

No. 12-399

In The
Supreme Court of the United States

—◆—
ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a Minor Under
The Age of Fourteen Years, *et al.*,

Respondents.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of South Carolina**

—◆—
**BRIEF OF THE HAMLINE UNIVERSITY
SCHOOL OF LAW CHILD ADVOCACY CLINIC
AS AMICUS CURIAE IN SUPPORT OF
RESPONDENTS BIRTH FATHER
AND THE CHEROKEE NATION**

—◆—
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QUESTIONS PRESENTED

1. Should the policy goals of the Indian Child Welfare Act be followed to protect the best interests of Indian children?
2. To protect the best interests of Indian children, must Guardians ad Litem consider the Indian Child Welfare Act and the unique needs of Indian children when making their recommendations regarding adoption or permanent placement of an Indian child?

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INTRODUCTION

A Guardian ad Litem has an obligation to the judicial system to provide a fair and unbiased report to the judicial officer as to a child. When that child is an Indian child, the Guardian ad Litem must consider the best interests of an Indian child and all that encompasses that definition under the ICWA. In that sense, the cultural tribal connections of the Indian child become an integral part of the Guardian ad Litem's assessment of the case. In the instant case, the Guardian ad Litem did not make an assessment based on the best interests of the Indian child.



INTEREST OF THE *AMICUS CURIAE*¹

The Hamline University School of Law Child Advocacy Clinic (HUSL), founded in 1993, is a non-profit legal clinic dedicated to protecting the best

¹ Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amicus curiae* brief. Letters of consent to the filing of all *amicus curiae* briefs were filed by each party with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

interests of children. The Child Advocacy Clinic furthers this purpose through zealous advocacy and representation in multiple capacities including: acting as Guardians ad Litem (hereinafter GAL) in child protection matters; representing GAL, particularly those acting as guardians for cases governed by the Indian Child Welfare Act (hereinafter ICWA); and representing clients in adoptions and third-party custody cases.

The Child Advocacy Clinic submits this brief of *amicus curiae* on behalf of Indian children in an effort to protect their best interests by ensuring that the policy goals of the ICWA are followed and that reunification with their parents or placement with extended family and tribes remains the goal of the various courts involved. Further, the amicus submit this brief to protect those interests and clarify the expected recommendations of Guardians ad Litem on cases governed by the ICWA when presented with an adoption or permanent plan for placement of an Indian child.



SUMMARY OF ARGUMENT

The Indian Child Welfare Act was enacted to prevent the injustice of removing Native American children from their homes and subsequently placing them in non-Native homes with no regard for their culture, heritage, and traditions. There are two factors that can ensure the best interests of Native

American children are protected: first, the policy goals of the ICWA must be followed; and second, guardian ad litem must consider the ICWA and the unique interests of the Indian child when making recommendations to the court. *The National CASA Association Volunteer Training Curriculum Volunteer Manual*, CASA for Children, Chapter 3, 2007. See also http://nc.casaforchildren.org/files/public/community/judges/July_2010/Connection_Winter2009.pdf and http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5525161/k.3114/Keeping_Native_Children_Connected.htm.

First, the policy goals of the ICWA must be followed so that the best interests of Indian children are protected. Prior to the enactment of the ICWA, large numbers of Indian children were removed from their families. These removals were not due to abuse or neglect, rather non-tribal government authorities were removing children because of their lack of understanding and their bias against Native people's customs and culture. The removals resulted in Indian children being denied access to their Native culture and losing their Indian identities. Also, the tribes were losing their future leaders and members. Therefore, the policy goals behind the ICWA serve to protect both the interests of Native American tribes in maintaining strong connections with their future generations and the best interests of Indian children in being raised by their Native American families with access to culture and heritage. In this case, the policy goals of the ICWA were violated when Baby Girl was placed for adoption based on the single

decision of a non-native person and this decision was enforced by a non-native GAL who did not address Baby Girl's best interests as an Indian child.

