UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

V. B., by her Next Friend,
Angel Smith,

Plaintiff,

vs.

C O M P L A I N T
(Declaratory & Injunctive Relief)

Daniel E. Martin, Jr. Judge,
Family Court for the Ninth Judicial Circuit,

Defendant
_____/

INTRODUCTION

V.B.[1] is nearly four years old. Since her birth, the adults in her life have been arguing in the South Carolina state courts whether, as a matter of state and federal law, she belongs in the care of Dusten Brown, her biological father, and his family with whom she has lived for the past 19 months in the State of Oklahoma, or whether she belongs in the care of Matt and Melanie Capobianco, a couple in South Carolina who want to adopt her and with whom she lived for the first 27 months of her life. In fact, the adults recently argued this question all the way to the Supreme Court of the United States, which remanded the case back to the South Carolina courts to answer this question again. *See Adoptive Couple v. Baby Girl*, No. 12-399, (U.S. June 25, 2013).

V.B. does not come to this Court to answer the question of whether she belongs with her father or the adoptive couple. Rather, V.B. simply asks this Court to decide the question of

[1]Consistent with the rules of this court, the child's name has been redacted, as she is a minor. While publicity surrounding this case has referred to her by her given name, in the reported decisions involving her, she has been referred to as "Baby Girl."

whether, prior to any final decision by the South Carolina state courts, she has a constitutionally protected right to a meaningful hearing in the state courts to determine what is in her best interests today. In addition, V.B., as an "Indian child" under the Indian Child Welfare Act, *see* 25 U.S.C. § 1903(4), asks this Court to declare that she possesses a federally protected right to have the state courts fully consider and appropriately weigh her best interests as an Indian child.

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988, the Fourteenth Amendment to the United States Constitution, and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (ICWA) on behalf of a child deprived of a right to a hearing to determine her best interests prior to the transfer of custody ordered by the Supreme Court of South Carolina. The defendant is a judge in the Family Court of the Ninth Judicial Circuit who has scheduled a hearing to determine the matter of transfer of physical custody to carry out a mandate of the Supreme Court of South Carolina. This United States District Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 25 U.S.C. § 1914.

PARTIES

2. V.B. is a member of the Cherokee Nation of Oklahoma who resides with her father, in Nowata County, Oklahoma. She is a minor, and brings this action through her next friend, Angel Smith, an attorney appointed as counsel for the child by the courts of the Cherokee Nation. She brings this action pursuant to Rule 17(c)(2) of the Federal Rules of Civil Procedure.

3. The defendant is the Honorable Daniel E. Martin, Jr., a duly appointed judge for the family court system of South Carolina, sitting in the Ninth Judicial Circuit in Charleston, South Carolina. He has been designated by the Family Court of the Ninth Judicial Circuit to

carry out the order of the Supreme Court of South Carolina. The actions being undertaken by defendant are under color of state law. The defendant is being sued in his official capacity only.

FACTUAL ALLEGATIONS

4. V.B. was born in 2009 in Bartlesville, Oklahoma. At the time of her birth, her mother had entered into a contract to give her to a couple who resided in South Carolina, Matt and Melanie Capobianco, who wanted to adopt her. Within days of her birth, the Capobiancos left Oklahoma with V.B. and returned to South Carolina.

5. At the time of her birth, V.B.'s father, Dusten Brown, was in active military service for his country, serving with the Army National Guard as an E-4 specialist. He was unaware that V.B.'s birth mother had consented to the adoption of his child. He continues to serve his country as a member of the National Guard. He is a citizen of the Cherokee Nation, and his membership in a recognized tribal sovereign was well known to the mother and the Capobiancos at the time of V.B.'s birth.

6. Due to some "misinformation" supplied to the Cherokee Nation by the attorney for the birth mother, the Nation was unable to determine that V.B.'s father was Cherokee, and the adoptive couple was able to leave the state with V.B.[2]

7. The adoptive couple filed an action for adoption in the family court in Charleston, South Carolina on September 18, 2009. The process seeking to terminate Mr. Brown's parental rights was not served on the father until January 6, 2010, shortly before he was to ship out to Iraq for a twelve month tour. By then, V.B. was nearly four months old.

8. Within five days of being served, the father retained an attorney who obtained a stay of the adoption proceedings pursuant to the Servicemembers' Civil Relief Act at 50 U.S.C.

[2] This was the characterization by the family court which ultimately heard the request for adoption and denied it after a hearing concluded September 15, 2011.

501, *et seq*. He also filed an action for custody in the domestic relations court in Oklahoma, which was ultimately dismissed in lieu of the adoption proceedings in South Carolina.

9. Because the father was serving in the U.S. Army in Iraq, and physically incapable of participating in proceedings in South Carolina, in addition to the stay imposed by 50 U.S.C.501, *et seq*., the action there was suspended for several months.

