionality. The court stated that while *Adoptive Couple* did address the ICWA's placement preferences—holding that the preferences do not apply when a party entitled to placement does not come forward—that holding did not apply to the facts of *In re Alexandria P.*, where Alexandria's Indian relatives had been identified as prospective adoptive parents.

Second, the appellate court held that the tribe's consent to Alexandria's placement did not waive the placement preferences. The court disposed of this argument easily by holding that petitioners forfeited the issue by failing to raise it at the trial court level. The court further stated that even if the issue had been preserved, "a mere consent" to a non-

Indian foster care placement in order to facilitate reunification efforts does not preclude a court from later ordering a change in placement to comply with the ICWA.

Finally, the appellate court affirmed the trial court's finding that the correct standard of proof for showing good cause to depart from the ICWA's placement preferences was clear and convincing evidence, rejecting petitioners' claim that it be by a preponderance of the evidence. Though the express statutory language in the ICWA was admittedly unclear on this point, the court—drawing upon the ICWA's policy goal of promoting stability and security of Indian tribes and families, statutory interpretation, and other case law—held that the higher standard was required. However, because the appellate court found that the lower court erred in applying the good cause exception to the facts of this case, it remanded the cause for further proceedings on that issue.

Though the foster parents in this case lost all of their constitutional claims as well as their argument that the existing Indian family doctrine should apply, the practical effect of the court's ruling on the third issue means that Alexandria's removal to her Indian relatives' home is delayed pending the lower court's further review. At the new trial, while the foster parents must now meet the higher burden in proving that there would be a significant risk of Alexandria suffering serious harm as a result of the change in placement, the court will also be permitted to consider Alexandria's bond with her foster family and her best interests.

The main significance of *In re Alexandria P.* is two-fold. First, the decision takes a stand on the existing Indian family doctrine, upon which the California appellate courts as well as courts of other states have been split. The Second California Appellate District here sided with the Third, Fourth, Fifth, and Sixth Districts in rejecting the doctrine. This decision seems to follow the national trend. Of note, not even the Kansas Supreme Court, which created the existing Indian family doctrine, continues to follow it. The California appellate court's ruling also sets important precedent for future cases in California and potentially elsewhere.

Second, the decision is significant in that it rejects the foster parents' constitutional claims that their rights are somehow equivalent to those of biological parents. This argument dates back to at least 1977, where in *Smith v. Organization of Foster Families for Equality and Reform* a group of foster families argued that it had a constitutionally-protected liberty interest in the survival of their family unit that was not adequately protected by the New York law governing the removal of foster children who had been placed with the family for one or more years. In that case, the Supreme Court declined to rule on the issue. The California appellate court's treatment of this issue in *In re Alexandria P.* is noteworthy in that it procedurally and substantively addresses the foster parents' constitutional contentions, ultimately finding that they—though “de facto” parents—did not occupy the same rights as biological parents under the ICWA.

As more and more state courts decide cases by interpreting the ICWA in light of *Adoptive Couple* and other precedent, the legal landscape surrounding the statute will continue to evolve. Decisions such as *In re Alexandria P.* provide important insight into the direction of courts within states and across the country on the important issues surrounding the custody and adoption of Native American children in the United States today.

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