Second, a guardian ad litem must consider the ICWA and the unique interests of the Indian child when they make recommendations to the court. When a GAL is first appointed to an ICWA case, she should have knowledge and an appreciation of the social and cultural standards of the Indian community where the parent or extended family reside or maintain social and cultural ties. In general, the role of a GAL is to represent the best interests of the Indian child by conducting an independent, balanced, and impartial investigation so the GAL can determine the facts relevant to the family situation. In an ICWA case, the GAL must focus on the heightened best interest standard for an Indian child, which requires the GAL to be familiar with the policies of the ICWA and to have an understanding of Native American culture. When making the report to the court regarding an ICWA case, a GAL must make final recommendations that will ensure that the Indian child is connected to their family, culture, heritage, and tribe. The placement preferences in the ICWA exist to ensure the best interests of the Indian child are protected and a GAL would never serve an Indian child's best interest by ignoring those requirements for placement when good cause does not exist. *National CASA*, supra at v3-3.

In this case, the GAL acted without consideration of the child's Native American culture. The GAL also minimized and ignored Baby Girl's heritage as a

Native American. That omission does not protect Baby Girl's best interest in maintaining connection to her culture and tribal family. The GAL's actions and recommendations not only violated the ICWA but also ignored Baby Girl's best interests which could have resulted in future harm. As an Indian child, Baby Girl's best interests include a placement with her biological father and the opportunity to be connected to her tribal culture.



ARGUMENT

I. To Protect the Best Interests of Indian Children the Policy Goals of the ICWA Must be Followed

At its core, the Indian Child Welfare Act was enacted to prevent the precise injustice which has occurred in the case before the court: removal of Native American children from their homes and subsequent placement into non-Native homes, without regard for the culture, heritage and traditions of those Indian children and their families.

A. History and Purpose

The need for the ICWA arose in the mid-1970's as Congress took notice of "the separation of large numbers of Indian children from their families and tribes and the subsequent consequences these Indian children, families and tribes faced as a result." *Mississippi Band of Choctaw Indians v. Holyfield*, 490

U.S. 30, 32 (1989). Studies conducted at the time uncovered that “25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.” *Id.* (quoting Indian Child Welfare Program Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3). The majority of the placements for these Indian children were with non-native homes and ultimately caused them to lose connection to not only their families and tribes, but their cultural heritage as well. *Id.* at 33-34. Not only were Indian children being denied access to their Native culture, they were losing their Indian identities, and tribes were losing potential future leaders. 25 U.S.C. § 1901; 124 Cong. Rec. 38, 102 (1978); *see also, Holyfield.*

It was in response to this crisis that the Indian Child Welfare Act of 1978 was enacted by Congress. The ICWA states as its purpose:

“[t]he Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family programs.”

25 U.S.C. § 1902. With its purpose and policy goals in mind, Congress was deliberate as it crafted the specific provisions of the ICWA. “The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child.” “Guidelines for State Courts; Indian Child Custody Proceedings, Part III (Notices).” Federal Register 44:228 (Nov. 26, 1979) p. 67587.

B. Placement/Reunification With Indian Family is in the Best Interest of Indian Children

At the time the ICWA was enacted, Indian children were being removed from their homes not because of abuse, but because the removal was conducted by “nontribal government authorities who ha[d] no basis for intelligently evaluating cultural and social premises underlying Indian home life and childrearing.” *Holyfield*, at 34-35. The workers would allege neglect or maltreatment simply because the ways of the Native American family did not comport with their own Anglo-Saxon beliefs on child rearing. *Id.* at 33.

Though the case at hand does not involve allegations of abuse or neglect, but rather the adoption of an Indian child, the ICWA and its goals and policies are still applicable, and must be followed in order to insure the continued protection of the best interest of Indian children. Results of a survey conducted in 1969 revealed that 85% of Native American children residing

in foster homes had been placed in non-native homes, and about 90% of Indian children adopted by nonrelatives went to non-Native American adoptive homes. *Id.*

In an effort to change this trend, the ICWA speaks directly to preference criteria for adoptive placements. Section 1915 of the ICWA states that “[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.” 25 U.S.C. § 1915(a). These placement preferences are of paramount importance for Indian children, because if they are denied access to their culture and heritage, their ultimate wellbeing may be at risk of negative impact.

