

REPLACEMENT

FILED

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**NEBRASKA SUPREME COURT
COURT APPEALS**

CASE NO. A-15-1080

IN THE
NEBRASKA COURT OF APPEALS

IN RE ADOPTION OF MICAH H.

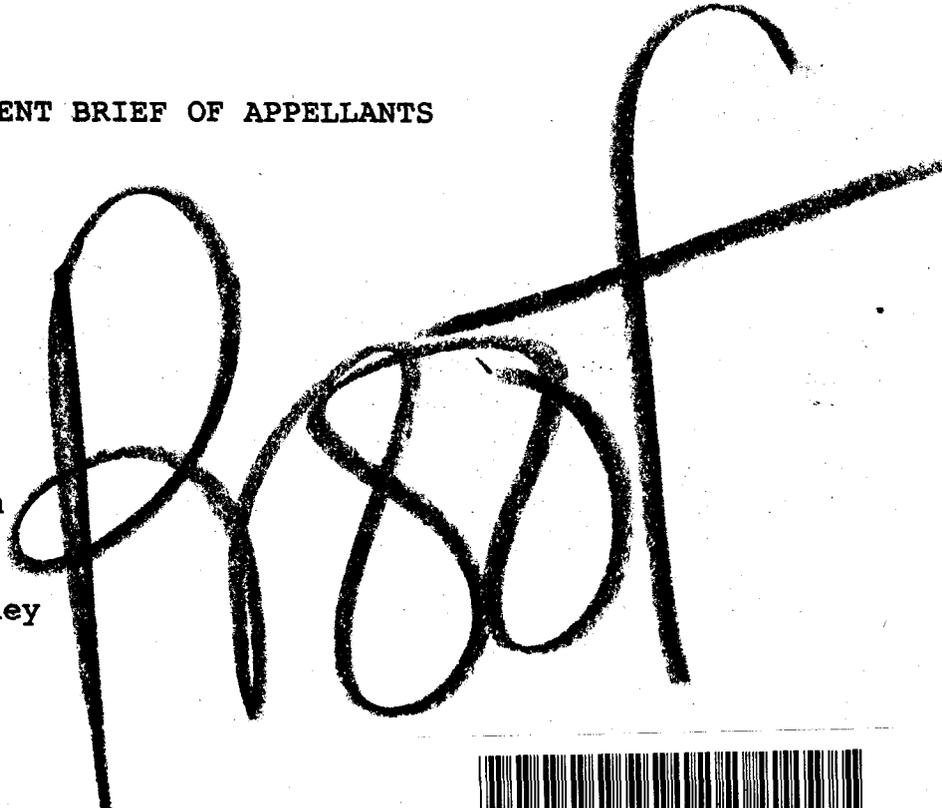
APPEAL FROM THE COUNTY COURT
OF SAUNDERS COUNTY, NEBRASKA

The Honorable Patrick R. McDermott, Judge

REPLACEMENT BRIEF OF APPELLANTS

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CASES CITED

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Neb.Rev.Stat. §43-112 (as amended), because the Saunders County Court rendered a final order and entered judgment on September 9, 2015. (T12). Petitioner/Appellants filed a timely Notice of Appeal on November 19, 2015, after the trial court overruled Petitioner/Appellants' Motion for New Trial on October 28, 2015.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a Saunders County Court adoption case. The maternal grandparents and court appointed Guardians of Micah H. sought to adopt Micah H. The biological mother, a member of the Oglala Sioux Tribe, had signed a relinquishment. The tribe was notified of the adoption but did not enter an appearance or otherwise plead. The non-Indian biological father refused to sign a relinquishment. Father objected to the adoption arguing that I.C.W.A./N.I.C.W.A. applied and required the court to apply a higher burden of proof and that an expert was required to testify as to the culture and traditions of the child's tribe and the appropriateness of the proposed adoptive family.

B. Issues Tried Below

The trial court tried whether the father had abandoned Micah H. and whether I.C.W.A./N.I.C.W.A. applied.

