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A05-1631

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In The Matter Of The Welfare
Of The Child Of G.W. & T.T.B., Parents

APPELLANT G.W.'S BRIEF AND APPENDIX

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LEGAL ISSUES INVOLVED

I. DID THE JUVENILE COURT LACK PERSONAL AND SUBJECT MATTER JURISDICTION OVER X.T.B. AND HIS PARENTS?

The juvenile court did not consider this question.

Most Apposite Authorities:

Minn. Stat. § 260C.175 (2002)
Welfare of Shady, 264 Minn. 222, 118 N.W.2d 449 (1962)

II. DID THE JUVENILE COURT ERR IN DENYING A.G.M.'S MOTION TO INTERVENE AS A PARTICIPANT?

The juvenile court denied the motion.

Most Apposite Authorities:

Minn. R. Juv. Prot. P. 22.01
J.W. v. C.M., 627 N.W.2d 687 (Minn. Ct. App. 2001)

III. DID THE JUVENILE COURT ERR IN DENYING THE MOTION TO TRANSFER THIS MATTER TO THE TRIBAL COURT?

The juvenile court denied the motion.

Most Apposite Authorities:

25 U.S.C. § 1911(b) (2000)
44 Fed. Reg. 67584 (Nov. 26, 1979)
Minn. D.H.S., Social Services Manual, § XIII-3544 (Oct. 15, 1999)

IV. DID THE JUVENILE COURT ERR IN TRANSFERRING LEGAL CUSTODY TO A NON-RELATIVE, NON-INDIAN HOME?

The juvenile court transferred custody to a non-relative, non-Indian home.

Most Apposite Authorities:

25 U.S.C. § 1915(b) (2000)
44 Fed. Reg. 67584 (Nov. 26, 1979)
Minn. D.H.S., Social Services Manual, § XIII-3555 (Oct. 15, 1999)
Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994),
cert. denied, 513 U.S. 1127 (1995)

STATEMENT OF PROCEDURAL HISTORY

This appeal is taken from an order of the Hennepin County Juvenile Court, Judge Herbert P. Lefler, which resolved an amended petition to transfer permanent legal and physical custody of X.T.B. from his parents, T.T.B. and G.W. That amended petition was filed with the juvenile court on July 16, 2004, and was preceded by at least two other petitions, one filed on November 21, 2003, and one filed on December 31, 2003.

A largely-stipulated trial of the transfer of legal custody petition, on documents and a limited amount of testimony, was held on October 27, 2004. On February 17, 2005, the court issued its order transferring permanent legal and physical custody of X.T.B. to S.G. (Appendices 7-12).

G.W. made a timely motion for a new trial. This motion was heard on May 9, 2005, and denied by order filed on July 14, 2005 (Appendices 13-17).

G.W. filed this appeal on August 15, 2005 (App. Ct. File No. A05-1631) (Appendices 1-6). A separate appeal from the same orders was filed by G.W.'s tribe, the Yankton Sioux Tribe (App. Ct. File No. A05-1615). The two appeals were consolidated by order of the Court of Appeals, at Appellants' request, on August 26, 2005. None of the other participants or parties to this litigation, including the mother, T.T.B., has appealed.

STATEMENT OF FACTS

X.T.B. was born to T.T.B. and G.W. in the State of Rhode Island on November 15, 2003. T.T.B. is a member of the Oglala Sioux Tribe of Pine Ridge, South Dakota. G.W. is a member of the Yankton Sioux Tribe of Marty, South Dakota (Exhibit # 1).

B.W. is G.W.'s mother, X.T.B.'s paternal grandmother, and is a member of the Yankton Sioux Tribe (Exhibit # 12). B.W. was interested in becoming either a permanency placement or an adoptive placement for X.T.B. (Exhibit # 12; Trans. April 20, 2004 at 7).

X.T.B. has always been eligible for enrollment in the Yankton Sioux Tribe (Exhibit #'s 2-4). He was formally enrolled in the tribe in June of 2004 (Trans. Oct. 5, 2004 at 14-15). The Yankton Sioux Tribe is the joint Appellant in App. Ct. File No. A05-1615. The record does not indicate whether X.T.B. was ever eligible for membership in the Oglala Sioux Tribe.

S.G. is the grandmother of T.T.B.'s first child, A.G. A.G. was placed with S.G. after her father (not G.W.) and T.T.B. voluntarily terminated their parental rights on February 17, 2004. See Trans. Feb. 17, 2004 at 3-16. Because they have the same mother, A.G. is X.T.B.'s half-sister. S.G. is not Native American. Although she is A.G.'s grandmother, she is not related by blood or marriage to X.T.B.

A.G.M. is a Native American woman who was a former foster mother to T.T.B. She had known T.T.B. and G.W. since 1997. She had worked with T.T.B. at a Ramsey County youth shelter, Beverly Youth Lodge. At the time of these proceedings, she and her husband, N.M., were living in Rhode Island, where she was studying for a Ph.D., writing her dissertation, and teaching at Merrimack College (Exhibit #'s 8,11). A.G.M. and N.M. were fully prepared and willing to assume long-term custody of X.T.B. (Exhibit # 8).

