

SUPREME COURT OF NORTH DAKOTA

Schirado v. Foote

785 N.W.2d 235 (N.D. 2010) · No. 20090282 · Decided July 13, 2010

SUMMARY

The North Dakota Supreme Court reversed and remanded a dismissal of a paternity and child-custody action. The court held that the district court needed to make additional factual findings under the Uniform Child Custody Jurisdiction and Enforcement Act concerning the child’s home state and whether the maternal grandparents were persons acting as parents. The court also directed clarification of the district court’s contempt and sanctions order.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Daniel J. Crothers; Mary Muehlen Maring; Carol Ronning Kapsner; Dale V. Sandstrom; Gerald W. VandeWalle, C.J.
JURISDICTION	North Dakota
DECIDED	July 13, 2010
DOCKET	20090282
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Andrew Schirado appealed from the Burleigh County District Court's dismissal of his paternity and child-custody action for lack of subject matter jurisdiction. He also challenged the district court's failure to address an earlier contempt order and sanctions against Foote and her attorney.
STANDARD OF REVIEW	Subject matter jurisdiction is reviewed de novo when jurisdictional facts are undisputed. When jurisdictional facts are disputed, the issue is a mixed question of law and fact; legal questions are reviewed de novo and factual findings are reviewed under the clearly erroneous standard.
PRECEDENTIAL VALUE	published; precedential
PARTIES	Andrew Schirado v. Anna Foote, J.L.F., a minor child, by his natural guardian, Anna Foote

TOPICS

child custody

tribal jurisdiction

indian child welfare act

subject matter jurisdiction

appellate procedure

PRACTICE AREAS

family law

civil procedure

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tribal jurisdiction

indian child welfare act

QUESTIONS PRESENTED

1. Whether the district court properly determined that the Fort Berthold Indian Reservation was the child's home state under the UCCJEA.
2. Whether the district court adequately determined whether the child lived with Foote, or with Foote's parents as persons acting as parents, for the six consecutive months preceding commencement of the custody proceeding.
3. Whether a nonparent's claimed right to legal custody under the UCCJEA must exist before or simultaneously with the filing of the custody proceeding.
4. Whether the district court properly dismissed the action without clarifying the status and jurisdictional basis of its contempt and sanctions order.
5. Whether the Indian Child Welfare Act supplied the exclusive jurisdictional basis for the initial custody determination.

HOLDINGS

1. The district court's dismissal order was insufficient because it did not specify whether the home-state determination rested on the child living with Foote, with Foote's parents, or with both, and it did not make the factual findings necessary for appellate review. The dismissal therefore had to be reversed and remanded.
2. For purposes of determining whether a nonparent is a person acting as a parent under the UCCJEA, the nonparent's claimed right to legal custody must occur before or simultaneously with the initial filing of the relevant litigation.
3. The Indian Child Welfare Act did not control because the case involved an initial custody determination, not one of the foster-care, termination, preadoptive, or adoptive proceedings covered by the ICWA. The UCCJEA supplied the exclusive jurisdictional basis for the custody dispute.
4. The district court had jurisdiction to establish paternity, but jurisdiction over the paternity action did not automatically confer jurisdiction to make an initial custody determination.
5. The district court had to clarify whether its contempt and sanctions order remained valid and whether the sanction was related to matters over which the court retained jurisdiction.

KEY QUOTATIONS

“We therefore conclude that to qualify as a “person acting as a parent” under the UCCJEA, a nonparent’s claimed right to legal custody must occur prior to, or simultaneous with, the initial filing related to the instant litigation.” (¶ 23)

“We reverse and remand for determination of the child’s home state consistent with this decision. On remand, the district court also must clarify whether its order for contempt and sanctions is still valid.” (¶ 28)

FACTUAL BACKGROUND

Schirado and Foote conceived their child in Bismarck, North Dakota, and the child was born in Williston in July 2006. Schirado filed a paternity and custody action in February 2007; during the relevant period, Foote attended college in Minot while the child stayed with Foote's parents on the Fort Berthold Indian Reservation. Foote and her parents also sought temporary custody in the Three Affiliated Tribes court, which issued temporary-custody orders while the North Dakota action was pending. The North Dakota district court later dismissed the action on the ground that the reservation was the child's home state and did not clarify the status of contempt sanctions imposed after Foote and her attorney failed to appear at a custody hearing.

