

Selected Adoption Cases

Conditions for Requiring Putative Father's Consent

In re Adoption of Byrd, 354 N.C. 188 (2001).

Facts: In 9/97 the eighteen-year-old mother informed the seventeen-year-old respondent that she was pregnant and that the due date indicated he was the father. A later ultrasound indicated a different due date, suggesting that respondent might not be the father. The mother asked respondent to consent to a private placement adoption. He refused and said he wanted his baby. The mother filed a petition in county A for a pre-birth determination of whether respondent's consent to adoption was required. He responded, alleging that

- his consent was required,
- he believed he possibly was the child's biological father,
- the mother had told him repeatedly he was the father,
- he wanted custody if he was determined to be the father, and
- he wanted to assist with medical expenses and pay child support if he was determined to be the child's father.

He asked that no adoption be approved until it was determined that he was not the father. Respondent also offered to provide the mother with a place to live during her pregnancy and obtained various jobs to try to provide support for the child.

The child was born a month later. The next day a couple filed an adoption petition in county B. The same day, in county A, respondent filed a complaint and petition in district court asking that (1) the court order blood tests to determine parentage, (2) all other proceedings in the cause be stayed until the test results were known, and (3) he be awarded custody or visitation rights if determined to be the father. The court denied respondent's petition for a blood test.

Respondent was served with the adoption petition; in response, he requested custody or visitation if he was determined by blood tests to be the child's natural father. He then moved for a blood test, which the court granted, and it showed a 99.99 percent probability that he was the father. At an adoption hearing, despite the test results, the court concluded that respondent's consent was not required under G.S. 48-3-601 because before the filing of the adoption petition he had not acknowledged the child and provided reasonable and consistent payments for the support of the mother or child or both. Respondent appealed and the court of appeals affirmed the trial court's order.

Holding: Affirmed.

1. The Supreme Court held that respondent had satisfied the acknowledgement requirement for preserving his rights. Because the statute (unlike the termination statute) does not specify how acknowledgement must occur, it "may be made orally or in writing, or may be demonstrated by the conduct of the putative father." For a period of time respondent unequivocally acknowledged his paternity. (The court of appeals had held that respondent's later conditioning of his acknowledgement on a determination that he was the biological father made his acknowledgement insufficient to satisfy the statute.)
2. Agreeing with the court of appeals, the Supreme Court held that the trial court did not err in finding that respondent failed to comply with the support requirement necessary to maintain his right to consent to adoption. Even when he unconditionally believed he was the father, respondent did not provide tangible support to the mother and child within his means to do so. Gifts from respondent's mother could not be counted as support provided by respondent.

Putative Father's Acknowledgement

In re Adoption of Shuler, 162 N.C. App. 328 (2004).

Facts: Respondent, the child's biological father, was present when the child was born but told hospital staff he was "just a friend" and refused to have his name entered on the child's birth certificate. Two weeks after the child was born, the mother gave the child to a couple who, a month later, filed a petition to adopt the child. Respondent was given notice of the adoption proceeding, and the court determined that his consent to the adoption was not required because he had not unequivocally acknowledged the child before the adoption petition was filed.

Holding: The court of appeals affirmed the trial court's denial of respondent's motion to dismiss, pointing to the state supreme court's holding in *Byrd* (see above) for the proposition that while a father's acknowledgement may be verbal or written or demonstrated by conduct, it must be unconditional. The court of appeals said that respondent had the burden of proving that before the adoption petition was filed he had done all three of the following: (1) acknowledged the child; (2) provided reasonable and consistent support; and (3) regularly visited or communicated with the mother and child or attempted to do so. The court found that competent evidence existed to support the trial court's finding that respondent had not acknowledged his paternity unconditionally. Therefore it was not necessary to consider whether the evidence was sufficient as to the other two actions.

Note: The opinion states that when the child was conceived the mother was married to another man but was not living with her husband. The opinion does not address whether, in light of that, respondent's name properly could have been put on the child's birth certificate at the hospital.

Putative Father's Offer of Support

In re Adoption of Baby Girl Anderson, 360 N.C. 271 (2006).

