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U.S.

Couples Sue Over Tribal Adoption Hurdles

Challengers say laws set up to protect American Indian children are outdated



A 2013 photo of Baby Veronica, the child at the center of a Supreme Court ruling that she didn't have to be returned by her adoptive parents in South Carolina to her biological father, a Cherokee living in Oklahoma. *PHOTO: MIKE SIMONS/TULSA WORLD/ASSOCIATED PRESS*

By **ASHBY JONES**

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For nearly four decades, couples wishing to adopt American Indian children out of troubled situations have faced several hurdles, including giving the child's tribe a chance to find suitable tribal parents first.

Now some prospective adoptive parents, Indian birthparents and members of the adoption industry are challenging the laws and regulations involved.

“The laws once served a purpose, but these days they’re doing more harm than good to children,” said Kate Wicar of Erie, Colo. She and her husband were blocked last year by the Osage tribe from adopting a 3-year-old Oklahoma girl who is part Osage. The Osage Nation didn’t respond to requests for comment.

Congress passed the Indian Child Welfare Act of 1978 to end what was then a common practice by state and private adoption agencies of pulling Indian children from their homes and placing them in state-run boarding schools or homes of non-Indian parents where they were thought to be better off. The law was aimed at giving tribes more say over the fate of Indian children, and keeping more families intact. It allows tribes to intervene in some child-welfare cases and requires a state that has temporarily moved an Indian child from its home to make “active efforts” to help the family retain custody.

People who identify as fully American Indian or Alaska Native make up 1.2% of the U.S. population, and children from those groups are about 1.7 times as likely to be adopted as other children, according to census data.

Many agree that the law has ended the most egregious practices. Supporters say it also helped keep tribes growing and connected from one generation to the next. But a handful of recent lawsuits say the federal law and similar legislation at state levels make it harder to find stable homes for Indian children who may lack them.



Matt and Melanie Capobianco leaving a 2013 news conference in Tulsa, Okla., where they discussed the dispute over Baby Veronica. PHOTO: MIKE SIMONS/TULSA WORLD/ASSOCIATED PRESS

In July, the Goldwater Institute, a conservative policy group in Arizona, sued the secretary of the Interior Department and the director of the Arizona Department of Child Safety on behalf of a potential class of couples and children affected by the federal law. A hearing on the suit, which alleges the law is unconstitutional, is set for December.

Among the plaintiffs is a non-Indian Arizona couple who began fostering a Navajo baby about four years ago, after his mother was convicted of a felony. The biological father is

unknown, according to the suit. The plaintiffs allege the couple, unidentified in the suit, has been thwarted from adopting the boy by the Navajo Nation.

The delay, according to the lawsuit, has “caused significant emotional and psychological harm to [the] baby boy,” who remains with the foster parents. The law “treats the safety and security of children with Indian ancestry less seriously than the safety and security of all other candidates,” the suit says.

Kandis Martine, an assistant attorney general with the Navajo Department of Justice, said finding the right placement for a Navajo child often takes time but is often beneficial. “They learn the culture, learn the language as they grow up, rather than having to come back and learn about it as adults, from the outside,” she said.

A spokeswoman for the Interior Department said courts have repeatedly upheld the 1978 law “and we are confident that the Department will prevail.” A spokeswoman for the Arizona attorney general’s office declined to comment.

Though past legal challenges have mostly been unsuccessful, critics point to a 2013 U.S. Supreme Court opinion as a sign the law might be vulnerable. The court, 5-4, ruled that the federal law didn’t require a child known as Baby Veronica to be returned by her adoptive parents in South Carolina to her biological father, a Cherokee in Oklahoma.

The justices found the law didn’t apply because Veronica’s father, Dusten Brown, had given up his parental rights before her birth, effectively allowing her mother to place the child for adoption with the South Carolina couple, Matt and Melanie Capobianco. A concurring opinion from Justice Clarence Thomas questioned the law’s constitutionality.

In response, the Obama administration in February issued guidelines that toughened the law, including one that says courts shall not consider the “best interest of [an] Indian child” when weighing whether “good cause” exists to place a child outside a tribe.

The guidelines have sparked their own legal battle. “It’s a shocking thing for our government to say—that a child’s best interests shall not be considered,” said Lori McGill, a Washington, D.C., lawyer who has filed suit against Interior on behalf of the National Council for Adoption and others in an attempt to strike them down.

An Interior spokeswoman said Congress has determined it “is in the best interests of an Indian child to keep that child...with the child’s parents,” extended family and tribal community.

Kathryn Fort, a lawyer with the Indigenous Law and Policy Center at Michigan State University, defends the law and the guidelines. Ms. Fort said that before the law was passed, social workers would argue that it was in the “best interests” of an Indian child

to be permanently removed from a house that was merely messy or lacked the most modern conveniences. “It’s really a way of allowing—and perpetuating—discrimination against Indians,” she said.

Supporters of the law say the adoption delays often required are part of its point. The law “demands excellence in how we treat Indian children,” said Matthew Newman, a staff attorney for the Native American Rights Fund. “That often requires a bit of time.”

Meanwhile, lawsuits in Oklahoma and Minnesota are challenging state laws that go beyond the federal law by explicitly requiring Indian parents to notify their tribes before placing their children for adoption.

The states say the laws reduce the chance that an Indian couple will be coerced into placing a child up for adoption.

But challengers say the Indian parents’ decision to put their children up for adoption should be “theirs to make, and theirs alone,” said Mark Fiddler, a lawyer representing a Minneapolis couple who want to place their six-month-old baby up for adoption without having to tell the mother’s tribe.

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