Appeal No. 09-4113
09-4129

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRITNEY JANE LITTLE DOVE NEILSON,

Petitioner - Appellee,

vs.

SUNNY KETCHUM; JOSHUA KETCHUM,

Respondents - Appellants,

CHEROKEE NATION,

Intervernors - Appellees.

Appeal from the United States District Court
for the District of Utah, No. 2:08-CV-00490-TS
Honorable Ted Stewart

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE CHEROKEE NATION HAS NEVER DECLARED THAT C.D.K. WAS A MEMBER OF THE TRIBE.

In their briefs, both Nielson and the Cherokee Nation have submitted exhaustive authority to support their assertion that the Cherokee Nation has the absolute right to determine its' membership and that its' determinations are final and conclusive. Having repeatedly stressed and relied on this principle, it is incredible that neither Nielson nor the Cherokee Nation have ever produced a statement or affidavit from the Tribe, signed by one in authority, supporting their claim that C.D.K. was a member. If the Tribe had, at any time, determined C.D.K. to be a member, an affidavit should have been easily produced. The absence of an affidavit is a significant omission and is compelling evidence that the Tribe has never considered C.D.K. a member. Likewise, the Tribe has failed to submit an affidavit stating that the Cherokee Nation Citizenship Act has been adopted by the Tribe and is used to make membership determinations.

The only evidence produced by Nielson and the Tribe to support their membership claim is a letter sent to Jim Hanks (Ketchum's lawyer) dated May 29, 2008 signed by Myra C. Reed from the "Indian Child Welfare Program." (Aplt. App. at 372, 373). The letter is notable for what it does not contain:

1. The letter does not state that C.D.K. is or was a member of the Tribe; rather, the letter states that he is "eligible for membership." (Aplt. App. at 372).

2. The letter is not a declaration by the Cherokee Nation; it is authored by an employee of the Cherokee Nation Welfare Program. (Aplt. App. at 372, 373).

3. There is nothing in the letter indicating that Myra C. Reed has authority to speak for the Cherokee Nation on membership issues.[1] (Aplt. App. at 372, 373).

4. The letter does not contain a declaration by one in authority that the Cherokee Nation Citizenship Act is used by the Tribe to establish the membership of newborn children. (Aplt. App. at 372, 373).

5. The letter references Section 5A of the Cherokee Nation Membership Act as the basis for allowing temporary automatic membership of new born children. As can be seen from a review of the Cherokee Nation Citizenship Act, Section 5A is neither found nor can be found any reference to a "Membership" act. (Aplt. App. at 337-342).

[1] Section 4(M) of the Cherokee Nation Citizenship Act provides that the Registrar "has the immediate administrative jurisdiction over the affairs of registration for enrollment/citizenship." An employee of the Cherokee Nation Welfare Department is not given that authority. (Aplt. App. at 338).

The only "declaration" issued by the Cherokee Nation concerning C.D.K.'s membership status is contained in the Tribe's answers to the Ketchum's request for admissions. (Aplt. App. at 138-142). There, the Tribe admitted that C.D.K. was not listed on the Cherokee register on November 6, 2007 and has never been listed in the register (Aplt. App. at 139), that the Tribe had no record that C.D.K. existed on November 6, 2007 (Aplt. App. at 139), that C.D.K. had never filed an application for membership (Aplt. App. at 140), and that C.D.K. has never had a registration number (Aplt. App. at 140). The Tribe also declared, through Jana Leach who was authorized to speak for the Tribe on registration issues, that she was not aware of any membership lists other than the Cherokee register (Aplt. App. at 123) and that the only list of Cherokee citizens is the register (Aplt. App. at 123). Further, Ms. Leach testified that she was not aware of any other process or procedure by which a person can be admitted as a citizen of the Cherokee Nation other than filing an application. (Aplt. App. at 410).

