Opinion No. 83

Indians, Adoption of—State Board of Health, Indian Adoptions Are Not To Be Substituted Into the Records of—Vital Statistcis, Bureau of

Held: 1. A substitution cannot be legally made in the records of the State Board of Health when an adoption is made through an Indian Tribal Court and is approved by the Indian Agency Superintendent.

January 20th, 1950.

Dr. B. K. Kilbourne
Executive Officer
State Board of Health
Helena, Montana

Dear Dr. Kilbourne:

You have requested my opinion whether a substitution can legally be made in the records of the State Board of Health when an adoption is made through an Indian Tribal Court and is approved by the Indian Agency Superintendent.

The appropriate statutory provision relating to substitution of a birth certificate in case of adoption is Section 24 of Chapter 44, Session Laws of 1943 (now Section 69-525, Revised Codes of Montana, 1947). Section 69-525 is as follows in part:

> "In case of adoption of a person born in the State of Montana, it shall be the duty of the Clerk of the District Court to forward by

the fifteenth of the following month a certified copy of the final order of adoption to the registrar of vital statistics of the State Board of Health. The State Registrar upon receipt of the certified copy of the order of adoption shall prepare a substitute certificate in the new name of the adopted person, naming the true date and place of birth and sex of said adopted person and statistical particulars of the foster parents in place of the natural parents. The State Registrar shall strike out the words "Attendant's own signature" on the substitute record and insert in their stead the words "State Registrar" and sign as such, and all dates of recording are to be left as on the original. And the State Registrar shall make such a substitute birth certificate if furnished with a certified copy of the adoption for any birth certificate now in his custody. The State Registrar shall send copies of the substitute record to the local registrar and to the County Clerk and Recorder, to be substituted for the copies of the original record in their possession. The local registrar and the County Clerk and Recorder shall forthwith enter the substitute record in their files and shall foward immediately to the State Registrar the copies of the original birth record to be sealed with the original record in the files of the State Registrar. Such sealed documents may be opened by the State Registrar only upon the demand of the adopted person if of legal age, or by order of a court of competent jurisdiction. Upon receipt of a certified copy of a court order of annulment of adoption, the State Registrar shall restore the original certificate to its original place in the files. . . ."

The above quoted Section seemingly relates only to adoptions made through a District Court of the State of Montana. Although not expressly excluding other adoptions from its embrace, it speaks only of adoptions made by the order of District Court.

Your question is in effect: Are Indian Adoptions to be given any recognition in the State Courts and if so should the State Bureau of Vital Statistics make a substitute birth certificate when a copy of such adoption is presented to the Bureau?

The Laws of the United States provide that in probate matters under the exclusive jurisdiction of the Secretary of the Interior no person shall be recognized as an heir of a deceased Indian by virtue of an adoption unless the adoption was made in one of four ways. Section 372a of Title 25, F. C. A. sets out these four methods of adoption as follows: (a) By a judgement or decree of a State Court; (b) By a judgment of decree of an Indian Court: (c) By a written adoption approved by the Superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member and duly recorded in a book kept by a superintendent for that purpose; (d) By an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose.

Although Indian Adoptions of approved form are recognized by the Secretary of the Interior as set forth in the preceding paragraph, it is somewhat questionable whether such adoptions are recognized by State Courts. There are no adoptions at common law in the United States and adoptions exist only by virtue of statute. 2 C. J. S., adoption of Children, Section 2, Page 370.

While Indian Marrigaes have been almost universally recognized by the State courts, I have been unable to find a case wherein an Indian adoption was recognized by a State court. The reasons for treating marriage and adoption differently are succinctly stated in the case of NON-SHE-PO v. WA-WIN-TA, 37 Ore. 213, 62 Pac. 15, 82 Am. S. R. 749, wherein the court employs the following language:

> "Now, adoption is the taking into one's family the child of another as son and heir, and conferring on it a title to the rights and privileges of such. It is a right purely statutory, and was unknown to the common law. . . . There must be some special authority for such a proceeding. In this State it requires the decree of a competent court, made in conformity to the provisions of the statute, to confer on a child the capacity or quality of heir to a stranger. . . . In the matter of marriage between Indians, tribal customs have been recognized by the courts because they were in conformity to natural rights. But the right of adoption is contrary to natural law, and we have been unable to find any case reported where adoption by custom has been sanctioned or maintained."

In Wells v. Zents, 83 Cal. App. 137, 256 Pac. 484, the court held as follows:

> "An adoption proceeding is not an ordinary civil action; it is a special statutory proceeding. The power of the court in adoption proceedings is a special power conferred by statute and is in derogation of the common law and repugnant to its principles, and one who claims a valid adoption must show that every requirement of the statute has been strictly complied with."

In view of the very stringent rules of construction which the courts have applied to adoption statutes and the absence of any recognition of Indian Adoptions by other jurisdictions I take no position in this opinion on this issue of whether or not such adoptions would be recognized by the Montana courts. However, since Section 69-525, supra, refers only to adoptions made by order of District Courts, I deem it advisable to instruct you that substitutions should not be made in the records of the State Board of Health when the adoption is made through an Indian Tribal court and is approved by the Indian Agency Superintendent.

It is therefore my opinion that a substitution cannot be legally made in the records of the State Board of Health when an adoption is made through an Indian Tribal Court and is approved by the Indian Agency Superintendent.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.