Facts: Anderson (mother) and Avery (father), high school students, had a relationship that resulted in Anderson's pregnancy. She informed Avery in June or July, 2002, and in July or August informed him that she planned to place the baby for adoption. Avery initially agreed, then withdrew his consent. He quit high school in September, 2002. The baby was born on 1/6/03. On January 9 or 10, 2003, Avery received notice of petitioners' petition to adopt the child. Petitioners filed a motion asking the court to determine whether the adoption could proceed without Avery's consent, along with Anderson's affidavit asserting that Avery had never provided financial or in-kind assistance to her or the child. Avery filed a timely objection to the adoption. The clerk ruled that the adoption could proceed, and Avery appealed to district court.

Evidence at the district court hearing showed that Avery had a history of employment, was employed at a restaurant, and lived with his parents at no cost to him. There was conflicting evidence as to whether Avery offered Anderson money at school and, if he did, how many times. Avery conceded that he never provided any actual tangible support. He went to Anderson's home and attempted to give her father a check for \$100 to give her, but the father refused it. At a meeting between Avery and Anderson and their parents, Avery and his parents made no offer of support, although his mother had invited Anderson to live with their family. The trial court ordered that Avery's consent to the adoption was not required because he had provided no actual support to Anderson or the child before the filing of the adoption petition, relying on *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001). The court of appeals reversed and remanded for further findings, distinguishing between a mere offer of support and a "tender" of actual support.

Holding: Reversed, and remanded for reinstatement of the trial court's order. The Supreme Court rejected the distinction between offers and tenders as being supported by neither the statute nor *Byrd*. It reaffirmed the holding in *Byrd* that actual support is required and pointed out that payments could be made into a savings or trust account for the child's benefit if the mother rejected offers of support.

Providing Reasonable Consistent Support

In re Adoption of K.A.R., 205 N.C. App. 611 (2010).

Facts: In a private-placement adoption proceeding, the district court (after transfer from the clerk) found that the putative father's consent to the child's adoption was required, because he had acknowledged the child and provided reasonable and consistent support according to his means before the adoption petition was filed. During the pregnancy he attended pre-natal classes and doctor visits until the mother asked him to stop. After obtaining employment, he bought a car seat, crib mattress, and other items worth over \$200 for the child. After petitioners gave notice of appeal from the trial court's order, the court granted the father's motion to dismiss the adoption petition.

Held: Affirmed in part; remanded.

1. After reviewing relevant case law, the evidence, and the trial court's findings, the court of appeals held that evidence in the record supported the trial court's findings and that the findings were sufficient to support the trial court's determination that the father's consent to the child's adoption was required.
2. Because petitioners had given notice of appeal, the trial court did not have jurisdiction to dismiss the adoption petition, but that error was harmless, and the court remanded the case for entry of a proper order dismissing the petition.

Burden of Proof to Establish that Putative Father's Consent is not Required

Miller v. Lillich, 167 N.C. App. 643 (2004).

Facts: Defendants wanted to adopt their daughter's child and brought a district court action to determine whether the consent of the child's father was required under G.S. 48-3-601. The trial court found that the father's consent was required because he had acknowledged his paternity and had provided reasonable, consistent support according to his financial means and had regularly visited or communicated or attempted to visit or communicate with the biological mother during her pregnancy or with the child, or with both.

Holding: Affirmed.

1. The court of appeals rejected defendants' argument that the statute should be read to require, in addition to the findings the trial court made, a finding that the plaintiff was obligated by a written agreement or court order to support the child, in order for his consent to be required. The plain language of the statute, the court said, made clear that these two requirements were in the disjunctive, not the conjunctive.
2. Appellants argued that the trial court erred in finding plaintiff's support payments "reasonable and consistent." They did not assign error to any of the trial court's findings of fact, however, and the court of appeals held that the findings were sufficient to support the trial court's conclusion.

Service by Publication and Personal Jurisdiction

Barnes v. Wells, 165 N.C. App. 575 (2004).

Facts: A child was born in 1970 and the mother was awarded custody when the parents divorced in 1975. The mother moved from Virginia to North Carolina, where she remarried. Her new husband, petitioner, filed an adoption petition and sought a declaration from the clerk that the respondent's consent to the adoption was not required because he had abandoned the child. Both petitioner and the clerk attempted to serve respondent by registered mail at the Virginia address where he lived with his grandmother, but the mailings were not successfully delivered. Petitioner proceeded to serve respondent by publication in the Virginia town where he lived. The respondent did not file a response or appear in the proceeding, the clerk determined that he had abandoned the child, and petitioner's

adoption of the child was completed in 1979. After the daughter who was adopted died in 2002, respondent filed a motion pursuant to G.S. 1A-1, Rule 60, to have the final order of adoption set aside on the basis that he was not properly served and the court in the adoption proceeding did not have personal jurisdiction over him. The trial court denied the motion and both respondent and petitioner appealed.

