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Summary of Matter of Petition of Phillip A. C., 122 Nev. Adv. Op. No. 109

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FAMILY LAW – ADOPTION

Summary

Appeal from a district court order vacating the adoption of a minor child.

Disposition/Outcome

Reversed the district court order vacating the adoption and remanded the matter to the district court.

Factual and Procedural History

Following a hearing, the district court granted Phillip A. C.’s petition for the adoption of Z.R.K., the child of Phillip’s ex-stepdaughter, Tarah K. Although Tarah K. was not present at the hearing, the petition for adoption was accompanied by two written consents terminating the parental rights of Tarah K. and Z.R.K.’s father. Subsequently, Tarah sought the assistance of the Central Council of Tlingit & Haida Indian Tribes of Alaska (Council) in an effort to overturn the adoption.² Because Tarah is 7/16ths Native American and Z.R.K is 7/32nds Native American, the Council filed a motion to intervene and vacate the adoption due to violations of the Indian Child Welfare Act (ICWA). Additionally, Tarah filed a petition to vacate the adoption. Both parties were represented by Nevada Legal Services and were assigned the same district court case number.

The district court did not rule on the Council’s motion to intervene, but found the adoption invalid for failure to comply with the ICWA. Specifically, the district court found that the adoption proceedings did not comply with 25 U.S.C. § 1913(a), which requires a judicial certification asserting that the judge fully explained the voluntary consent for termination of parental rights to both parents and that both fully understood the consequences of the consent. Accordingly, the district court vacated Z.R.K.’s adoption conditioned on proof that Z.R.K. was a Native American child.

In response, Nevada Legal Services submitted various documents on behalf of the Council evidencing that Z.R.K. was eligible for membership of a Native American tribe. Phillip filed an objection asserting that the documents did not comply with rules of evidence. Although the district court found that the documents proving Z.R.K.’s membership eligibility did not meet the affidavit requirements of NRCP 56(e), it granted the Council an additional thirty days to submit proper affidavits. In the meantime, an unspecified “petitioner” filed a notice of voluntary dismissal pursuant to NRCP 41(a); however, it was unclear whether Tarah or the Council had filed it. Nevertheless, the Council submitted a proper affidavit of tribal enrollment officer, Valerie M. Hillman, declaring Z.R.K.’s eligibility for membership. As such, the district court entered an order to vacate the adoption because no judicial certification had been entered, therefore violating the ICWA.

¹ Summarized by Erin Phillips

² Tarah claimed she consented under duress and that Phillip prevented her from attending the adoption hearing.

Subsequently, Phillip appealed the order asserting that (1) the district court lacked jurisdiction to consider the Council's motion to intervene and to vacate the adoption because the Council and Tarah voluntarily dismissed the action; (2) the evidence submitted to prove that Z.R.K. was a Native American child was inadequate; (3) the Council lacked independent standing to contest the adoption; (4) the district court should have granted him the opportunity to rebut the Council's evidence.

Discussion

(1) District Court's Jurisdiction to Vacate the Adoption

The court first considered Phillip's claim that the district court lacked jurisdiction to consider the Council's motion to intervene and to invalidate the adoption because the Council and Tarah voluntarily dismissed the matter under NRCP 41(a). The court rejected this claim and instead concluded that substantial evidence supported the Council's assertion that only Tarah was the dismissing petitioner. The court based its decision on two reasons. First, the dismissal only referred to a single "petitioner," which indicated that it was only applicable to one of the parties. Also, both parties agreed that Tarah was the petitioner. Further, Tarah filed a "petition" whereas the Council filed a "motion." Second, the court noted that the Council's vigorous pursuit of its motion to intervene was wholly inconsistent with the filing of a voluntary dismissal. Moreover, as an independent ground for its decision, the court reasoned that even if the voluntary dismissal applied to both Tarah and the Council, it would be ineffectual because it was filed at an advanced stage of the proceedings and the district court had already addressed the merits of the case.³ As such, the court concluded that the district court had proper jurisdiction to permit the council's intervention and vacate the adoption.

(2) Sufficiency of Evidence to Establish that Z.R.K. was a Native American Child

Next, the court addressed Phillip's claim that the tribal officer's affidavit was insufficient to prove that the ICWA applied to Z.R.K.'s adoption. For the ICWA to apply, the child must be under eighteen, unmarried and either (a) a member of a Native American tribe or (b) eligible for such membership and the biological child of a tribe member.⁴ The Native American tribe has absolute discretion over membership determinations,⁵ and that decision is not reviewable by an appellate court.⁶ Thus, the court's role is to determine whether the individual asserting a child's membership eligibility on the tribe's behalf has proper authority to do so.

³ NRCP 41(a), like the federal counterpart, is meant to prevent arbitrary dismissals in the advanced stages of proceedings. The court explained that federal decisions interpreting Federal Rules of Civil Procedure provide guidance when reviewing its own rules. Accordingly, the court analogized the case at hand to a federal case interpreting FRCP 41(a), *Harvey Aluminum v. American Cyanamid Co.* 203 F.2d 105 (2d Cir. 1953). There, the court of appeals interpreted FRCP 41(a)(1) to bar a plaintiff from dismissing an action through notice before the defendant had answered because of the advanced point of the proceedings, during which the court had addressed the merits of the case. *Id.* at 107-08. As such, the court concluded that the same interpretation should apply to NRCP 41(a). Thus, a voluntary dismissal by either Tarah or the Council would be ineffectual because it was filed three months after the district court had heard the Council's motion to intervene and made a decision to vacate the adoption.

⁴ 25 U.S.C. § 1903(4) (2000).

⁵ *In Interest of A.G.-G.*, 899 P.2d 319, 321 (Colo. Ct. App. 1995).

