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Navajo Grandparents - Parent or Stranger - A Child Custody Determination

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NAVAJO GRANDPARENTS—"PARENT" OR "STRANGER"—A CHILD CUSTODY DETERMINATION

On September 9, 1976 the New Mexico Court of Appeals, in *Adoption of Doe*,[1] affirmed a decision of the Bernalillo County District Court granting the adoption of a Navajo child to Caucasian petitioners. In reaching this decision the court applied the best interests of the child doctrine and considered the mother's wishes, the father's abandonment, and the fitness of the individuals seeking custody.

The awarding of custody of this three year old Navajo boy to a Caucasian couple by the New Mexico courts follows a national trend of removing Indian children from their native environment and placing them in non-Indian homes.[2] This casenote will review the judicial development of child custody determinations, will discuss the best interests of the child doctrine and how it can be applied when minority children are before the court for custody placement, and will review the decision of the New Mexico Court of Appeals in *Adoption of Doe*.

THE FACTS

The child in *Adoption of Doe*[3] was born to full-blooded, unwed Navajos. He lived off the reservation in Gallup with his mother and maternal grandfather and only briefly with his father.[4] The child's grandfather assumed most of the responsibilities for raising the boy and "provided in his own house for the care, custody and control, shelter, food and clothing of the child."[5]

On March 17, 1975 the mother placed the child with petitioners, Chaparral Home and Adoption Services, and expressed the desire that her son be placed with a non-Indian family. Chaparral placed the child with a Caucasian couple, co-petitioners John and Mary Doe, who two months later filed for adoption. At that time the grandfather filed a writ of habeas corpus for custody of the child. The

1. 89 N.M. 606, 555 P.2d 906, *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).
2. McCartney, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 Colum. Human Rts. L. Rev. 529, 529 (1976).
3. 89 N.M. at 612, 555 P.2d at 912.
4. *Id.* at 612, 555 P.2d at 912.
5. *Id.* at 613, 555 P.2d at 913.

district court dismissed the writ and the grandfather appealed. The child's father also appealed in his own behalf.[6] The court of appeals affirmed the trial court and granted the adoption petition.[7]

CHILD CUSTODY AWARDS

All custody controversies can be classified as one of three types: parent-parent, parent-stranger, and stranger-stranger. Under the English common law awards of custody in parent-parent conflicts were made to the father and children were considered as little more than chattels.[8] Viewing children as chattels created the necessary property right to allow the matter to be heard before the chancellor in equity. These children became wards of chancery and the crown acted as *parens patriae,* parent of the country, in aid of the minors.[9] A mother had no legal right to her children whatsoever unless they were illegitimate.[10] Parliament gradually recognized a mother's rights to custody of her children and in 1925 the Guardianship of Infants Act gave equal rights to the mother and father.[11]

In the United States a mother and father have always had equal rights to custody of their legitimate children but the mother has been given custody of any illegitimate children.[12] In most instances in a parent-parent controversy the mother has been preferred over the father in custody awards of small children.[13]

A traditional approach in deciding custody in parent-stranger conflicts has been the parental preference rule which "creates a presumption that the natural parent is preferred over strangers."[14] Strangers are everyone other than the child's biological parents even though they may have had physical custody of the child for an extended period of time.

The New Mexico Children's Code defines legal custody as

> a legal status created by the order of a court or tribunal of com-

6. *Id.* at 611, 555 P.2d at 911.

7. *Id.* at 622, 555 P.2d at 922.

8. Project, *California Custody Awards to Non-Parents: A View of Civil Code Section 4600,* 2 Pepperdine L. Rev. 458 (1975). "In *In Re Campbell,* 130 Cal. 380, 62 P. 613 (1900), '[u]nder the general law . . . the father has a natural right to the care and custody of his child. . . . [T]he right of custody is essentially the same as the right of property. For though the subject of the right is not saleable, it is valuable and of all species of property the most valuable to the parent.' " *Id.* at 459.

