ADOPTIVE COUPLE V. BABY GIRL

CHILD CUSTODY AND ADOPTION IN JEWISH LAW

OCTOBER 16, 2013
RABBI MOSHE DAVIS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Adoptive Couple, Appellants,

v.

Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, Respondents.

Appeal from Charleston County
The Hon. Deborah Malphrus, Family Court Judge

Opinion No. 27148
Heard April 17, 2012 – Filed July 26, 2012

AFFIRMED

Mark D. Fiddler, of Minneapolis, Minnesota, Raymond W. Godwin and Julie M. Rau, both of Greenville, and Robert Norris Hill, of Newberry, all for Appellants.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, Lesley Ann Sasser and Shannon Phillips Jones, both of Charleston, all for Respondent, Birth Father.

Chrissi R. Nimmo, of Tahlequah, Oklahoma, for Respondent, Cherokee Nation.

James Fletcher Thompson, of Spartanburg, and Philip McCarthy, of Flagstaff, Arizona, for Amicus Curiae, the American Academy of Adoption Attorneys.

Dione Cherie Carroll, of Miami, Florida, for Amici Curiae, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs.

Thomas P. Lowndes, Jr., of Charleston, for the Guardian ad Litem.

CHIEF JUSTICE TOAL: This case involves a contest over the private adoption of a child born in Oklahoma to unwed parents, one of whom is a member of the Cherokee Nation. After a four day hearing in September 2011, the family court issued a final order on November 25, 2011, denying the adoption and requiring the adoptive parents to transfer the child to her biological father. The transfer of custody took place in Charleston, South Carolina, on December 31, 2011, and the child now resides with her biological father and his parents in Oklahoma. We affirm the decision of the family court denying the adoption and awarding custody to the biological father.

FACTS / PROCEDURAL HISTORY

Father and Mother are the biological parents of a child born in Oklahoma on September 15, 2009 ("Baby Girl"). Father and Mother became engaged to be married in December 2008, and Mother informed Father that she was pregnant in January 2009. At the time Mother became pregnant, Father was actively serving in the United States Army and stationed at Fort Sill, Oklahoma, approximately four hours away from his hometown of Bartlesville, Oklahoma, where his parents and Mother resided. Upon learning Mother was pregnant, Father began pressing Mother to get married sooner. The couple continued to speak by phone daily, but by April 2009, the relationship had become strained. Mother testified she ultimately broke off the engagement in May via text message because Father was pressuring her to get married. At this point, Mother cut off all contact with Father. While Father testified his post-breakup attempts to call and text message Mother went unanswered, it appears from the Record Father did not make any meaningful attempts to contact her.

It is undisputed that Mother and Father did not live together prior to the baby's birth and that Father did not support Mother financially for pregnancy related expenses, even though he had the ability to provide some degree of financial assistance to Mother.

In June 2009, Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother. Father explained: "In my mind I thought that if I would do that I'd be able to give her time to think about this and possibly maybe we would get back together and continue what we had started." However, under cross-examination Father admitted that his behavior was not conducive to being a father. Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would have never considered relinquishing his rights.

Mother testified she chose the adoption route because she already had two children by another father, and she was struggling financially. In June 2009, Mother connected with Appellants (or "Adoptive Mother" or "Adoptive Father") through the Nightlight Christian Adoption Agency (the "Nightlight Agency"). She testified she chose them to be the parents of the child because "[t]hey're stable . . . . they're a mother and father that live inside a home where she can look up to them and they can give her everything she needs when needed."

Appellants reside in Charleston, South Carolina, and were married on December 10, 2005. Adoptive Mother has a Master's Degree and a Ph.D. in developmental psychology and develops therapy programs

for children with behavior problems and their families. Adoptive Father is an automotive body technician currently working for Boeing. They have no other children. After connecting, Mother spoke with Appellants weekly by telephone, and Adoptive Mother visited Mother in Oklahoma in August 2009. Appellants provided financial assistance to Mother during the final months of her pregnancy and after Baby Girl's birth. Adoptive Mother testified Mother consistently represented that the birth father was not involved.

