STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-07

Date issued: February 2, 2000

Requested by: Doug Mattson, Ward County State's Attorney

- QUESTION PRESENTED -

Whether state courts have jurisdiction over paternity actions brought by county social service boards where the mother, child, and putative father are all enrolled tribal members.

- ATTORNEY GENERAL'S OPINION -

State courts may have jurisdiction over paternity actions brought by county social service boards where the mother, child, and putative father are all enrolled tribal members, depending on the residence of the parties and whether conception occurred on or off an Indian reservation.

- ANALYSIS -

Seldom is there a "rigid rule" to apply in Indian law. White Mt. Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). This is true with jurisdiction over paternity actions involving Indians.

Fortunately, two North Dakota decisions on the subject provide guidance. The first is McKenzie County Social Services Board v. V.G., 392 N.W.2d 399 (N.D. 1986). The mother, putative father, and child were all tribal members and the mother and child lived on the reservation. Id. at 402. The opinion doesn't state where the putative father lived, but notes that "at times" he lived off the reservation, implying at least some residence on the reservation. Id. Conception occurred on the reservation. Id. In light of these reservation connections the court ruled that tribal interests were paramount and the state court did not have jurisdiction to adjudicate paternity. It noted that the mother's application for public assistance off the reservation was insufficient to change this result. Id. at 402.

The second North Dakota decision is In re M.L.M., 529 N.W.2d 184 (N.D. 1995). Here the reservation connection was a bit less than that in McKenzie County but still substantial. The putative father, mother, and children were all tribal members and conception occurred on the reservation. Id. at 185. The mother and children lived off the

reservation but the mother worked on the reservation and planned to take up residence there. Id. The father lived on the reservation. Id. at 185. With these reservation connections the court ruled that the state court was without jurisdiction to adjudicate paternity.

While these two decisions provide guidance for deciding jurisdiction over some paternity actions, they are not necessarily precedent for situations in which the reservation connection is less pronounced. Where the facts are different than in McKenzie County and In re M.L.M. the general tests governing state court jurisdiction over matters involving Indians should be applied. The first is the preemption test and the second is the infringement test.

Under the preemption test, state jurisdiction is preempted if Congress, in exercising its plenary authority over Indians, prohibits state jurisdiction. Williams v. Lee, 358 U.S. 217, 222 (1959). Federal statutory law, however, does not preempt state courts from adjudicating the paternity of an Indian child. State v. Zaman, 946 P.2d 459, n.2 461 (Ariz. 1997); State v. Medina, 549 N.W.2d 507, 509 (Iowa 1996); State v. W.M.B., 465 N.W.2d 221, 223-24 (Wis. Ct. App. 1990); Jackson County v. Swayney, 352 S.E.2d 413, 416-17 (N.C. 1987); Wildcatt v. Smith, 316 S.E.2d 870, 875 (N.C. 1984); State v. Jojola, 660 P.2d 590, 592 (N.M. 1983).

Even if Congress hasn't acted to preempt state jurisdiction, state courts might still be without jurisdiction under the infringement test. State jurisdiction is not present if it will "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. at 220 (emphasis added).

Several states apply three criteria to determine if state court jurisdiction over paternity actions infringes upon tribal sovereignty. They examine the Indian and non-Indian status of the parties, whether the cause of action arose on or off the reservation, and the tribal and state interests at stake. Anderson v. Beaulieu, 555 N.W.2d 537, 540 (Minn. Ct. App. 1996); Medina, 549 N.W.2d at 510; Jackson County, 352 S.E.2d at 417; Jojola, 660 P.2d at 592-93.

The first factor is the Indian or non-Indian status of the parties. In the kinds of paternity actions at issue here, although the plaintiff will be a county social service board, which is a non-Indian, other parties in interest, the mother and the child, are Indian. (County social service boards have the right to pursue a paternity determination for a child to whom they provide support. N.D.C.C. § 14-17-05(3).) Where the putative father is also Indian, this first factor favors tribal jurisdiction.

On the other hand, if the putative father is non-Indian, this factor favors state court jurisdiction. One court recently found that a non-Indian defendant in a paternity action could not use the mother's status as an Indian to bar state court jurisdiction when the mother asked the state to bring the action in state court. State v. Zaman, 946 P.2d 459 (Ariz. 1997). The court held: "As long as the Indian party selects the state forum, there is nothing for the infringement test to protect against." Id. at 461.[1] This decision is consistent with Rolette County v. Eltobgi, 221 N.W.2d 645, 648 (N.D. 1974), in which the court could "imagine no way in which the reciprocal enforcement . . . of the duty of a non-Indian to support his Indian wife and child on an Indian reservation in this State can infringe on the right of reservation Indians to make their own laws and be ruled by them." Thus, if the putative father is non-Indian, this factor favors state jurisdiction even though the mother and child are Indian and live on the reservation.