⁶ *In re Dependency of A.L.W.*, 32 P.3d 297 (Wash. Ct. App. 2001).

Phillip argued that the affidavit of the Council's tribal enrollment officer, Valerie M. Hillman, submitted to prove Z.R.K.'s membership eligibility did not comply with NRCP 56(e). NRCP 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."⁷ Hillman's affidavit stated that she had served as the Council's tribal enrollment officer for the past 15 years. Further, Hillman attested to Tarah's membership in the Tlingit & Haida Indian Tribes of Alaska and Z.R.K.'s eligibility in these tribes. Accordingly, the court found the affidavit sufficient to establish Hillman's authority to determine tribal membership eligibility and therefore admissible to establish that Z.R.K. was a Native American child for purposes of the ICWA.

(3) The Council's Standing to Challenge Z.R.K.'s Adoption

Assuming Z.R.K. was a Native American child under ICWA, Phillip asserted that the Council had no independent standing to contest the adoption because the rights of the Council dissolved when Z.R.K.'s parents voluntarily relinquished their parental rights. The court rejected this claim because it is inconsistent with provisions of the ICWA and presupposes that the parent consent was valid despite the district court's decision to the contrary. Pursuant to the ICWA, a Native American tribe can intervene in any state court proceeding that terminates the parental rights of child belonging to that tribe.⁸ Because an adoption proceeding terminates parental rights, the Council did have proper standing to challenge Z.R.K.'s adoption in accordance with the ICWA. Additionally, § 1914 of the ICWA provided standing to challenge the adoption proceeding by allowing a Native American child's tribe to file a petition to invalidate a termination of parental rights upon a showing that certain ICWA provisions had been violated.⁹

Even if the ICWA permitted tribe intervention or petition to challenge the termination of parental rights, Phillip claimed that the same should not be true for an adoption action. He asserted that because the tribe is not entitled to notice of the adoption, the two actions should not be considered equivalent. His arguments were based primarily on the case of *Navajo Nation v. Superior Court of the State of Washington*,¹⁰ in which the Navajo Nation instituted an action in federal court to invalidate the adoption of a Native American child seven years after the fact because the parental consents were invalid. There, the court rejected the tribe's claim that it was entitled to notice of the voluntary adoption.¹¹ Thus, Phillip argued that if the tribe is not entitled to notice, Congress did not intend to allow a tribe to contest the adoption. Therefore treating an

⁷ NEV. R. CIV. P. 56(e).

⁸ 25 U.S.C. § 1911(c) (2000).

⁹ The statute provides that for termination of parental rights actions "[a]ny parent or custodian from whose custody such child was removed, and the child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914 (2000). The court explained that a plausible argument could be made that the use of "and" in the statute indicates that the parent or custodian *and* the child's tribe must file a petition to invalidate the termination of parental rights. However, the court chose to follow the Michigan Court of Appeal's decision in *Matter of Kreft*, which involved the parent petitioning independently of the tribe. 384 N.W.2d 843, 846 (Mich. Ct. App. 1986). There, the court concluded that Congress intended for § 1914 to give each party listed independent standing to challenge the validity of the action based on the ICWA's stated policy in 25 U.S.C. § 1902. *See id.*

¹⁰ 47 F. Supp. 2d 1233 (E.D. Wash. 1999).

¹¹ *Id.* at 1238.

adoption as equivalent to termination of parental rights would undermine the ICWA's adoption provisions.

Additionally, Phillip contended that *Navajo Nation* established the rule that only the natural parents of a Native American child are authorized to institute an action to invalidate their adoption and that these actions are subject to time restrictions. However, the court rejected *Navajo Nation's* applicability on three grounds. First, Navajo Nation relied on a *parens patriae* theory to assert standing for claims of all tribal members.¹² In contrast, the Council claimed independent standing pursuant to ICWA § 1914, which the court already found applicable. Second, the court in *Navajo Nation* found the parental consents valid¹³ whereas the district court in the Z.R.K. adoption found the consents invalid in violation of 1913(a), therefore providing the Council standing pursuant to ICWA § 1914. Lastly, the time gap in the present case was insignificant as compared to the seven year gap in *Navajo Nation*. Given these distinctions, the court held that ICWA § 1913(a) provided the Council with proper standing to challenge the parental consents in the Z.R.K. adoption.

(4) District Court's Failure to Provide an Opportunity to Rebut the Council's Affidavit

Despite its decision to permit Hillman's affidavit to serve as admissible evidence establishing Z.R.K.'s status as a Native American, the court concluded that Phillip should have been given the opportunity to challenge the affidavit. Accordingly, the court remanded the matter so that Phillip could submit evidence to rebut Hillman's authority to make membership determinations for the Council. However, the remand was limited to this issue and the court order to vacate the adoption will stand if Phillip cannot rebut Hillman's authorization.

Conclusion

The court reached five conclusions regarding Phillip's appeal of the district court order vacating his adoption of Z.R.K. First, substantial evidence supports the Council's assertion that only Tarah dismissed her petition and therefore the district court had jurisdiction to consider the Council's motion to intervene and invalidate Phillip's adoption of Z.R.K. Second, the voluntary dismissal was filed after the district court addressed the merits of the case and therefore ineffective. Third, Hillman's affidavit was admissible evidence for the purpose of establishing Z.R.K.'s status as a Native American. Fourth, a Native American tribe has independent standing to contest a voluntary adoption under the ICWA because it includes a termination of parental rights. Fifth, the district court erred by not allowing Phillip to submit evidence rebutting Hillman's affidavit. Therefore, the court reversed the district court order and remanded the case.

¹² *Id.* at 1241.

¹³ *Id.* at 1241-42.