

1 STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
 2 COUNTY OF CHARLESTON) CASE NO.: 2009-DR-10-03803
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 4 Adoptive Couple, Husband and)
 Wife,)
 5)
 PLAINTIFFS,)
 6)
 vs.) TRANSCRIPT OF RECORD
 7)
 Baby Girl, and minor child)
 8 under the age of fourteen)
 years; "John Doe", Birth)
 Father, and Dusten Brown,)
 9 Birth Father,)
)
 10 DEFENDANTS.)
)
 11

12 September 29, 2011

13 Ridgeland, South Carolina

14 B E F O R E:

15 DEBORAH A. MALPHRUS, Judge.

16 A P P E A R A N C E S:

17 RAYMOND W. GODWIN, ESQ.
 Attorney for the Plaintiffs

18 SHANNON JONES, ESQ.
 Attorney for the Defendants

20 CHRISSI NIMMO, ESQ.
 (Appearing via Telephone)
 Attorney for the Cherokee Nation

22 THOMAS P. LOWNDES, ESQ.
 Attorney for the Guardian ad Litem

23
 24 RONDA T. CUMMINGS, CVR
 Official Court Reporter
 P.O. Box 2082
 25 Walterboro, SC 29488

2	Ruling by The Court	3
3	Certificate of Reporter	21

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11 EXHIBITS

12 None.

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1 THE COURT: When we get her on the line, is everyone
2 ready to proceed?
3 MR. GODWIN: Yes, ma'am.

4 THE COURT: Hello?

5 MS. NIMMO: This is Chrissi Nimmo.

6 THE COURT: Hey, Chrissi. This is Judge Malphrus.

7 How are you?

8 MS. NIMMO: I'm good. How are you?

9 THE COURT: Can you hear us?

10 MS. NIMMO: Yes.

11 THE COURT: Think that mic is too much?

12 CLERK OF COURT: I can just move it back.

13 THE COURT: Can I just turn it off?

14 CLERK OF COURT: It's on the bottom.

15 THE COURT: I'm going to try to get rid of this

16 microphone. Okay?

17 MS. NIMMO: Okay.

18 THE COURT: All right. Can you still hear us?

19 MS. NIMMO: I can.

20 THE COURT: Okay.

21 Okay, we are here today in Case 2009-DR-10-3803.

22 This is a Charleston County Case. It is Adoptive Couple,

23 Husband and Wife, Plaintiffs, versus Baby Girl and Minor

24 Child under the age of fourteen years, John Doe, birth --

25 John Doe, birth father, and Dusten Brown, birth father,

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1 defendants.

2 This matter was heard and tried by me in Charleston

3 County, and at the request of all parties, the parties

4 were allowed to present post-trial briefs in the matter

5 and was scheduled to be reconvened here today in Jasper

6 County for the purpose of me rendering my decision.

7 We have present in the courtroom Mr. Raymond Godwin,
8 here on behalf of the adoptive couple, who are also here
9 present in the courtroom with us. We have Ms. Shannon
10 Jones here representing birth father, Dusten Brown. We
11 have Attorney Thomas Lowndes, Jr., here. He is the
12 attorney for the Guardian ad Litem. We have participating
13 via telephone Attorney Christy R. Nimmo, Attorney for the
14 Cherokee Nation.

15 Is that correct?

16 (NO RESPONSE.)

17 THE COURT: Is that correct?

18 MS. NIMMO: Yes, Your Honor.

19 THE COURT: In addition to reviewing the file
20 contents, the evidence, and my notes, I want the parties
21 and the attorneys to know that I have read all briefs that
22 were submitted to me and the supporting documents that
23 were submitted with the briefs.

24 I appreciate the conduct of the attorneys and the
25 parties during these difficult proceedings. I believe

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1 that all of the attorneys have done an excellent job
2 representing their clients in a very difficult case.

3 This is a private adoption action involving the
4 adoption of an infant child born in Oklahoma to unwed
5 parents, who were both citizens and residents of Oklahoma.
6 The adoptive parents are citizens and residents of
7 Charleston County, South Carolina.

8 The natural father is an enrolled member of the

9 Cherokee Nation. Additionally, at the time of the minor
10 child's conception, birth, and institution of the adoption
11 proceeding, the birth father was an active duty service
12 member.