9. *In Re Santillanes,* 47 N.M. 140, 147, 138 P.2d 503, 507 (1943).

10. 15 AM. JUR. *Proof of Facts,* § § 1, 3 (1964).

11. *Id.*

12. *Id.* at 4.

13., Foster & Freed, *Children and The Law,* 2 Fam. L.Q. 40, 41 (1968).

14. Hunter, *Child Custody–Rebutting the Presumption of Parental Preference,* 43 MISS. L.J. 247 (1972).

> petent jurisdiction that vests in a person the right to have physical custody of the child, the right to determine where and with whom he shall live, the right and duty to protect, train and discipline the child and to provide him with food, shelter, education and ordinary medical care . . .[15]

New Mexico, as well as other jurisdictions, has traditionally acted in its *parens patriae* role,[16] as guardian of all the state's children. "(D)ependent and neglected children are placed under the jurisdiction and control of the district court, and the right of possession as between the two litigants does not preclude the district court from exercising its jurisdiction by making the child its ward . . ."[17] Children who are delinquent, neglected, or in need of supervision become wards of the court, as do those placed in foster homes.[18]

> Children are presumed to be incomplete beings who are not fully competent to determine and safeguard their interests. They are . . . in need of direct, intimate, and continuous care. . . . The state seeks to assure each child membership in a family with at least one such adult whom the law designates 'parent'.[19]

In New Mexico where one party is a parent and the other a stranger, a parental right is found to be a *prima facie*, but not an absolute, right.[20] Former custody alone is insufficient to establish a *prima facie* right when the custodian was not a parent.[21] Moreover, courts have held that when a mother with custody dies, custody does not automatically revert to the father, and custodial rights descend to no one.[22]

The New Mexico Department of Human Services has tried to avoid placing Indian children in Anglo-American homes. Unfortunately this is not always possible due to the scarcity of minority families willing

15. N.M. Stat. Ann. §32-1-3J (1978).

16. Ettinger v. Ettinger, 72 N.M. 300, 383 P.2d 261 (1963).

17. N.M. Dept. of Public Welfare v. Cromer, 52 N.M. 331, 334, 197 P.2d 902, 902 (1948).

18. N.M. Stat. Ann. § 32-1-9 (1978).

19. J. Goldstein, A. Freud, A. Solnit, Beyond The Best Interests of The Child, 3 (1973).

20. Shorty v. Scott, 87 N.M. 490, 535 P.2d 1341 (1975). In *Shorty*, the natural mother wanted custody of her child. Respondent was the child's maternal grandmother who had temporary custody of the child. The court favored the parental right doctrine and held that a parent who can care for the child, wants to do so, and who has not been found unfit is entitled to custody against the grandparents and others who have no permanent or legal right to custody. *Id.* at 493, 535 P.2d at 1344.

21. Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968). In *Roberts*, the child's maternal grandparents sought custody with a writ of habeas corpus. The court denied the writ and held that the grandparents had no natural or inherent right to custody of the child merely because they had had former custody. Former custody was not enough to establish a *prima facie* right. *Id.* at 300, 442 P.2d at 790.

22. State v. Marshall, 58 N.M. 286, 270 P.2d 702 (1954).

and able to adopt. Sometimes such scarcity necessitates long waits for child placement or placement with families of a different minority than the child they are adopting.[23]

INDIAN CUSTOM

In the Navajo culture custody traditionally lies with grandparents as well as parents.[24] A conflict similar to the one in *Adoption of Doe* is not a stranger-stranger controversy. "A Navajo feels himself a part not only of his immediate biological family, but also what has been called his 'extended' family. This consists of his mother's family and his father's family, reaching far beyond the easily recognized degrees of relationship. . . ."[25]

> The extended family supplements the nurture and the instruction given by the parents. A child is surrounded by a varied assortment of kin in an extended camp and some of these will oversee the child if his mother is doing chores, or if she needs help for some other reason. In the case of the death of either parent or of divorce, the extended family cushions the disruption of family life for the child.[26]

Extended kinship is not unique to the Navajos but can be found in almost all American Indian tribes.[27] Many state courts, confronted with a conflict in classifying the status of an Indian grandparent, have resolved such cases on a jurisdictional basis. When the child is domiciled on the reservation, tribal law governs and the categorization, according to tribal custom, is closer to a parent-stranger controversy because grandparents are afforded "parent" status. If the child lives off the reservation, state law is determinative and the case is decided upon a stranger-stranger basis.

