

LAW REVIEW¹ 13088

July 2013

Supreme Court Reverses South Carolina Court in Indian Child Welfare Act Case

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

4.3—SCRA Right to Continuance and Protection Against Default Judgment

5.2—Military Service and Child Matters

10.2—Other Supreme Court cases

Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013).

In Law Review 13026, I discussed in detail *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). In that article, I promised to keep readers informed of developments in this fascinating case. At the end of its 2012-13 term, the United States Supreme Court reversed the decision of the South Carolina Supreme Court and remanded the case for further proceedings consistent with the Supreme Court opinion.

¹I 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.

²BA 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.

This case involves a child (Baby Girl) who was born out of wedlock on September 15, 2009. The child's mother (Mother) was a citizen of Oklahoma who is considered Hispanic in origin. The biological father (Father) is a member of the Cherokee Tribe. At the time the child was conceived and was born, Father was on active duty and assigned to Fort Sill in Oklahoma. These two individuals became engaged in December 2008. A month later, Mother informed Father of the pregnancy. He pushed her to move up the date of the marriage, but she refused. They became estranged, and the engagement was called off in May 2009. Mother sent Father a text message, inquiring as to whether he would prefer to pay child support or waive his parental rights, and he responded, saying that he would waive his rights.

Father had no further contact with mother and paid no support during the pregnancy. Father was still stationed at Fort Sill when Baby Girl was born in September 2009, but he deployed to Iraq four months later (January 2010). Father had no contact and paid no support before or during his deployment.

After she broke off the engagement with Father, Mother contacted an adoption agency, seeking a couple willing to adopt the child, and she found Adoptive Couple, who live in South Carolina. They provided emotional and financial support to Mother during the remainder of the pregnancy and were present at the hospital when Baby Girl was born. After obtaining Mother's written consent, they brought the child back to South Carolina and initiated adoption proceedings in South Carolina Family Court.

In January 2010, just a few days before Father deployed to Iraq, a process server hired by Adoptive Couple found Father near Fort Sill and obtained his signature on a document consenting to the adoption. Father signed the document but almost immediately renounced his signature, claiming that the process server had misled him about the nature and effect of the document he signed. Father vigorously contested the adoption and the termination of his parental rights.

It appears that the South Carolina Family Court punctilioously observed Father's rights under the Servicemembers Civil Relief Act (SCRA), as a member of the armed forces on active duty. By the time the adoption case went to trial in September 2011 (24 months after the birth of the child), Father was home from Iraq and off active duty, having completed the active duty period for which he enlisted. It appears that no claim has been made that Father's Army service prejudiced him in his pursuit of his rights in the South Carolina court system, and in any case Father prevailed in that system.

After a four-day trial in September 2011, Judge Deborah Malphrus of the South Carolina Family Court ruled for Father, holding that the Indian Child Welfare Act of 1978 (ICWA) [1] precluded terminating Father's rights and precluded the adoption. In December 2011, Adoptive Couple complied with Judge Malphrus' order and turned Baby Girl over to Father, 27 months after the child was born, and Father took the child to live with him and his parents in Oklahoma. Adoptive Couple appealed to the South Carolina Supreme Court, which affirmed Judge Malphrus by a 3-2 margin, with two very vigorous dissents.

In the final step available to them, Adoptive Couple applied to the United States Supreme Court for a writ of *certiorari*. Granting *certiorari* requires the affirmative vote of at least four of the nine Justices, and *certiorari* is denied more than 95% of the time. When the United States Supreme Court declines to hear a case, the reviewed case becomes final but does not become equivalent to a United States Supreme Court case, in terms of precedential value going forward.

Surprisingly (at least to me), the Supreme Court agreed to hear this case. On a 5-4 vote, the Supreme Court reversed the decision of the South Carolina Supreme Court and remanded the case for proceedings consistent with this decision. The Opinion of the Court was written by Justice Samuel Alito, joined by Chief Justice John Roberts, Justice Anthony Kennedy, and Justice Stephen Breyer. Justice Clarence Thomas provided the crucial fifth vote, but on a completely different basis. Justices Antonin Scalia, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan dissented. There are five opinions in this case.

This case made fascinating reading, at least for me, concerning constitutional law, family law, statutory construction, civil procedure, etc. But none of the five opinions mentions Father's military status or the SCRA. I was asked to draft an *amicus curiae* (friend of the court) brief in this case, concerning the application of the SCRA. I seriously considered doing so but ultimately decided not to, because the military connection seemed just too attenuated. In light of the result, I am pleased that we did not get involved.

Update

After the United States Supreme Court remanded this case to the South Carolina Supreme Court, the latter court acted promptly and awarded custody to Adoptive Couple, the Capabiancos. Duster Brown, the Father, sought emergency relief in the United States Supreme Court, to delay the order of the South Carolina court. On August 2, 2013, the United States Supreme Court declined to order any further delays. It appears that Duster Brown has exhausted all his legal options.

The turnover of the child (Veronica) will likely take place over a period of several days, to try to minimize trauma for a very confused child. She spent the first 27 months of her life (September 2009 to December 2011) with the Capabiancos in South Carolina, then the next 20 with Duster Brown and his family in Oklahoma.

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

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 eight³ 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
Washington, DC 20002

³Congress recently established the United States Space Force as the 8th uniformed service.