PROCEDURAL HISTORY

Schirado filed a North Dakota action seeking paternity and custody. The district court ordered genetic testing, determined Schirado was the father, denied several motions to dismiss, and entered interim orders concerning custody, visitation, and support. After Foote and her attorney failed to appear at a custody hearing and a tribal court issued temporary-custody orders, the district court ultimately dismissed the action, concluding the Fort Berthold Indian Reservation was the child's home state. The Supreme Court reversed and remanded for additional home-state findings, communications with the tribal court as appropriate, and clarification of the contempt and sanctions order.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The district court must determine the child's home state under the UCCJEA, make specific factual findings concerning whether the child lived with Foote or with Foote's parents, determine whether any absences were temporary, determine whether the grandparents claimed a right to legal custody before or simultaneously with commencement of the action, communicate with the tribal court as appropriate, and clarify whether the contempt and sanctions order remains valid and whether it related to matters within the district court's retained jurisdiction.

CASES CITED

- Harshberger v. Harshberger, 2006 ND 245, ¶ 16, 724 N.W.2d 148
- Escobar v. Reisinger, 64 P.3d 514, 516 (N.M. Ct. App. 2003)
- Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108
- Kelly v. Kelly, 2009 ND 20, ¶¶ 9, 21, 759 N.W.2d 721
- In re DeFender, 435 N.W.2d 717, 721 (S.D. 1989)
- Arkansas Dep't of Human Servs. v. Cox, 82 S.W.3d 806, 822 (Ark. 2002)

- In re Voisine, 2010 ND 17, ¶ 13, 777 N.W.2d 908
- Dosland v. Netland, 424 N.W.2d 141, 142 (N.D. 1988)
- Wagner v. Wagner, 887 A.2d 282, 287 (Pa. Super. Ct. 2005)
- In re S.J.A., 272 S.W.3d 678, 684 (Tex. App. 2008)
- Adoption House, Inc. v. A.R., 820 A.2d 402, 408-09 (Del. Fam. Ct. 2003)
- Hangsleben v. Oliver, 502 N.W.2d 838, 842-43 (N.D. 1993)
- In re A.J.C., 88 P.3d 599, 606-07 (Colo. 2004)
- Reed v. Reed, 62 S.W.3d 708, 713 (Mo. Ct. App. 2001)
- In re B.N.W., No. M2004-02710-COA-R3-JV, 2005 WL 3487792, **25-26 (Tenn. Ct. App. Dec. 20, 2005)
- Ruffier v. Ruffier, 190 S.W.3d 884, 890 (Tex. App. 2006)
- Patrick v. Williams, 952 So. 2d 1131, 1139 n.9 (Ala. Civ. App. 2006)
- In re Sophia G.L., 890 N.E.2d 470, 482 (Ill. 2008)
- Plemmons v. Stiles, 309 S.E.2d 504, 506 (N.C. Ct. App. 1983)
- Draper v. Roberts, 839 P.2d 165, 173-74 (Okla. 1992)
- O'Rourke v. Vuturo, 638 S.E.2d 124, 128 (Va. Ct. App. 2006)
- In re A.C., 200 P.3d 689, 692 (Wash. 2009)
- In re Mannix, 776 P.2d 873, 875 (Or. Ct. App. 1989)
- S.B. v. Department of Health and Social Services, 61 P.3d 6, 13 (Alaska 2002)
- Rogers v. Platt, 199 Cal. App. 3d 1204, 1212-13 (Cal. Ct. App. 1988)
- In re Clausen, 502 N.W.2d 649, 682 (Mich. 1993)
- Garcia v. Rubio, 670 N.W.2d 475, 484 (Neb. Ct. App. 2003)
- Campney v. Ayala, 454 N.Y.S.2d 207, 209 (N.Y. Fam. Ct. 1982)
- In re S.S., No. 22980, 2009 WL 161333, *5 (Ohio Ct. App. Jan. 23, 2009)
- Hylland v. Doe, 867 P.2d 551, 554 (Or. Ct. App. 1994)
- State v. Samuel P., No. 93-0857, 1993 WL 328966, *2 n.3 (Wis. Ct. App. Sept. 1, 1993)
- DiRuggiero v. Rodgers, 743 F.2d 1009, 1017 (3d Cir. 1984)
- Bell v. Hood, 327 U.S. 678, 682-83 (1946)
- United Accounts, Inc. v. Teladvantage, Inc., 499 N.W.2d 115, 119 (N.D. 1993)