13 The birth mother planned on placing the minor child
14 for adoption prior to its birth and received adoption
15 subsidies from the prospective Adoptive Couple during her
16 pregnancy. The minor child was born on September 15th,
17 2009. The birth mother executed numerous consents and
18 relinquishments of her parental rights for the purpose of
19 adoption, the first being executed the day after the minor
20 child's birth.

21 The Summons and Complaint for adoption were filed in
22 Charleston County on September 18th, 2010(sic.), three
23 days after the child was born. The birth father executed
24 a document entitled "Acceptance of Service and Answer" on
25 January 6, 2010. The document states that he is the birth
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1 father of the minor child, he is not contesting the
2 adoption, and he waives the thirty day waiting period and
3 notice of the hearing.

4 On January 8, 2010, he consulted an Oklahoma attorney
5 regarding what he signed, and procedurally what he had to
6 do to get custody of his daughter. On January 11, 2010,
7 the birth father filed a stay of the South Carolina
8 adoption proceedings pursuant to the Service Member's
9 Civil Relief Act, and the South Carolina adoption action
10 was stayed for ninety days.

11 On January 12, 2010, a Two Thousand Five Hundred

12 Dollar attorney retainer fee and a Two Hundred and Fifty
13 Dollar filing fee was paid to an Oklahoma attorney to
14 institute legal proceedings to gain custody of the minor
15 child on behalf of her father. The lawsuit was filed in
16 Oklahoma on behalf of birth father on January 14, 2010.

17 Less than two weeks after signing the Acceptance of
18 Service and Answer, birth father was deployed to Iraq and
19 served this country honorably during Operation Iraqi
20 Freedom. Exactly six months from the date the Adoptive
21 Couple took possession of the minor child, the Adoptive
22 Couple filed a Motion to Dismiss the Oklahoma lawsuit on
23 jurisdictional grounds, alleging that South Carolina was
24 the proper forum. The adoptive parents' motion was
25 granted, and the birth father's Oklahoma lawsuit was

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1 dismissed on jurisdictional grounds.

2 Birth father answered and counterclaimed in the South
3 Carolina lawsuit seeking custody of the minor child. In
4 April, 2010, the Cherokee Nation filed its Notice of
5 Intent to Intervene, pursuant to the Indian Child Welfare
6 Act, in the South Carolina adoption action.

7 The first issue that I considered was: Does the
8 Indian Child Welfare Act apply to this lawsuit?

9 §1912(d) of the Indian Child Welfare Act states
10 plainly and unequivocally that any party seeking to effect
11 a termination of parental rights to an Indian child under
12 State law shall satisfy the court that active efforts have
13 been made to provide remedial services and rehabilitative

14 programs designed to prevent the breakup of the Indian
15 family and that these efforts have proved unsuccessful.
16 §1912(f) of the Indian Child Welfare Act states
17 plainly that no termination of parental rights may be
18 ordered in the absence of a determination, supported by
19 the evidence beyond a reasonable doubt, including the
20 testimony of qualified expert witnesses, that custody of
21 the child by the Indian parent or Indian custodian is
22 likely to result in serious emotional or physical damage
23 to the child.

24 As a result of a hearing held on July 12, 2011, Judge
25 Paul W. Garfinkel signed an Order on September 7, 2011,
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1 finding that the Indian Child Welfare Act applied to this
2 case. To the extent I must answer that question again, I
3 answer it in the affirmative.

4 It is not disputed that birth father was an enrolled
5 member of the Cherokee Nation. It is also not disputed
6 that the minor child is his biological child and is
7 eligible for membership in the Cherokee Nation.

8 Under 25 U.S.C. §1903, the minor child meets the
9 statutory definition of "Indian child". The Indian Child
10 Welfare Act applies to involuntary child custody
11 proceedings, including termination of parental rights and
12 adoptive placement proceedings of an Indian child.

13 First, Adoptive Parents urge the court to adopt the
14 "Existing Indian Family" Doctrine and find that because of
15 this doctrine, the requirements of ICWA do not apply to
16 the facts of this case. I cannot do so.

19 security of Indian tribes does not exist as prescribed by
20 ICWA -- as prescribed, ICWA does not apply.