Psychologists and sociological studies have suggested that Native American children brought up in non-native homes suffer from a variety of adjustment disorders once they discover their unique racial ancestry. They eventually long to discover their indigenous roots, and this longing often results in maladaptive behavior, contributing little to either the dominant society or the native traditions.

B.J. Jones, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* 4-5 (Section of Family Law, American Bar Association 1995) (citation omitted).

Baby girl was not only moved hundreds of miles away from her birthplace, but she was also placed for

adoption without regard for her Native American heritage. Furthermore, the impact to Baby Girl of denying her the opportunity for a life of exposure to her Indian culture was not considered. The policy goals behind the ICWA serve to protect the interests of Native American tribes in maintaining strong connections with their future generations and the best interests of Indian children in being raised by their Native American families with access to their cultures and heritage. See http://nc.casaforchildren.org/files/public/community/judges/July_2010/Connection_Winter2009.pdf. It is undeniably unfortunate that Baby Girl had to go through the experience of being removed from the home of the adoptive couple; however, that removal was necessary in order to ensure that her best interests were adhered to and considered as well as the immediate consequences. By applying the ICWA, Baby Girl's best interests were considered and protected.

II. To Protect the Best Interests of Indian Children, Guardians ad Litem Must Consider the Indian Child Welfare Act and the Unique Needs of Indian Children When Making Their Recommendations Regarding the Adoption or Permanent Placement of an Indian Child

A. Guardian ad Litem's Role

The role of a guardian ad litem is to "represent the best interest of the child" by "conducting an independent, balanced, and impartial investigation to

determine the facts relevant to the situation of the child and the family.” S.C. Code § 63-3-830(A)(1-2). A guardian ad litem’s investigation must include, but is not limited to:

“(a) obtaining and reviewing relevant documents . . . ; (b) meeting with and observing the child on at least one occasion; (c) visiting the home settings if deemed appropriate; (d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case; (e) obtaining criminal history of each party when determined necessary; and (f) considering the wishes of the child, if appropriate.”

S.C. Code § 63-3-830(A)(2)(a-f). A guardian ad litem, once they have conducted their investigation, is also given the responsibility of presenting that information to the court in a clear and concise written report regarding the child’s best interest. S.C. Code § 63-3-803(A)(6). In other jurisdictions, special emphasis is made as to the GAL duties when the ICWA is involved. For example, the Minnesota Judicial Branch Policy, Guardian ad Litem System Program Standards speaks specifically to this point.

All pertinent factors shall be considered in the identification and selection of the guardian ad litem to be appointed, including the age, gender, race, culture, heritage, and needs of the child; the cultural heritage, understanding of ethnic and cultural differences, background, and expertise of each

individual guardian ad litem, as those factors are related to the needs of the child . . .

they go on to further state, “[n]o person shall be appointed as a guardian ad litem in any case governed by the Indian Child Welfare Act or the Minnesota Indian Family Preservation Act unless that person demonstrates knowledge and an appreciation of the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.” Minnesota Rules of Guardian ad Litem Procedure. Thus, the GAL in a case involving an Indian child must pay attention to the unique tribal connection of an Indian child. See *National CASA* at p. 10, “Understanding the Justice of ICWA”.

B. Best Interest Factors

When conducting an investigation, a guardian ad litem must evaluate all factors that are relevant in determining the best interests of a child. This may include inquiry into “the character, fitness, attitude, and inclinations on the part of each parent as they impact the child,” as well as “psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child’s life.” *Woodall v. Woodall*, 322 S.Ct. 7, 11 (1996). However, when a Guardian ad Litem is appointed to a case that is governed by the ICWA, they must take

into consideration additional factors when determining what is in the Indian child's best interest.

