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**In The Matter of the Parental Rights as to N.J., 125 Nev. Adv. Op. No. 62
(Dec. 24, 2009)¹**

Family Law - Termination of Parental Rights - ICWA

Summary

Appeal of a district court order terminating the parental rights of Dawn M. as to N.J., a minor. The Division of Child and Family Services (DCFS) petitioned the district court to terminate the parental rights of Dawn after unsuccessfully attempting to reunify N.J. with Dawn. Dawn appealed arguing the district court erred in (1) finding clear and convincing evidence of parental fault, and (2) applying the Existing Indian Family (EIF) doctrine after finding DCFS did not meet Indian Child Welfare Act's (ICWA) beyond a reasonable doubt standard.

Disposition/Outcome

The Nevada Supreme Court affirmed the district court's order terminating parental rights. The Court adopted a dual-standard burden of proof for termination of parental rights cases involving ICWA, utilizing Nevada's "clear and convincing evidence" for state law findings and ICWA's "beyond a reasonable doubt" standard for ICWA findings. The Court upheld that there was clear and convincing evidence of parental fault. The Court upheld the application of the EIF doctrine because the breakup of a Native American family was not at issue and neither the child's father (who was Native American) nor his tribe were contesting the termination.

Factual and Procedural History

At N.J.'s birth, both N.J. and Dawn tested positive for Marijuana and Methamphetamine. Because N.J.'s putative father could not be located and no safe placement could be found, the Division of Child and Family Services (DCFS) was given custody of N.J. and she was placed into foster care. Eventually N.J.'s putative father, Javy J., contacted DCFS. DNA testing showed that Javy was the father of N.J.; nevertheless Javy denied paternity and never made further contact with DCFS. Because Javy was an enrolled member of the Ely Shoshone Tribe, N.J. was eligible to become a member of the tribe. Dawn was not a member of any Native American Tribe. DCFS created a case plan for Dawn to follow in order to reunify with N.J., but Dawn did not comply.

DCFS petitioned the district court to terminate the parental rights of Dawn due to her failure to comply with the case plan and her continued drug use. Because N.J. was a Native American child, the parental termination proceedings were subject to the Indian Child Welfare Act (ICWA). The district court applied a dual-level evidentiary standard, using Nevada's "clear and convincing evidence" for state law findings and ICWA's "beyond a reasonable doubt" standard for ICWA findings. The district court found that clear and convincing evidence supported terminating Dawn's parental rights, but DCFS failed to meet ICWA's "beyond a reasonable doubt" burden. However, the district court held the Existing Indian Family Doctrine applied because neither N.J.'s putative father, nor her putative father's tribe, contested the

¹ By Paul C. Williams

termination and the breakup of a Native American family was not at issue. The district court granted the petition to Terminate Parental Rights.

Discussion

Dawn appealed the termination of her parental rights arguing the district court erred in (1) finding clear and convincing evidence of parental fault, and (2) applying the Existing Indian Family (EIF) doctrine after finding DCFS did not meet ICWA's burden of proving its case beyond a reasonable doubt. The Court first addressed the conflicting evidentiary standards between Nevada law and ICWA. Second, the Court analyzed the State law claims. Finally, the Court addressed ICWA and the EIF exception.

Conflicting Evidentiary Standards

Nevada and ICWA have conflicting evidentiary standards for cases involving the termination of parental rights. While Nevada has a "clear and convincing" evidentiary standard for parental termination cases² ICWA requires the petitioner to prove its case "beyond a reasonable doubt."³

The Court held that Nevada's "clear and convincing evidence" standard applies to state law findings and the ICWA "beyond a reasonable doubt" standard applies to federal law findings. The Court reasoned that ICWA sets forth "minimum Federal standards"⁴ for the removal of Native American children from their families only as it relates to ICWA-related findings, not a uniform standard that applies to all findings. The Court also cited to a statute which expressly states that ICWA's standards yield to other state or federal law if the law "provides a higher standard of protection to rights of the parents[.]" than ICWA.⁵ The Court noted that nearly every state court that has interpreted the issue of conflicting standards came to the same conclusion.

State Law Claims: Clear and Convincing Standard

Under Nevada law, "a petitioner must prove by clear and convincing evidence that termination is in the child's best interest" and that parental fault exists.⁶ The Court found that terminating parental rights was in N.J.'s best interest and that parental fault existed.

To decide what is in the child's best interest, a court looks to the child's continuing need for "proper, physical, mental and emotional growth and development."⁷ Also, it is presumed that terminating parental rights in the child's best interest if the child has been in foster care for 14 of any 20 consecutive months.⁸ Applying the facts of the case, the Court held that the presumption

² Matter of Parental Rights as to D.R.H., 120 Nev. 422, 428, 92 P.3d 1230, 1234 (2004).

³ 25 U.S.C. § 1912(f) (2006).

⁴ *Id.* § 1902 (2006).

⁵ *Id.* § 1921 (2006).

⁶ Matter of Parental Rights as to D.R.H., 120 Nev. at 428, 92 P.3d at 1234. *See also* NEV. REV. STAT. § 128.105 (2007).

⁷ NEV. REV. STAT. § 128.005(2)(c) (2007).