These proceedings are governed by the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (2000)(*hereinafter*, ICWA) and by the Minnesota Indian Family Preservation Act, Minn. Stat. § 260.751-§ 260.835 (2002).

In 2003, T.T.B. was subject to the jurisdiction of the juvenile court in two files. In the first file, she was a state ward, as her parents' parental rights had been terminated some time earlier.¹ Judge Lefler dismissed T.T.B. from state-ward jurisdiction on September 5, 2003. In the second file, she was before the court in child-protection matters involving her first child, A.G.²

At the time she became pregnant with X.T.B., T.T.B. was living at the Beverly Youth Lodge in Ramsey County, a court-ordered placement on the state-ward proceeding. She wanted to deliver her baby in Rhode Island, where A.G.M. was then living. She and G.W. wished to explore either adoption or some form of

¹ Hennepin County Juvenile Court File No. J4-03-055416.

² Hennepin County Juvenile Court File Nos. J9-03-051071 & J9-03-057131. The first was a C.H.I.P.S. proceeding filed on January 16, 2003; the second was a termination of parental rights/transfer of legal custody proceeding filed on April 29, 2003.

custody transfer of the child she was expecting to A.G.M. and her husband. She was given permission by Beverly Youth Lodge to travel to Rhode Island with G.W.

While T.T.B. was in Rhode Island, on November 10, 2003, she failed to appear in court on the child-protection proceedings involving A.G., and, over objection, Judge Lefler preliminarily defaulted her.³ Although the court's order from that hearing does not so state, the court was apparently told on that date that T.T.B. was in Rhode Island for treatment of a medical condition which she did not wish to be disclosed (Trans. Dec. 23, 2003 at 2). Both the court and the county attorney's office claimed that staff members of the Beverly Youth Lodge had not told them the truth about T.T.B.'s visit to Rhode Island (Trans. Dec. 23, 2003 at 2,5-6; Trans. Feb. 17, 2004 at 17,19-20), but there is nothing in the record as to what they were told or why it was not the truth.⁴

T.T.B. gave birth to X.T.B. in Rhode Island on November 15, 2003. Within a short time, T.T.B. told a hospital social worker some things which caused the Rhode Island authorities to remove X.T.B. from the home of A.G.M. and N.M., where X.T.B. was staying with T.T.B. and G.W. Eventually, the social worker contacted Hennepin County authorities and learned that T.T.B. had a child-protection proceeding pending before the juvenile court.

³ Ultimately, both T.T.B. and A.G.'s father voluntarily terminated their parental rights, and the court placed A.G. with S.G., her paternal grandmother, where she had been since shortly after her birth (Trans. Feb. 17, 2004 at 3-16).

⁴ Nor is there anything in the record which supports the county attorney's claim that T.T.B., G.W., A.G.M. and N.M. were planning to do a "quick adoption" in Rhode Island without Hennepin County authorities ever finding out about X.T.B. (Trans. Dec. 23, 2003 at 3).

On November 21, 2003, Judge Lefler issued an order for immediate custody of X.T.B. and that order was transmitted to the authorities in Rhode Island. There is no dispute that the petition which resulted in this order was nothing more than a copy of the earlier, A.G., petition, to which X.T.B.'s name and G.W.'s name had been added in passing (Trans. Dec. 23, 2003 at 4-5).⁵ With the exception of one paragraph, which details X.T.B.'s detention by Rhode Island authorities, the November 21st petition deals exclusively with T.T.B. and her parenting of A.G., and says nothing about G.W. [This was the same petition on which the court had issued a preliminary default adjudication six weeks earlier (Trans. Dec. 23, 2003 at 5).]

The court's November 21st order, which also does not mention G.W., stated that a *prima facie* showing had been made that X.T.B. was in surroundings or conditions that endanger[ed his] health, safety or welfare” The Rhode Island courts refused to intervene (Trans. Dec. 23, 2003 at 3; Trans. Feb. 17, 2004 at 17; Trans. April 20, 2004 at 6);⁶ within a month, X.T.B. was transferred to Minnesota.

A new, proper, petition was not prepared and filed until December 31, 2003,⁷ eight days *after* the emergency protective care hearing at which the court took custody of X.T.B., using the old A.G. petition, amended on November 21st.

⁵ See computerized history of Hennepin County Juvenile Court File No. J9-03-057131, which has an entry for November 21, 2003 which states “child added” followed by X.T.B.’s full name.

⁶ The county attorney repeatedly referred to the matter being heard by the Rhode Island Supreme Court. The documents we have are Family Court and Juvenile Court documents only (Trans. April 20, 2004 at 6).

⁷ Hennepin County Juvenile Court File No. J8-03-071747.

The amended, December 31, 2003 petition sought termination of parental rights or, alternatively, a permanent transfer of legal custody. It was virtually identical to the November 21st petition. Like the November 21st petition, with the exception of one paragraph which related the circumstances of X.T.B.'s detention by Rhode Island authorities, the new petition concerned itself entirely with T.T.B. and her parenting of A.G. It contained no allegations against G.W.; in fact, it merely mentioned his name in passing, listing his race as "unknown," and his tribal affiliation as "none known."