21 "Existing Indian Family" Doctrine was born primarily
22 in the State of Kansas. Those states that have chosen to
23 follow this doctrine -- doctrine have relied primarily on
24 Kansas law. However, a recent Kansas Supreme Court case,
25 In the matter of A.J.S., specifically overruled its

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1 precedent establishing the Indian Family Doctrine and
2 specifically abandoned the Indian Family Doctrine as a
3 basis for not applying ICWA. As such, I do not adopt the
4 notion of the Indian Family Doctrine as a basis to hold
5 that ICWA does not apply.

6 Second, the Adoptive Couple argued that if ICWA
7 applies, it has been satisfied. I disagree.

8 The Tribe was sent incorrect information regarding
9 birth father's name and date of birth by birth mother's
10 attorney. Birth mother testified that she knew birth
11 father -- birth father was a Cherokee and that she knew
12 how to correctly spell his name.

13 The Tribe's response to birth mother's attorney
14 stated that its determination that the child was not an
15 Indian child was based on the information exactly as
16 provided by birth mother's attorney and that any incorrect
17 or omitted family documentation could invalidate their
18 determination. Once the Tribe was provided with the
19 correct information, the Tribe intervened.

20 Additionally, I find that Oklahoma would never have
21 given consent for the child to be removed from the State

22 of Oklahoma through the Interstate Compact for Placement
23 of Children, had the Interstate Compact Application been
24 correct.

25 The information submitted to the Interstate Compact
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1 for Placement of Children, which was signed by birth
2 mother, stated that the child was Hispanic, not Native
3 American. Birth mother had no explanation for this,
4 stating plainly that she knew the child's father was
5 Native American.

6 I specifically find that ICWA applies to this action
7 and it has not been complied with.

8 Last, as to ICWA, it provides that before an Indian
9 parent's parental rights can be terminated, the Court must
10 find beyond a reasonable doubt that custody of the minor
11 child with birth father is likely to result in serious
12 emotional or physical damage to the child. Adoptive
13 parents argue that the proper standard of proof is a
14 hybrid standard of proof, a hybrid of "beyond a reasonable
15 doubt" and the State standard of proof by "clear and
16 convincing evidence" as it relates to termination of
17 parental rights and best interest of the child.

18 I do not find that adoptive parents have proven
19 beyond a reasonable doubt or by clear and convincing
20 evidence that the minor child is likely to suffer serious
21 emotional or physical damage if returned to the birth
22 father. I do not find that clear and convincing evidence
23 exists to find it would in the minor child's best

24 interests to terminate birth father's parental rights
25 and/or award custody of the minor child to Adoptive

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1 Couple.

2 In making this determination, I considered all of the
3 testimony and evidence, including testimony of Adoptive
4 Couple's expert, Bart Saylor. The minor child turned two
5 years old two weeks ago. Dr. Saylor testified that the
6 minor child had bonded to Adoptive Couple. He based this
7 determination on the fact that Adoptive Couple had been
8 the sole caregivers and only parents the child had known
9 since birth. He found that she had been well cared for
10 since birth and was a healthy, little girl whose needs had
11 been well cared for and she seemed very secure with them.

12 He testified that in the short-term, serious
13 emotional harm or damage would likely result if the child
14 were removed from Adoptive Couple. However, it was not
15 his opinion beyond a reasonable doubt that the child would
16 be seriously harmed or damaged if the child were returned
17 to birth father's custody.

18 He testified, in the short-term, it would be
19 traumatic to her. However, he could not render an opinion
20 what the long-term effect would be to the minor child if
21 she were returned to her birth father.

22 Specifically, he testified that children are
23 generally resilient. He also testified that his
24 experience in "bonding evaluations" was limited and that
25 he had never previously conducted a bonding evaluation

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1 regarding an Indian child. Moreover, he did not perform
2 any type of evaluation or interview with birth father.

3 Next, even if ICWA does not apply, I find that birth
4 father's consent to the adoption was necessary, and he has
5 not consented to this adoption. I find that he was a
6 "thwarted father" as that term is defined in Abernathy
7 versus Baby Boy and subsequent cases interpreting
8 Abernathy and further defining a "thwarted father". I
9 make this finding on the fact that birth mother and birth
10 father were engaged at the time the child was conceived.
11 Instead of shirking his responsibilities, he implored
12 birth mother to move the wedding date forward.

13 He wanted and offered to birth mother for her to move
14 with herself, and her two children from a previous
15 relationship, into his base housing. He wanted her to
16 avail herself of the benefits to which both she and the
17 minor child were entitled as military dependents.

