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Applicability of ICWA When Non-Custodial Indian Parent Facing TPR

- *When an Indian child is involved in a custody proceeding, ICWA does not apply if the Indian parent never had physical or legal custody of the Indian child.*
- *The requirement to provide remedial/reunification services to an Indian parent applies only if there had been a relationship between the Indian parent and child.*
- *The adoption preferences under ICWA do not apply where no alternate party has formally sought to adopt the Indian child.*

Adoptive Couple v. Baby Girl, 570 U.S. ____ (June 23, 2013)

http://www.supremecourt.gov/opinions/12pdf/12-399_8mj8.pdf

Facts: Baby girl's biological father is a member of the Cherokee Nation, and she is an Indian child under ICWA. Her mother is not Indian. The parents ended their relationship during the pregnancy. In a text to mother, biological father stated he relinquished his rights to the child. Mother contacted an adoption agency and selected a non-Indian couple in South Carolina as the adoptive parents. Adoptive parents supported mother during pregnancy. Three months after father relinquished his rights by text to mother, Baby Girl was born. Father did not support mother during pregnancy or during the first four (4) months of Baby Girl's life. Father was served with a petition for adoption of Baby Girl and signed an acknowledgement and that he was "not contesting the adoption." The next day, father contacted an attorney and contested the adoption and sought custody. DNA testing proved he was Baby Girl's biological father. Adoptive parents sought to terminate father's parental rights and adopt Baby Girl. Applying ICWA, the South Carolina trial court denied the adoption and awarded custody of Baby Girl to dad based upon a failure of the adoptive parents to show Baby Girl would suffer serious emotional or physical harm with biological father. The Supreme Court of South Carolina affirmed. Adoptive parents petitioned for certiorari, which was granted by the U.S. Supreme Court.

Held: Reversed and remanded

Decision written by Justice Alito and joined by Roberts, Kennedy, Thomas and Breyer

1. ICWA establishes federal standards that govern state-court child custody proceedings involving Indian children. The purpose of ICWA is to prevent the removal of Indian children from their homes.
2. The provision of 25 U.S.C. §1912(f) that requires the court find Baby Girl would suffer serious emotional or physical damage if biological father had "continued custody" is inapplicable because he never had custody of the Indian child. Having never had physical or legal custody of Baby Girl, removal of an Indian child is not at issue.
3. The provision of 25 U.S.C. §1912(d) that requires a party seeking to terminate parental rights to an Indian child to prove active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts failed does not apply when there was never a relationship between the parent and Indian child.
4. Section 1915(a) addressing adoptive placement preferences with Indian families are inapplicable in cases where no alternative party has formally sought to adopt the child.

Adjudication and Disposition Order: Appeal and Mootness

- *Appeal is moot when issues on appeal will have no practical effect on the existing controversy.*
- *There is no bright line rule establishing what conduct by a parent will result in the forfeiture of a parent's constitutionally protected status.*

In The Matter of A.S., III (August 20, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy00Mi0xLnBkZg==>

Facts: Father of A.S. served in the military after A.S.'s birth and was deployed to Afghanistan and stationed in Colorado when he was stateside. During his military service, Father maintained contact with A.S. and provided support for A.S. although he was no longer in a relationship with A.S.'s mother. During father's deployment, A.S. was taken into DSS custody and adjudicated neglected. Father was present at the disposition hearing, at which the court found that mother and father had acted inconsistently with their constitutionally protected parental rights. The trial court ordered physical custody of A.S. to her maternal grandmother and legal custody of A.S. to Father. Father was ordered to maintain a cell phone to facilitate his making legal decisions, to complete a parenting class, and to have unsupervised visitation with A.S. Father appealed. During the appeal, review hearings were held in the juvenile proceeding based upon new circumstances, and modification orders were entered by the trial court.

Held: Appeal dismissed

1. In juvenile cases, adjudication and disposition orders are subject to review and modification. Additional findings made by the court in a subsequent review order support the conclusion that father acted inconsistently with his rights as a parent by failing to maintain contact with A.S. and by disobeying the earlier disposition order regarding being able to be contacted.
2. The issues raised by father on appeal are moot, and none of the exceptions to the mootness doctrine (collateral legal consequences, capable of repetition but evading review or public interest) apply.
3. The Court of Appeals declined to establish a minimum standard of care by which service members may fulfill their parental responsibilities.