C. How Issues Were Decided and Judgment Entered

The trial court found that I.C.W.A./N.I.C.W.A. applied and used the "beyond a reasonable doubt" standard in determining whether the father had abandoned Micah H. Using the heightened standard, the trial court found that it could not find that Father had abandoned Micah H. The trial court further found that, as I.C.W.A./N.I.C.W.A. applied, Petitioners were required to offer expert testimony regarding the culture and traditions of the child's tribe and the appropriateness of the proposed adoptive family.

Having made the above findings, the trial court denied the Complaint for Adoption.

D. Scope of Review

An appellate court reviews a question of law independent of the lower court's determination. Jeremiah J. v. Dakota D., 285 Neb. 211, 826 N.W.2d 242 (2013).

An appellate court reviews a fact dispute for error appearing on the record. In re Adoption of Kailynn D., 273 Neb. 849, 733 N.W.2d 846 (2007).

STATEMENT OF ERRORS

The trial court made two errors, one legal and one factual:

1) The trial court erred in finding that I.C.W.A. applied at the request of the non-Indian father, who had abandoned the family, and where neither the Tribe nor the Indian mother requested its application; and

2) As a result of the first error, the trial court erroneously applied the higher burden of proof (beyond a reasonable doubt vs. clear and convincing) and found that the moving parties failed to show that Father had abandoned Micah H.

STATEMENT OF FACTS

Micah H. was born on September 4, 2007, to Allison Hardy and Tyler Robar. (34:8-10). Tyler was not informed of the birth until nine (9) months after Micah's. birth. (37:19). Allison is a member of the Oglala Sioux Tribe. (19:13-18). Tyler is not of Indian heritage.

Tyler's paternity was established pursuant to a Saunders County District Court action brought by the State of Nebraska to enforce child support. (E7:145-147). Subsequently, the matter expanded to consider custody matters as well. Finally, on July 2, 2010, a Decree of Paternity, Custody and Child Support was entered upon the

parties' stipulation. (E7:26-36). The aforementioned Decree granted Allison full legal and physical custody. (E7:27). Tyler was ordered to pay child support of One Hundred Dollars and No Cents (\$100.00) per month beginning August 1, 2010, and all arrearages were preserved. (E7:27). Tyler was awarded visitation as set forth in the parties' parenting plan. (E7:27). The parties parenting plan provided that Tyler's visitation would be supervised: "All visitations by Father shall be supervised by his mother Dawn Robar or other suitable person approved by Mother." (E7:31). For a brief period of time, Tyler's visits resembled a modified Wilson v. Wilson visitation. (E7:31-33). The supervised visitation provision of the parties' parenting plan has never been removed. (E7).

Allison testified that Tyler and his mother had ignored the supervised visitation portion of the parties' parenting plan. (45:22 to 46:24). Tyler did not refute that allegation.

Allison and Tyler lived together for a total of seven to ten days from the date of their first meeting to the time of trial. (25:8-11).

Allison had requested, by letter, that Tyler's visits be restricted due to Micah reporting to Allison that Daddy Tyler had made comments in Micah's presence that she felt were inappropriate, to wit: ". . . big titted girls like to be spanked . . ." (E8)(32:4-7)(47:4-10). Allison had also observed Micah playing with dolls simulating a sex act

(kissing a penis) and of Micah talking about ejaculation. (30:24 to 32:3). Additionally, Allison became aware that Tyler and his mother, Dawn, were not following the supervised visitation requirements of their parenting plan. (46:2-24). Micah was between age two and three at the time these events were occurring. (32:11-14).

From Micah's birth (September 4, 2007) to the entry of the parties' Decree of Paternity (July 2, 2010), Tyler had no contact with Micah nor had Tyler provided any support. (34:17-24)(7:26).

Both Allison and Tyler have struggled with addiction issues. At the time of the hearing, Allison admitted to being alcoholic but had been sober for seven (7) months prior to trial. (27:19-23). Tyler had numerous drug and alcohol related charges. (107:6-111:9). Tyler told Allison of a death that resulted when he gave a girl cocaine during her birthday party. (27:1-11). At the time of the hearing, Tyler was serving a sentence at the Nebraska State Penitentiary for motor vehicle homicide with a release date in 2021 and a possible parole date of 2019. (109:14-17)(116:8-18).

