

A-15-1080

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

In re Adoption of Micah H., a minor child

Daniel H. and Linda H.

Appellants

vs.

Tyler R.

Appellee

FILED

MAY 06 2016

NEBRASKA SUPREME COURT
COURT APPEALS

APPEAL FROM THE COUNTY COURT OF
SAUNDERS COUNTY, NEBRASKA

Honorable Patrick R. McDermott, County Judge

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

- I. The Nebraska Court of Appeals has jurisdiction of this case pursuant to Neb. Rev. Stat. §43-112 and §25-1911 (Reissue 2008). The facts supporting such jurisdiction are set forth in the following sections.
- II. The Order of the trial court upon which the Appellants seek review is the Order of the Saunders County Court dated September 9, 2015 (T12).
- III. Appellants filed a timely Notice of Appeal on November 19, 2015, after the trial court overruled Appellants' Motion for a New Trial on October 28, 2015.
- IV. The decision of the trial court adjudicated all of the claims concerning each of the parties and this case does not involve an interlocutory appeal.

STATEMENT OF THE CASE

(1) Nature of the case

This is an appeal from a Saunders County Court adoption case, in which the trial court denied the court appointed guardians' request to terminate the biological father's parental rights to Micah H. and further, denied the guardians' Complaint for Adoption.

The guardians appeal the decision of the trial court denying their request to terminate the biological father's parental rights and as a consequence, denying the adoption. As assignments of error, the guardians assert the following: (1.) that the trial court erred in finding that the Indian Child Welfare Act (ICWA) and that the Nebraska Indian Child Welfare Act (NICWA) applied at the request of the non-Indian father, who they assert, had abandoned the family, and where neither the Tribe nor the Indian mother requested its application; and (2.) because of the first error, the trial court erroneously

applied the higher evidentiary standard of proof beyond a reasonable doubt, and found that the guardians failed to show that the father had abandoned Micah H.

(2) Issues actually tried in the court below

The Appellee generally agrees with the issues presented by the Appellants.

(3) How the issues were decided by the trial court

The trial court denied the Complaint for Adoption and found that the ICWA/NICWA applied and used the ‘beyond the reasonable doubt’ standard in determining whether the father had abandoned Micah H. Applying that standard, the trial court found that the father had not abandoned Micah H. The trial court further found that, as the ICWA/NICWA applied, the Appellants were required to offer expert testimony regarding the culture and traditions of the child’s tribe and the appropriateness of the proposed adoptive family.

(4) Scope of Review

Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record. In re Adoption of David C., 280 Neb. 719, 790 N.W. 2d 205 (2010). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Jeremiah J. v. Dakota D., 287 Neb. 617, 843 N.W. 2d 820 (2014).

PROPOSITIONS OF LAW

I. Under ICWA/NICWA, “[p]arent’ means any biological parent or parents of an Indian child . . . [i]t does not include the unwed father when paternity has not been acknowledged or established. Neb. Rev. Stat. Sec 43-1503 (9).

II. The ICWA applies to a 'child custody proceeding' involving an Indian child.

Under both State and Federal Statutes, a "child custody proceeding" includes any one of four situations or circumstances involving an Indian child:

- a. Foster care placement;
- b. Termination of parental rights;
- c. Pre-adoptive placement;
- d. Adoptive placement.

"Termination of parental rights" refers to any action resulting in the complete and final severance of the parent-child relationship. 25 U.S.C. §1903 (1); Neb. Rev. Stat. sec. 43-1503(1)(b).

"Pre-adoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. 25 U.S.C. §1903 (1); Neb. Rev. Stat. sec. 43-1503(1)(c).

"Adoptive placement" refers to the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. 25 U.S.C. §1903 (1); Neb. Rev. Stat. sec. 43-1503(1)(d).

III. The party seeking to invoke the ICWA has the burden to prove that the child is an "Indian child". In re Nery V., 20 Neb. App. 798 (2013).

IV. Once the court has determined that the child is an Indian child, the substantive provisions of the ICWA will apply from the point forward in the proceedings- thus, the

critical issue is when the child's status as an Indian child was established in the proceedings. In re Nery V., 20 Neb. App. 798 (2013).

