IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANE DOE, JOHN DOE, MARY ROE, RICHARD ROE, INDIVIDUALLY AND ON BEHALF OF BABY DOE, Plaintiffs, v. TODD HEMBREE, in his official capacity as Cherokee Nation Attorney General; and ED LAKE, in his official capacity as the Director of the Department of Human Services, Defendants.	)	Case No. 15-CV-471-JED-FHM

ORDER

Before the Court are two dismissal motions filed by Todd Hembree, who is sued here in his official capacity as Cherokee Nation Attorney General (Doc. 23, 56), and a motion to dismiss (Doc. 39) filed by defendant Ed Lake, in his official capacity as the Director of the Oklahoma Department of Human Services (DHS).

I. Background

As alleged in the Amended Complaint, plaintiffs Jane Doe and John Doe, who were 18 years old at the time this action was filed, are the biological parents of Baby Doe, who was born in July of 2015. Before the birth of Baby Doe, Jane and John decided that they wanted to place their child in a suitable adoptive home, given their young age and circumstances. They ultimately selected plaintiffs Mary and Richard Roe as the potential adoptive parents of Baby Doe. Jane Doe is a member of the Cherokee Nation and thus believed Baby Doe to be eligible for membership in the Cherokee Nation. As a result, Jane and John discovered that the Oklahoma Indian Child Welfare Act (OICWA) would require that the Cherokee Nation be notified and provided with an

opportunity to intervene in any adoption proceeding involving Baby Doe. Mary and Richard Roe are non-Indian and not related to Jane or John Doe or Baby Doe.

Because OICWA facially applies to voluntary child custody proceedings, the plaintiffs alleged that OICWA violated their substantive due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. Plaintiffs seek a determination of the unconstitutionality of OICWA, *Okla. Stat.* tit. 10, §§ 40.3, 40.4, and 40.6. During the pendency of this action, however, the Roes' adoption of Baby Doe was completed.

II. Cherokee Nation Attorney General Hembree's Dismissal Motions (Doc. 23, 56)

Attorney General Hembree initially moved to dismiss this action on grounds that (1) the Court should abstain from interfering in state adoption proceedings, pursuant to the absention doctrine as set forth in *Younger v. Harris*, 401 U.S. 37 (1971), where the plaintiff's challenge to OICWA had not first been presented to or determined by the state adoption court; and (2) the plaintiffs had not alleged any action by the Cherokee Nation or Attorney General Hembree that violated their constitutional rights. (Doc. 23).

During the pendency of this action, the plaintiffs notified the Cherokee Nation of Baby Doe's adoption proceeding, as required by *Okla. Stat.* tit. 10, § 40.4, and the Cherokee Nation intervened in the adoption, but it did *not object* to the adoption. The notice did not inform the Cherokee Nation that the adoption proceeding involved Baby Doe or any of the plaintiffs to this proceeding. A final decree of adoption was filed on February 10, 2016, completing the adoption of Baby Doe by Mary and Richard Roe. (*See* Doc. 56). In October 2016, the plaintiffs provided the Court with notice of the completion of the adoption of Baby Doe. (*See* Doc. 48). In their notice of the completion of Baby Doe's adoption, plaintiffs argued that this case was not rendered moot because the "challenged action is in its duration too short to be fully litigated prior to its

cessation or expiration, and there is a reasonable expectation that the same complaining party will be subjected to the same action again." (*Id.*). Upon receiving notice of the completion of the adoption, Attorney General Hembree filed a supplemental dispositive motion, premised upon the issues in the case being rendered moot. (Doc. 56).

The Court has reviewed all of the arguments and authorities provided by the parties, and concludes that, on the facts presented, this case should be dismissed as moot. The question of mootness is grounded in the limitation of a federal court's jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. At the start of litigation, a plaintiff must show standing under Article III by demonstrating "(1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) a likelihood that a favorable decision will redress the injury." *Ind v. Colorado Dept. of Corrections*, 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011)). A "live case or controversy" is a "constitutional prerequisite to federal court jurisdiction" and "exists at all stages of federal judicial proceedings." *Id.* (quoting *McClendon v. City of Albuquerque,* 100 F.3d 863, 867 (10th Cir. 1996)). Thus, if a case becomes moot, it must be dismissed. *See Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891-92 (10th Cir. 2008) (citation omitted).

There are exceptions to the mootness doctrine. Here, the plaintiffs assert that this case falls within the exception of a "wrong capable of repetition yet evading review." *See Ind*, 801 F.3d at 1213, 1215. That exception is "narrow" and only available "in exceptional situations." *Id*. at 1215 (quoting *McAlpine v. Thompson*, 187 F.3d 1213, 1216 (10th Cir. 1999) and *Jordan*, 654 F.3d at 1035). In order for the exception to apply, a plaintiff must establish that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action

again." *Id.* (quoting *Jordan*, 654 F.3d at 1035 and *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

With respect to the first component – that the issue involves a duration too short to be fully litigated prior to its cessation – the plaintiffs admit that "in the present case there is not a time period limited by the term of a pregnancy, and Oklahoma law does not impose a deadline for completing an adoption case once it is filed." (Doc. 57 at 2-3). However, they argue that the first requirement is satisfied because "the overall tenor of the Oklahoma Adoption Code is that adoption cases are time sensitive matters and should be completed in less time than other civil matters." (Doc. 57 at 2-3). The Court is not convinced that the "tenor" of the Oklahoma adoption statutes satisfies the short duration requirement of the exception.

