

In re Adoption of Micah H., a minor child

Caselaw No.

301 Neb. 437

Filed on

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Summary:

This case is a continuation of *In re Adoption of Micah H.*, 295 Neb. 213 (2016), where the Supreme Court determined that the county court applied the wrong standard of proof with regard to determining abandonment and also determined that the active efforts requirement of the Nebraska Indian Child Welfare Act (NICWA) applied to cases involving the termination of parental rights over Indian children, even when the parent is not of Native American descent. The case was remanded to county court where the correct standard of abandonment was applied and found that the petitioning grandparents had made active efforts to unite the parent with the native child but determined that his biological father, Tyler R., had abandoned him. Tyler now appeals.

Micah is the 10-year-old biological child of Tyler and Allison H., the latter being a member of the Oglala Sioux tribe, making Micah an "Indian child" pursuant to the federal Indian Child Welfare Act (ICWA) and NICWA. Linda H. and Daniel H. are Allison's adoptive parents and legal guardians of Micah for the majority of his life. Linda and Daniel are not Native Americans and became involved due to Allison's struggles with sobriety, which Tyler also shares and has been incarcerated since February 2012 as a result of an alcohol-related vehicular homicide and is projected to be released in August 2019. Tyler has a previous history of drug and alcohol-related offenses.

In January 2014, Micah was evaluated by a psychologist and found to have symptoms of anxiety triggered by his situation and his parents' problems, resulting in an adjustment disorder. As a result, Linda and Daniel filed a petition for adoption and TPR. Allison voluntarily relinquished rights to Micah and the Oglala Sioux Tribe declined to intervene.

In 2015, the county court denied that petition and Linda and Daniel appealed, assigning error that the county court should not have found ICWA to apply as the request of Tyler, a non-native, and that the county court applied the wrong standard of abandonment. At initial appeal, the Nebraska Supreme Court determined that the abandonment standard of "beyond a reasonable doubt" as applied by the county court was indeed incorrect and a "clear and convincing" standard should have been applied instead.

On remand, the county court found in favor of Linda and Daniel, determining that active efforts had been demonstrated under ICWA by attempting to contact the tribe and directing Tyler to substance abuse treatment programs. The county court also determined that Tyler had abandoned Micah. The court further found that Tyler had not made any efforts to acquaint himself with tribal customs or practice that would inform his relationship with Micah. Evidence was heard that the contact the Tyler and Micah had prior to his incarceration was not positive and resulted in concerning behaviors in Micah. Tyler asserted that Linda and Daniel had not made efforts to direct him to programming, that he didn't need substance abuse therapy, and that he had made progress in a single parenting program offered in prison. However, Tyler

also admitted little to no face-to-face contact with Micah in years, included prior to his incarceration. Tyler pays minimal child support, using family financial help, and no formal requests for visitation while in prison were made.

At the conclusion of the adoption proceedings, the county court judge remarked that he was "not turning this case over to some other judge to read the record and come to a conclusion" because he "was the one that's heard all the live evidence." The judge further stated that "those observations are important in the context of the whole case," indicating that the adoption track involving Linda and Daniel and the abandonment track involving Tyler weren't to be bifurcated. No objection, argument, or testimony was raised or provided by Tyler. The county court then found Tyler abandoned Micah and terminated his parental rights, further finding that adoption by Linda and Daniel was in Micah's best interests.

Tyler then filed the instant appeal assigning that the county court erred in (1) finding that Linda and Daniel had used active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family or to unite the parent or Indian custodian with the Indian child within the meaning of ICWA, (2) finding by clear and convincing evidence that Tyler abandoned Micah, (3) finding that the adoption was in the best interests of the child, (4) granting the adoption decree without notice and an opportunity to be heard at a further hearing on the best interest of Micah after terminating Tyler's parental rights, and (5) not adhering to statutory adoption requirements.

Beginning its review, the Supreme Court first gave an overview of the relevant adoption laws, especially where related to ICWA and NICWA. The Court took specific care to mention that "when a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before the child may be adopted," but Native descended children complicate the matter in the way of "additional safeguards" that "provide heightened protection to the rights of parents and tribes in proceedings involving . . . adoption."

The Court provided the established purpose of ICWA as protecting "the best interests of Indian children and to promote the stability and security of Indian tribes and families" through the use of legal standards and frameworks that "reflect the unique values of Indian culture" and "provide for assistance to Indian tribes in the operation of child and family service programs." While Micah is undoubtedly part of the class of individuals falling under the protections of ICWA, not "every provision of ICWA and NICWA applies to a non-Indian parent."

As a result, the Supreme Court zeroed in further on the "active efforts" requirement provided in ICWA where if "[a]ny party seek[s] to effect a . . . termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proved unsuccessful." Moreover, NICWA gives a more stringent final clause in that active efforts not only includes "remedial services and rehabilitative programs to prevent the breakup of the Indian family" but then also "or unite the parent or Indian custodian with the Indian child and these efforts have proved unsuccessful." In this context, "[p]arent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child," thus requiring active efforts even where the parent is not of native descent.