⁸ *Id.* § 128.109(2) (2007).

applied and Dawn had the burden to overcome the presumption.⁹ The Court held Dawn did not overcome the burden because she failed to maintain sobriety and failed to bond with N.J.

When a child has been placed in foster care and the ultimate goal of the termination of parental rights is to have the child's foster family adopt her, a court must look at "the extent the [child's] familial identity is with that family[,]"¹⁰ "[t]he length of time the child has lived in a stable. . . foster home[,]"¹¹ and "[t]he permanence as a family unit of the foster family."¹² The Court held that there was substantial evidence that N.J. was fully integrated into her foster family. N.J. had been placed with the foster family since leaving the hospital following her birth. Expert witnesses testified that N.J. was very well bonded with the foster family and removal from the foster family would be traumatic.

Dawn also argued that there was not substantial evidence of parental fault. The district court found parental fault on grounds of neglect, unfitness, and token efforts. A child is neglected when a parent "neglects or refuses to provide proper or necessary subsistence, education, medical or. . . other care necessary for [the child's] health, morals, or well-being."¹³ Courts shall consider excessive drug and alcohol use¹⁴ and the inability of public agencies to reunify the child with the parents¹⁵ when determining neglect. Applying the facts of the case, the Court held Dawn's drug use, her failure to regularly visit with N.J., her failure to end an abusive domestic relationship, and her failure to provide financial assistance demonstrated neglect.

An unfit parent is "any parent of a child who, by reason of his fault or habit or conduct toward the child or other persons, fails to provide the child with proper care, guidance and support."¹⁶ The Court upheld the district court's determination of unfitness due to Dawn's continued drug use and her failure to provide for any of N.J.'s physical or mental well-being. Although Dawn maintained sobriety for a few months, the Court held that it was insignificant as she continued to test positive for methamphetamine.

Parental fault can be established when a parent engages in only in token efforts to (1) "support or communicate with the child; (2) "prevent neglect of the child"; (3) "avoid being an unfit parent; or (4) "eliminate the risk of serious physical, mental or emotional [harm] to the child."¹⁷ The Court upheld that Dawn had only engaged in token efforts because she only sporadically visited N.J., did not provide financial assistance, did not end an abusive domestic relationship, and failed to address her drug use.

ICWA: Beyond a Reasonable Doubt Standard

ICWA's higher evidentiary standards were established due to concerns of an "alarmingly high percentage" of Native American children removed from their families and the failure of state courts to recognize traditional Native American social standards. Before terminating the parental rights of a Native American child there must be "[a] determination, supported by evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that

⁹ Matter of Parental Rights as to A.J.G., 122 Nev. 1418, 1426, 148 P.3d 759, 764 (2006).

¹⁰ NEV. REV. STAT. § 128.108 (2007).

¹¹ *Id.* § 128.108(4) (2007).

¹² *Id.* § 128.108(5) (2007).

¹³ *Id.* § 128.114(2) (2007).

¹⁴ *Id.* § 128.106(4) (2007).

¹⁵ *Id.* § 128.106(8) (2007).

¹⁶ *Id.* § 128.018 (2007).

¹⁷ *Id.* § 128.105(2)(f) (2007).

the continued custody by the parent or [Native American] custodian is likely to result in serious emotional or physical damage to the child[,]"¹⁸ in addition to other determinations.¹⁹

The Court upheld the district court's determination that DCFS did not provide a tribal expert²⁰ who could testify that returning N.J. to either of her parents would be likely to result in serious emotional or physical damage to N.J. Although a tribal expert and a clinical social worker testified, neither could testify as to whether returning N.J. would likely result in serious emotional or physical damage to N.J. Therefore, DCFS did not meet ICWA's higher evidentiary standard.

EIF Doctrine Exception

The Existing Indian Family (EIF) doctrine precludes ICWA from applying to cases where the court determines that there is no existing Native American family, meaning the child is not, and never was, part of a Native American family or tribe.²¹ The Court held the EIF doctrine should be used on a case-by-case basis to avoid results that are counter to ICWA's goal of protecting the best interest of Native American children.

Here, the Court held the EIF doctrine was applied correctly because neither her father, nor his tribe, were contesting the termination and the termination would not result in the breakup of a Native American family. The Court also noted that the foster family had testified that they were committed to educating N.J. about her Native American heritage.

Conclusion

When termination of parental cases implicates ICWA, a dual-standard burden of proof should be used. Specifically, Nevada's "clear and convincing evidence" should be used for state law findings and ICWA's "beyond a reasonable doubt" standard should be used for ICWA findings. The application of Existing Indian Family Doctrine (EIF) may be appropriate when the breakup of a Native American family is not at issue and neither the tribe nor the Native American Parent is contesting the termination.

¹⁸ 25 U.S.C. § 1912(f) (2006).

¹⁹ *See Id.* § 1912(d) (2006) (Requiring "active efforts" to prevent the breakup of the family).

²⁰ Although ICWA does not define a "tribal expert," the Nevada Supreme Court looked to NEV. REV. STAT. § 128.093(2) (2007) for guidance.

²¹ *In Re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Ct. App. 1996).