The ICWA provides a back drop for determining the best interest of the Indian child. ICWA was created by Congress to give great weight to the Native American culture and traditions of the child. When a guardian ad litem has been appointed to an ICWA case, it is their job to advocate for the best interest of that Indian child. This requires that the Guardian ad Litem be familiar with the policy considerations embodied in the ICWA, and that they have an understanding of the relevant Native American culture. *Id.*

C. Actions/Decisions of the GAL in this Case

From the outset, the GAL's work on Baby Girl's case was troubling. These troubling aspects extend beyond the obvious impropriety due to previous relationships that the GAL had with parties involved in the case. her actions after her appointment were even more cause for concern. Transcript of the Record at 591-592, Vol. 1-5, *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012). The decision of the GAL, while investigating the two potential placements for Baby Girl, to determine that it was not "necessary" to visit the potential tribal home of Baby Girl's father, is disquieting. Tr. 632. Visiting the biological father's home would have allowed the GAL to obtain an accurate representation of what Baby Girl's life would be like and how her best interests would be affected. After repeated requests from

father's attorney, the GAL eventually did visit the father's home. While at the father's home, the GAL chose to disclose information to the father and his family regarding the prospective adoptive couple who were caring for Baby Girl. The GAL informed the paternal family of how beautiful the home of the adoptive couple was; their high levels of education and the couple's ability to send Baby Girl to private school. Tr. 567-568. The GAL also told the family that they needed to "pray" about making the right decision for Baby Girl. Tr. 570. Such actions suggest that the GAL's investigation was not a neutral and objective investigation of what was in Baby Girl's best interests as an Indian child.

Baby Girl's best interests were not represented by the appointed Guardian ad Litem where Baby Girl's best interests *as an Indian child* were altogether ignored. Because Baby Girl qualifies as an "Indian child" under the ICWA, the GAL was charged with an additional responsibility to bring to light for the court that Baby Girl be placed in a home in which she could have access to and nurture her cultural heritage. The GAL overlooked this duty. Rather than conducting an "independent, balanced, and impartial investigation" taking into consideration the degree of importance that Baby Girl's Cherokee heritage played in the determination of her best interests, the GAL allowed her own cultural and economic biases to impact the investigation and recommendations. The ICWA was enacted specifically to address that state "judicial bodies . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and

social standards prevailing in Indian communities and families.” *Holyfield* at 45.

The initial report that the GAL submitted to the court on behalf of Baby Girl’s best interests, failed to even mention Baby Girl’s Native American heritage. Tr. 631. The GAL’s testimony was that she did not believe that Baby Girl’s Indian heritage was important and that the court did not need to even consider it. Tr. 634. In the GAL’s deposition about the extent of her knowledge of the Native American culture and conversations she had with Baby Girl’s father regarding it, the GAL stated that she had talked to him about “their little get togethers, and little dances.” Tr. 634. The GAL’s lack of appreciation for Indian community standards was evident in the written report which stated her concerns regarding Baby Girl’s biological father. Two prominent concerns that the GAL noted centered on the father living in his parents’ home rather than his own. His ability to “provide for two children independently of his parents provisions” was also stated as a concern. Guardian ad Litem Report at 810, Transcript of the Record, Vol. 1-5, *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012). The GAL’s lack of understanding of the common practice in Native American cultures for families to live with and support each other is evidenced by that concern. In contrast, the GAL did not express concern that if Baby Girl remained in the adoptive home, she not only would be in a home that was non-native, but she also would be hundreds of miles away from any of her biological relatives.

When making recommendations to the Court regarding a case governed by the ICWA, it is imperative that the guardian ad litem be a zealous advocate not only for the child's best interests, but also for the unique needs of the "Indian child." A guardian ad litem on an ICWA case must make a final recommendation that will protect and ensure the Indian child is as exposed and connected to their family, culture, heritage and tribe. The GAL must consider the policy considerations behind the ICWA.

It is for these reasons, that the placement preferences in the ICWA exist. The preferences are needed to ensure that the best interests of Indian children are protected. The Guardian ad Litem should be following the placement preferences of the ICWA and considering tribal heritage in making recommendations.

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CONCLUSION

For these reasons, the South Carolina Supreme Court's decision should be upheld.

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Respectfully submitted,

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