In *Wisconsin Potowatomies of the Hannahville Indian Community v. Houston,*[28] the tribe was allowed to retain custody of three orphaned children because the children were tribal members and the court ruled that the matter was a tribal affair. In *In re Adoption of Buehl*[29] a Washington court lacked jurisdiction to adjudicate a

23. For the year ending July, 1977, thirteen Indian or part Indian children were placed for adoption. Three went to Indian families, six to Anglo families, one to a Spanish-Anglo family, two to Indian-Anglo families, and one to an Indian, Black-Anglo family. Telephone interview with Heidi Illanes, Adoption Services, Department of Human Services, Santa Fe, New Mexico (Jan. 4, 1977).

24., A Leighton & D. Leighton, The Navajo Door (1944).

25. *Id.* at 22.

26. M. Shepardson & B. Hammond, The Navajo Mountain Community 122 (1970).

27. McCartney, *supra* note 2, at 534.

28. 393 F. Supp. 719, 734 (W.D. Mich. 1973).

29. 87 Wash. 2d 649, 555 P.2d 1334 (1976). In *Buehl* the mother and the child were Blackfoot Indians enrolled as members of the tribe. The court ruled that it had no jurisdiction over the case as the Blackfoot reservation was outside the state.

matter involving an out-of-state tribe. An Oregon court exercised jurisdiction over Indian children who were not domiciled on a reservation.[30] The State of Washington assumed civil and criminal jurisdiction over the Quinault Indians pursuant to a gubernatorial proclamation.[31] Recently, an Alaskan court took jurisdiction of a child custody dispute between parents because the mother lived in Juneau.[32]

The trend appears to be cultural dilution for those Indians who choose to live outside reservation boundaries.[33] Within the reservation, tribal customs guide the governing council. Outside the reservation, state law is applied. The courts are, in essence, saying to the American Indian that a home outside the reservation implies assimilation. Perhaps Indians who live off the reservation are indeed assimilated and have chosen to live within the Anglo-American mainstream by their act of moving off the reservation. Perhaps it is the very existence of Indian reservations, and tribal jurisdiction over them, that has enabled the American Indian who remains on the reservation to retain his identity more thoroughly than those of other minority groups and to pass that identity on to his children.

THE BEST INTERESTS OF THE CHILD DOCTRINE

Today, virtually every jurisdiction including New Mexico follows the best interests of the child doctrine when deciding child custody controversies.[34] Concern for the child's psychological and material

30. *In re* Greybull, 23 Ore. A. 674, 543 P.2d 1079 (1975). In *Greybull* the court never considered the question of whether the children would be best raised by an Indian family, particularly the paternal grandparents, but merely removed the children from their mother, whom the court deemed unfit because of alcoholism.

31. Comenout v. Burdman, 84 Wash. 2d 192, 525 P.2d 217, *appeal dismissed*, 240 U.S. 915 (1974). In this case the tribal council resolved that state jurisdiction should be extended to include the tribe and the reservation. Because of this express desire by the tribe, the governor issued a proclamation giving the state court jurisdiction to temporarily place two Quinault Indian children in a foster home over the objections of the children's parents.

32. Carle v. Carle, 503 P.2d 1050 (Alaska 1972). On appeal *Carle* was reversed and remanded. The trial court statement that "the village way of life is succumbing to the predominant [sic] caucasian, urban society" was found to be an ambiguous and impermissible criterion for child custody. *Id.* at 1054.