The second factor courts have considered is where the cause of action arose. There is some uncertainty what event defines the cause of action. Some courts find that the cause of action arises off the reservation because that is where the mother applied for public assistance. Anderson, 555 N.W.2d at 541; Jojola, 660 P.2d at 593. In McKenzie County, 392 N.W.2d at 402, the court implied that this could be a factor to consider. Other courts also recognize it as relevant. State v. Medina, 549 N.W.2d 507, 509 (Iowa 1996); Jackson County v. Swayney, 352 S.E.2d 413, 418 (N.C. 1987). The place of conception may also determine where the cause of action arises.[2] Medina, 549 N.W.2d at 510; Jackson County, 352 S.E.2d at 418.

The application for public assistance will often occur off the reservation. If conception also occurred off the reservation, then the cause of action clearly arose off the reservation and this factor would favor state jurisdiction.

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[1] This decision could be interpreted to undermine the decision in McKenzie County, in which the residence of the mother and child on the reservation was viewed as an important factor despite the fact that the mother petitioned the state court for a determination of paternity. However, McKenzie County is distinguishable because the putative father was also a tribal member and lived "at times" on the reservation.

[2] A North Carolina court has distinguished, for jurisdictional purposes, between causes of action for paternity and those for recouping public assistance paid and setting future child support. The court found, under the facts of that case, that jurisdiction over paternity lies with the tribal court but that the state court had jurisdiction over a parent's financial obligations to his child. Jackson County v. Swayney, 352 S.E.2d 413, 418 (N.C. 1987).

The third factor examines the state and tribal interests at stake. In its two "paternity jurisdiction" decisions our state Supreme Court made broad statements about the important role of tribal courts in adjudicating paternity. In McKenzie County it stated:

> We believe that the determination of the parentage of a child of Indian tribal members is a matter that is intimately connected with "the right of reservation Indians to make their own laws and be ruled by them."

McKenzie County, 392 N.W.2d at 402. It made a similar statement in In re M.L.M., 529 N.W.2d at 185. In non-paternity decisions the court has made other broad statements about the significant role tribal courts should play in the domestic relations of their members. Byzewski v. Byzewski, 429 N.W.2d 394, 399 (N.D. 1988); Malaterre v. Malaterre, 293 N.W.2d 139, 144 (N.D. 1980).

Such statements, if read in isolation, might indicate that state courts never have jurisdiction over paternity actions involving Indians no matter what the facts may be. But there are significant state interests at stake that, under the infringement analysis, must be considered. Consequently, the court's statements should be confined to the kinds of disputes from which they originated, that is, disputes with significant factual connections to a reservation.

Indeed, parts of the McKenzie County and In re M.L.M. decisions indicate that they should be confined to their facts. For example, in McKenzie County the court stated that state court jurisdiction would undermine tribal court authority "over Reservation affairs." McKenzie County, 392 N.W.2d at 402. In McKenzie County conception occurred on the reservation and the mother and child lived on the reservation and it appears the father did too. Id. All three were tribal members. Id. Under these facts the dispute truly was a "Reservation affair."

In In re M.L.M. the court noted that some off-reservation features of the case were insufficient to overcome the interests of tribal sovereignty. In re M.L.M., 529 N.W.2d at 186. The McKenzie County opinion made a similar statement. McKenzie County, 392 N.W.2d at 402. The implication is that there could be "off-reservation facts" that would be sufficient to move the interests in favor of state court jurisdiction.[3]

[3] The briefs submitted to the Supreme Court in McKenzie County and In re M.L.M. made only minimal arguments in favor of state jurisdiction.

While tribal courts have an important interest in adjudicating the paternity of a child of tribal members, the state also has important interests at stake. At least four state interests can be identified.

One, the "Court has recognized the important public and social policy involved in determining a child's biological parents." Williams County Social Services Bd. v. Falcon, 367 N.W.2d 170, 175 (N.D. 1985). See also Throndset v. J.R., 302 N.W.2d 769, 774 (N.D. 1981). It has also noted the significant interest the state has in family issues and child welfare. B.H. v. K.D., 506 N.W.2d 368, 376, 378 (N.D. 1993). These state interests apply to all children. The state has as much of an interest in the welfare and parentage of Indian children as it does in non-Indian children.

Two, the requirements of federal law heighten the state's interest in adjudicating paternity. Title IV-D of the Social Security Act of 1935 created a federal and state cooperative program for the purpose of establishing paternity. Jenkins v. Massinga, 592 F.Supp. 480, 483 (D. Md. 1984).