Issue: Did the trial court err in denying respondent's motion on the basis that the abandonment proceeding was improper due to improper service and lack of personal jurisdiction?

Held: No. Affirmed.

Service of process was sufficient. Petitioner used due diligence to serve respondent personally before resorting to service by publication. Respondent admitted living at the address to which the clerk and petitioner had attempted to serve him by certified mail, but he did not accept the certified mail. Respondent also had sufficient minimum contacts with North Carolina to warrant the exercise of personal jurisdiction. Those included his living in North Carolina for one month, being divorced in the state, removing the child from the state and filing in Virginia a custody action he later dropped, and returning the child to the mother in North Carolina.

Consent Obtained by Fraud

Fakhoury v. Fakhoury, 171 N.C. App. 104 (2005).

Facts: When respondent adopted his granddaughter, he and petitioner were living together and discussing marriage. They agreed that petitioner would adopt the child after they married, which they did shortly thereafter. They decided to wait two years for the petitioner to adopt the child so that a home study would not be required. Petitioner filed an adoption petition in September 2002, and respondent signed a consent. Almost two months after the revocation period ended, petitioner left the home. Respondent moved to dismiss the adoption petition, and attempted to prove that his consent was obtained fraudulently because petitioner, completely unknown to him, already planned to leave and to seek a divorce when she got him to sign the consent. His evidence showed that on a computer in the home someone had visited two websites with names that included the word "divorce." Petitioner presented extensive evidence of prior marital problems and separations and petitioner's growing disapproval of respondent's drug use. The trial court denied the motion to dismiss and respondent appealed.

Holding: Affirmed. Respondent did not assign error to any findings of fact, including findings that he was fully aware of the precarious state of the marriage and of the possibility of a separation. The court of appeals held that the trial court's findings supported the conclusion that the consent was not obtained by fraud and also held that the trial court was correct in refusing to apply a constructive fraud standard.

Selected Termination of Parental Rights Cases Involving Putative Fathers

In re A.C.V., 203 N.C. App. 743 (2010).

Facts: In early stages of the pregnancy respondent went to some appointments with the mother, and the mother's father talked with respondent about the need for him to provide financial assistance. The child's mother decided to place the child for adoption and informed respondent. On April 15 the child was born; on April 16 the mother relinquished the child to Agency for adoption; and on April 17, Agency filed a petition to terminate respondent's rights alleging that he failed to provide adequate support for the mother during the pregnancy. Respondent filed an answer asserting that he was not given an opportunity to care for the child although he had expressed his desire to do so, and that he was not aware that he could file legal documents to legitimate the child. The court adjudicated a ground for termination under G.S. 7B-1111(a)(5), found that termination was in the child's best interest, and terminated respondent's rights.

Held: Affirmed.

1. There was no indication that respondent provided any direct financial support or "consistent care" during the pregnancy, and he satisfied no other prong of G.S. 7B-1111(a)(5).
2. The court of appeals rejected respondent's argument
 - a. that the mother's relinquishment alone was insufficient to confer standing on the Agency to petition for termination of his rights.
 - b. that he could not comply with G.S. 7B-1111(a)(5) because he was a minor.
 - c. that the trial court erred by terminating his rights without finding that he was unfit or had neglected the child.
3. The court of appeals noted the potential unfairness to a putative father in application of the ground at issue in this case, but held that the court was bound by the holdings in *Owenby v. Young*, 357 N.C. 142 (2003) and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006) and the harsh interpretation of the statute that they represent.

A Child's Hope, LLC v. Doe, 178 N.C. App. 96 (2006).

Facts: After his girlfriend told him she was pregnant, respondent returned home from college, sought employment, planned with his girlfriend for the child's birth, kept her other children while she attended medical appointments, attended one prenatal appointment with her, and purchased a vehicle suitable for transporting the baby and the girlfriend's other two children. When he expressed that he was not ready to get married, the relationship ended. Respondent continued to try to get information about the girlfriend and child, even after the girlfriend led him and his mother to believe that she had miscarried.