Mother testified that she knew "from the beginning" that Father was a registered member of the Cherokee Nation, and that she deemed this information "important" throughout the adoption process. Further, she testified she knew that if the Cherokee Nation were alerted to Baby Girl's status as an Indian child, "some things were going to come into effect, but [she] wasn't for [sic] sure what." Mother reported Father's Indian heritage on the Nightlight Agency's adoption form and testified she made Father's Indian heritage known to Appellants and every agency involved in the adoption. However, it appears that there were some efforts to conceal his Indian status. In fact, the pre-placement form reflects Mother's reluctance to share this information:

> Initially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he's registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption.

Appellants hired an attorney to represent Mother's interests during the adoption. Mother told her attorney that Father had Cherokee Indian heritage. Based on this information, Mother's attorney wrote a letter, dated August 21, 2009, to the Child Welfare Division of the Cherokee Nation to inquire about Father's status as an enrolled Cherokee Indian. The letter stated that Father was "1/8 Cherokee, supposedly enrolled," but misspelled Father's first name as "Dustin" instead of "Dusten" and misrepresented his birthdate. (emphasis added). Because of these inaccuracies, the Cherokee Nation responded with a letter stating that the tribe could not verify Father's membership in the tribal records, but that "[a]ny incorrect or omitted family documentation could invalidate this determination." Mother testified she told her attorney that the letter was incorrect and that Father was an enrolled member, but that she did not know his correct birthdate. Adoptive Mother testified that, because they hired an attorney to specifically inquire about the baby's Cherokee Indian status, "when she was born, we were under the impression that she was not Cherokee." Any information Appellants had about Father came from Mother.

When Mother arrived at the hospital to give birth, she requested to be placed on "strictly no report" status, meaning that if anyone called to inquire about her presence in the hospital, the hospital would report her as not admitted.Mother testified that neither Father nor his parents contacted her while she was in the hospital.

Adoptive Mother and Adoptive Father were in the delivery room when Mother gave birth to Baby Girl on September 15, 2009. Adoptive Father cut the umbilical cord. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption.

Appellants were required to receive consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children ("ICPC") as a prerequisite to removing Baby Girl from that state. Mother signed the necessary documentation, which reported Baby Girl's ethnicity as "Hispanic" instead of "Native American." After Baby Girl was discharged from the hospital, Appellants remained in

Oklahoma with Baby Girl for approximately eight days until they received ICPC approval, at which point they took Baby Girl to South Carolina. According to the testimony of Tiffany Dunaway, a Child Welfare Specialist with the Cherokee Nation, had the Cherokee Nation known about Baby Girl's Native American heritage, Appellants would not have been able to remove Baby Girl from Oklahoma.

Father was aware of Mother's expected due date, but made no attempt to contact or support Mother directly in the months following Baby Girl's birth.

Appellants filed the adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth, but did not serve or otherwise notify Father of the adoption action until January 6, 2010, approximately four months after Baby Girl was born and days before Father was scheduled to deploy to Iraq. On that date outside of a mall near his base, a process server presented Father with legal papers entitled "Acceptance of Service and Answer of Defendant," which stated he was not contesting the adoption of Baby Girl and that he waived the thirty day waiting period and notice of the hearing. Father testified he believed he was relinquishing his rights to Mother and did not realize he consented to Baby Girl's adoption by another family until after he signed the papers. Upon realizing that Mother had relinquished her rights to Appellants, Father testified, "I then tried to grab the paper up. [The process server] told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper."

After consulting with his parents and a JAG lawyer at his base, Father contacted a lawyer the next day, and on January 11, 2010, he requested a stay of the adoption proceedings under the Servicemember's Civil Relief Act ("SCRA"). On January 14, 2010, Father filed a summons and complaint in an Oklahoma district court to establish paternity, child custody, and support of Baby Girl. The complaint named Appellants and Mother as defendants.10 Paragraph 12 of this Complaint stated, "Neither parent nor the children have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do not apply." Father departed for Iraq on January 18, 2010, with his father acting as power of attorney while he was deployed overseas.

On March 16, 2010, Appellants, with Mother joining, filed a Special Appearance and Motion to Dismiss Father's Oklahoma action on jurisdictional grounds. The motion was granted, thereby ending the Oklahoma custody action.

Meanwhile, in January 2010, the Cherokee Nation first identified Father as a registered member and determined that Baby Girl was an "Indian Child," as defined under the Federal Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. (the "ICWA"). It is not apparent from the Record when Appellants were made aware of this change, but on March 30, 2010, Appellants amended their South Carolina pleadings to acknowledge Father's membership in the Cherokee Nation. Accordingly, on April 7, 2010, the Cherokee Nation filed a Notice of Intervention in the South Carolina action.

