LAW REVIEW[1] 13026
Updated April 2013

Child Custody and Military Service

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Adoptive Couple v. Baby Girl, 398 S.C. 625, 731 S.E.2d 550 (South Carolina Supreme Court 2012), *cert. granted,* 184 L.E.2d 646 (U.S. 2013).[3]

Background of this case

This case involves a child who was born out of wedlock on September 15, 2009. Because of the age of the child, the record of this case is sealed, and I have not had access to it. Even the

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[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3]The South Carolina Supreme Court decided this case, 3-2, on July 26, 2012. State appellate court decisions are published in regional reporters, including *Southeastern Reporter, Second Series*. The citation means that you can find this case in Volume 731 of *Southeastern Reporter, Second Series*, starting on page 550. The "*cert. granted*" means that the United States Supreme Court has agreed to hear this case.

names of the parties have not been divulged, and I do not know them. In the court decisions so far, the child has been referred to as Baby Girl (BG). The information in this article is the best that I have been able to obtain as of this point.

Mother (M) lives in Bartlesville, Oklahoma, about a four-hour drive from Fort Sill, Oklahoma, where Father (F) was serving on active duty in the United States Army at the time the child was conceived and was born. M claims a Native American heritage but is not a registered member of any tribe.

F is a citizen of the Cherokee Nation and has lived his entire life on the historic Cherokee reservation in Oklahoma, except for the 40 months that he was on active duty in the Army.[4] F served on active duty from February 14, 2008 until June 19, 2011.

F was serving at Fort Sill when he met and had a relationship with M and when M informed him of the pregnancy. In April 2009, F's Commanding Officer informed him that the unit would be deploying to Iraq in about January 2010. F did in fact deploy to Iraq on or about January 12, 2010. He remained there for 11.5 months and returned to Fort Sill on December 26, 2010.

Proceedings in state courts in Oklahoma and South Carolina

After her relationship with F soured and she ended the relationship, M was put in touch with Adoptive Couple (AC) through the efforts of a private adoption agency. AC provided significant financial and other support to M and they were with her during the childbirth. M gave her consent to AC to adopt BG. Shortly after the child was born, AC took her with them back to South Carolina.

In early January 2010, just six days before he departed Fort Sill for Iraq, a process server hired by AC found F near the base and served him with papers. The process server apparently misled F about the nature and effect of the papers he was signing. When F learned that he had signed what amounted to consent to the adoption of BG, he sought to retrieve or destroy the document that he had signed. The process server threatened him with criminal prosecution and left with the signed paper, which F immediately disavowed.

After consulting with a military judge advocate, F initiated a legal action in Oklahoma seeking to establish paternity and child support of BG. While serving in Iraq, F provided a sample for DNA testing, and the testing confirmed F's paternity of BG, with a probability rate of 99.99997%.

AC initiated an action in the Charleston County Court (South Carolina) to approve their adoption of BG. Based on the Servicemembers Civil Relief Act (SCRA), the state court granted a continuance because of F's service in
Iraq. By the time the case came up for trial, F was not only home from Iraq but off active duty. There was a four- day trial before Judge Deborah Malphrus (Family Court Judge) in September

[4]The Cherokee Nation does not currently have a reservation in Oklahoma. It has a 14-county federally recognized service area that is comprised of the former reservation. M and F both resided in that area.

2011. Based on a federal statute called the Indian Child Welfare Act (ICWA), Judge Malphrus denied approval of the adoption and ordered AC to turn over custody of BG to F, which they did. The child has apparently resided with F and his family in Oklahoma since late 2011.

Under the ICWA, a child with one or two Native American parents cannot be taken from an Indian family unless those who seek to do so can "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful." Title 25, United States Code, section 1912(d) [25 U.S.C. 1912(d)]. Moreover, no termination of parental rights of a Native American parent may be ordered in such a proceeding in the absence of a determination, beyond a reasonable doubt, that the continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. 1912(f).

Based on these federal law provisions, Judge Malphrus determined that the adoption could not be approved and that custody of BG should be awarded to F. AC appealed, and the South Carolina Supreme Court affirmed by a 3-2 vote, with two very vigorous dissents.

The two dissenting justices of the South Carolina Supreme Court held it against F that he had little or no contact with M and BG during the pregnancy, the childbirth, and the initial months of BG's life. For example, one dissenter wrote: "The reality is Father purposely abandoned this child and no amount of revisionist history can change that truth." He also wrote: "although [F] was permitted to leave the military base on weekends, he seldom made the four- hour drive from Fort Sill to Bartlesville."

In Footnote 34 of the South Carolina Supreme Court decision, the same dissenter wrote: "Because of Father's military service, he was not required to pay income taxes when in active service." That is not correct. F was exempt from having to pay federal income tax while serving in Iraq, where hazardous duty pay was awarded, but not while serving at Fort Sill in Oklahoma.

How F's military service affected this case

I have not seen the record in the state court, because it is sealed, but I think that it is entirely possible that F was unable, because of his military duties in the months leading up to his deployment to Iraq, to leave Fort Sill routinely on weekends. I know that when a unit deployment is announced the training schedule becomes most rigorous and time intensive. The two dissenting Justices of the South Carolina Supreme Court seemed not to understand and appreciate these realities of military service. But fortunately for F they were the dissenters. The South Carolina trial court ruled for F and the state's Supreme Court affirmed by a 3-2 margin.

It has now been 40 years since Congress abolished the draft in 1973. I find that with each passing year since the draft went away a greater and greater percentage of those who are in charge of things have never served in our nation's armed forces. Moreover, few of their family members or close friends have ever served. The entire United States military establishment,

including the National Guard and Reserve, amounts to less than 3⁄4 of one percent of our country's population.

I am not saying that I want Congress to reinstate the draft. Our All Volunteer Military has been a great success, and I do not want to see our country go back to a poorly motivated draftee military. But the fact that those who serve make up such a tiny fraction of our population means that we at ROA and other military associations need to redouble our educational efforts.

Some of those who have commented on this case have claimed that it was a "tragedy" that the child spent the first two years of her life with AC and then (because of the court order) was removed from the custody of the only two adults she had ever known as parents and sent to a distant state to live with strangers. But the delay in bringing this case to trial was necessitated by F's active duty service and his deployment to Iraq. Moreover, it is likely that the Oklahoma authorities never would have permitted AC to remove the child from Oklahoma, but for AC have misled (knowingly or unknowingly) those authorities about the identity and Native American heritage of the child's father and about the father's "consent" to the adoption. Judge Malphrus held, and the South Carolina Supreme Court majority agreed that "there is no such thing as adverse possession when dealing with custody of a child."

Proceedings in the United States Supreme Court

In the final appellate step available to them, AC applied to the United States Supreme Court for a *writ of certiorari* (discretionary review), which the Court granted, apparently based on the perception that there is a conflict among state high courts about the meaning and effect of these ICWA provisions in cases involving proposed adoptions of Native American children.

This case is moving very fast. The oral argument will likely be held in late April. The Supreme Court decision will likely come down before the end of the current term in late June. We will keep the readers informed of developments in this important and interesting case.

Update – April 2013

The United States Supreme Court reversed the South Carolina Supreme Court in law June 2013. Please see Law review 13088.

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ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national

security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[5] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
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[5]Congress recently established the United States Space Force as the 8th uniformed service.