10. A hearing on the merits of the parties' claims was held by the family court in Charleston, South Carolina for four days beginning September 12, 2011. The family court judge concluded that the Capobiancos' request for adoption should be denied, and that V.B. should be placed with her father, who was found to be a fit and loving parent. At this juncture, V.B. was two years old. The family court issued a bench order on September 29, 2011, finding it to be in V.B.'s best interest that custody be granted to her father, and that she be transferred to his care on October 15, 2011. That transfer did not occur.

11. The final order of the family court was signed November 25, 2011, and by order of the court V.B. was placed in the custody of her father on December 31, 2011.

12. The adoptive parents appealed the order of the family court by serving notice of appeal on December 20, 2011. By then, both the family court and the appellate court had denied their request for a stay of the family court's decree.

13. The Supreme Court of South Carolina took jurisdiction of the appeal and heard it on April 17, 2012. The court issued an opinion on July 26, 2012, and by a vote of three justices to two, affirmed the family court's decision. *Adoptive Couple v. Baby Girl*, 398 S.C. 625, (2012). The court denied the adoptive parents' request for rehearing on August 22, 2012. By this time, V.B. was nearly three years old.

14. The adoptive parents sought and obtained a writ of certiorari in the United States Supreme Court raising federal questions regarding the Indian Child Welfare Act, 25 U.S.C. 1901, *et seq*. The U.S. Supreme Court granted certiorari on January 24, 2013, and heard arguments from the parties on April 16, 2013. In its opinion, issued June 25, 2013, the United States Supreme Court did not address the issue of whether the adoption of V.B. should proceed or whether V.B. should remain with her father after being with him for 19 months. The Supreme Court did reverse the state courts' judgments insofar as they rested on federal questions, and remanded the case "for further proceedings not inconsistent with this opinion." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

15. Although not mandated by the opinion of the United States Supreme Court, by a vote of three to two on July 17, 2013, a sharply divided Supreme Court of South Carolina issued an order on remand that summarily denied the opportunity for a hearing on the best interest of V.B. and dispensed with any further proceedings. The court directed the family court below to grant the adoption of V.B. by the Capobiancos. *See*, Order of the Supreme Court of South Carolina issued July 17, 2013, Appellate Case No. 2011-205166. In a subsequent order issued by the court on rehearing on July 24, 2013, the divided court reiterated that the family court is not to hold any such hearing on best interest, limiting the family court to a decision about a "transition plan." Employing an irrebuttable presumption, that order found that changing custody of V.B. back to the Capobiancos was in her "best interests." The court indulged in that finding, notwithstanding its previous finding in the appeal from the family court that, like the family court, "we cannot say that [V.B.'s] best interests are not served by the grant of custody to Father, as Appellants have not presented evidence that Baby Girl would not be safe, loved and cared for if raised by Father and his family." *Adoptive Couple*, 398 S.C. at 655..

16. The family court, with Judge Daniel E. Martin Jr., presiding, is to hold a hearing "to determine the manner of transfer physical custody" on Wednesday, July 31, 2013 at 3:30 p.m.

17. V.B. will turn four years old in September. She has been with her father and her extended family in Oklahoma nearly as long as she was with the prospective adoptive couple.

COUNT I: VIOLATION OF DUE PROCESS

18. In domestic relations law, it has been observed that "the best interests of the child" is the polestar of any proceeding involving the care and custody of a child. *Wendland v. Wendland*, 29 Wis. 2d 145 (1965). Under South Carolina law, this is true even where grounds for termination of parental rights exist to justify severing a parent's rights. *Hooper v. Rockwell*, 334 S.C. 281 (1999). It is paramount that termination of those rights be in a child's best interests. *South Carolina Department of Social Services v. Sarah W.*, 402 S.C. 324 (2013). Even if grounds for the severing of a parent's right to the child exist, adoption must nonetheless be in the child's best interest. *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311 (2013).

19. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the rudiments of due process are notice and opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 354 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976). Long ago this principle was applied by the United States Supreme Court to adoption proceedings. *Armstrong v. Manzo*, 380 U.S. 545 (1965) (where a father was given no notice of adoption by a stepparent). This principle was long ago applied to children in the juvenile court. *In Re Gault*, 387 U.S. 1 (1967).

20. The Supreme Court of South Carolina, albeit in a sharply-divided opinion, summarily found, based only on the record created before the Family Court in 2011, that it is in

V.B.'s best interest to be removed from the father and given to the adoptive couple. The opinion fails to take into account or require any inquiry regarding the current circumstances for V.B.: her psychological and emotional well-being, her attachment to her father and extended family, her safety and stability, and other compelling needs. The Supreme Court of South Carolina opinion does not consider the implications to V.B.'s best interests *today*—at the point in time in which the state is acting to transfer custody. Moreover, the opinion bars any hearing on the question of her interests by the Family Court.

