Adoption

6/9/10

In **In Re Adoption of D.C.**, 928 N.E.2d 602 (Ind. Ct. App. 2010), the Court affirmed the probate court's order granting the petition of Stepfather and his wife (collectively Adoptive Parents) to adopt the eleven-year-old child. The child and his two older siblings were born during the marriage of Mother and the child's Biological Father. Biological Father and Mother separated before the child's birth. They later divorced and Mother married Stepfather. In 1998, Biological Father was ordered to pay child support of $230 per month for the child's older sister. Because the middle child was the biological child of Stepfather, no child support was ordered on her behalf in the dissolution decree. Because the child's paternity was not yet established, the dissolution decree was silent as to him, but in 2003 Biological Father was ordered to pay child support of $322.78 per month for the child. Mother and Stepfather had custody of all three children until Mother's death in 2005. A few months prior to Mother's death, Stepfather petitioned to adopt the child and his older sister. Mother's notarized consent was attached to the adoption petition. Stepfather's adoption petition alleged that Biological Father's consent to the adoption was not required due to his failure to communicate significantly with the children and provide support (IC 31-19-9-8(A) – (B)). Biological Father, who had recently become an enrolled member of the Sitka Tribe of Alaska, with a Tribe Decree of 1/16th, filed his motion to contest the adoption, and alleged that the children were subject to the Indian Child Welfare Act of 1978, 25 U.S.C. sections 1903-1963 (1982) (the ICWA). Biological Father also asserted that he had not failed to communicate significantly with or support the children. Stepfather remarried, and his wife joined in the petition for adoption. The probate court permitted the Sitka Tribe of Alaska to intervene, and evidence and arguments were heard regarding the potential application of the ICWA. The Sitka Tribe representative argued that the ICWA was applicable, but advised the probate court that transfer of jurisdiction was not being sought because the children were domiciled outside Alaska. On May 10, 2007, the probate court found the ICWA inapplicable because the proposed adoption would not cause a removal from an Indian home. The probate court then conducted a hearing on the issue of whether Biological Father's consent to adoption was required. On July 14, 2008, the probate court issued an order declaring that Biological Father's consent was not required. The probate court set a hearing date to address the children's best interests. Before the final hearing, the child's fifteen-year-old sister went to live with Biological Father in Alaska, and the adoption petition as to her was dismissed. After the adoption hearing, the probate court issued its Findings of Fact, Conclusions of Law and Order granting the adoption. The order included provisions for sibling visitation, with the older sister to visit her siblings in Indiana and the child visit his older sister at Biological Father's home in Alaska with the testimonial consent of Adoptive Parents. The order also provided for unlimited

telephonic visitation between the child, his older sister, and Biological Father, a gratuitous provision entered by the probate court and not challenged by Adoptive Parents on cross-appeal.

The Indiana Supreme Court has construed the ICWA to be inapplicable where there was no "removal" from custody within an Indian family as contemplated by 25 U.S.C. section 1902 and section 1912; therefore, it is not within the province of the Court of Appeals to overturn the "existing Indian family" doctrine. Id. at 605. Biological Father had enrolled the child's fifteen-year-old sister in the Sitka Tribe of Alaska, with a Tribal Degree of 1/32nd. Presumably, the child would be eligible for enrollment upon presentation of required documentation. Biological Father sought the procedural protections of the ICWA applicable in termination of parental rights proceedings, including the beyond a reasonable doubt standard of proof and the required testimony of expert witnesses (section 1912 (f) of the ICWA). The probate court found the ICWA to be inapplicable because there was no "removal" from custody within an Indian family as contemplated by 25 U.S.C. section 1902 and section 1912(f) providing as follows:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.
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> No termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(emphasis added). The Indiana Supreme Court has construed the ICWA as "applicable when you have Indian children being removed from their existing Indian environment." Matter of Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989). D.C. at 605. The Court of Appeals cannot overturn the "existing Indian family" doctrine. Id. The Court was also not persuaded by Biological Father's second ICWA argument that he, the child's fifteen-year-old sister, and the child constitute an existing Indian family because of Biological Father's and sister's tribal enrollment and the child's eligibility for enrollment. Id. at 605-06. The Court characterized Biological Father's argument as merely an invitation to reweigh the evidence, noting that the child has never lived with Biological Father and thus has never lived in an Indian home from which he could be removed. Id.

The Court concluded that Adoptive Parents established, by clear and convincing evidence, that Biological Father failed to provide for the child's care and support when able to do so, therefore Biological Father's consent to adoption is not required. Id. at 606-07. The Court

quoted IC 31-19-9-8(a), which states in pertinent part that consent to adoption is not required from a parent of a child in the custody of another person if for a period of at least one year the parent: (A) fails without justifiable cause to communicate significantly with the child when able to do so; or (B) Knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. The Court, citing In Re Adoption of T.W., 859 N.E.2d 1215, 1218 (Ind. Ct. App. 2006), said that the provisions of IC 31-19-9-8 are disjunctive; as such, either provides independent grounds for dispensing with parental consent. D.C. at 606. Adoptive parents were required to prove by clear and convincing evidence that Biological Father's consent was not required. Id. The following evidence, inter alia, supports the probate court's finding that Biological Father failed to provide for the care and support of the child when able to do so: (1) in 2003, Biological Father was ordered to pay support of $322.78 per month for the child; (2) from Biological Father's income of $23,430, "No more than $500 had been paid on behalf of the child and his fifteen-year-old sister in the twelve months preceding the adoption petition; (3) with regard to checks that Biological Father sent to Mother in 2004, $70 was designated for the fifteen-year-old sister and $150 was designated for clothes; (4) there is no showing that Biological Father made any single conforming child support payment for the child's benefit during the year preceding the filing of the adoption petition although a substantial child support arrearage had accrued. Id. at 606.

The Court did not reverse the adoption judgment because Biological Father failed to demonstrate prejudice to his substantial rights. Id. at 607. In considering the probate court's determination that the adoption was in the child's best interests, the Court noted the following evidence: (1) Stepfather cared for the child, without interruption throughout the eleven years preceding the adoption petition; (2) Biological Father had extremely limited contract with the child and accumulated a child support arrearage of tens of thousands of dollars; (3) at all times prior to the filing of the adoption petition, Biological Father acquiesced to Stepfather's custody of the child; (4) the child is well-adjusted to his surroundings and bonded with Adoptive Parents; Biological Father does not claim otherwise. Id. Biological Father contended that the findings and conclusions are contradictory and inconsistent because the order severs parental rights while at the same time permitting sibling visitation and unlimited telephonic visitation; therefore, the decree must be reversed. The Court opined that Biological Father does not explain how he is prejudiced by the provisions for sibling visitation and telephonic communication. Id. The Court quoted Ind. Trial Rule 61, which provides, inter alia, that no error or defect in any court order is ground for reversal on appeal, unless refusal to take action appears inconsistent with substantial justice. Id. The Court noted that the decree relieved Biological Father of future obligations as to the child while he was afforded opportunities for contact. Id.

In a concurring opinion Judge Barnes noted that the validity of the "existing Indian family" doctrine has repeatedly been called into question and many courts in other states have now abandoned the doctrine. Judge Barnes urged the Indiana Supreme Court to revisit its applicability. Id. at 608-09.