In return for federal money states must develop a program to establish paternity. 42 U.S.C.A. § 651. This program must satisfy certain standards to maintain federal funding. E.g., 42 U.S.C.A. §§ 652(g), 654(4)(A), 666(a)(2)(5), 668. In particular, "the state must establish a Title IV-D agency which '[a]dministers the plan uniformly throughout the state, or supervises the administration of the plan by its political subdivisions.'" Jenkins, 592 F.Supp. at 483.[4]

As a part of its compliance with such duties the state has enacted a number of statutes concerning paternity. For example, it has identified circumstances under which paternity is presumed; it has a statute of limitation for paternity actions; and it requires courts to order genetic testing upon the request of a party. N.D.C.C. §§ 14-17-04, 14-17-06, 14-17-10. The state has also enacted laws by which paternity can be established by acknowledgement. N.D.C.C. ch. 14-19.

Title IV-D and state obligations under it are factors to consider in deciding whether state courts have jurisdiction over matters that involve Indians. Anderson, 555 N.W.2d at 541; Medina, 549 N.W.2d at 510; County of Inyo v. Jeff, 277 Cal. Rptr. 841, 846 (Cal. Ct. App. 1991); First v. State, 808 P.2d 467, 470-71 (Mont. 1991); Jackson

[4] Federal law also requires that the state program provide for entering into agreements with tribes to assist the state in administering the plan. 42 U.S.C.A. § 654(7). The Department of Human Services' Child Support Enforcement Division has been seeking but has not yet reached agreements with North Dakota tribes.

County, 352 S.E.2d at 418. If tribal law governing paternity is inconsistent with state law and state obligations under Title IV-D, the state has a heightened interest in retaining adjudicatory jurisdiction over paternity.

Three, as a general rule "a state . . . has jurisdiction over the conduct of an Indian off the reservation." Felix S. Cohen, Handbook of Federal Indian Law 146 (1942). "[A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). See also Fournier v. Roed, 161 N.W.2d 458, 466 (N.D. 1968). For example, an Indian who commits a crime off the reservation is subject to state criminal law. Solem v. Bartlett, 465 U.S. 463, 467 (1984); Ward v. Race Horse, 163 U.S. 504 (1896).

The principle that underlies this rule has a role in deciding jurisdiction over an Indian who conceives a child off the reservation. As one court stated, it did "not condone" a putative father's "use of his Indian status as a shield from the ramifications of his off-reservation activities." Medina, 549 N.W.2d at 510.

Four, where the "'permanent status of litigants'" is at issue, "'it is appropriate to predicate jurisdiction on the residence of the litigants rather than the location of particular incidents of marginal relevance, at best.'" Byzewski v. Byzewski, 429 N.W.2d 394, 399 (N.D. 1988) (quoting Fisher v. District Court, 424 U.S. 382, 390 n.14 (1976). Thus, if the mother, child, and putative father live off the reservation, even if conception occurred on the reservation, state courts may have jurisdiction. Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990) ("when an Indian leaves the reservation and establishes a new domicile, a situation significantly different from [William v.] Lee arises").

As is apparent, the infringement test is not a bright-line test. Consequently, jurisdiction over paternity actions that involve Indians is not subject to rigid rules. Courts can and have reached seemingly inconsistent results. New Mexico and Arizona have ruled in favor of state court jurisdiction even where the reservation connection is significant. State v. Zaman, 946 P.2d 459 (Ariz. 1997); State v. Jojola, 660 P.2d 590 (N.M. 1983); Francisco v. State, 556 P.2d 1, 2 n.1 (Ariz. 1976) (dicta).

The North Dakota Supreme Court has been more respectful of tribal interests. In its two decisions on the subject it deferred to tribal

courts.[5] But in each case there was a substantial reservation connection. Other factual situations may favor state court jurisdiction.

For example, where conception and the application for public assistance take place off the reservation, and the mother, child, and putative father all live off the reservation, state court jurisdiction would not unduly infringe upon tribal sovereignty. Where the mother and child live on the reservation, if the cause of action occurred off the reservation and the putative father lives off the reservation, tribal interests may still not outweigh the state interest in asserting jurisdiction. Where the father lives on the reservation but the cause of action arose off the reservation, the question becomes closer because the father's connection to the reservation heightens the tribe's interests in adjudicating paternity. However, there is also plenty of authority that an Indian's off-reservation conduct subjects the Indian to state jurisdiction.

In summary, at least until the case law is further developed, it is appropriate to invoke state court jurisdiction in cases involving Indians where the state interest is more prominent than it was in McKenzie County and In re M.L.M.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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[5] Should a tribal court fail to exercise its jurisdiction, then there would be no infringement of tribal sovereignty were a state court to adjudicate the matter. State v. W.M.B., 465 N.W.2d 221, 224 (Wis. Ct. App. 1990); Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990).