

MAY 23 2023

IN THE CONSTITUTIONAL COURT OF THE
CHOCTAW NATION OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA)
)
Petitioner,)
)
And)
)
The Honorable MARK A. MORRISON)
District Judge)
Respondent.)
)

COURT CLERK
BY Cara Schumann Deputy

Case No. CC-23-02

REDACTED FOR PUBLICATION
ORDER GRANTING APPLICATION TO
ASSUME ORIGINAL JURISDICTION AND PETITION
FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

I. Procedural History

This case comes to the Constitutional Court by Application to Assume Original Jurisdiction filed by the Choctaw Nation of Oklahoma and joined by the parties to the underlying adoption. This Court having reviewed the pleadings filed by the Choctaw Nation and the prospective adoptive parents will answer the following questions: (1) Does the Choctaw Nation, through its tribal prosecutor, have authority to intervene in a matter when it questions the constitutionality of statute or determine that the rights of a member of the Choctaw Nation of Oklahoma are being infringed upon; (2) Do Sections 3 and 3.1 of the Choctaw Nation Marriage and Divorce Act (C.N.M.D.A) violate the rights granted to members/citizens of the Choctaw Nation of Oklahoma by the Constitution of the Choctaw Nation of Oklahoma, approved by vote of the members on July 9, 1983; (3) Can a same sex stepparent adopt under Section 3-1.1 (2) of the Choctaw Nation Adoption Code (C.N.A.C.); and (4) Should this Court issue a writ of

mandamus or writ of prohibition preventing the District Court from enforcing Sections 3 and 3.1 of the C.N.M.D.A and mandating review of the Petition for Stepparent Adoption under 3-1.1 of the C.N.A.C.

On May 3, 2023, the Choctaw Nation of Oklahoma, through its tribal prosecutor, filed an Application to Assume Original Jurisdiction seeking a writ of mandamus or writ of prohibition from this Court to the District Court regarding the constitutionality of certain sections of the codes and acts and their relation to the adoption of minor child. On May 5, 2023, prospective adoptive parent and parent of minor child, caused a Brief in Support of the Petition for Writ of Prohibition or Writ of Mandamus to be filed in the Constitutional Court of the Choctaw Nation of Oklahoma. No responsive brief has been filed to date and no amicus curiae briefs have been filed arguing the constitutionality of the Code and Acts at issue. This Court determines this case is ripe for decision.

Though this Court does not foreclose the possibility of judicial review by the District Court or Court of Appeals for the Choctaw Nation, as to the constitutionality of the laws of the Choctaw Nation of Oklahoma, ultimate authority rest with the Constitutional Court.

II. Summary of Opinion

- The Application to Assume Original Jurisdiction is granted.
- The Choctaw Nation of Oklahoma does have standing to intervene when the constitutionality of its acts and codes are called into question.
- Sections 3 and 3.1 of the C.N.M.D.A do violate the constitutional rights afforded to members of the Choctaw Nation Of Oklahoma through their Constitution, which in its Bill of Rights in Article IV Section 1 states, “Nothing in this Constitution shall be interpreted in a way which would diminish the rights and privileges that tribal members

have as citizens of this Nation, the State of Oklahoma, the *United States of America* or under an Act of the Congress of the United States.” (*Emphasis added*)

- A member of the same sex is a husband or wife of the parent, as required by Section 3-1.1 (2) of the C.N.A.C. and are qualified to adopt under the same.
- A writ of prohibition against enforcement of Sections 3 and 3.1 of the C.N.M.D.A is hereby ordered by this Court.
- A writ of mandamus is issued directing the district court to hear and rule upon the Petition for Stepparent Adoption in Case No. FA-23-17 in conformity with this Opinion and without regard to the unconstitutional Sections of the C.N.M.D.A.

