

Nos. A05-1615 and A05-1631

STATE OF MINNESOTA

IN SUPREME COURT

OCT 30 2005

FILED

In the Matter of the Welfare of the

Child of T.T.B. and G.W., Parents

JOINT PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Minn. R. Civ. App. P. 140.01-.03, respondents G.W. and Yankton Sioux Tribe (the "Tribe") jointly and respectfully request that the Court grant rehearing in the above matter. The Court's holding in its October 19, 2006 Opinion that the ASFA and Minn. Stat. § 260C.201 would have been violated by granting the motion to transfer to tribal court is clearly and plainly contrary to the facts, those statutes themselves and controlling principles of law.

Please also note that this petition is solely addressed to the specific, limited criteria for rehearing set forth in Minn. R. Civ. App. P. 140.01. This petition contains only issues which are permitted by Rule 140, and Respondents do not intend to waive other issues already presented to this Court or to the Court of Appeals.

STATEMENT OF THE CASE

This case involves denial by the district court of G.W.'s and T.T.B.'s joint motion to transfer proceedings initiated to determine placement of their child, X.T.B., an enrolled member of the Yankton Sioux Tribe, to the Yankton Sioux Tribal Court. Reversing a decision of the Minnesota Court of Appeals, this Court reinstated the district court's denial of transfer, citing three statutes as supporting that holding: the Indian Child Welfare Act ("ICWA"), the Adoption and Safe Families Act of 1997 ("ASFA") and Minn. Stat. § 260C.201, subd. 11a.

Pursuant to Minn. R. Civ. App. P. 140.01, requests for rehearing by this Court are appropriate where a party can set forth with particularity: (1) any controlling statute, decision or principle of law; (2) any material fact; or (3) any material question in the case which the Court has overlooked, failed to consider, misapplied or misconceived.

In this case, Respondents respectfully suggest that the Court: (1) misapplied the facts to the ASFA, as granting the motion to transfer would not have violated the ASFA; (2) misapplied established law that the ASFA does not supersede the ICWA; (3) misapplied the facts to Minn. Stat. § 260C.201, subd. 11a, as granting the motion to transfer would not have violated Minn. Stat. § 260C.201, subd. 11a; (4) ignored the Supremacy Clause of the United States Constitution by announcing and applying a state-created statute of limitations to extinguish substantive federal rights granted under the ICWA; and (5) erred by retroactively applying a statute of limitations first announced on October 19, 2006 to extinguish substantive federal rights of X.T.B., his parents and his Tribe as of July 2004 despite a total absence of notice that those rights were then at risk.

ARGUMENT

I. THERE WAS NO VIOLATION OF THE ASFA.

The Court misapplied the facts in determining that the ASFA was violated or otherwise supported denial of the motion to transfer. The ASFA requires that there be a permanency hearing within twelve months of entering foster care. 42 U.S.C. § 675(5)(C) (2000). The ASFA's application is not specific to Indian children.

Here, the County filed a petition seeking to terminate G.W.'s and T.T.B.'s parental rights to X.T.B. on December 31, 2003. On July 22, 2004, X.T.B.'s parents jointly moved to transfer jurisdiction to the Yankton Sioux tribal court. There is nothing in the record to support a finding or conclusion that granting the motion to transfer would have delayed permanency beyond the twelve months set forth in the ASFA. As such, the Court's reliance upon the ASFA constitutes a misapplication of the facts before it.

II. THE ASFA DOES NOT SUPERSEDE THE ICWA.

The Court's reliance upon the ASFA to "trump" the ICWA's unmistakably clear presumption in favor of transfers to tribal court also constitutes a misapplication of the ASFA. As noted in Title IV-E Foster Care Eligibility Reviews and Family Services Plan Reviews, 60 F.R. 4020, 4029 (2000), nothing in the ASFA supercedes the ICWA. *See also People ex. rel. J.S.B.*, 691 N.W.2d 611, 620 (S.D. 2005) (holding that the ICWA was not modified by the ASFA).

In sum, the October 19, 2006 Opinion incorporates an incorrect factual assumption that granting of the motion to transfer would have violated the ASFA, and that Opinion further incorporates a legal misinterpretation that the ASFA has precedence over the

ICWA, including the ICWA's express presumption in favor of transfers to tribal court of placement proceedings regarding children of that Tribe.

III. THERE WAS NO VIOLATION OF MINN. STAT. § 260C.201, SUBD. 11a.

Minn. Stat. § 260C.201, subd. 11a (2005) requires only that "no later than six months after placement the court shall conduct a permanency hearing to review the progress of the case, the parent's progress on the out-of-home placement plan, and the provision of services." *Nothing* in the statute requires a permanency determination within six months.

Here, the district court, within six months, held hearings in compliance with Minn. Stat. § 260C.201, subd. 11a and *thereafter* issued an Order postponing the trial date based upon its express finding that a delay in holding the permanency hearing beyond six months was in the best interests of X.T.B. The district court ordered the continuance of the permanency hearing *sua sponte*, and the Order to delay the permanency trial was *not* requested by X.T.B., his parents or the Tribe. No party objected to that Order, and that Order was independent of the motion to transfer. In sum, there was no violation of the statute, and there is absolutely no support in the record or the statute for this Court's determination that granting the motion to transfer would have violated the statute.