On May 6, 2010, the family court ordered paternity testing which conclusively established Father as the biological father of Baby Girl, and Appellants have since acknowledged Father's paternity. Furthermore, the family court issued an order confirming venue and jurisdiction in Charleston County Family Court and lifting the automatic stay of proceedings under the SCRA. On May 25, 2010, Father answered Appellants' amended complaint, stating he did not consent to the adoption of Baby Girl and seeking custody. By temporary order dated July 12, 2011, the family court set a hearing date for the case, and found separately that the ICWA applied to the case.

✓ The trial of the case took place from September 12–15, 2011. A Guardian ad Litem ("GAL") represented the interests of Baby Girl. On November 25, 2011, the family court judge issued a Final Order, finding that: (1) the ICWA applied and it was not unconstitutional; (2) the "Existing Indian Family" doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) Appellants failed to prove by clear and convincing evidence that Father's parental rights should be terminated or that granting custody of Baby Girl to Father would likely result in serious emotional or physical damage to Baby Girl. Therefore, the family court denied Appellants' petition for adoption and ordered the transfer of custody of Baby Girl to Father on December 28, 2011.

Appellants filed a motion to stay the transfer and to reconsider on December 9, 2011, which the family court denied on December 14, 2011.13 Appellants then filed a notice of appeal in the court of appeals on December 20, 2011, along with a petition for a writ of supersedeas. Judge Aphrodite Konduros temporarily granted the petition for a writ of supersedeas pending the filing of a return by Father. On December 30, 2011, Judge Konduros issued an order lifting the temporary grant of supersedeas and denying the petition for a writ of supersedeas. On December 31, 2011, Appellants transferred Baby Girl to Father, and Father and his parents immediately traveled with Baby Girl back to Oklahoma.

This Court certified the appeal pursuant to Rule 204(b), SCACR. In addition to briefs filed by the parties, the American Academy of Adoption Attorneys, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs have filed briefs as amici curiae.

SUPREME COURT OF THE UNITED STATES

No. 12–399

ADOPTIVE COUPLE, PETITIONERS *v.* BABY GIRL,

A MINOR CHILD UNDER THE AGE OF

FOURTEEN YEARS
, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF

SOUTH CAROLINA

[June 25, 2013]

JUSTICE ALITO delivered the opinion of the Court. This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

Contrary to the State Supreme Court's ruling, we hold that 25 U. S. C. §1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child— does not apply when, as here, the relevant parent never Had custody of the child. We further hold that §1912(d)— Which conditions involuntary Termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that §1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child. We accordingly reverse the South Carolina Supreme Court's judgment and remand for further proceedings.

Talmudic Ruling on Child Custody

Ketubot 59b

1. Custody of children under the age of six is granted to the mother
2. Custody of boys over the age of six is granted to the father
3. Custody of girls over the age of six is given to the mother

Three Models for Parental Custody in Jewish Law

1. **Parental Right Model:** Rabbi Asher Ben Yechiel (Rosh) writes that a father has an obligation to support his children regardless of the custodial relationship. In a circumstance when the marriage has ended, or the mother is incapable of raising the children, the father is entitled to custody.
    a. Ketubot 102b - Limitation of father's (or natural parent) custody when life threatening.
    b. Nodah BeYehdah E.H. 2:89 – Mother can be assigned custodial rights as a matter of agency.
2. **Best Interest Model**: Rabbi Solomon Ben Aderet (Rashba) writes that when the father is deceased, the mother does not have an indisputable right to custody as best interest of child needs to be assessed, which may not necessarily be in mother's favor.
3. **Contractual Agreement:** Rabbeinu Nissim (Ran) writes that the parental responsibility towards children is contractually obligated in the Ketubah. Ketubah however makes no reference to custodial arrangements should divorce or death occur, so implications are not clear.

Unfit or More Fit?

Case of Rabbi David Ibn Zimra (Radbaz) – Couple gets divorced and custody of seven year old girl is awarded to the mother. Mother then becomes pregnant out of wedlock and father then seeks to regain custody on the claim that mother displays moral delinquency. Radbaz rules in favor of the father due to unfitness of the mother.

Case Rabbi Shmuel ben Moshe of Medina (Maharashdam) – Guardianship is granted ta a brother in law in a case where mother is present and fit.