18 Still to this day, he does not know why birth mother
19 terminated the engagement. He attempted to contact her on
20 numerous occasions during her pregnancy, and she denied
21 his attempts. He knew generally when the child was due,
22 but birth mother did not advise him as to when she went to
23 deliver the child.

24 Moreover, she strictly guarded her privacy while at
25 the hospital and immediately turned the child over to

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1 adoptive parents in the delivery room. Birth father went
2 by her home and heard people inside, but birth mother

3 refused to come to the door. Birth father's family
4 attempted to provide birth mother with essentials for the
5 minor child, but she refused their efforts as well.

6 Adoptive mother testified that she had contact and
7 established a relationship with birth mother as early as
8 June, 2009, and Adoptive Couple paid some of her living
9 expenses prior to the birth of the child, including rent,
10 car payments, and utilities. There is no indication in
11 the record that birth mother or the infant child had
12 pre-birth or birthing medical expenses that needed to be
13 paid by anyone. Clearly, when the minor child was
14 released from the hospital in the custody of adoptive
15 parents, birth mother was not seeking, nor did she need
16 assistance, financial or otherwise, from birth father.

17 Also, adoptive parents were not seeking any type of
18 support or contact from birth father. As they have had a
19 right to do so, they have maintained the privacy and
20 confidentiality of their identity throughout these
21 proceedings. Prior to being served with the lawsuit
22 papers, birth father had no idea his child was in the
23 custody of adoptive parents and no support was ever sought
24 by them for the child.

25 I do not find birth mother's testimony credible as to
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1 any type of assistance she may have sought -- she may have
2 sought from birth father. To the contrary, I find that it
3 was her desire, and she made active efforts, to have no
4 contact whatsoever with birth father and herself and birth
5 father and the minor child prior to or after the birth of

6 the minor child. I find it credible to believe that birth
7 mother so wanted to limit the contact between her and
8 birth father that she sought out the adoption option so
9 that birth father would have no reason to be in her life.

10 Also important to me in the "thwarted father"
11 analysis is the fact that birth father was an active duty
12 service member whose ability to move freely about was
13 severely limited prior to the birth of the child. As to
14 the evidence and testimony related to birth father
15 agreeing to "sign his rights away," I find that birth
16 father believed that in making this statement, all he was
17 agreeing to was allowing birth mother to have sole custody
18 of the child. I do not find birth mother's testimony
19 credible that birth father did not want to pay child
20 support for his child.

21 Though Adoptive Couple did not specifically plead any
22 of the statutory grounds for termination of birth father's
23 parental rights, these matters were argued, both at trial
24 and in post-trial briefs. The Adoptive Couple argued that
25 termination of birth father's parental rights should occur
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1 based upon his failure to visit and failure to support. I
2 do not find that Adoptive Parents have established by
3 clear and convincing evidence that birth father's parental
4 rights should be terminated based upon his failure to
5 visit or support for a period in excess of six months.

6 Within days of birth, the child was removed from
7 Oklahoma and taken to South Carolina. Upon his learning

8 of this fact, birth father immediately instituted legal
9 proceedings to obtain custody of his child.

10 The child was four months old when birth father
11 instituted legal proceedings to gain custody of his child.
12 At that time, he paid large sums of money in attorney
13 fees, and upon his return from Iraq, he began paying child
14 support, which is currently being held in trust for the
15 child.

16 I do not believe that Adoptive Couple would have ever
17 granted birth father visitation rights. At a deposition
18 in this matter, birth father did request to see the child.
19 Predictably, his requests were denied.

20 Parental rights are fundamental rights that are --
21 that are to be protected. I find that birth father is a
22 fit and proper person to have custody of his child. He
23 has demonstrated that he has the ability to parent
24 effectively, based upon his relationship with his other
25 daughter. He has demonstrated his love and commitment to
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1 this child by instituting proceedings to gain custody of
2 his child. However, when parental rights and the best
3 interests of the child are in conflict, the best interests
4 of the child must prevail. In this case, I find no
5 conflict in the two. The best interests of the child are
6 protected by not terminating father's parental rights.

7 Though Adoptive Couple have had this child in their
8 care for two years, a child is not property, and the right
9 to custody cannot ripen simply by virtue of the passage of
10 time. Custody and parental rights cannot be gained by

11 adverse possession.