In summary, if the Court must accept the determinations of the Cherokee Nation on Tribal membership issues as "final and conclusive," the declarations made by the Tribe in this case are clear: C.D.K. has never been a member of the Tribe because he never submitted a membership application, was never included

in the Cherokee register, did not receive a registration number and because the Tribe never knew he existed at the time he was placed for adoption. These conclusions are supported not only by the Tribe's own admissions, but by the express terms of their Constitution, the Cherokee Nation Citizenship Act,[2] and the sworn testimony of Jana Leach, a Tribe employee authorized to represent the Tribe on registration issues.

II. NIELSON'S INTERPRETATION OF THE CHEROKEE CONSTITUTION IS UNREASONABLE

Nielson's argument that the Cherokee Nation Constitution "supports the possibility that other methods for obtaining membership exist" is without any rational basis. (Nielson's Br. p. 21). The Constitutional requirements for citizenship are clearly stated and are mandatory in nature:

1. "All citizens of the Cherokee Nation must be original enrollees or descendents of original enrollees listed on the Dawes Commission Rolls." C. N. Const. art. IV, §1; (Aplt. App. at 357) (emphasis added).

2. There shall be established a Cherokee Register to be kept by the Registrar, for the inclusion of any Cherokee for citizenship purposes in the

[2] See footnote 1.

Cherokee Nation who presents the necessary evidence of eligibility for registration. C. N. Const. art. IV, §2; (Aplt. App. at 357) (emphasis added).

3. A registration Committee shall be established. It shall be the duty of the Registration Committee to consider the qualifications and to determine the eligibility of those applying to have their names entered in the Cherokee Register. . . ." C. N. Const. art. IV, §2(a); (Aplt. App. at 357) (emphasis added).

4. There shall be a number assigned to every name, which is approved and entered in the Cherokee Register. C. N. Const. art. IV, §2(b); (Aplt. App. at 357) (emphasis added).

As can be seen, there is absolutely nothing in the citizenship provisions of the Cherokee Constitution which suggest another procedure for obtaining membership. The Cherokee Nation cannot ignore the express terms of its own Constitution.[3]

Nielson further argues that inclusion in the Cherokee Register is not a mandatory prerequisite for Tribal citizenship because the Constitution uses the words "any Cherokee" rather than "all Cherokee" when referring to those citizens required to be entered in the Register. (Nielson's Br. p. 19). This argument flies

in the face of reason. Why would the Cherokee Nation go to the trouble and expense of establishing a membership registry if it was not intended to include all members? Moreover, Nielson's argument is contrary to the Cherokee Nation Citizenship Act which defines the Cherokee Register as "the current citizenship roll of the Cherokee Nation . . . maintained by the Registrar." (C. Nat. Cit. Act, §4(E)) (Aplt. App. at 338).

Because the Cherokee Register constitutes the official roll of tribal citizens, C.D.K.'s absence from the Register is conclusive evidence from the Tribe itself that C.D.K. has never been a member.

III. THE ORIGINAL ENROLLEE ON THE DAWES COMMISSION ROLLS HAS NEVER BEEN IDENTIFIED.

Although Nielson has provided evidence that C.D.K. is related to "enrolled" members of the Cherokee Nation, she has yet to identify any "original enrollees" from whom he descends. The Constitution of the Cherokee Nation requires that a citizen descend from "original enrollees" listed on the Dawes Commission Rolls. (Aplt. App. at 357). The temporary automatic citizenship of newborn children provisions of the Cherokee Nation Citizenship Act only purport to apply to

[3] "Neither the secretary nor the Indians themselves, may ignore the express provisions of the [tribal] Constitution." The Seminole Nation of Oklahoma, 223 F. Supp. 2d 122, 139, 144 (D.D.C. 2002).

children who are "direct descendents of an original enrollee." (Aplt. App. at 340). The Cherokee Nation Citizenship Act defines an "original enrollee" as an "individual who is listed on the final rolls." C. Nat. Cit. Act §4(L); (Aplt. App. at 338). Pursuant to Section 4(K) of the Cherokee Nation Citizenship Act, the following evidence is required for determining citizenship:

> "Necessary Evidence" means the documents that clearly establish relationships from one generation to another and that the person has a Direct Ancestor on the Dawes Rolls. These documents must be State certified copies of the original birth and/or death records. These records are issued by State Vital Statistics Offices. Other acceptable records are Court Ordered Determinations or a CDIB issued by the BIA.