Two weeks later, notices were sent out concerning a hearing on February 17, 2004. The first notice, dated January 14, 2004, did not list the Yankton Sioux Tribe, and listed G.W.'s address as "general delivery" in Minneapolis. The second notice, dated January 15, 2004, listed the Yankton Sioux Tribe but still addressed G.W. in care of "general delivery."

February 17, 2004 was the first hearing on the December 31st petition. G.W. was present and was appointed public counsel (Trans. Feb. 17, 2004 at 16); the Yankton Sioux Tribe was not present, and there is nothing in the record which shows whether it received the January 15, 2004 notice. Counsel for T.T.B. advised the court that she and G.W. wanted X.T.B. placed with A.G.M. and N.M., and that the parents considered their Rhode Island friends a potential permanent

placement. A home study had already been initiated (Trans. Feb. 17, 2004 at 18-19).

T.T.B.'s lawyer asked that the court allow A.G.M. and N.M. to visit X.T.B. in April of 2004, when they were expecting to be in Minnesota (the court had denied visitation at the December 23, 2003 hearing)(Trans. Feb. 17, 2004 at 18-19).

The court felt that T.T.B. and the staff of the Beverly Youth Lodge had misled it about the circumstances under which T.T.B. went to Rhode Island; for that reason, it denied visitation with A.G.M. and N.M. until it could learn whether they took part in that alleged deception (Trans. Feb. 17, 2004 at 19-20).

A pretrial conference was scheduled for April 20, 2004. By then, A.G.M. had secured counsel, who asked by motion and oral argument that she be allowed participant status under Rule 22.01 of the rules of juvenile procedure (Trans. April 20, 2004 at 2-3). The motion was based on A.G.M.'s relationship with T.T.B. and G.W. and X.T.B., and upon the parents' preference that A.G.M. and her husband become X.T.B.'s long-term custodians. T.T.B. and G.W. supported the motion, and advised the court that they wished to transfer legal custody of X.T.B. to A.G.M. and her husband (Trans. April 20, 2004 at 4-5). The county attorney and the Guardian opposed the motion on the ground that the proceedings were not yet at the permanency stage (despite the fact that the December 31, 2003 petition was a permanency petition), and on the ground that A.G.M. was aligned with the parents; thus, counsel argued, the parents could

provide the court with whatever information A.G.M. possessed (Trans. April 20, 2004 at 3-6).

Judge Lefler denied A.G.M.'s motion. He said that there were three possible placements: A.G.M. and her husband, G.W.'s mother, B.W., and A.G.'s grandmother, S.G., X.T.B.'s then-foster mother. If the court granted participant status to one, it had to grant it to all, and it did not want to do that. The court asked that notice be provided to all three families, and suggested that an upcoming Family Group Conference might facilitate the placement issue (Trans. April 20, 2004 at 7-9).

Counsel for G.W. objected to X.T.B.'s placement in a non-Native American home when a Native American home was available (Trans. April 20, 2004 at 9-10).

The Yankton Sioux Tribe was not present. The court indicated that the county attorney's office planned to send Yankton "enrollment information." The Oglala Sioux Tribe was represented by a local advocate and indicated that it was satisfied with the placement for the time being (Trans. April 20, 2004 at 10).

By the time of the next court hearing, on June 10, 2004, the Family Group Conference had taken place but the discussions among all three placement families, Yankton Sioux's ICWA Director, Mr. Cournoyer, and the parents did not result in any consensus as to placement (Exhibit # 7).

At the June 10th hearing, both parents were present, along with X.T.B.'s foster mother, S.G. Both the Yankton Sioux and Oglala Sioux tribes were present through a local representative. Preliminary discussions had taken place about having the Yankton Sioux Tribe appear at the adjudicatory hearing by telephone, and the county attorney indicated that it would arrange travel plans for both tribes to be present (Trans. June 10, 2004 at 3).

Both G.W. and T.T.B. again advised the court that they wanted X.T.B. placed with A.G.M. and her husband. Both objected to X.T.B.'s placement (and the agency's determination to continue that placement) at S.G.'s home, which was a non-Native home as well as a non-relative home (Trans. June 10, 2004 at 3-4). The Guardian supported the placement, and the Oglala Sioux Tribe supported it for the time being. The local representative for both Yankton and Oglala indicated that she was "collecting the information between [both tribes]" and that they were in agreement at that point (Trans. June 10, 2004 at 5). An adjudicatory hearing date for late July was set and later changed.

Prior to the next scheduled hearing, the county attorney filed, on July 16, 2004, an amended permanency petition which included a prayer for transfer of legal custody. Unlike the two December, 2003 petitions, this petition alleged behavior on the part of G.W. The petition was scheduled for August 12th, and a notice was sent to both the Yankton Sioux Tribe and the Oglala Sioux Tribe on July 22nd.