12 Adoptive mother testified that it was clear to her
13 when the child was four months old that birth father
14 wanted his child and that issues related to the child's
15 status as a Native American had arisen and the adoption
16 would be contested.

17 I find that it is in the minor child's best interest
18 to not terminate the parental rights of birth father, and
19 it is in her best interest for custody of her to be with
20 her birth father.

21 I have no doubt that the adoptive parents love this
22 child and could provide a safe and loving home for this
23 child. I believe that removal will be difficult for
24 Adoptive Couple and the minor child, and I have not taken
25 this matter lightly.

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1 As to when to return the minor child, I find based on
2 the evidence and testimony before me that her interests
3 will best be served by a quick and immediate vesting of
4 custody with the birth father, Dusten Brown, and am
5 issuing a written order today that requires her return to
6 the birth father on October 15th at 1:00 p.m.

7 As to the assessment of attorneys' fees and Guardian
8 ad Litem fees; first, as it relates to the parties'
9 attorneys' fees: In deciding whether to award attorney's
10 fees, the family court should consider the following: (1)
11 each party's ability to pay his or her own fee; (2) the
12 beneficial results obtained by the attorney; (3) the

13 parties' respective financial conditions; and (4) the
14 effect of the fee on each party's standard of living.

15 In considering those factors, I do not find it
16 appropriate to award any of the parties attorney's fees in
17 this action.

18 As to Guardian ad Litem fees and attorney fees for
19 the Guardian ad Litem, I find them to be reasonable, and I
20 find that adoptive parents and defendant birth father
21 should bear these equally. I further find that any sums
22 being held in trust as child support should first be
23 applied to the Guardian ad Litem and attorney for Guardian
24 ad Litem fees, and thereafter, the balance divided equally
25 between adoptive parents and defendant birth father.

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1 In summary, I find that adoptive parents have failed
2 to meet their burden of proof, and it would not be in the
3 best -- in the minor child's best interests to
4 terminate -- to terminate birth father's parental rights.

5 I am today issuing a bench order related to custody
6 only. This bench order reads: This matter was heard by
7 me in Charleston County, and at the request of all
8 parties, they were allowed to submit post-trial briefs and
9 the matter scheduled to be reconvened today, September
10 29th, in Jasper County, South Carolina, for the purpose of
11 me rendering my decision.

12 I have rendered my decision from the bench and am
13 requesting that a formal written order follow. Pending
14 the signing of the more detailed written order, I find
15 that it is in the best interest of Baby Girl for this

16 bench order -- this bench order to be issued, ordering
17 that custody of Baby Girl be given to her birth father,
18 Dusten Brown, at 1:00 p.m. on Saturday, October 15th,
19 2011.

20 It is, therefore, ordered, adjudged, and decreed that
21 Adoptive Couple shall relinquish custody of Baby Girl to
22 Dusten Brown at 1:00 p.m. on Saturday, October 15th, 2011.

23 If Adoptive Couple and Dusten Brown are unable to
24 agree on a location for the custody exchange, it shall
25 take place in front of the Charleston County Courthouse,
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1 located at 100 Broad Street, Charleston, South Carolina.

2 Is there anything I have not covered or anything
3 about which you don't understand?

4 MS. JONES: No, ma'am.

5 THE COURT: Ms. Jones, I would ask that you prepare a
6 written order consistent with my rulings. Forward it to
7 opposing counsel. Mail it to me. And I would also ask
8 that you E-mail it to me in Word Format so that I can make
9 any corrections or additions that I feel are necessary.

10 This concludes these proceedings.

11 (END OF REQUESTED TRANSCRIPT OF RECORD.)

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1 CERTIFICATE OF REPORTER

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4 STATE OF SOUTH CAROLINA)

5)

6 COUNTY OF CHARLESTON)

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9 I, Ronda T. Cummings, Official Court Reporter for the
10 Judicial Department of the State of South Carolina, do
11 hereby certify that the foregoing is a true, accurate and
12 complete Transcript of Record of the proceedings had and
13 evidence introduced in the trial of the captioned case,
14 relative to appeal, in the Family Court for Charleston
15 County, South Carolina, on the 29th day of September,
16 2011.

17 I do further certify that I am neither of kin,
18 counsel nor interest to any party hereto.

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September 29, 2011

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Ronda T. Cummings, CVR
Official Court Reporter