(Aplt. App. at 338).

In the present case, there is no dispute that C.D.K. is a descendent of enrolled members of the Cherokee Nation. None of C.D.K.'s enrolled ancestors, however, have been identified as original enrollees on the Dawes Commission Rolls.[4] Pursuant to Tribal policy, if an applicant for membership cannot find an ancestor on the Dawes rolls, she cannot become a member. (Dep. J. Leach, 9:14-24); (Aplt. App. at 405).

[4] The Cherokee Nation Registration Department has a copy of the Dawes Rolls. (Dep. J. Leach, 9:25, 10:1-20); (Aplt. App. at 405).

Despite numerous requests, neither the Cherokee Nation nor Nielson have been able to establish C.D.K.'s ancestry to a member on the Dawes Rolls. Because they have been unable to provide clear evidence of such a link, their membership claims must fail.

IV. RESPONSE TO NIELSON'S STATEMENT OF FACTS.

The Ketchums dispute many of the factual assertions set forth in Neilson's statement of facts:

A. Nielson's assertion that "the Second District Court failed to inquire whether C.D.K. was an Indian child and did not consider the ICWA when it terminated Nielson's parental rights" is incorrect. (Nielson's Br. p.3, ¶3). In actuality, Judge Rodney Page asked detailed questions about Nielson's Indian ancestry and was told by Nielson's mother that Nielson was not a tribal member. (Aplt. App. at 76,77). Having been told that Nielson was not a member of a tribe, Judge Page had no reason to suspect that her one day old child would thereafter be alleged to be a member.[5]

B. Nielson's assertion that Section 5A of the Cherokee Nation Membership Act "provides for the temporary automatic membership of newborn

[5] Pursuant to Cherokee Nation policy, a child cannot be a member of the tribe without parental consent. (Aplt. App. at 409).

children . . .” is incorrect. (Nielson’s Br. p. 3, ¶6). The Act referred to by Nielson in the appendix (Aplt. App. at 337) is the Cherokee Nation *Citizenship* Act, not the Cherokee Nation *Membership* Act. The Citizenship Act does not contain “Section 5A.” (Aplt. App. at 271-286).

C. The Ketchums object to Nielson’s claim that “[o]n May 29, 2008, the Cherokee Nation sent Jim Hanks a letter declaring that C.D.K. was a member of the Cherokee Nation for the first 240 days following his birth.” (Nielson’s Br. p. 3, ¶7). This assertion is incorrect because the letter was sent by Myra C. Reed on behalf of the Indian Child Welfare Program, not the Cherokee Nation. There is nothing in the letter indicating that Ms. Reed was authorized to speak for the Cherokee Nation on membership issues. Moreover, the letter does not state that C.D.K. was a member or the tribe; rather, it only states that he was “eligible for membership” because Thomas Eugene Seabolt, a member of the tribe, was his “great grand-parent.” (Aplt. App. at 372). Further, the letter’s reference to *Section 5A* of the Cherokee Nation *Membership* Act lends nothing because *Section 5A* of the *Membership* Act doesn’t exist. (Aplt. App. at 271-286).

D. The Ketchums dispute Nielson’s assertion that “the Cherokee Nation made the determination that C.D.K. was a member of the Cherokee Nation

because he was a direct descendent of an original enrollee of the tribe." (Nielson's Br. p.3, ¶8). For the reasons set forth in the above paragraphs, the Cherokee Nation has made no such declaration or determination. Furthermore, the Tribe has never determined the identity of an "original enrollee" linked to C.D.K. The Tribe's declarations, as set forth in their formal admissions in this case, expressly contradict Nielson's assertion. (Aplt. App. at 138-142).

