

**Juvenile Cases Decided by the
North Carolina Court of Appeals**
July 2, 2013

Adoption; Adoption/Custody

Adoption: When unwed father's consent is required

- An order finding that an unwed father's consent to adoption was not required was immediately appealable.
- The adoption statute may have been unconstitutional as applied to an unwed father.
- A biological father has an interest in the opportunity to develop a relationship with his child.
- By taking timely steps to assume parental responsibility an unwed father may develop a constitutional interest sufficient to require his consent to the child's adoption.

In re S.D.W., ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzYyLTEucGRm>

Facts: The child's mother and father dated for several months, but he did not know about her pregnancy or the birth of the child after they stopped dating. Within weeks after the child was born, the mother relinquished the baby to an adoption agency, claimed untruthfully that she did not know the father's whereabouts, and gave an improper name for the child's father.

Prospective adoptive parents filed a petition to adopt in November 2010, and the father first learned of the child's existence in April 2011. After the father contacted the adoption agency petitioners voluntarily dismissed a termination action (against a father with the incorrect name), removed a stay on the adoption proceeding, and had notice of the adoption proceeding served (on the father's brother). The father, pro se, wrote to the clerk of court and petitioners' attorney asking what he had to do to obtain custody of the child and seeking a DNA test to establish paternity. A test subsequently showed a 99.99 percent probability that he was the father. The father filed a motion to intervene in the adoption proceeding and a motion to dismiss the adoption proceeding. Petitioners made a motion for summary judgment on the question of whether the father's consent to the adoption was required. After a hearing, the trial court denied the father's motions and granted petitioners' motion for summary judgment on the basis that the father's consent to the adoption was not required because he had taken none of the steps listed in G.S. 48-3-601 before the filing of the adoption petition.

Held: Reversed and remanded.

1. Although the appeal was interlocutory, a determination that a biological father's consent to adoption is not required affects a substantial right and is immediately appealable.
2. The court of appeals rejected the father's argument that his consent was required by G.S. 48-3-601, and held that the trial court correctly interpreted the statutes in concluding that his consent was not required.
3. The court went on, however, to consider whether the father's consent was required under the N.C. or federal constitution, a question that North Carolina appellate courts have not reached before when considering the rights of an unwed father in an adoption. Earlier cases, relying solely on the wording of the adoption and termination of parental rights statutes, have not treated a mother's deceit or the father's lack of knowledge of the child's existence as relevant to whether his consent was required or his rights could be terminated. *See, e.g., In re Adoption*

of *Anderson*, 360 N.C. 271 (2006); *In re Adoption of Byrd*, 354 N.C. 188 (2001); *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006); *In re T.L.B.*, 167 N.C. App. 298 (2004).

4. After analyzing *Lehr v. Robertson*, 463 U.S. 248, other U.S. Supreme Court decisions, and decisions of other states' courts that have considered the issue, the court of appeals held as follows:

“[A] biological father, who prior to filing of the adoption petition was unaware that the mother was pregnant and had no reason to know of the pregnancy, promptly takes steps to assume parental responsibility upon discovering the existence of the child has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending.”

5. The court emphasized that constitutional rights of a biological father do not result solely from the biological relationship. Rather, biology gives that one man the *opportunity* to develop a relationship with the child, and a father who takes that opportunity can establish a relationship that results in full blown parental rights. The unwed father has an “inchoate interest” in that opportunity. In this case, the court said, the adoption statute’s consent provisions “may be unconstitutional as applied to the father if he can show that he promptly attempted to grasp the opportunity of fatherhood once he discovered his son’s existence, but the statute foreclosed that opportunity.”
6. Because the court of appeals could not make factual findings, it remanded the case to the trial court for an evidentiary hearing on steps the father took after learning of the child’s existence.

Concurrent adoption and custody actions

- The district court may have concurrent jurisdiction in adoption and custody actions involving the same child.
- The potential for conflicts in the two cases and the absence of statutory guidance for resolving them required in this case that the court hold the custody action in abeyance pending completion of the adoption proceeding.

Jones v. Welker, ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMTU0LTEucGRm>

Facts: The father in *S.D.W.*, the case summarized above, also filed an action seeking custody of the child while the adoption proceeding was pending. The trial court dismissed the custody action on the basis that it lacked subject matter jurisdiction.

Held: Reversed and remanded.

1. An adoption proceeding was not a prior pending action that deprived the court of jurisdiction in a custody action, because the parties and precise issues in the two cases were not the same.
2. The court of appeals noted the lack of statutory provisions addressing simultaneous custody and adoption proceedings and also noted that the plaintiff had not made a motion to consolidate the two actions.
3. Because both proceedings involved custody issues, the court held that “potential unresolvable conflicts between the two proceedings” required that the trial court hold the custody action in abeyance pending completion of the adoption proceeding.

Appellate court opinions: <http://www.aoc.state.nc.us/www/public/html/opinions.htm>.
Earlier case summaries: <http://www.sog.unc.edu/node/513>.
Other juvenile law resources: <http://www.sog.unc.edu/node/1689>.



UNC
SCHOOL OF
GOVERNMENT

Janet Mason

School of Government
The University of North Carolina at
Chapel Hill
Campus Box 3330, Knapp-Sanders
Building
Chapel Hill, NC 27599-3330
mason@sog.unc.edu