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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

IN THE MATTER OF THE ADOPTION OF: C.D.K, A Minor Child	**Case No. _____** **PETITION TO INVALIDATE ADOPTION AND, IN THE ALTERNATIVE, TO VACATE ADOPTION** [Indian Child Welfare Act]

Petitioner, B. J. N., the biological mother of C. D. K., by and through counsel Paul Tsosie of TSOSIE & HATCH, LLC. brings this action pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (hereinafter "ICWA"), to invalidate the illegal voluntary termination of parental rights of Petitioner to C. D. K., hereinafter the minor child, under Section 1914 of ICWA, and in the alternative, to vacate the illegal adoption of the minor child by Sunny and Joshua Ketchum under Section 1913(d) of ICWA.

JURISDICTION

1. This Court has original jurisdiction to hear this complaint and to adjudicate the claims stated herein under 25 U.S.C. § 1914 and 28 U.S.C. §1331, this action being brought under §§ 1914 and 1913(d) of the Indian Child Welfare Act, as amended, to invalidate the

voluntary termination of parental rights of Petitioner to C. D. K., or in the alternative, to vacate the adoption of C. D. K. by Sunny and Joshua Ketchum.

VENUE

2. Venue is proper in the United States District Court for the State of Utah, pursuant to Title 28 U.S.C. 1391 (b) because many of the parties, including the Petitioner, C. D. K., and Sunny and Joshua Ketchum reside in this District and the practices violative of ICWA described herein occurred in this District.

STANDING

3. Under Section 1914 of ICWA, a Petition to Invalidate may be brought by the Indian child, the parent(s), or the custodian from whom the custody of the minor was last removed, or the child's tribe. Under Section 1913(d) of ICWA, the parent of the Indian child may petition the court to vacate a final decree of adoption of the child. Therefore, Petitioner, as the biological mother of C. D. K., has standing to bring this action.

PARTIES

4. **The Petitioner.** Petitioner, B. J. N., is the biological mother of C. D. K. Petitioner's maternal grandmother, [redacted] Cherokee Nation Membership [redacted] and C. D. K.'s maternal great grandfather, [redacted] CN Membership [redacted] are both members of the Cherokee Nation, making C. D. K. a direct descendant of an enrolled member and therefore, a member of the tribe for 240 days after his birth under Section 5A of the Cherokee Nation Membership Act.

5. **Sunny and Joshua Ketchum.** Sunny and Joshua Ketchum are the adoptive parents in the above-entitled matter. Both Sunny and Joshua Ketchum are non-Indians in that neither are enrolled or eligible for membership in a federally recognized Indian tribe. Sunny and Joshua Ketchum had reason to believe that C. D. K. might be an Indian Child at the time of the adoption pursuant to ICWA, however, they failed to inquire of the Cherokee Nation whether ICWA applied to the above-entitled case, therefore rendering the proceedings invalid and illegal.

6. **The Cherokee Nation**. The Cherokee Nation is a federally recognized Indian tribe located in Tahlequah, Oklahoma. Although the Cherokee Nation is not yet a party to this action, it has indicated its intent to intervene upon the filing, or soon thereafter, of this Petition.

FACTUAL BACKGROUND

6. Petitioner gave birth to C. D. K. in 2007, in Salt Lake City, Salt Lake County, Utah.

7. Section 5A of the Cherokee Nation Membership Act states that a child who is the Direct Descendent of an Original Enrollee of the Tribe shall be automatically admitted as a member of the Cherokee Nation for 240 days following the birth of the child.

8. Petitioner's maternal grandmother, [redacted] and C. D. K.'s maternal great grandfather, [redacted] are both members of the Cherokee Nation, therefore automatically making C. D. K. an enrolled member of the Cherokee Nation. Thus C. D. K. is clearly an Indian child pursuant to Section 1903 of ICWA.

9. Sunny and Joshua Ketchum and the Second District Court, State of Utah, Farmington District, failed to inquire of the Cherokee Nation as to the eligibility or status of C. D. K., although they had reason to believe that an Indian Child was involved in the proceedings.

10. The Cherokee Nation was never notified of any proceedings, including the initial placement, voluntary termination of parental rights, the filing of the adoption and the finalization of the adoption. Therefore, the Cherokee Nation did not have the opportunity afforded it under ICWA Section 1911(b) and (c) to make a motion to intervene in the proceedings or make a motion to transfer jurisdiction to tribal court.

11. Sunny and Joshua Ketchum intentionally and calculatedly never left the Petitioner to be alone with her biological child, [redacted] after his birth, even at the hospital.