III. Standing to Intervene

It is the opinion of this Court that the Choctaw Nation of Oklahoma does have standing to intervene when the constitutionality of its codes are drawn into question. The Choctaw Nation Code of Civil Procedure (C.N.C.C.P.) Section 228 (D) states, “The court shall permit the Choctaw Nation to intervene for presentation of evidence, if the evidence is otherwise admissible in the case, and for argument on the question of constitutionality or enforceability of the Choctaw Nation laws at issue.” Here, it is the Choctaw Nation of Oklahoma, itself, that is questioning the constitutionality of its act, so their standing to enter this case is as proper as it would be if another party were questioning the constitutionality of its act or code, and the Choctaw Nation of Oklahoma has elected to intervene and defend its constitutionality.

IV. Constitutionality of Section 3 and 3.1 of C.N.M.D.A.

Authority to review the constitutionality of an act of Tribal Council, the legislative branch of the Choctaw Nation, comes directly from Article XIII of the Constitution for the Choctaw Nation of Oklahoma. It states, “Tribal Court shall have exclusive jurisdiction to decide

disputes, by vote of two members, arising under any provision of this Constitution or any rule or regulation enacted by the tribal council.” It is worth noting that the “Tribal Court”, as set forth in the Constitution, also sits as the “Constitutional Court” pursuant to Section 1.103 (b) of the Act to Unify the Courts of the Choctaw Nation of Oklahoma within the Judicial Department.

Though the names may be used interchangeably, for clarity we will only refer to this Court as the Constitutional Court. This is done to prevent confusion when referring to the District Court and Appellate Division.

Here the sections of the code at issue are contained in the C.N.M.D.A. Whether these sections infringe on the constitutional rights of the prospective adoptive parent is the central issue in this matter and is a dispute arising from the language of the Constitution. This Court will exercise its ability to assume original jurisdiction for the purpose of analyzing the constitutionality of Section 3 and 3.1 of the C.N.M.D.A.

The Constitution of the Choctaw Nation of Oklahoma has its own Bill of Rights contained in Article IV, Section 1 which states, “Nothing in this Constitution shall be interpreted in a way which would diminish the rights and privileges that tribal members have as citizens of this Nation, the State of Oklahoma, the United States of America or under any Act of the Congress of the United States.” This Court will focus its opinion on those rights afforded to citizens of the United States of America as the Supreme Court for the United States has already determined in *Obergefell v. Hodges*, 576 U.S. 644 (2015) that individuals have a fundamental right to marry regardless of their sex. Though tribal governments are typically not subject to the United States Constitution, it is clear from the language of the Choctaw Nation of Oklahoma Constitution, Choctaw Members are to have all freedoms, liberties, and rights of any other member of the United States of America.

Article IX of the Choctaw Nation of Oklahoma Constitution gives the Legislative Department of the Choctaw Nation of Oklahoma its privileges, duties, and powers. Section 4 grants Tribal Council the authority to enact legislation so long as it is for the general good of the Choctaw Nation, for the administration and regulation of its affairs and not inconsistent with the CNO Constitution. The central question is whether the C.N.M.D.A. provisions prohibiting individuals of the same sex from marrying run afoul of the rights afforded Choctaw members in their Bill of Rights. The majority in *Obergefell* recognized that marriage is a fundamental right that all couples are entitled to under the Fourteenth Amendment of the Constitution of the United States, which provides for equal protection to all citizens under the law. It would be impossible to afford Choctaw members the rights afforded in the Choctaw Nation of Oklahoma Constitution while not recognizing the rights of those members afforded by the Constitution and laws of the United States of America.

Based upon *Obergefell*, any attempt to prevent Choctaw couples of the same sex from marrying would be a violation of the rights afforded them by the Bill of Rights in their Constitution and it is the opinion of this Court that Sections 3 and 3.1 of the C.N.M.D. are unconstitutional.