21. The precipitous actions of the Supreme Court of South Carolina in dictating this result have deprived V.B. of her right to be heard on the question of her best interests—whether it is in her best interests to remain with her father and extended family in Oklahoma where she has resided for the past nineteen months, or whether it is in her best interests to be transferred back to the prospective adoptive couple in South Carolina. She doubtless has a liberty interest in remaining with her father and such an interest justifies at a minimum a plenary hearing on her current status, her relationships with others and her genuine need for stability. *See, e.g. Smith v. O.F.F.E.R.*, 431 U.S. 816 (1977), holding that at least some process is due when removing a child from a parent figure, such as a foster parent. Her liberty interest is even more compelling in view of the fact that the parent figure is her father. *See, e.g., Stratton v. Mecklenburg County Department of Social Services*, No. 11-2131 (4th Cir. Decided May 31, 2013 - Unpublished), concurring opinion of Judge Gregory, citing *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (assuming for analysis that children have reciprocal liberty interests in retaining nurturing relationships with their parents);*see also, Smith v. City of Fontana*, 818 F.3d 1411, 1418 (9th Cir. 1987) (concluding that a "long line" of Supreme Court cases stressing the importance of familial

bonds "logically extends to protect children from unwarranted state interference with their relationships with their parents").

22. V.B. is entitled to a hearing in the Family Court to determine her best interests as they exist today. This is especially true in light of the fact that she is an Indian child, with additional rights protected by federal law.

COUNT II VIOLATION OF THE INDIAN CHILD WELFARE ACT

23. Congress passed the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*, to preserve the heritage and connections of Indian children with their families. Among other findings, Congress observed at 25 U.S.C. § 1901(3):

> that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

24. The focus of the Indian Child Welfare Act is clear and unequivocal. "It is the policy of this Nation to protect *the best interests of Indian children* and to promote the stability and security of Indian tribes and families…" 25 U.S.C. § 1902 (emphasis added). Indeed, the Act is based "on the fundamental assumption that it is in the Indian child's best interest that [the child's] relationship to the tribe be protected." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50, n. 24 (1989), *applied* in *Adoptive Couple*, 398 S.C. at 654, noting that the family court in V.B.'s case found no conflict between her best interests and the interests of her father.

25. Despite the finding of the family court and the implicit assumption by the Supreme Court of South Carolina that V.B.'s best interest would be served by being with her father, two years later the court now determines, despite the passage of time and V.B.'s stage of development at age four, that her "best" interests will now be served by being removed from him and given back to the adoptive couple. Again, this order is without any consideration to the

present circumstances, psychological and emotional well-being, and future impact on V.B. This is an arbitrary result, depriving V.B. of any opportunity to be heard on her own behalf, irrespective of the competing interests of the adult litigants in her young life.

26. The Supreme Court of South Carolina, in its decision on remand, ignored federal law and applied state law to hold that consent of V.B.'s father was not required for the adoption.

27. This interpretation, however, ignores preemptive federal law, which requires under the Indian Child Welfare Act that a parent may only voluntarily surrender rights in writing, before a judge, with a clear showing that any such surrender and its consequences was fully understood. 25 U.S.C. § 1913(a). Otherwise, under the Act, a parent who does not consent may only have his rights terminated if there is a finding of unfitness under applicable state law.

28. 25 U.S.C. § 1914 provides for an express right of action by Indian children such as V.B. to challenge and defeat a termination of her parent's rights in violation of the terms of the Indian Child Welfare Act. V.B. has a substantial interest in maintaining her right to her father, family and Tribe, and is entitled to a fair application of the federal standard set out by 25 U.S.C. § 1913(a).

29. V.B. is entitled to a plenary hearing to challenge the action of the state courts of South Carolina in depriving her of her right to have a familial relationship with her father and extended family and her right to retain a full and meaningful relationship with the Cherokee Nation.

WHEREFORE plaintiff requests the following relief:

1. The assumption by this court of jurisdiction over the matter;

2. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that as a matter of law, the actions of the state courts of South Carolina have deprived the Plaintiff of a

meaningful opportunity to be heard on the matter of her current best interests before being transferred from her father to an adoptive couple, and an opportunity to challenge her separation from her father and her Tribe in violation of the Indian Child Welfare Act;

3. Preliminary and permanent injunctive relief under Rule 65 of the Federal Rules of Civil Procedure prohibiting the state courts of South Carolina, and particularly its family court, from further proceedings without a full hearing on the matter of Veronica's interests in remaining where she lives and connected to her father, family and Tribe;

4. Such other and further ancillary relief as this court deems just and equitable.

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Application and Motion for
Admission Pro Hac Vice Pending

BY:***John D. Elliott***
JOHN D. ELLIOTT

Columbia, South Carolina

July 30th, 2013

By signing this complaint electronically, counsel verifies pursuant to Rule 65(b)(1) that the facts set forth in the complaint, motion for temporary restraining order and exhibits clearly show that the minor plaintiff will suffer immediate and irreparable injury and loss before the adverse party may be heard in opposition, and that counsel is unable to give notice to the adverse party due to the emergent nature of these proceedings.