The girlfriend hid the pregnancy from her family. After the baby's birth she surrendered the child to a private adoption agency and lied about paternity, saying that her pregnancy resulted from a rape by someone she could not identify. Respondent contacted a newspaper that had reported an abandoned baby, the mother's physician, a hospital, and DSS trying to determine whether the girlfriend had given birth. He was given no information due to confidentiality concerns. Because DSS conducted an investigation based on respondent's statements, his identity was made known to the petitioning adoption agency and the termination petition that had been filed against an unknown father was amended to name him as a respondent. Service of the petition on him was the first indication respondent had that the child had in fact been born.

The trial court made lengthy findings and concluded that petitioner had failed to prove a ground for termination of parental rights by clear, cogent, and convincing evidence.

Holding: Reversed and remanded, one judge dissenting.

The majority disagreed with the trial court and held that uncontroverted evidence showed that respondent had not met the requirements of G.S. 7B-1111(a)(5) – that is, that before the filing of the termination petition respondent had not

1. established paternity judicially or by affidavit filed in a DHHS central registry; or
2. legitimated the child, filed a petition to legitimate, or married the mother; or
3. provided substantial financial support with respect to the child and mother; or
4. provided consistent care with respect to the child and mother.

The court of appeals relied on the “bright line rules” regarding the rights of putative fathers established by the state supreme court in *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001) and *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006).

Dissent:

The dissenting judge would have affirmed the trial court’s order on the basis that respondent’s conduct after learning of the pregnancy amounted to “consistent care,” a term the appellate courts have not heretofore interpreted.

Note: Both *Byrd* and *Anderson* were decided under G.S. 48-3-601(2)b., which governs whether a putative father’s consent to an adoption is required.

1. Unlike the termination statute, the adoption provision does not specify either a burden of proof or a standard of proof, but the cases suggest that the burden is on the putative father to establish that he has taken steps required to preserve his right to object to an adoption. In a termination proceeding, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that he has not taken any of those steps.
2. With facts comparable to those in this case, in an adoption proceeding the putative father would have to show that before the filing of the adoption petition he
 - a. acknowledged paternity of the child, regardless of the form of the acknowledgement; and
 - b. provided, consistent with his financial means, reasonable and consistent payments for the support of the mother or the child or both; and
 - c. regularly visited or communicated with, or attempted to visit or communicate with, the mother during or after the pregnancy, or with the child, or with both.

Or, if another party proved that he had not done any one of those, the clerk could find that his consent was not required.

- Even if paternity test show high likelihood that respondent is not the child’s father, the court may consider those results only if they are properly introduced into evidence. The results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. *In re L.D.B.*, 168 N.C. App. 206, 617 S.E.2d 288 (2005).
- Petitioner must prove that respondent failed to take any of the four listed actions. *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485 (1987) (allegation of respondent’s “putative” fatherhood in a DSS affidavit for publication was not clear, cogent, and convincing evidence of a ground for termination); *In re I.S.*, 170 N.C. App. 78, 611 S.E.2d 467 (2005); *In re M.A.I.B.K.*, 184 N.C. App. 218, 645 S.E.2d 881 (2007) (record clearly established that respondent failed to take any of the required steps); *In re S.C.R.*, 198 N.C. App. 525, 679 S.E.2d 905 (2009).
- The statute does not require a finding that respondent had the ability to support the child, but in this case the trial court made such a finding in any event. *In re Hunt*, 127 N.C. App. 370, 489 S.E.2d 428 (1997).
- Fact that the putative father did not know of the child’s existence is not a defense to termination. *In re T.L.B.*, 167 N.C. App. 298, 605 S.E.2d 249 (2004).

Putative Fathers: Comparing Chapter 48 and Chapter 7B Provisions

§ 48-3-601. Persons whose consent to adoption is required.

....

b. Any man who may or may not be the biological father of the minor but who:

....

4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
 - I. Is obligated to support the minor under written agreement or by court order;
 - II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both; or
 - III. After the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or
5. Before the filing of the petition, has received the minor into his home and openly held out the minor as his biological child; or

....

§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

....

- (5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:
 - a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
 - b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
 - c. Legitimated the juvenile by marriage to the mother of the juvenile; or
 - d. Provided substantial financial support or consistent care with respect to the juvenile and mother.