IV. DECLARATION OF A SIX MONTH STATUTE OF LIMITATION ON MOTIONS TO TRANSFER JURISDICTION UNDER THE ICWA BASED UPON MINN. STAT. § 260C.201 VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court's Opinion also violated a well-established principle of law, specifically the principle of constitutional law that where a state law conflicts with a federal law, the

state law is preempted. *See Hines v. Davidowitz*, 312 U.S. 52, 66-69 (1941). That rule finds its source in the Supremacy Clause of the United States Constitution. *Id.* at 62-63 (citing U.S. Const. Art. VI).

As noted in the Court's Opinion:

Congress enacted ICWA to address the 'rising concern in the mid-1970s over the consequences . . . of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'

Slip Op. at 8 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA was enacted as an express exercise of federal authority over state decisions and rules regarding the placement of Indian children. The ICWA's plain language includes a presumption of tribal jurisdiction unless good cause is shown to the contrary. 25 U.S.C. § 1911(b). Nowhere in the ICWA is there any *per se* time limitation on bringing motions to transfer. As such, any attempt by the State of Minnesota—whether through its Legislature or through its Court in this Opinion—to graft a six month statute of limitations on the bringing of motions under the ICWA to transfer to tribal court is preempted. Furthermore, if every State is allowed to set its own statute of limitations (presumably based upon its own interests), the result will be to turn preemption on its head. An Act of Congress that was specifically enacted to take away State authority over the placement of Indian children will be made dependent upon multiple statutes of limitations generated by those same States.

Nothing in the ICWA countenances such a result, which would raise the possibility that Indian parents and Tribes will have to run a gauntlet through a 'crazy

quilt' of up to fifty separate limitation periods—depending upon where their children are located—to preserve their substantive Federal rights under the ICWA. Moreover, those State-generated statutes of limitation may not be readily discoverable by the parents or the Tribe, with this case being a prime example: in July 2004, there was nothing in the ICWA, any reported decision interpreting the ICWA or any reported decision from this Court or any other court that alerted X.T.B's parents or the Tribe that they had to file a motion to transfer within six months of the initial filing of the petition in this case.

V. THE COURT ERRED BY RETROACTIVELY APPLYING ITS DECISION.

For the reasons noted above, the Court's Opinion that motions to transfer must be made within six months is factually and legally incorrect. Furthermore, the Court's decision to apply a statute of limitations first declared on October 19, 2006 to bar a motion filed in July 2004 is clear error.

Minnesota courts follow a three-part test in determining whether to apply a new rule prospectively. *Summers v. R&D Agency, Inc.*, 593 N.W.2d 241, 245 (Minn. Ct. App. 1999) (citing *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982)). The three factors are: (1) "the decision must establish a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) "the court must weigh the merits by looking at the prior history of the rule, its purpose and effect, and determine whether retroactive operation will further or retard its operation;" and (3) "the court must weigh the equities imposed by retroactive application, and avoid 'injustice or hardship' with a holding of nonretroactivity." *Id.* (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

See also Spanjel v. Mounds View Sch. Dist. #621, 264 Minn. 279, 294-95, 118 N.W.2d 795, 804 (1962) (holding that a newly announced rule did not apply to that litigant but only to future litigants).

All three factors are present here. First, the Court's decision that Minn. Stat. § 260C.201 and/or the ASFA served to bar a motion to transfer filed in July 2004 was not clearly foreshadowed in any statute, regulation, rule or published decision. Second, retroactive operation will retard the ICWA's operation by—without any prior notice—cutting off the substantive Federal rights of Indian children, their parents and their Tribes to transfer their placement proceedings to tribal court. Third, the equities favor prospective application because Respondents had no notice in 2004 that a six month limitation on motions to transfer would be declared in October 2006.

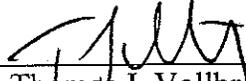
The substantive rights of X.T.B., his parents, and the Tribe under the ICWA that existed at the time that the motion to transfer was filed in July 2004 cannot be retroactively extinguished by this Court's announcement—for the first time—on October 19, 2006 that such motions to transfer must be filed within six months. Nothing in the ICWA or any prior decision alerted them to the possibility of such a ruling. To apply such a rule to them retroactively, more than two years after the fact, is inequitable and a material violation of Minnesota law on prospective application.

CONCLUSION

Respondents respectfully request a rehearing at which time these important and dispositive matters can be fully briefed, argued, and examined by the Court.

Dated: October 30, 2006

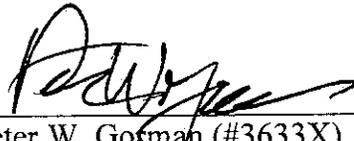
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CERTIFICATION
OF BRIEF LENGTH

Child of T.T.B. and G.W., Parents

Appellate Court
Case Number: Nos. A05-1615 and A05-1631

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with proportional font. The length of this brief is 1,822 words. This brief was prepared using Microsoft Word 2003 software.

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