G.W. moved to dismiss the permanency petitions on July 21, 2004. When that motion was argued at a hearing on August 12, 2004, he argued that the two December, 2003 petitions alleged nothing as to him, that the contents of both petitions alleged T.T.B.'s conduct with regard to A.G. only. As to the July, 2004, petition, G.W. argued that his alleged case plan failures were not probative because the case plan, as to him, was completely voluntary. Last, he argued that he had not abandoned X.T.B.—rather, his advocacy of a custody transfer to either his mother or to A.G.M.'s family merely reflected his youth, his inexperience in parenting, and his recognition that he would need assistance in raising X.T.B. (Trans. Aug. 12, 2004 at 5-9). The court denied this motion (Trans. Aug. 12, 2004 at 12-13).

At this hearing, the county attorney clarified that it was no longer seeking to terminate the parents' rights to X.T.B., but was instead seeking only a transfer of legal custody. Counsel also indicated that arrangements were being made to pay travel expenses for both tribes to take part in the adjudicatory hearing (Trans. Aug. 12, 2004 at 12,14). Although neither tribe was present at this hearing, the Yankton Sioux Tribe had by then communicated its position that X.T.B. should be placed with A.G.M. and her family, or at a home that it approved (Exhibit #'s 5,6).

The Rhode Island home study was completed and received about the end of August, 2004. Although the home study discovered nothing which would

preclude A.G.M. and N.M. from caring for X.T.B., the authorities nevertheless recommended against the placement. The study makes clear that its recommendation against placement was almost exclusively based on its belief that either T.T.B. or A.G.M. had been untruthful to that department in the days after X.T.B.'s birth (Exhibit # 8, at 9). By the time it was completed, the home study was of marginal relevance, because, by the fall of 2004, A.G.M. and her family had moved, first to Nova Scotia and then to Massachusetts (Exhibit # 13).

On July 22, 2004, T.T.B. and G.W. jointly filed a motion to transfer the proceedings to the tribal court of the Yankton Sioux Tribe. This was two months before the adjudicatory hearing, then scheduled for October 27, 2004. On September 8, 2004, the Yankton Sioux Tribe itself also filed a motion to transfer the matter to its tribal court (Trans. Oct. 5, 2004 at 2). The transfer motion was to have been heard at the August 12th hearing (Trans. Aug. 12, 2004 at 4), but the court indicated that it wanted to know whether the tribal court would accept jurisdiction before it heard arguments (Trans. Aug. 12, 2004 at 13).

This motion was heard on October 5, 2004. The agency took no position on it (Trans. Oct. 5, 2004 at 3). The ICWA Director for the Yankton Sioux Tribe, Mr. Raymond Cournoyer, was present and was examined by all parties (Trans. Oct. 5, 2004 at 4-16). Cournoyer indicated that, while G.W. had asked him in June, 2004, to seek a transfer to tribal court, that he had also had a lengthy discussion with the tribal prosecutor who signed the request. The request, once

made, had to be approved by the tribal court before jurisdiction would be accepted (Trans. Oct. 5, 2004 at 10-11). Courmoyer had met with every party and participant in the matter, aside from the Rhode Island authorities (Trans. Oct. 5, 2004 at 5-6, 10-12). The Guardian was the only party opposing it, in both brief and argument (Trans. Oct. 5, 2004 at 16-17). The Guardian's objections were that the motion had been filed too late, when the proceeding was at an advanced stage, that it was inconvenient for parties and witnesses to travel to Marty, South Dakota for tribal court proceedings, that X.T.B. had bonded with his half-sister, and that the parents were guilty of forum-shopping (Trans. Oct. 5, 2005 at 16-17).

On October 27, 2004, the date of the adjudicatory hearing, the court denied the motion for transfer to tribal court. The court gave the following reasons: (a) the Tribe had received notice of the proceeding in May, 2004, but had not filed its motion until September, 2004; (b) Marty, South Dakota is 400 miles from Minneapolis and traveling this distance is a hardship to parties, participants and witnesses; (c) the Tribe did not state that it had a tribally-approved placement ready for X.T.B.; and (d) transfer to tribal court would delay permanency. See Appendices 23-26 of Appellant Yankton Sioux Tribe's brief.

At the adjudicatory hearing on October 27th, the matter was submitted to the court for decision as to three possible options for a transfer of legal custody:

(a) the home of S.G., who is A.G.'s grandmother and X.T.B.'s foster mother, but who was not Native American and not related by blood or marriage to X.T.B.; (b) the home of B.W., X.T.B.'s grandmother, G.W.'s mother, and a Native American; and (c) the home of A.G.M., a long-time friend, mentor, and care-provider for G.W. and T.T.B., and former foster parent to T.T.B. Each of these submitted an affidavit stating her willingness to provide for X.T.B. (Exhibit #'s 10,12,11, respectively).

T.T.B. and G.W. preferred A.G.M.'s family first and B.W.'s home second (Trans. Oct. 27, 2004 at 20-27; Stipulation, Oct. 27, 2004, ¶ 15); the Guardian and the agency preferred S.G.'s home (Trans. Oct. 27, 2004 at 26-33; Stipulation, Oct. 27, 2004, ¶'s 16-17). The Yankton Sioux Tribe, through its ICWA Director, Mr. Cournoyer, recommended transfer of legal custody to B.W. (Trans. Oct. 27, 2004 at 18-19).