33. [T]he American Indian child-welfare crisis is of massive proportions. American Indian families face vastly greater risks of involuntary separation than are typical of society as a whole. Furthermore, most of their children must face the additional adjustment of living in non-Indian environments much different from their own. McCartney, *supra* note 2, at 530.

34. Ettinger v. Ettinger, 72 N.M. 300, 383 P.2d 261 (1963); Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960); *In re* Guardianship of Howard, 66 N.M. 445, 349 P.2d 547 (1960); State *ex rel.* Hockenhull v. Marshall, 58 N.M. 286, 270 P.2d 702 (1954); Bassett v. Bassett, 56 N.M. 739, 250 P.2d 487 (1952); State *ex rel.* Day v. Parker, 55 N.M. 227, 230 P.2d 252 (1950); Cook v. Brownlee, 54 N.M. 227, 220 P.2d 378 (1950); *Ex parte* Pra, 34 N.M. 587, 286 P. 828 (1930).

welfare is implicit in the criteria of best interests.[35] The court looks at many factors: the moral character and the emotional stability of the parties, the age and health of claimants and child, home conditions, religious beliefs, ethnic and racial background, financial advantages, express wishes of the child's parent, personal preference of the child, and stability of the child's environment.[36] The courts recognize the one most likely to meet the child's psychological needs as the "psychological parent."[37] The court looks at the circumstances of each case and to the person who can fill the child's needs and "become his 'psychological parent' in whose care the child can feel valued and wanted."[38] Continuity of surroundings has also been recognized as vitally important to a child's well-being[39] especially when the child is an infant or toddler. "Their attachments, at these ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult."[40]

The best interests doctrine is rarely applied in parent-stranger controversies. It is presumed that a parent will be the best custodian for the child and the stranger has the burden of rebutting that presumption.[41] This only occurs if the parent is found unfit.

When a stranger-stranger conflict arises the best interests doctrine will be used by the courts to determine where custody should lie. The court will look solely to the child's physical, psychological, and emotional health and welfare.

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35. Project, *Alternatives To "Parental Right" in Child Custody Disputes Involving Third Parties,* 73 Yale L.J. 151, 157 (1963).

36. Annot., 30 A.L.R.3d 290, 300 (1970).

> Whenever a court is called upon to determine whether custody of a minor child should be awarded to the grandparent of the child or to some other person (except a parent of the child) or organization, it applies, as in all other cases involving the custody of minor children, the so-called "best interests of the child" doctrine, which stands for the proposition that custody should be awarded in accordance with the best interest of the child regardless of claims based on the particular status or legal relationship of the claimant to the child. This does not mean, however, that, everything being equal, a grandparent will not be favored . . . or that a preferential status is not accorded to the child's guardian or the person in *loco parentis.*

Id. at 299.

37. Whenever [sic] any adult becomes the psychological parent of the child is based on day to day interaction, companionship, and shared experiences. The role can be filled either by a biological parent or by an adoptive parent or by any other caring adult–but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Goldstein, *supra* note 19, at 19.

38. *Id.* at 5.

39. Project, *supra* note 35.

40. Goldstein, *supra* note 19, at 32.

41. Hunter, *Child Custody–Rebutting The Presumption of Parental Preference,* 43 Miss. L.J. 247, 247 (1972).

In *Adoption of Doe* the difficulty arose when the conflict was classified as a stranger-stranger controversy. Navajo custom would classify the parties as parent and stranger. In that case the best interests doctrine would not be applied unless the "parent" was found unfit.