12. Sunny and Joshua Ketchum told the Petitioner that she had to terminate her rights on the day after C. D. K. was born. The Petitioner and the Petitioner's mother asked to terminate at a later date, but were informed by Sunny and Joshua Ketchum and their attorney that that day was the only day available. The attorney for Sunny and Joshua Ketchum informed the Petitioner that she needed to terminate her rights that day because it had been a difficult day.

13. The attorney for Sunny and Joshua Ketchum showed the termination papers to the Petitioner only moments before the termination. The Petitioner stated that she did not understand the termination papers, the attorney did not explain them to her, and the Ketchum's attorney pushed forward with the proceedings.

14. Prior to the termination, the Petitioner also asked the attorney for Sunny and Joshua Ketchum if she needed to consult with an attorney before terminating her parental rights

because she did not understand the paperwork. The attorney informed her that she did not need to consult with an attorney to explain the paperwork or to represent her at the termination proceeding.

15. Sunny and Joshua Ketchum, and their attorney, continually represented to the Petitioner that this adoption would be an open adoption. Specifically, the Ketchums and their Counsel promised Petitioner to frequently provide Petitioner with pictures, updates, letters and allow Petitioner monthly contact with the C. D. K. Petitioner stated that an open adoption would be the only type of adoption to which she would consent. To date, Sunny and Joshua have provided only a few letters and pictures to Petitioner and rarely allow Petitioner contact with C. D. K.

16. Sunny and Joshua Ketchum were represented by legal Counsel when they agreed to an open adoption, although open adoptions are not enforceable under Utah law, and henceforth illegal. Although open adoptions are not valid in Utah and the Ketchums were represented by Counsel, they still assured the Petitioner it would be an open adoption. Petitioner was not represented by Counsel and had no way of knowing that open adoptions were not valid in Utah.

17. After receiving assurances that the adoption would be an open adoption, the Petitioner gave her voluntary termination and consent to the adoption in the Second District Court one day after the birth of C. D. K.

18. The Petitioner was not represented by Counsel at the termination. She did not understand the document, and upon information and belief neither the Second District Court nor

the attorney for Sunny and Joshua Ketchum inquired as to whether she understood what she was signing.

19. Upon information and belief, the Second District Court did not issue a certificate that the terms and consequences of the consent were fully explained and understood by Petitioner and that she understood the English language.

20. Upon information and belief, the adoption was finalized in the Second District Court for Davis County, State of Utah, Case Number 072700191 before the Honorable Judge Page. Neither the Petitioner nor the Cherokee Nation received notice of the finalization.

NATURE OF CASE

A. APPLICABILITY OF ICWA

21. C. D. K. is an "Indian Child" pursuant to Section 1903 of the Indian Child Welfare Act. Both Sunny and Joshua Ketchum and the Honorable Judge Page of the Second District Court had reason to know that an Indian child was involved in the voluntary termination of parental rights proceeding that occurred one day after C.D.K. was born. Neither Sunny and Joshua Ketchum nor the Honorable Judge Page of the Second District Court, inquired with the Cherokee Nation as to the status of C. D. K. as an Indian child. Had they done so, the Cherokee Nation would have promptly informed them that C.D.K. was, and still is, a member of the Cherokee Nation under Section 5A of the Cherokee Nation Membership Act, and that as a result, ICWA applied to the voluntary termination of parental rights proceedings as well as the adoptions proceedings.

22. ICWA offers both procedural and substantive guidelines governing the "removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests" and cultural heritage of Indian children and to "promote the stability and security of Indian tribes." The Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963, § 1901(3)). Congress made the intent behind ICWA clear when it stated that "the states exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." H.R. Rep. No. 95-1386, at 21. "The most important provisions of the ICWA are those setting forth minimum standards for the placement of Indian children in state courts and providing procedural safeguards to insure that parental rights are protected." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 56 (1989). To demonstrate the importance Congress has placed on these procedures and the preference for keeping Indian children with their families, it is policy that "the Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines, and nay state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in *favor of a result that is consistent with these preferences*." 44 Federal Register 228 (1979)(A)(1) (*emphasis added*).