In addition to these exhibits, and testimony taken that day from both parents and Mr. Cournoyer, the Yankton ICWA Director (Trans. Oct. 27, 2004 at 6-20), there were: (a) two documents concerning X.T.B.'s enrollment eligibility with the Yankton Sioux Tribe (Exhibit #'s 3-4); (b) G.W.'s enrollment with the Tribe dated April 13, 2004 (Exhibit # 1); (c) Yankton Sioux Tribe's intervention dated April 23, 2004 (Exhibit # 2); (d) two affidavits by Yankton Sioux Tribe's ICWA Director, dated May 24, 2004 and July 13, 2004 (Exhibit #'s 5-6); (e) the June 4, 2004 Family Group Conference report (Exhibit # 7); (f) the home study on A.G.M. and N.M.'s home dated August 24, 2004 (Exhibit # 8); (g) an affidavit

dated October 27, 2004 by the child protection social worker (Exhibit # 9); and (h) a letter from A.G.M.'s counsel (Exhibit # 13).

On February 17, 2005, the court issued its orders transferring permanent legal and physical custody to S.G. The court's principal finding was that B.W. had not taken steps to establish a personal or legal relationship with X.T.B. (Feb. 17, 2004 Order at ¶'s 27-29,38.4).

G.W. then filed a new-trial motion, and the court denied this motion on July 14, 2005. This appeal is taken from those orders.

ARGUMENT

I.

THE JUVENILE COURT LACKED PERSONAL AND SUBJECT-MATTER JURISDICTION OVER X.T.B. AND HIS PARENTS.

Appellant G.W. agrees in all respects with Joint Appellant Yankton Sioux Tribe's argument that the juvenile court lacked personal and subject-matter jurisdiction over him and over X.T.B. when it granted the order for immediate custody on November 21, 2003. See Brief of Appellant Yankton Sioux Tribe (App. Ct. File No. A05-1615) at 7-13.

At that time, X.T.B. was living in the State of Rhode Island. He had been discharged from the hospital in care of his parents. He had never lived in

Minnesota. G.W. and T.T.B. were with him and with A.G.M. and her husband in Rhode Island.

X.T.B.'s name was added onto an already-adjudicated (by default) child protection petition involving T.T.B.'s other child, A.G. The A.G. case numbers were scratched out and replaced with new case numbers. The petition mentioned G.W. as a father, stating that his birthdate, address, race and tribal affiliation were unknown. There is not one additional word in this petition about G.W., and no allegations that he was not providing proper care for his son. There is not one word in the petition alleging that X.T.B. was in conditions dangerous to his health or welfare. The most that can be said of the petition is that it contained one paragraph pleading the manner in which the agency learned that the family was in Rhode Island.

The November 21, 2003 order for immediate custody, which is the document under which Rhode Island authorities transferred X.T.B. back to Minnesota, contains the same defects. It does not contain one word about G.W., and no allegations that he was not providing proper care for his son. There isn't one word suggesting that X.T.B. was in conditions dangerous to his health or welfare.

Minnesota law requires a threshold showing before the court may take custody of an infant in a child-protection proceeding, even one brought under alleged "emergency" conditions. See Minn. Stat. §§ 260C.175, *et. seq.*; Minn. R. Juv. Prot. P. 28-30; Welfare of Shady, 264 Minn. 222, 225, 227-30, 118 N.W.2d

449, 451, 453-54 (1962).⁸ There is not even the remotest threshold showing that, at the time the court issued its order for immediate custody, that X.T.B. was in any danger at all, or that G.W., A.G.M. or N.M. could not properly care for him.

Since the court lacked personal and subject matter jurisdiction at the outset, its orders taking X.T.B. into custody in November, 2003, and its subsequent order transferring legal custody are entirely void. The orders should be reversed; X.T.B. should be restored to his father's custody, his status in November, 2003 before the court acted without jurisdiction.

II.

THE JUVENILE COURT ERRED IN DENYING A.G.M.'S MOTION TO INTERVENE AS A PARTICIPANT IN THE PROCEEDING.

On April 12, 2004, A.G.M. and her husband moved to intervene in the proceeding as participants under Minn. R. Juv. Prot. P. 22.01(i), which grants participant status in the juvenile court proceeding to "any other person who is deemed by the court to be important to a resolution that is in the best interests of the child."⁹

In support of their motion, A.G.M. and N.M. argued that T.T.B. and G.W. had named them as potential long-term custodians or adoptive parents of X.T.B. They also noted that they had taken "significant parental roles in the lives of"

⁸ The relevant provisions of the law are not significantly different from what they were when Shady was decided.

⁹ Contrary to the county attorney's statement (Trans. April 20, 2004 at 2), this was not a motion for party status under Rule 21

T.T.B. and G.W. By allowing them participant status, they argued that they would be better able to provide the court with information necessary to evaluate them as custodians or adoptive parents. Last, A.G.M. and N.M. argued that, because of their relationship with T.T.B. and G.W., they qualified as X.T.B.'s relatives under state law and under the ICWA.