THE COURT'S REASONING

The New Mexico Court of Appeals, in *Adoption of Doe,*[42] placed its emphasis upon the needs of the child. It classified the controversy as a stranger-stranger conflict and applied the best interests of the child doctrine. The court found the grandfather's claim of physical custody without merit since actual physical custody for two months had been with petitioners.[43] The court also determined that "the grandfather had no natural or inherent right to custody of the child"[44] even though Navajo custom and tradition recognizes grandparents as custodians of their grandchildren.[45] The court felt that Navajo custom was subordinate to New Mexico state law because the parties did not reside on the reservation.[46] The court, therefore, did not feel constrained to follow tribal tradition and acknowledge the grandfather's right to custody. In applying the best interests of the child doctrine, moreover, the grandfather was found to be unfit to have custody due to alcoholism.[47] This alcoholism, which allegedly created an unstable home, was the reason the mother gave for placing her son for adoption. The grandfather's frequent absences from home was another factor which contributed to his being found unfit.[48]

The father joined the appeal in an effort to obtain custody of his son for himself. The court held the father's rights negligible because of his earlier abandonment of the child.[49]

The court placed importance upon the mother's express wish that

42. 89 N.M. 606, 555 P.2d 906, *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976).

43. *Id.* at 613, 555 P.2d at 913.

44. *Id.*

45. *Id.*

46. The cases seem to indicate that when the parties are domiciled on the reservation state courts have no jurisdiction, and the issue is to be resolved by tribal council. In Worcester v. Georgia, 31 U.S. 515, 559 (1832), the Court determined that "Indian nations had always been considered as distinct, independent, political communities. . . . The very term 'nation' so generally applied to them, means 'a people distinct from others' " and the Cherokee Nation was determined not to be bound by the laws of Georgia. The care and custody of Indian children was of Indian concern, an internal Indian affair. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), the Supreme Court held that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of that state."

47. 89 N.M. at 614, 555 P.2d at 914.

48. *Id.*

49. *Id.* at 621, 555 P.2d at 921. "We approve the definition of abandonment stated in D.M. v. State, Alaska, 515 P.2d 1234 (1973), '(A)bandonment consists of conduct on the

the child be placed with a Caucasian couple. She had lived with non-Indian relatives for thirteen years and did not identify with the Navajo culture.[50] Having ruled out the father and grandfather, the court determined it was in the best interests of the child to affirm the trial court's grant of petitioner's adoption decree.[51]

CONCLUSION

Because the grandfather was found unfit for custody the New Mexico Court of Appeals never reached the key issue of whether the court would categorize the grandfather's status as that of "parent" or "stranger." If a stranger-stranger classification is made, and the best interests of the child doctrine is applied, the court's responsibility is to the child. Only his needs should be taken into account. The cultural shock of removing a child from one environment and placing him in another unfamiliar one is an important factor to be considered in the best interests doctrine. The weight it is given should depend upon the child's needs, his age, and whether his home had adopted an Anglo-American lifestyle. The contesting parties' interests should always be secondary, for the court, in its role as *parens patriae* should not give weight to their interests in determining adoption placement.

State courts should attempt to apply the best interests of the child doctrine in light of that child's culture. Even though a child is from a minority group threatened with depopulation by removal of its children, the sociological needs of the group must not be paramount to the welfare of the child. A proper categorization of an Indian grandparent's status would help resolve conflicting needs. Whatever the outcome, it should be faced squarely by the courts and not sidestepped as a jurisdictional issue.

The New Mexico Court of Appeals made an attempt to consider Navajo custom in *Adoption of Doe* although the court did award custody to an Anglo-American family. This interest in Navajo custom should be expanded if similar conflicts arise. That expansion may be significant enough to elevate the status of a grandparent to a "parent." This change in classification would give proper emphasis to tribal custom and would help to minimize the price of mainstreaming American Indian children.

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part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship," 89 N.M. at 618, 555 P.2d at 918. The father had consented to the adoption and had signed the adoption form. Evidence pointed to an absence of a parental relationship between the father and the child. It appears that the father's appeal was based upon a dislike of the grandfather and an attempt to thwart his effort to adopt the child.

50. 89 N.M. at 614, 555 P.2d at 914.

51. *Id.* at 622, 555 P.2d at 922.