That said, the Court turns to Tyler's claim that active efforts were not supplied in attempts to

reunite him with Micah, citing specifically 43-1503(1)(a) to (h) as a "checklist" needing to be complied with in total. To this the Supreme Court reminds that there is "no precise formula for active efforts" and requires a case-by-case analysis. Citing prior decisions involving sufficiency of active efforts, the Court recalls that Tyler had been counseled on parenting techniques, as well as his drug and alcohol problems by Linda, complete with suggestions for programming and a treatment. However, at the time of adoption Tyler had only completed one parenting class and attended one AA meeting, both in prison. As a result, the Supreme Court concludes that "Linda and Daniel undertook active efforts to provide remedial services and rehabilitative program designed to unite Tyler and Micah."

Moving on to the issue of abandonment, the Court cites 43-104(2)(b) which does not require written consent from the biological parent for adoption to proceed and instead provides an allowance for the adoption to continue if it can be shown that the parent "has abandoned the child for at least six months preceding the filing of the adoption petition" by clear and convincing evidence by the petitioning party. This occurs where "an absolute relinquishment of the custody and control of the minor and thus laying aside by the parents of all care for the minor" is shown or "where there is willful or intentional conduct on the part of the parent which evinces a settled purpose to forgo all parental duties and relinquish all parental claims to the child, or a willful neglect and refusal to perform the natural and legal obligations of parental care and support." However, this six-month window is not hard and fast; issues such as parental incarceration can be taken into account when making an abandonment determination, but parental ability, actions, and fitness are the ultimate determining factors.

Applied here, Tyler lived with Micah for only seven to ten days during Micah's ten years. Visitation has only been court-ordered and supervised. Tyler never sought increased or less-restrictive visitation, nor custody. The last face-to-face contact the pair had was May 8, 2011 and Tyler never requested Micah visit him in prison. Tyler has never personally paid child support and used the resources of others to meet those support obligations. Correspondence has only occurred since Tyler's incarceration. Tyler is unwilling to acknowledge or seek treatment for his substance abuse issues.

While the lower court somewhat incorrectly summated that Tyler "deliberately withheld . . . normal parental care," as Tyler had been sending letters and drawings to Micah to maintain contact, the Supreme Court ultimately agrees with the lower court's essential conclusion of abandonment and opines that "isolated contact or expression of interest does not negate the inference that a person no longer wishes to act in the role of parent to a child" and affirms the finding of abandonment.

Then turning to a "best interests" analysis, the Court reviews that the intentions of ICWA and NICWA is to "assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe or tribes and tribal community." Here, the Oglala Sioux Tribe was served and declined to intervene. Tyler, despite being non-native, testified that he took Micah to some tribal events. Linda and Daniel, on the other hand, raised Micah's mother from age four and made efforts to expose her to her native heritage throughout her upbringing using artifacts and books kept in the home. A similar approach has been taken as they raise Micah: taking him to tribal events; education and awareness about his Native heritage; through artifacts kept in the home; and visits in Linda and Daniel's home with his mother, a member of the Oglala Sioux Tribe.

The Supreme Court finds that due to these facilitations and interactions, along with assessments made by Micah's caseworkers and therapists, it is in Micah's best interests,

both in respect to ICWA and his personal development, to remain in the home with and be adopted by Linda and Daniel.

The Court continues with the issue raised by Tyler of a lack of procedural due process in the adoption. Specifically, Tyler argues that he was not included in the adoption proceedings until final judgement despite retaining parental rights until that point. However, the Court finds this argument is without merit as it was stated at the abandonment hearing that the case was not being bifurcated to handle the abandonment and adoption issues separately. Tyler raised no objection and had the opportunity to call witnesses and chose to do neither.

Finally, the Court considers Tyler's final point alleging the lower court did not comply with statutory requirements of 43-107 and 43-109, specifically that: a criminal check and home study of any person(s) adopting a child must be conducted; the child must appear in court at the adoption hearing; and no decree of adoption can be entered without requisite medical histories being made court record and affidavits received from the relinquishing biological parent.

Linda and Daniel argue that: the county court waived the home study requirement due to Micah having lived with them for the majority of his life and their status as his current legal guardians; a previous background check from 2012 as part of their becoming legal guardians was relied on by the court; Micah was present at some but not all adoption proceedings; and medical records were provided in 2015 as part of the original adoption application. However, the Court finds that: while a waiver can be permitted for certain parties, adoptive grandparents were intentionally excluded by the legislature in 43-107(b)(ii), thus necessitating the pre-adoption home study; there was no criminal history check or medical information included as part of the record argued and must be conducted or provided; and Micah was required, by statute, to be present at the final adoption hearing and he was absent, in violation of the statute. However, they also find the statutory parental relinquishment argument without merit in that Allison relinquished her parental rights via signed document and this is sufficient to satisfy 43-107(c). For these reasons, the Supreme Court finds that Tyler's arguments on some of these statutory points are valid.

As a result, the Supreme Court affirms in part, vacates the adoption decree, and remands the cause to the county court with directions to comply with the statutory inclusions mentioned above.