Tyler, while living at his mother's home, provided Allison, with his mother's knowledge, drugs and alcohol. (23:2-16). Tyler then engaged in sex with Allison. (22:19 to 23:1). Tyler has also given Allison marijuana laced with cocaine without telling her it was laced with cocaine. (25:23 to 26:17). Tyler has also acknowledged dealing

drugs before he had a relationship with Allison. (26:23-25).

Allison had noted that Tyler had no person to person contact, phone contact, or written contact with Micah for at least one (1) year prior to Tyler entering the Nebraska State Penitentiary in February of 2012. (33:8-23). After being incarcerated and before the guardianship, Tyler also had no contact with Micah. (33:24to 34:7).

On March 1, 2012, Daniel and Linda Hardy, the adoptive maternal grandparents of Micah file to become joint guardians of Micah. (E6:103). The Order appointing them and their Acceptance of the guardianship were signed and filed on April 26 and 30, 2012. (E6:406).

Daniel and Linda Hardy not only adopted Allison, but her two older sisters. (53:20 to 54:2). Daniel and Linda Hardy have been in Micah's life from the beginning. Micah has resided with Dan and Linda as follows:

DATE	CITATION
September 4, 2007 from hospital to Dan and Linda's to October 2009	(54:12-15)
October 2009 to January 2009 lived with Allison in an apartment in Wahoo. Almost daily visits from Dan and Linda	(54:23 to 55:3)
January 2009 to February 2011 Allison and M.R. lived with Dan and Linda, "most of the time."	(55:9-16)
February 2011 to present with Dan and Linda Guardianship proceedings started in March of 2012	(55:21 to 56:15)

Linda Hardy had also requested that the court apply the same fifteen (15) month rule that it applies in

juvenile matters as Micah had been out of the care of the biological parents for more than fifteen (15) months prior to the filing of the adoption/termination proceeding. (67:2-25).

Tyler's mother, Dawn's testimony was confused. Dawn testified that Tyler had in person visitation with Micah as recently as 2013. (144:1-4). However, Tyler went to jail in February of 2012 and Dawn has acknowledged that she has never taken Micah to the penitentiary to visit Tyler. (152:24 to 153:4)(155:10-12). Dawn also testified that Tyler had telephone visits after he was incarcerated 15 to 20 times while Micah was visiting her home. (147:24 to 148:5). No dates are given as to when these phone conversations first began.

Procedurally, the trial court bifurcated the proceeding allowing the termination portion to go forward first which, if successful, the adoption portion would proceed. Allison had signed a voluntary relinquishment and the Tribe, although notified of the proceeding, made no appearance. (E9).

PROPOSITIONS OF LAW

IN CONSTRUING A STATUTE, A COURT LOOKS TO THE STATUTE'S INTENT.

Fisher v. Payflex Sys. USA, Inc., 285 Neb. 808, 829 N.W.2d 703 (2013).

TO ESTABLISH ABANDONMENT, THE COURT WILL LOOK TO THE SIX MONTHS PRIOR TO THE FILING OF THE ADOPTION AND THE TOTALITY OF THE CIRCUMSTANCES TO SHOW THAT A PARENT HAD AN INTENT TO ABANDON HIS/HER CHILD.

In re Adoption of Simonton, 211 Neb. 777, 320 N.W.2d 449 (1982).

Neb.Rev.Stat. §43-104 (as amended).

DETERMINING THE CREDIBILITY OF THE WITNESS IS ALMOST ALWAYS A DIFFICULT MATTER, REQUIRING AS MUCH TANGIBLE AND INTANGIBLE DATA AS POSSIBLE TO BETTER ASSURE A CORRECT DETERMINATION AND, THEREFORE, SUCH A DETERMINATION IS ALWAYS INITIALLY LEFT TO THE FACT FINDER AT THE TRIAL LEVEL AS SAID FACT FINDER HAD THE OPPORTUNITY TO HEAR AND OBSERVE THE WITNESS. FURTHER, THE FACT FINDER AT TRIAL WILL NOT BE OVERTURNED ABSENT AN ABUSE OF DISCRETION.

Ritter v. Ritter, 234 Neb. 203, ante p. 203, 450 N.W.2d 204 (1990).