V. In order for the ICWA to apply to the proceedings, there must also be a showing that: 1) the child is a member of an Indian tribe; or the 2) the child is eligible for membership in an Indian tribe and the child is a biological child of a parent of a member of an Indian tribe. 25 U.S.C. §1903 (4).

VI. Article II of the Constitution of the Oglala Sioux Tribe states that : Membership of the Oglala Sioux Tribe shall be automatic when . . . [a] child is born to any member of the Oglala Sioux Tribe. Constitution of the Oglala Sioux Tribe, Article II, Section 1 (b), as amended October 28, 2008.

VII. Neb. Rev. Stat. Sec 43-1502, which articulates the purpose of the Nebraska Indian Child Welfare Act, has been amended by LB 566 (2015) by the addition of the following language: "This cooperation includes recognition by the state that Indian tribes have a continuing and compelling governmental interest in an Indian child whether or not the Indian child is in the physical or legal custody of a parent, an Indian custodian, or an Indian extended family member at the commencement of an Indian child custody proceeding or the Indian child has resided or is domiciled on an Indian reservation. The state is committed to protecting the essential tribal relations and best interests of an Indian child by promoting practices consistent with the federal Indian Child Welfare Act

and other applicable law designed to prevent the Indian child's voluntary or involuntary out-of-home placement.”

VIII. . . (4) Any party seeking to effect a foster care placement of, or 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 **or unite the parent or Indian custodian with the Indian child** and that these efforts have proved unsuccessful. (amended language in bold). Neb. Rev. Stat. Sec 43-1505 (4), as amended by LB 566, 2015.

IX. Consent [for adoption] shall not be required of any parent who:

- (a) has relinquished the child for adoption by a written instrument,
- (b) has abandoned the child for at least six months next preceding the filing of the adoption petition,
- (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or
- (d) is incapable of consenting.

Neb. Rev. Stat. §43-104(2)

Pursuant to subsection (3) of this section, for an adoption to proceed, the consent of the biological father who has established a familial relationship with his child is required unless, under subsection (2) of this section, the party seeking adoption has established that the biological parent: (1) has relinquished the child for adoption by a written instrument, (2) has abandoned the child for at least six months next preceding the filing

of the adoption petition, (3) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (4) is incapable of consenting. In re Adoption of Corbin J., 278 Neb. 1057, 775 N.W.2d 404 (2009).

X. Willful abandonment is a voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection. In re Adoption of David C. Et. al, 280 Neb. 719, 790 N.W. 2d. 205 (2010).

XI. The critical period of time during which abandonment must be shown is the 6 months immediately preceding the filing of the adoption petition. In re Adoption of Dana D. and Eric L. Simonton, 211 Neb. 777, 320 N.W. 2d 449 (1982).

XII. The various definitions of abandonment do not require us to view this [6 month] statutory period in a vacuum. One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his child or children. In re Adoption of Dana D. and Eric L. Simonton, 211 Neb. 777, 320 N.W. 2d 449 (1982).

XIII. "Abandonment" has also been defined as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection,

maintenance and opportunity for the display of parental affection for the child. In the interest of J.L. M., 234 Neb. 381, 451 N.W. 2d 377 (1990).

STATEMENT OF FACTS

PROCEDURAL BACKGROUND

Appellants Daniel H. and Linda H., maternal grandparents of Micah H., filed their petition for adoption on or about September 10, 2014 in the Saunders County Court. Previously, on April 30, 2012, Daniel H. and Linda H. had obtained guardianship of Micah H. in the Saunders County Court (E6) after Tyler R., father of Micah H. had been incarcerated for the charge of motor vehicle homicide.

Tyler R. filed an answer and objection to the petition for adoption on or about October 23, 2014, denying the allegations of the petition and further alleging that he has not abandoned Micah H., that he continues to pay child support for his son and that the Appellants have intentionally and repeatedly rebuffed all attempts by Tyler R. to exercise his visitation and contact with Micah H. In his answer, Tyler R. also alleged that Micah H. is an "Indian Child" pursuant to the Indian Child Welfare Act (ICWA), specifically 25 U.S.C. § 1903 (4) and pursuant to the Nebraska Indian Child Welfare Act (NICWA), specifically Neb. Rev. Stat. § 43-1503 (4) and that the Appellants had failed to give the proper notices required under the ICWA and the NICWA and had failed to plead or otherwise satisfy requirements of 25 U.S.C. § 1912 (d) and Neb. Rev. Stat. § 43-1503 (4).