V. Application of Section 3-1.1 (2) of C.N.A.C.

Though *Obergefell* makes it clear that same sex couples should be able to marry, it does not specifically address whether restrictions can be put on same sex couples who wish to adopt under state and tribal laws. This Court need not address that question here as C.N.A.C. states:

Article 3. Adoption of Minors

Section 3-1.1. Eligibility to Adopt

The following persons are eligible to adopt a child:

1. A husband and wife jointly if both spouses are at least twenty-one (21) years of age;
- 2. *Either the husband or wife if the other spouse is a parent of the child;***
3. An unmarried person who is at least twenty-one (21) years of age; or
4. A married person at least twenty-one (21) years of age who is legally separated from the other spouse.

C.N.A.C. Section 3-1.1 (emphasis added)

Following the rationale and ruling on *Obergefel*, the ruling of this Court is that the Choctaw members have a constitutional right to marry regardless of their sex. If they are married, under the laws of the Choctaw Nation of Oklahoma or any other state, then the stepparent is eligible to adopt under Section 3-1.1 (2) regardless of the sex of the parent their married spouse would be their husband or wife.

VI. Writ of Prohibition and Writ of Mandamus

Though writs of prohibition and writs of mandamus should only be issued in rare instances, this matter warrants the issuance of both.

Though this Court does not have a standard as to when to issue a writ of prohibition and writ of mandamus, as recommended by the Choctaw Nation of Oklahoma in their brief, this Court adopts the standards for a writ of prohibition and writ of mandamus prescribed by the State of Oklahoma. Before a writ of prohibition may be issued, a petitioner must show: (1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of that power will result in injury for which there is no other adequate remedy. *James v. Rogers*, 1987 OK 20, 734 P.2d 1298, 1299. In applying this standard, this Court finds that the District Judge did exercise judicial power in failing to recognize the marriage between the prospective adoptive parents and under our

analysis, failing to recognize their marriage was in conflict to the rights afforded to the prospective adoptive parents by the Constitution of the Choctaw Nation of Oklahoma and there is no adequate remedy other than to recognize their union. For these reasons this Court issues a writ of prohibition to Respondent and other District Judges prohibiting judicial recognition or enforcement of the portions Sections 3 and 3.1 of the C.N.M.D.A., specifically as far as it would prohibit same sex marriage and the recognition of same sex marriages.

For a writ of mandamus to be issued, the party must show: 1) a clear legal right vested in the petitioner, 2) refusal to perform a plain legal duty which does not involve the exercise of discretion, and 3) adequacy of the writ and inadequacy of other relief. *Draper v. State*, 1980 OK 117, 621 P.2d 1142, 1147. Here, the prospective adoptive parent clearly has the right to be recognized as legally married and therefore meets the qualifications set forth in Section 3-1.1 of the C.N.M.A. Respondent, though following the code as it was at the time of his Order, dismissed the Petition for Stepparent Adoption for Lack of Subject Matter Jurisdiction. The Dismissal, when viewed in the light of this Order and the writ of prohibition issued, was improper and Respondent's legal duty was to hear the Petition for Stepparent Adoption. The only just relief, at this time, is for Respondent's Order Dismissing Case for Lack of Subject Matter Jurisdiction to be vacated and hearing held on the Petition for Stepparent Adoption in Case No. FA-23-17 consistent with these instructions.

This court issues a writ of mandamus to Respondent directing him to review the Petition for Stepparent Adoption, filed in Case No. FA-23-17, with the finding that Petitioner in that case, prospective adoptive parent, is the wife of the parent of minor child.

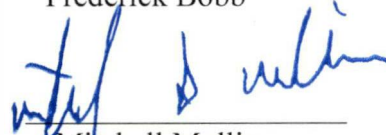
IT IS SO ORDERED:



David A. Burrage
CHIEF JUSTICE



Frederick Bobb



Mitchell Mullin

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May 2023, a true and correct copy of the above and the foregoing instrument was mailed, first class mail, postage prepaid, and/or delivered electronically to:

Hon. Mark A. Morrison, Respondent
Jackie Jo Perrin, Attorney for Child
Gina South, Tribal Prosecutor
Kara Bacon, Tribal Prosecutor
Linque Gillett, Attorney for Parents



Cara Schumann, Constitutional Court Clerk
Choctaw Nation Judicial