This motion was argued before the court on April 20, 2004 (Trans. April 20, 2004 at 2-7) and denied by the court (Trans. April 20, 2004 at 7-9). Both parents supported A.G.M.'s motion (Trans. April 20, 2004 at 4-7). In particular, counsel for G.W. noted that a child's best interests would be *better* served by a larger number of people interested in its welfare (Trans. April 20, 2004 at 7). The county attorney and the Guardian opposed the motion on the grounds that it was premature, because the case was not yet at permanency, and because A.G.M. was "aligned" with the parents and therefore the parents could provide A.G.M.'s information (Trans. April 20, 2004 at 3-6).

The court, in denying the motion, said that it would have to grant participant status to both B.W. and to S.G. if it granted participant status to A.G.M. and N.M., and he did not want to give any proposed custodian a "leg up" by granting participant status (Trans. April 20, 2004 at 7-9).

This ruling was a clear abuse of discretion. It is certainly hard to see how the motion was "premature," in the county attorney's words, because the case was not yet at permanency, when its December 31, 2003 petition was, in fact, a permanency petition. It is also hard to square the Guardian's opposition to the

motion on the ground that it was "premature" when that same Guardian argued against a motion for transfer to tribal court on the ground that the proceeding was at an advanced stage (Trans. Oct. 5, 2004 at 16-17). See Argument III, *infra*.

Nothing in Minnesota juvenile law says that a person cannot be a participant in a child protection proceeding because that person might be "aligned" with another party. In fact, foster parents, grandparents and prospective adoptive parents intervene in these cases routinely, and they *always* are aligned with one or another party.

A.G.M. had known T.T.B. since 1997 and had known G.W. almost that long. A.G.M. had been a foster parent to T.T.B. when the latter was a state ward, and had worked with her when she was placed at Beverly Youth Lodge. T.T.B. and G.W., recognizing that because of their youth they would need assistance in raising X.T.B., asked A.G.M. and her husband to be custodians and possible future adoptive parents for X.T.B.

For these reasons, for the reasons stated in the supporting memorandum filed with her motion, for all the reasons stated by A.G.M. in her affidavit of July 9, 2004 (Exhibit # 11), and for the reasons stated in an earlier affidavit A.G.M. submitted to the court, it is impossible to conclude that A.G.M. would not have been "important to a resolution that is in the best interests of" X.T.B. Minn. R. Juv. Prot. P. 22.01(i). The juvenile court erred in denying the motion.

Although A.G.M.'s motion did not mention intervention under Minn. R. Juv. Prot. P. 23, it is also clear that A.G.M. could have moved for permissive intervention under Rules 23.02 and 23.03, subd. 2. Rule 23.02 permits a person "to intervene as a party if the court finds that such intervention is in the best interests of the child."

As a matter of public policy, intervention should be encouraged. BE & K Const. Co. v. Peterson, 464 N.W.2d 756, 758 (Minn. Ct. App. 1991). This Court has explained that permissive intervention is permitted where the applicant's claim and the underlying action have a common question of law and fact, and if intervention would not unduly delay or prejudice the rights of the original parties. J.W. v. C.M., 627 N.W.2d 687, 691 (Minn. Ct. App. 2001)(analyzed under Minn. R. Civ. P. 24.02).

Here, of course, the parents wanted A.G.M. and her husband to be custodians and perhaps future adoptive parents of their infant. A.G.M.'s application would not have prejudiced the rights of any party to the proceeding. The motion was made in April, 2004, more than six months before the adjudicatory hearing. This question is reviewed for abuse of discretion, J.W. v. C.M., 627 N.W.2d at 691. The juvenile court clearly abused its discretion in denying A.G.M.'s and N.M.'s motion and should be reversed.

III.

THE JUVENILE COURT ERRED IN DENYING THE MOTION TO TRANSFER THIS MATTER TO THE YANKTON SIOUX TRIBE'S TRIBAL COURT.

Appellant G.W. agrees in all respects with Joint Appellant Yankton Sioux Tribe's argument that the juvenile court erred in denying the motion filed by the tribe and by both parents to transfer the matter to the tribal court of the Yankton Sioux Tribe. See Brief of Appellant Yankton Sioux Tribe (App. Ct. File No. A05-1615) at 13-17. He has these additional remarks to make on this issue.

Section 101(b) [25 U.S.C. § 1911(b)] of the ICWA provides that the court *shall* transfer the matter to tribal court absent objection by either parent and absent good cause to the contrary. The same provision appears in Minnesota law as part of the Indian Family Preservation Act, Minn. Stat. § 260.771, subd. 3, and in the Minnesota Tribal-State Agreement On Indian Child Welfare, Part III(B)(2) (Appendices 23-25).

Here, neither parent objected; in fact, they brought the motion.

The Department of the Interior's implementing regulations on this point suggest, in pertinent part, that "good cause" *may* exist if: (a) the proceeding was at an advanced stage when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving notice of the hearing; and (b) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the

witnesses. Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," 44 Fed. Reg. 67584, 67591 (§ C.3), November 26, 1979 (*hereinafter*, BIA Guidelines).

The party arguing "good cause" for denying transfer has the burden of proof. *Id.*; Welfare of the Children of C.V., No. A04-0441, slip op. at 3 (Minn. Ct. App. Nov. 9, 2004)(Appendices 18-22).