The trial court bifurcated the proceeding and heard the termination of parental rights portion on June 4, 2015. Appellee moved to dismiss at the beginning of trial, based on the failure of the Appellants to comply with the requirements of ICWA/NICWA, which was denied by the trial court. After hearing, the trial court

rendered its order on September 9, 2015. After hearing, the trial court found that ICWA applied, analyzed the evidence under the evidentiary standard of “proof beyond a reasonable doubt” and further found that Tyler R. had not abandoned Micah H. The trial court then denied Appellant’s complaint for adoption.

FACTUAL BACKGROUND

Micah H. was born on September 4, 2007, to Tyler R. and Allison H. At the time of conception, Tyler R. was 18 years of age (41:23-25) and Allison H. was 17 years of age (39:1-25). Tyler R. was not informed of Micah H.’s birth until he was served with the District Court action brought by the State of Nebraska to establish paternity and enforce child support. (37:19). On July 2, 2010, a Decree of Paternity, Custody and Child Support was entered in the District Court of Saunders County, finding that Tyler R. was the father of Micah H., establishing child support at \$100.00 per month, awarding custody to Allison H. and allowing parenting time to Tyler R. in the form of supervised visitation. The visitation was to be supervised by Tyler R.’s Mother, Dawn R. or other suitable person. (E7).

Allison H. testified that she is, and has always been, an enrolled member of the Ogallala Sioux Tribe, and further, that Micah is not a member, but is eligible for enrollment, as she is an enrolled member. (19:1-25)(E6).

Linda H. testified that Tyler R.’s first visit with his son occurred in November 2008 at her home. At that time, Tyler was not free to take Micah. Linda H. did not have a definitive recollection about Tyler R.’s contact with Micah H. but on cross-examination, testified that Tyler R. would visit more than “once a year” and sometimes “more than once a month, but not always.” (76:1-25).

Tyler R. testified that he has paying his child support and was caught up with his support payments. (118:1-25) Although he was currently in custody at the Nebraska State Penitentiary, he was eligible for work release in 2017 and parole in 2019. (121:1-7) Tyler R. testified that he loved Micah and at some point, Dan H. and Linda H. started denying him visits and that he had filed a contempt action in the Saunders District Court to allow him to have parenting time with his son. (127:14-25)(128:1-25). Tyler stated that Micah H. calls him "Daddy Tyler". Prior to his incarceration, Tyler R. testified about the activities that he would do with his son during his parenting time. After he was in custody in 2012, Tyler R. testified that he would write letters to Micah H. (129:22-25). Further, Tyler R. was having phone visits with Micah H. at the prison during Micah's visits with Dawn R. until Linda H. put a stop to the phone visits. (149:1-25).

Amber Milliken, Tyler R.'s caseworker from the Child Support Enforcement Unit testified that Tyler R. had sent her a letter from the State Penitentiary requesting that the state start an income withholding on his earnings from his job at the prison. (138:1-25). Ms. Milliken stated that she had to refuse the request for the income withholding, as Tyler R. did not make enough money from his employment at the prison to do so. Nonetheless, his \$100.00 per month child support obligation was regularly paid, even though his mother Dawn R. would actually send in the money. (118:1-25)(E10). Both Tyler R. and Dawn R. stated that the source of the funds were from Tyler R.'s earnings at the prison and monies from Dawn R. to make up any shortfall. (118:1-25).

SUMMARY OF THE ARGUMENT

The Appellants have misinterpreted the decision of the United States Supreme Court in the “Baby Girl” case, as the decision does not apply to fathers with visitation rights or fathers who have paid their support obligation.

Further, the Indian Child Welfare Act and the Nebraska Indian Child Welfare Act apply to the case at bar, because the case involves an Indian child who is the subject of an adoption proceeding.

The trial court was correct in denying the petition for adoption as Tyler S. has not abandoned Micah H. as, even though in custody, he continues to pay his support obligation, continues to write to Micah H. and has filed a contempt action to enforce his visitation rights.

ARGUMENT

I. THE APPELLANTS HAVE MISINTERPRETED THE DECISION OF THE UNITED STATES SUPREME COURT IN THE “BABY GIRL” CASE AS THE DECISION DOES NOT APPLY TO FATHERS WITH VISITATION RIGHTS OR WHO HAVE PAID THEIR SUPPORT OBLIGATION.