The plaintiff argues that this Court should apply *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016) and find that this case is not moot. While that case is similar in certain respects to this one, the *Piper* court's disposition of the mootness issue presented circumstances that were quite different from this case, at least as to the first element of the capable of repetition yet evading review exception. The *Piper* court found that "[o]n the first element, the Does had far less time than the plaintiffs in various Supreme Court precedents where the Court applied the capable-of-repetition exception." *Id.* at 807. In making that finding, the court noted that the plaintiffs in *Piper* had only "one month and five days," and the court cited paragraphs 2 and 41 of the plaintiffs' complaint in that case. *See id.* [1] This presents a crucial distinction to the facts of this case. Unlike

[1] Paragraph 41 of the plaintiffs' complaint in *Piper* expressly alleged "This is an emergency. Plaintiffs placed Baby Doe with Adoptive Parents, for eventual adoption, on May 8, 2015, pursuant to a preadoptive custody order signed by the Hennepin County Juvenile Court. Plaintiffs must execute their consents to adoption within 60 days of the date of placement. Minn. Stat. § 259.47, subd. 7. . . . If Plaintiffs fail to execute consents in 60 days (i.e., by July 8, 2015), the state juvenile court is required to refer the matter to the county child protection agency to investigate whether Plaintiffs should have their rights terminated on the basis of abandonment. Minn. Stat. § 259.47,

the complaint referenced in *Piper*, the plaintiffs' Amended Complaint did *not* assert the existence of any "emergency" or that Oklahoma adoption laws included a short time limit by which they must act or face termination of their parental rights for abandonment. (*See* Doc. 22). Indeed, as noted, the plaintiffs here expressly recognize that, in this case, "there is *not a time period limited* by the term of a pregnancy, and *Oklahoma law does not impose a deadline for completing an adoption case once it is filed*." (Doc. 57 at 2-3) (emphasis added). This Court finds these facts to be distinguishable from those presented in *Piper*. The failure to satisfy the first prong of the exception renders this case moot.

The plaintiffs' arguments on the second element of the exception are a closer call, but the Court also finds the explanation offered by the plaintiffs does not satisfy that element. With respect to the second element, plaintiffs assert that "Jane and John Doe, together or separately, could have another child they may choose to put up for adoption" and "Mary Roe and Richard Roe are also reasonably likely to adopt a child again that would be an Indian Child. . . ." (Doc. 57 at 6). The Court finds that, while these circumstances are theoretically *possible*, they do not appear probable. In *Murphy v. Hunt*, 455 U.S. 478 (1982), the Supreme Court stated:

> The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable. Rather we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

Id. at 482 (quoting *Weinstein*, 423 U.S. at 149).

The plaintiffs have not established the components of the capable-of-repetition, yet evading review exception to the mootness doctrine. This case is moot. As a result, this matter will be

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subd. 8." Thus, the "one month and five days" referenced by the *Piper* court was specifically tied to the time from the plaintiffs' filing of their complaint on June 3, 2015 and the July 8, 2015 statutory deadline under Minnesota law by which the plaintiffs had to consent or face potential termination of their parental rights before the desired adoption could be completed.

dismissed without prejudice. *See Brown v. Buhman*, 822 F.3d 1151, 1179 (10th Cir. 2016) (dismissal where a case has become moot is a dismissal other than on the merits and is thus without prejudice).

III. Director Lake's Dismissal Motion (Doc. 39)

Because this Court has determined that this case is moot, the entire action – including claims against Director Lake – will be dismissed without prejudice, which will in turn render Director Lake's dismissal motion moot. However, the Court notes that, even were this case not rendered moot, Director Lake's motion to dismiss would have been granted in any event, because the plaintiffs did not state a claim against him. The only specific allegation made against him in the Amended Complaint is that he is authorized by Oklahoma law "to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by ICWA." (Doc. 22 at ¶ 10). There is no evidence or authority indicating that the Oklahoma Director of Human Services is vested with the power or responsibility, or that he has actually undertaken any authority, to enforce the challenged portion of OICWA in any adoption proceeding. In addition, Baby Doe was not placed in the care or custody of the Department of Human Services; as alleged in the plaintiffs' Amended Complaint, the plaintiffs or their adoption counsel arranged for the preadoptive and adoptive placement of Baby Doe, without any involvement of the Department of Human Services.

IV. Conclusion

For the reasons set forth herein, the motion of Cherokee Nation Attorney General Todd Hembree to dismiss this action on the basis of mootness (Doc. 56) is **granted**. All other pending motions (Doc. 23, 39, 47) are deemed moot as a result. This action is dismissed without prejudice. A separate Judgment of Dismissal will be entered forthwith.

SO ORDERED this 31st day of March, 2017.

JOHN E. DOWDELL
UNITED STATES DISTRICT JUDGE