The ICWA permits a state to enact procedures which accord greater benefit to the Native parent. See § 111 [25 U.S.C. § 1921]; Welfare of B.W., 454 N.W.2d 437, 443 (Minn. Ct. App. 1990).

In keeping with that provision, the Minnesota Department of Human Services has enacted its own implementing regulations which *requires* a referral to tribal court unless the tribe declines or the parent objects. The two "good cause" provisions cited above do not appear in the D.H.S. Guidelines. See Minnesota Department of Human Services, Social Services Manual, § XIII-3544 (October 15, 1999)(Appendices 26-29).

The motion to transfer to tribal court was filed jointly by both T.T.B. and G.W. on July 22, 2004. This was the date the court fixed for filing of motions. The Yankton Sioux Tribe filed its own independent motion on September 8, 2004, *after* the juvenile court indicated that it wanted to know whether the tribal court would accept jurisdiction (Trans. Aug. 12, 2004 at 13). At oral argument on October 5, 2004, the county attorney took no position; the Guardian, in argument and in written memorandum, opposed transfer on the following grounds: (a) the

proceeding was at an advanced stage and the petition was not filed timely; (b) it would be a hardship for parties and witnesses to travel to the tribal court; (c) the parents were guilty of forum shopping; and (d) good cause existed to keep X.T.B. living with a half-sibling (Trans. Oct. 5, 2004 at 3-4,16-17).

Under the Minnesota Social Services Manual, it is arguable that the court should not even have considered these alleged "good cause" factors. But the court did consider them. It found that the motion to transfer was untimely, that it would be a hardship for parties and witnesses to travel to tribal court, that the tribe did not then have a foster placement available for X.T.B., and that X.T.B. had a medical problem that it apparently felt could not be treated on the reservation. See Appendices 23-26 of Appellant Yankton Sioux Tribe's brief.

The court erred in each of these conclusions and its order should be reversed.

First, there is nothing in either statute or any of the implementing regulations which says that transfer to tribal court can be denied because of the court's feeling that medical services cannot be provided by the Tribe. There isn't a word of evidence in the record about X.T.B.'s condition or whether the condition could or could not be treated in South Dakota or on the reservation.

Second, neither statute and none of the implementing regulations state that a state court can deny transfer to tribal court because it believes that the tribe has not yet identified a foster placement.

Third, although the court did not rule on this argument, the law does not support the claim that transfer can be denied if the party seeking the transfer is "forum shopping" (Trans. Oct. 5, 2004 at 19). There is no evidence in this record that either G.W. or T.T.B. are guilty of that.

Fourth, there is no support in the law for the conclusion that a transfer should be denied because it might affect a half-sibling relationship.

Fifth, the court's conclusion that the proceeding was at an advanced stage and that the petition was not filed in a timely manner is completely belied by the record, for at least the following reasons:

(a) It's hard to understand how the proceeding can be at an advanced stage when the county attorney argued against A.G.M.'s participant motion on the ground that it was premature. See Argument II at 17-18, *supra*.

(b) The motion to transfer was filed at the time fixed by the court for motions, July 22, 2004. This date was only five months after G.W.'s counsel had been appointed, less than seven months after the proceedings had begun with the filing of the amended petition. And we know that, as of the April 20, 2004 hearing, the county attorney's office was going to send "enrollment information" to the Yankton Sioux Tribe (Trans. April 20, 2004 at 10).

(c) The Tribe filed its formal motion to transfer to tribal court seven weeks after T.T.B. and G.W. filed theirs, but less than a month after the court indicated that it wanted a positive indication that the tribal court would accept jurisdiction (Trans. Aug. 12, 2004 at 13).

The cases decided elsewhere which have denied transfer based on untimeliness have involved far greater periods of delay. See, e.g., Interest of J.L.P., 870 P.2d 1252 (Colo. Ct. App. 1994). In Welfare of B.W., 454 N.W.2d 437, 445-46 (Minn. Ct. App. 1990), this Court did not close the door to a transfer to tribal court even though the motion was filed on the day of trial.

Sixth, there is nothing whatever in the record which shows that any party or any witness to this proceeding would find it a hardship to travel to tribal court in South Dakota, for at least the following reasons:

(a) The Tribe's ICWA Director, Mr. Cournoyer, traveled to Minneapolis three times, twice for court hearings and once for the Family Group Conference (Exhibit # 7).

(b) Some tribal courts travel to major cities for tribal-court proceedings involving their enrollees. The tribal court of the Sisseton-Wahpeton Sioux Tribe in eastern South Dakota followed that practice for years.

(c) The county attorney indicated that it was willing to facilitate travel and pay travel expenses for tribal officials if the hearing was held in Minneapolis. There is no reason to suppose that agency witnesses, the Guardian, and counsel would not be treated in like fashion by the court or their employers.

(d) There was brief, but no serious, discussion of the use of telephone-conference technology (Trans. June 10, 2004 at 3; Trans. Oct. 5, 2004 at 20). This is not impossible; this Court frequently uses Interactive Video to link its courtroom with courthouses in Greater Minnesota for oral arguments.