At issue in this matter is the application of the ICWA/NICWA to a private adoption proceeding involving an Indian child. The ICWA applies to a ‘child custody proceeding’ involving an Indian child. Under both State and Federal Statutes, a “child custody proceeding” includes any one of four situations or circumstances involving an Indian child:

- a. Foster care placement;
- b. Termination of parental rights;

- c. Pre-adoptive placement;
- d. Adoptive placement.

“Termination of parental rights” refers to any action resulting in the complete and final severance of the parent-child relationship. Neb. Rev. Stat. sec. 43-1503(1)(b), 25 U.S.C. §1903 (1).

“Pre-adoptive placement” means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. Neb. Rev. Stat. sec. 43-1503(1)(c); 25 U.S.C. §1903 (1).

“Adoptive placement” refers to the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Neb. Rev. Stat. sec. 43-1503(1)(d.), 25 U.S.C. §1903 (1).

The Brief of Appellants allege that the recent U.S. Supreme Court decision in Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 186 L.Ed. 2d 729 (U.S.S.C. 2013) renders the ICWA/NICWA inapplicable to the case herein. Appellants have misinterpreted the U.S. Supreme Court decision as the Baby Girl decision is limited to the particular facts of that case, and it does not apply to the case at bar, The vast difference in facts is contained in the very first paragraph of the decision:

Because Baby Girl is classified (as in Indian Child) the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal

statute at issue here do not demand this result.

Id. At p.2556-57. Because the biological father in that case had never known his child, the Court held that there was no “breakup” of the Indian family. The Court reasoned that because the family had never been together, they could not be broken up. Id.

The Baby Girl case was a completely different case than the case at bar. Before the child was born, the parents separated and the biological father said he wanted to relinquish his rights. The biological mother selected the Adoptive Couple through a private adoption agency, and four months after the birth of the child, the biological father was served with the adoption papers. At that time, he signed papers saying he was not contesting the adoption. He later changed his mind, and when the child was 2 years of age, a custody trial was held. Id. at p. 2558.

Baby Girl was a 5-4 decision, and of the five justices in the majority, two wrote separate concurring opinions. Thus, while five justices concurred in the result, there really was no opinion that represented the beliefs of a majority of justices. Justice Breyer, who cast the fifth and deciding vote, emphasized in his concurring opinion that the decision should not be extended to cases with dissimilar facts:

We should decide here no more than is necessary. Thus, this case does not involve a father with visitation rights or a father who has paid “all of his child support obligations.” (Citation omitted). Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child.

Id. at p. 2571.

The Baby Girl case differs in many respects to the case at bar and the rationale should not be extended by this Court to the case of Micah H. As a threshold matter, as Justice Breyer made clear, Baby Girl did not involve a father with visitation rights or a father who has paid “all of his child support obligations.” Id at p. 2571. The foregoing principle alone forecloses the application of Baby Girl to the case of Micah H. as Tyler R. clearly has established visitation rights and has paid his child support regularly, even while in custody at the State Penitentiary.

Further, the operative facts of Baby Girl versus the operative facts of the case at bar are in contrast. Unlike Tyler R., the Father in Baby Girl had no prior contact with his child. Unlike Tyler R., the Father in Baby Girl had consistently stated that he desired to relinquish the child, and when served with the adoption papers, stated that he did not contest the adoption. Only later did the Father in Baby Girl attempt to assert his parental rights.

Thus, this Court should decline to extend the principles of the Baby Girl case to the case at bar.

II. THE INDIAN CHILD WELFARE ACT (ICWA) AND THE NEBRASKA INDIAN CHILD WELFARE ACT (NICWA) APPLY TO THE CASE AT BAR.

In order for the ICWA to apply to the proceedings, there must also be a showing that: 1) the child is a member of an Indian tribe; or the 2) the child is eligible for membership in an Indian tribe and the child is a biological child of a parent of a member of an Indian tribe. 25 U.S.C. §1903 (4). Moreover, Article II of the Constitution of the Oglala Sioux Tribe states that : Membership of the Oglala Sioux Tribe shall be automatic

when . . . [a] child is born to any member of the Oglala Sioux Tribe. Constitution of the Oglala Sioux Tribe, Article II, Section 1 (b), as amended October 28, 2008.