22. Because both Sunny and Joshua Ketchum and the Second District Court failed to inquire as to the applicability of ICWA, the Second District Court did not apply ICWA to the termination and adoption proceedings. By their actions, the Ketchums and the Second District

Court undermined the intent of Congress to keep Indian families together. Therefore, all parties, including the Petitioner, C. D. K., and the Cherokee Nation were not afforded the rights and protections available under ICWA.

a. Section 5A of the Cherokee Nation Membership Act provides for the temporary automatic membership of newborn children who are the direct descendant of an original enrollee of the Tribe. The section was enacted "for the purpose of protection of the rights of the Cherokee Nation under the Indian Child Welfare Act." Section 5A provides that "every newborn child who is a Direct Descendant of an Original Enrollee shall be automatically admitted as *a member of the Cherokee Nation* for a period of 240 days following the birth of the child. No request or application for Tribal membership or other documentation need be submitted or delivered to the Registrar as a prerequisite to the temporary Tribal Membership of a child under this Section. Such temporary Tribal Membership shall be effective automatically from an[d] after the birth of the child for all purposes although the name of the child is not entered on the Cherokee Register." (*emphasis added*). See Attachment.

b. The Cherokee Nation did not find out about the proceedings until after the adoption was finalized. Upon finding out about the proceedings involving the Petitioner and C. D. K., the Cherokee Nation promptly issued a letter stating that "the Indian Child Welfare Program has examined the tribal records and [C. D. K.] will be determined an 'Indian child' in relation to the Cherokee Nation as defined in 25 U.S.C. section 1901 et seq., of the Federal Indian Child Welfare Act." See Attachment.

c. Indian tribes have inherent authority to determine their own memberships and such determinations are binding on the federal and state governments. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The Bureau of Indian Affairs Guidelines for State Courts regarding Indian Child Custody Proceedings states that a tribal determination of membership is conclusive. Department of Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. No. 228, 67584, 67586, B.1(b)(i) (Nov. 26, 1979).

d. Such a conclusion is also entitled to full faith and credit under Section 1911(d) of ICWA, which states that "The United States, every State . . . shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings . . ."

e. ICWA applies to any "child custody proceeding" involving an "Indian child." The current case is a child custody proceeding involving an Indian child, therefore ICWA applies to the above-entitled case.

f. Section 1903 of the Indian Child Welfare Act states that an "Indian child" means "any unmarried person who is under age eighteen and . . . a member of an Indian tribe." Since C. D. K. is a member of the Cherokee Nation under Section 5A of the Cherokee Nation Membership Act, he is an "Indian child" pursuant to ICWA.

g. Section 1903 of ICWA defines "child custody proceeding" as any "'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship;" and "'adoptive placement' which shall mean the

permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." Because this proceeding involved a termination of parental rights and an adoptive placement, it is a "child custody proceeding" under ICWA.

h. Thus, it is clear in this case that ICWA applies and should have been complied with. In other words, Congress intended for the Petitioner, the Indian child and the Cherokee Nation to be afforded substantive and procedural rights in this case:

> Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources [and] ...that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe[.]

Id. at § 1901.

B. INVALIDATION

23. Petitioner petitions this court to invalidate the voluntary termination of her parental rights over her biological child, C. D. K. pursuant to Section 1914 of ICWA because the action of voluntary termination of her parental rights over C. D. K. violated Sections 1911 and 1913 of ICWA. Section 1914 of ICWA allows an Indian Child's parent to petition any court of competent jurisdiction to invalidate and requires a court to invalidate an action for the termination of parental rights "upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of ICWA." 25 U.S.C. § 1914.

a. Petitioner is the biological mother of C. D. K., who was born in 2007, in Salt Lake City, Salt Lake County, Utah.

b. The voluntary termination of parental rights in the above-entitled case occurred without adherence to the procedural and substantive mandates of ICWA, which sets out requirements and procedures for the voluntary termination of parental rights over an Indian child. Such requirements *must* be followed or a court is required to invalidate an action for the termination of parental rights. ICWA at § 1914.

c. The requirements for a voluntary termination of parental rights are as follows. Section 1913(a) of ICWA provides that where any parent voluntarily consents to a termination of parental rights, "such consent *shall not* be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood." Section 1913(a) further provides that "[a]ny consent given prior to, or within ten days after, birth of the Indian child shall not be valid." Section 1913(a) was violated in this case. Therefore, the Petitioner's consent was *not* valid under ICWA.

e. Under Section 1911, "the Indian child's tribe shall have the right to intervene at any point in the proceeding." Because the Cherokee Nation did not receive

any type of notice regarding the proceeding, it was not aware of the proceeding and did not have an opportunity to intervene.

f. Also under Section 1911 of ICWA the United States and every State "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings. A violation of Section 1911 occurred when the Second District Court did not give full faith and credit to Section 5A of the Cherokee Nation Membership Act ("Section 5A") which provides for the temporary automatic membership of newborn children who are the direct descendant of an original enrollee of the Tribe. Because the Second District Court did not give full faith and credit to Section 5A, it assumed that ICWA did not apply and therefore, the parties were not afforded the protections of ICWA, as required under the statute.

h. As detailed above, Sections 1911 and 1913(a) of ICWA were violated in the proceedings regarding the voluntary termination of Petitioner's parental rights over C. D. K. Section 1914 requires a court to invalidate an action for the termination of parental rights "upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of ICWA. Therefore, voluntary termination should be invalidated.