Harwager v. Harwager, 234 Neb. 703, 452 N.W.2d 296 (1990)(At pages 704 to 705).

SUMMARY OF ARGUMENT

Appellants argue that Tyler may not invoke I.C.W.A. or N.I.C.W.A. to thwart an adoption or termination, where he is not a custodial parent nor has he been an active member of an Indian family. Only an Indian Tribe or parental Indian member of an Indian family may invoke those statutory protections. If Appellants' first argument is correct, then the trial court should not have applied a "beyond a reasonable doubt standard" to determine if Father had abandoned Micah H. Further, Appellants did prove by clear and convincing evidence that Father had abandoned Micah and, therefore, their Petition for Adoption should have been granted.

As the applicable sections of N.I.C.W.A. mirror the federal statute (except the cite itself), Appellant will only make reference to I.C.W.A.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT I.C.W.A. APPLIED

Appellants will first argue that the trial court erred in finding that I.C.W.A. applied. If the appellate court finds that the trial court made no error in this legal finding, the appeal is at an end as Appellants' did not

offer the testimony of an expert as required by I.C.W.A. If, however, the appellate court finds that the trial court did err in applying I.C.W.A. to the case currently before this court, the second factual error must either be reviewed by this court, de novo on the record, or sent back to the trial court to apply the appropriate burden of proof standard to the facts.

In construing a statute, a court first looks to the statute's intent. Fisher v. Payflex Sys. USA, Inc., 285 Neb. 808, 829 N.W.2d 703 (2013).

The purpose of I.C.W.A. was set forth by the U.S. Supreme Court as: ". . . the product of rising concern in the mid-1970's over the consequences to Indian children, **Indian families, and Indian tribes** of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their **families and tribes** through adoption or foster care placement, usually in non-Indian homes." (Emphasis Added). Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

In the matter currently before this court, Tyler had abandoned his child for more than a year before the filing of the adoption, Tyler's mother had been paying the support and Tyler had only been an active part of the "Indian family" for 7-10 days of Micah H.'s life. Tyler was not

part of or actively participating with any Indian family unit at the time of the filing of the adoption. See, 25 U.S.C. §§1901 & 1902, Mississippi Band of Choctaw Indian v. Holyfield, 490 U.S. 30 (1989), and Adoptive Couple v. Baby Girl, 398 S.C. 625, 731 S.E.2d 550 (2013).

Adoptive Couple, supra, is the U.S. Supreme Court's most recent interpretation of I.C.W.A. In Adoptive Couple, an Indian Father attempted to invoke the protection of I.C.W.A. to obtain custody of his child. The Father signed a relinquishment to his baby girl. The adoptive couple (the couple does not include biological mother) served Father with notice of the pending adoption. Father then withdraws his relinquishment indicating he thought he was relinquishing to the mother, and not for a private adoption. Father never had custody or supported baby girl. Father sought custody at the adoption proceedings arguing that I.C.W.A. applied. The South Carolina Family Court denied Adoptive Couple's Petition and awarded custody to the Indian Father indicating that, since the matter involved an Indian child, I.C.W.A. applied and certain heightened burdens of proof applied. The South Carolina Supreme Court upheld the trial court and the matter eventually found itself before the U.S. Supreme Court.

The U.S. Supreme Court reversed noting that neither 25 U.S.C. §1912 (f) nor (d) applied. Those sections only applied to require a heightened showing in an involuntary termination case where a parent's "continued" custody was at issue. As the Indian Father in Adoptive Couple never had custody, I.C.W.A. didn't apply. The Supreme Court went on to say that 25 U.S.C. §1915(a) also did not prevent a non-Indian family from adopting where no other eligible candidates have sought to adopt.

In the matter currently before this court the non-Indian father, Tyler, also never had custody of Micah. In fact, by his own admission, he had no contact with Micah for more than one year prior to his going to prison. (131:11-23). Further, if the policy of I.C.W.A. is to be preserved, allowing Tyler to assert I.C.W.A. seems counter productive to promoting the Indian culture. The Hardy's have raised three Indian children, keeping them aware of and in tune with their Indian heritage. (84:12-85:3).