E. Nielson's claim that "the Cherokee Nation made the determination that C.D.K. was a member of the Cherokee Nation even though his name was not placed on the Cherokee Register"[6] is incorrect for the reasons more fully set forth above.

F. Nielson's statement that "Section 5A of the Cherokee Nation Membership Act was enacted for the specific purpose of protecting the rights of the Cherokee Nation . . ." [7] is false because the Cherokee Nation *Membership* Act does not exist.

G. C.D.K. was not "an enrolled member or citizen of the Cherokee Nation from his birth beginning on November 5, 2007 and continuing for 240 days

[6] Nielson's Br. p.3, ¶9
[7] Nielson's Br. p.4, ¶10

thereafter."[8] Pursuant to Section 4(H) of the Cherokee Nation Citizenship Act, "enrollment" means "[t]he process for applying to be formally recognized or registered as a citizen of the Cherokee Nation." Based on the Tribe's own admission, C.D.K. has never applied for citizenship. (Aplt. App. at 392).

H. In paragraph 15, Nielson states that "on June 4, 2009, the United States District Court for the District of Utah granted Nielson's Motion for Summary Judgment holding that C.D.K. was an Indian child pursuant to the ICWA and that the adoption must be invalidated pursuant to Section 1914." (emphasis added).[9] Contrary to the above statement, the Court invalidated Nielson's "consent to termination of her parental rights over C.D.K.", but did not invalidate the adoption. (Aplt. App. at 467). The allegations set forth in paragraph 16 should be rejected for the same reasons.

I. The assertions set for in paragraphs 18-32 of Nielson's statement of facts and any documents in Nielson's appendix in support thereof are irrelevant to the issues on appeal and are part of Nielson's attempt to raise issues which are not before the Court. As such, they should be stricken from the record.

V. NIELSON IMPROPERLY ATTEMPTS TO ARGUE ISSUES NOT RAISED ON APPEAL.

[8] Nielson's Br. p.4, ¶11
[9] Nielson's Br. p.3, ¶15

In addition to responding to the issues raised by the Ketchums in their brief, Nielson attempts to argue matters outside the appeal by claiming that the District Court erred in refusing "to invalidate the adoption" and that the Court further erred by refusing to grant her post judgment requests for an immediate return of the child. (Nielson's Br. pp. 31-34). Nielson's attempt to raise these issues is inappropriate because they are not relevant to the issues raised by the Ketchums and because Nielson never filed her own appeal. As such, her argument set forth under the caption *"III. THE UNITED STATES DISTRICT COURT PROPERLY INVALIDATED THE CONSENT TO TERMINATION OF PARENTAL RIGHTS AND SHOULD HAVE INVALIDATED THE ADOPTION PURSUANT TO SECTION 1914 OF THE ICWA"* (Nielson's Br. pp. 31-34) should be rejected and stricken from the record.

VI. CONCLUSION

For the reasons set forth above, the lower Court erred in granting Nielson summary judgment because of the existence of multiple disputed factual issues. Furthermore, the Court erred in denying Ketchum's motion for summary judgment because neither Nielson nor the Cherokee Nation met their burden of proving that C.D.K. was an Indian Child under the Indian Child Welfare Act. For these

reasons, the lower Court's decision should be reversed and relief be awarded the Ketchums in accordance with their motion for summary judgment.

DATED this 18 day of February, 2010.

HANKS & MORTENSEN, P.C.

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CERTIFICATE OF COMPLIANCE

This brief contains 2,928 words. It complies with the 14,000 word limitation set forth in Fed. R. App. P. Rule 32(7)(B)(ii).

Respectfully submitted this 18th day of February, 2010.

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CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the within and foregoing APPELLANT'S REPLY BRIEF to be delivered:

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