C. VACATION OF ADOPTION

24. In the alternative, Petitioner petitions this Court to vacate the final decree of adoption in the above-entitled case under Section 1913(d) of ICWA because Petitioner's consent to such adoption was obtained through fraud, coercion and duress. Section 1913(d) states that "After the entry of a final decree of adoption of an Indian child in any State court, the parent may

withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. . ."

a. Sunny and Joshua Ketchum agreed to an open adoption and promised Petitioner to frequently provide Petitioner with pictures, updates, letters and allow Petitioner monthly contact with the C. D. K.

b. To date, Sunny and Joshua have provided only a few letters and pictures to Petitioner and rarely allow Petitioner contact with C. D. K.

c. Sunny and Joshua Ketchum were represented by Counsel when they agreed to an open adoption, although open adoptions are not recognized in Utah. Even though the Ketchums were represented by Council and should have known that open adoptions are illegal in Utah, Sunny and Joshua Ketchum still assured the Petitioner it would be an open adoption. Petitioner was not represented by Counsel and had no way of knowing that open adoptions were not valid.

d. Based upon the above-stated assurances of Sunny and Joshua Ketchum that the adoption would be open and that she would have contact with C. D. K. and receive frequent letters, pictures and updates, Petitioner gave her consent to the adoption and voluntarily terminated her rights the day after the child was born.

e. Sunny and Joshua Ketchum fraudulently induced the Petitioner to voluntarily terminate her rights over C. D. K. by telling her that the adoption would be an open adoption, even though open adoptions are not recognized in Utah and they were

represented by Counsel. Further, they have provided only a few pictures and letters and have allowed only minimal correspondence between the Petitioner and C. D. K., although they promised frequent contact and monthly visits. The Petitioner relied on Sunny and Joshua Ketchum's assurances of an open adoption when she terminated her parental rights and consented to the adoption.

f. The Petitioner was under duress and felt coerced at the time she consented to the adoption and the voluntary termination of her parental rights.

g. Sunny and Joshua Ketchum rarely or never left the Petitioner alone with her biological child, C. D. K., even at the hospital. This denied the Petitioner her right to be alone with her child and make a final decision as to whether she wanted to terminate her parental rights and consent to an adoption.

h. The Petitioner signed a document, which upon information and belief, was a discharge document for the child allowing C. D. K. to be released Sunny and Joshua Ketchum, while the Petitioner was in the hospital and heavily medicated. Because she was on medications at the time, Petitioner does not remember what she signed, however, the document she signed denied her the right to take her biological son home from the hospital and allowed Sunny and Joshua Ketchum to do so.

i. Sunny and Joshua Ketchum told the Petitioner that she had to terminate her rights the day after C. D. K. was born. The Petitioner and the Petitioner's mother asked to terminate at a later date, but were informed by Sunny and Joshua Ketchum or their attorney that the day after C.D.K. was born was the only day available. The

attorney for Sunny and Joshua Ketchum informed the Petitioner that she needed to terminate her rights that day and quickly because it had been a difficult day. As such, the Petitioner felt forced and coerced into terminating her rights.

j. The Petitioner was not represented by Counsel at the termination. She did not understand the termination and consent document. The Petitioner informed the opposing attorney that she did not understand the documents, yet he did not explain them to her. When she asked if she should secure an attorney to assist her in the matter, the attorney for Sunny and Joshua Ketchum stated that she did not need to secure an attorney.

k. Upon information and belief neither the Court nor the attorney for Sunny and Joshua Ketchum inquired diligently as to whether she understood what she was signing. The Petitioner felt confused and felt like she had to sign the document because the Court instructed her to do so.

l. Upon information and belief, the Court did not issue a certificate that the terms and consequences of the consent were fully explained and understood by Petitioner and that she understood the English language.

m. Because consent to the adoption and voluntarily termination of parental rights was obtained by coercion, fraud and duress, the court is required to vacate the final decree of adoption and return C. D. K. to the Petitioner under Section 1913(d) of ICWA.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays:

A. That the Petitioner's voluntary termination of parental rights over her biological child C. D. K. be invalidated under Section 1914 of the Indian Child Welfare Act and that [redacted] be immediately returned to Petitioner's custody.

B. That, in the alternative, the adoption of C. D. K. by Sunny and Joshua Ketchum be vacated pursuant to Section 1913(d) of the Indian Child Welfare Act and that [redacted] be immediately returned to Petitioner's custody.

Dated this 25 day of June, 2008

Paul Tsosie
Attorney for Petitioner