Adoptive Couple, supra, does not stand for the position stated by the Saunders County Court, to wit: "3. The right of preservation of the family flows through the child and is therefore available to both parents." (T12:2). The trial court having erroneously applied I.C.W.A. and thereby applied that wrong burden of proof and heightened

standards it now becomes incumbent on this court to review the factual findings of the court, de novo on the record, relating to abandonment.

II.

Abandonment

The trial court's findings are set forth in its Journal Entry and Order filed September 9, 2015, it states, in pertinent part as follows:

a) The paternal grandmother not the father pays the support for Micah H.

b) This case is as much about preserving paternal grandparent visitation rights as it is about preserving the parental bond of the father.

c) The mother appeared to be the person, besides Petitioners, who held the best interests of Micah H. above even her own selfish interests. Her evidence showed that she felt Micah deserved a permanent place to live with a reliable parent.

d) The father, by contrast, in his testimony, showed more concern for himself and his mother's efforts to gain grandparent visitation. His record of fatherhood is limited to getting a fifteen year old runaway under the influence of alcohol and getting her pregnant at his home when the evidence suggested his mother knew or should have

known what was going on in her basement and did nothing to intervene and protect that child. His record of fatherhood consists of a ten day period in which he and the mother attempted to live together, which was unsuccessful, and his visitation from time to time with the child. His present circumstance of being incarcerated for causing the death of his friend while operating a motor vehicle under the influence of alcohol makes it impossible for him to be considered for custody until his release from prison which is not until 2019. By then, Micah will be twelve years old and will have lived with with his grandparents for most of his life. There was no evidence offered that the father was doing anything while incarcerated to increase his skill set as a parent. While he is certainly not a fit parent at this time, the court is unable to find beyond a reasonable doubt that he has abandoned the child. He has some minimal contact with the child and his child support obligation is satisfied by his mother.

e) By nearly any other standard, the court would not hesitate to grant adoption but under the unique requirements of I.C.W.A. and the burden of proof beyond a reasonable doubt the Court is compelled to deny the petition. (T12:3).

The trial court, having had the opportunity to hear and observe the witnesses, is in the better position to determine the credibility of the witness and its finding of fact will not be overturned absent an abuse of discretion. Ritter v. Ritter, 234 Neb. 203, ante p. 203, 450 N.W.2d 204 (1990). Harwager v. Harwager, 234 Neb. 703, 452 N.W.2d 296 (1990) (At pages 704 to 705).

The trial court clearly indicates in Paragraph 5 of its findings that it only denied the adoption because of the heightened standard of I.C.W.A. (T12:3).

Applying a clear and convincing standard to the matter currently before this court, and reviewing the totality of the circumstances, Tyler has abandoned Micah H. In re Adoption of Simonton, 211 Neb. 777, 320 N.W.2d 449 (1982). Neb.Rev.Stat. §43-104 (as amended).

As Tyler has abandoned Micah, Tyler's rights should have been terminated.

CONCLUSION

I.C.W.A. does not apply to a parent Indian or non-Indian who has not had custody of an Indian child.

The Hardys have shown by clear and convincing evidence that Tyler has abandoned Micah H. and Tyler's parental rights should be terminated and the adoption granted.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

IN RE ADOPTION OF

MICAH H.

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CASE NO. A-15-1080

PROOF OF SERVICE

COME NOW Appellants, Daniel L. Hardy and Linda K. Hardy, by and through counsel, John H. Sohl, and does hereby certify that on the 5th day of April, 2016, two (2) true and exact copies of Appellants' Replacement Brief in the above-captioned matter were served upon all interested parties by mailing the same by first-class, U.S. Mail, postage prepaid, to the following addresses:

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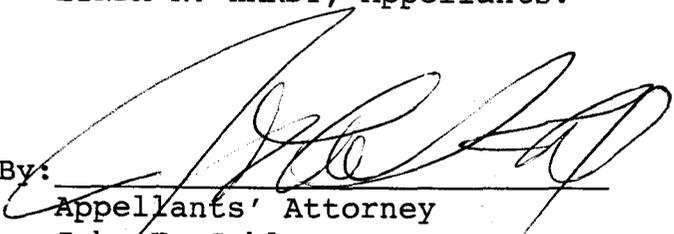
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