As the trial court correctly noted, “the right of preservation of the family flows through the child and is therefore available to both parents.” It is undisputed that Allison H. is an enrolled member of the Oglala Sioux tribe and that Micah H. is eligible for enrollment in the Oglala Sioux Tribe. Thus, both ICWA and NICWA are applicable to the case at bar, including the heightened evidentiary standards and the need for qualified expert testimony as required by ICWA and NICWA.

III. THE TRIAL COURT WAS CORRECT IN DENYING THE PETITION FOR ADOPTION AS THE APPELLEE HAS NOT ABANDONED MICAH H.

Consent for adoption shall not be required of any parent who . . . (b) has abandoned the child for at least six months next preceding the filing of the adoption petition. Neb. Rev. Stat. §43-104(2)(b). Willful abandonment is a voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection. In re Adoption of David C. Et. al, 280 Neb. 719, 790 N.W. 2d. 205 (2010).

In the case of In re David C., the father had completely rid himself of all fatherly duties for 3 full years, and only attempted to establish a relationship after he received notice that his parental right were going to be terminated. Id. David C. is easily distinguished from the case at bar. Tyler R. had sought to have a relationship with his

child since he learned that he had a child, including but not limited to, being caught up on his child support even while in custody, exercising visitation prior to his incarceration, and then, when he was being refused access to his son while in custody, filing a complaint for contempt in the Saunders District Court. Id. The record clearly shows that Tyler at no time wanted to give up his relationship with his son. The record further shows that Tyler R. desperately desires to be a part of his son's life.

In many regards, this case is like the recent Court of Appeals case of In re Adoption of Madysen S. 23 Neb. App. 351 (2015), in which this Court reversed a finding of abandonment from the trial court on similar facts, using a lesser standard of proof - clear and convincing evidence- than the standard of proof applied in the case at bar. The Father in Madysen S. had been incarcerated for sexually assaulting his own child, which was one of the children at issue in the case, and sentenced to 16 years imprisonment. The Father's former spouse and current husband filed a complaint for adoption and moved to terminate the Father's parental rights, alleging that the Father had abandoned the children. The Father testified that since being incarcerated, he had sent the children birthday cards and letters and was paying his child support. The Father further testified that it might be 12 years until his possible release date when he could see his children in person. The trial court in Madysen S. found, *inter alia*, that the Father had intentionally removed himself as a parent, withholding his presence, care, love, protection, guidance and opportunity to display parental affection, concluding that this actions amounted to abandonment pursuant to § 43-104. This Court reversed the trial court, finding that the Father continually paid his child support obligation, had sent cards and letters, had adamantly refused to relinquish his parental rights, and has indicated that he does not

wish to forgo parental obligations or parental rights. The Court of Appeals concluded that the record did not present clear and convincing evidence to prove abandonment pursuant to § 43-104 (2), that mere inadequacy is not the test.

Like the Father in Madysen S., Tyler R. is incarcerated (albeit not for an act perpetrated upon his own child) has paid his child support obligation, has sent cards and letters, has adamantly refused to relinquish his parental rights, and has indicated that he does not wish to forgo parental obligations or parental rights. Thus, even under a clear and convincing standard, it cannot be said that Tyler R. has abandoned Micah H. within the meaning of § 43-104 (2).

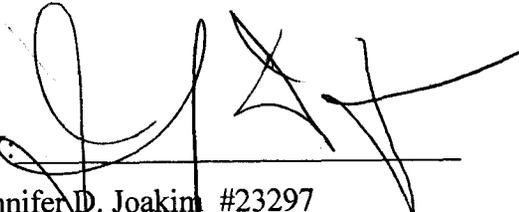
CONCLUSION

Based upon the above and foregoing, Appellee requests that this court deny the appeal and uphold the lower court's order denying the Appellants' Complaint for Adoption.

Dated May 6, 2016

RESPECTFULLY SUBMITTED,

Tyler R. Appellee

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IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

IN RE ADOPTION OF)
) CASE NO. A-15-10 80
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) PROOF OF SERVICE
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COMES NOW Appellee, Tyler Robar, by and through counsel, Jennifer D. Joakim, and does hereby certify that on the 6th day of May, 2016, two (2) true and exact copies of Appellee's 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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