Termination of Parental Rights: Withdrawal of Parent's Attorney

- *Before granting an attorney's motion to withdraw, court must determine whether the attorney gave the client prior notice of intent to withdraw and had justifiable cause to withdraw*

In the Matter of D.E.G., ___ N.C. App. __ (August 6, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0yNzktMS5wZGY=>

Facts: By consent order, a 3-year-old was adjudicated neglected and dependent. After a hearing at which the father was represented by counsel, the trial court ordered that reunification efforts with the father cease and changed the permanent plan from reunification to adoption. At a later TPR hearing, neither the parents nor their attorneys appeared. The DSS attorney notified the court that both parents' attorneys had informed her that they had had no contact with their clients and that the father's attorney asked the DSS attorney to be excused from representing the father in the TPR hearing. The trial court excused both parents' attorneys' absence and held the termination hearing. The trial court adjudicated three grounds, found that termination was in the child's best interests, and terminated the father's rights. Respondent father timely appealed the permanency planning order and the order terminating his parental rights.

Held: Affirmed in part; vacated and remanded in part

1. Parents have a right to effective assistance of counsel in termination of parental rights proceedings. The trial court erred by allowing father's appointed counsel to withdraw without first determining
 - a. whether the attorney made reasonable efforts to give his client prior notice of his intent to withdraw and
 - b. whether the attorney had justifiable cause to withdraw.

Without the attorney's appearance in court to determine these facts, the trial court had no discretion to grant the request but should have either granted a reasonable continuance or denied the motion to withdraw.

2. Undisputed findings of fact by the trial court supported the court's conclusion and order to cease reunification efforts with the father.

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

Adoption: Motions for Equitable Relief; Transfer to District Court

- *Motion is treated by substance, not label.*
- *An adoption proceeding before the clerk of superior court is transferred to district court when a request for equitable relief is made.*

For the Adoption of C.E.Y., _____ N.C. App. ____ (July 16, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy02NS0xLnBkZg==>

Facts: Father of CEY was served in prison with adoption petition and TPR regarding his daughter. He forwarded his paperwork to his court appointed attorney for the TPR action, mistakenly believing his attorney would be representing him in the adoption proceeding as well. Due to his failure to respond to the adoption petition in a timely manner, the clerk of superior court determined his consent was not required for the adoption. Father filed a motion to set aside the clerk’s order under Rules 59 and 60 and gave notice of appeal of the order to district court. The clerk transferred the case to district court. The district court dismissed the motion on the basis that the clerk’s order was not a final order for purposes of Rule 60 and dismissed the appeal on the basis that only final orders can be appealed pursuant to G.S. 48-2-607(b) or G.S. 1-301.2(e).

Held: Reversed and remanded

1. The appeal to the court of appeals, although interlocutory, was proper because a trial court’s determination that a parent’s consent to adoption is not required affects a substantial right.
2. Although respondent characterized his challenges to the clerk’s order as an “appeal” and a Rule 60 motion, a motion must be treated according to its substance not label, and respondent’s motion was a request for equitable relief.
3. District court had jurisdiction to hear respondent’s motion pursuant to G.S. 1-301.2(b), which requires transfer to district court when “a request for equitable relief is raised in a ...pleading or written motion in an adoption proceeding.”

Criminal Conviction for Contributing to Neglect of a Minor

State v. Stevens, ___ N.C. App. ____ (July 16, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzk0LTEucGRm>

The court of appeals upheld defendant's appeal of his conviction for contributing to the delinquency and neglect of a minor, a Class 1 misdemeanor. Evidence was sufficient to prove the elements of the crime: Defendant was at least 16, the minor was younger than 12, and defendant caused the minor to be in a place or condition where the minor could be adjudicated neglected as defined by G.S. 7B-101. The State was able to show beyond a reasonable doubt that defendant knowingly or willfully caused the juvenile to be in a place or condition where the juvenile could be adjudicated neglected. And, the state showed by clear and convincing evidence that the juvenile was neglected. During a bike ride with the juvenile, defendant took the juvenile away from his neighborhood, later caused an eye injury to the juvenile, did not seek treatment of that injury, and abandoned the juvenile when the juvenile was sleeping in a parking lot, leaving the juvenile without the proper supervision of his parents.