(e) But, as argued by Joint Appellant Yankton Sioux Tribe (App. Ct. File No. A05-1615), Brief for Joint Appellant at 16, the use of a geographic yardstick like the juvenile court used would mean, not only that cases would not be transferred to foreign states, but could also mean that cases would not be transferred to distant Minnesota tribes. The Grand Portage Ojibwe community is a great distance from Minneapolis; so is the Lake Vermillion Native community. As G.W.'s counsel argued, South Dakota is a bordering state, and one decision of this Court involved a transfer to an Oregon tribal court. Welfare of R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)(Trans. Oct. 5, 2004 at 20-21).

In short, there is no evidence in the record that transfer to the Yankton Sioux Tribal Court would work a hardship on parties and witnesses. And the record belies any claim that the transfer motions were untimely.

For all of these reasons, the juvenile court erred in denying transfer to tribal court and its order should be reversed.

IV.

THE JUVENILE COURT ERRED IN TRANSFERRING LEGAL CUSTODY TO A NON-RELATIVE, NON-INDIAN HOME.

Section 105(b) [25 U.S.C. § 1915(b)] of the ICWA sets forth a series of placement preferences for Indian children who are placed in foster or preadoptive care. The statute requires that the placement must be the least restrictive setting which approximates a family, that it be one in which the child's special needs are met, and it must be within reasonable proximity of the child's home. The preferences, in descending order, are: (a) a member of the Indian child's extended family; (b) a foster home licensed, approved, or specified by the Tribe; (c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (d) an institution for children approved by a Tribe and operated by an Indian organization with a program suitable to meet the child's needs. The preferences must be followed absent "good cause" to the contrary.¹⁰

Although neither the Indian Family Preservation Act nor the Minnesota Tribal-State Agreement discusses this provision, it is the subject of implementing regulations issued by both the Department of the Interior and the Minnesota Department of Human Services.

The Department of the Interior's implementing regulations on this point suggest, in pertinent part, that "good cause" to ignore these placement

¹⁰ Since the court's order was a transfer of legal custody and neither T.T.B.'s nor G.W.'s parental rights were terminated, this brief will not discuss the adoptive placement preferences. Adoption can only occur if the child is freed by voluntary or involuntary termination of parental rights.

preferences *may* exist if: (a) the biological parents or the of-age child so request; (b) the child has extraordinary physical or emotional needs, as established by the testimony of a qualified expert witness; or (c) there are no suitable families which meet the placement preferences after a diligent search. Like the "good cause" exception for tribal court transfers, the party seeking to ignore the preferences has the burden of proving "good cause." Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," 44 Fed. Reg. 67584, 67594 (§ F.3), November 26, 1979 (*hereinafter*, BIA Guidelines).

The Minnesota Department of Human Services' implementing regulations track the Department of the Interior's. See Minnesota Department of Human Services, Social Services Manual, § XIII-3555 (October 15, 1999)(Appendices 30-32). In applying the preferences, the Social Services Manual states that:

[The] standards to be applied in meeting the preference requirements shall be the prevailing social and cultural standards of the community in which the parent(s) or extended family resides or with which the parent(s) or extended family members maintain social and cultural ties.

The manual clearly states that placement with a half-sibling does not comply with the preferences.

At the time of the adjudicatory hearing in October of 2004, T.T.B. and G.W. wanted X.T.B. placed with A.G.M. and N.M. If that could not be done, they wanted X.T.B. placed with G.W.'s mother, B.W. The agency sought placement with S.G., who was A.G.'s paternal grandmother and X.T.B.'s foster mother, but who was not related to X.T.B. and not a Native American (Stipulation, Oct. 27,

2004 at ¶'s 15-16). Mr. Cournoyer, the Yankton Sioux Tribe's ICWA Director felt compelled by the preferences to seek placement with B.W., recognizing that this was not the parents' first choice (Trans. Oct. 27, 2004 at 16-19).

There is no dispute that B.W. is both a relative (paternal grandmother) of X.T.B. and a Native American enrolled with the Yankton Sioux Tribe (Exhibit # 12; Stipulation, Oct. 27, 2004 at ¶ 11). Nor is there any dispute that S.G. is neither a relative of X.T.B. nor a Native American. A.G.M. is a Native American of Blackfeet and Cherokee descent, but who is not enrolled in either tribe. She is T.T.B.'s former foster parent (Exhibit # 11). She is a "relative" of X.T.B. under Minnesota statute and rule,¹¹ and could be considered an "extended family member" of X.T.B. under § 4(2) [25 U.S.C. § 1903(2)] of the ICWA. See Exhibit # 6, ¶ 7 (Affidavit of Raymond Cournoyer).

In its order of February 17, 2004, the court did not discuss the placement preferences and did not discuss the "good cause" exceptions to those preferences. It also mistakenly stated that the parents favored B.W. for placement, although the stipulation indicates that they favored A.G.M.'s family.

The court's orders are erroneous for a number of reasons.

First, the orders baldly state that X.T.B.'s placement with S.G. is in his best interests (¶ 38). But the Minnesota Supreme Court has held that "good cause" to disregard the preferences cannot simply be based upon the court's conclusion

¹¹ Minn. Stat. § 260C.007, subd. 27; Minn. R. Juv. Prot. P. 2.01(t)

that the child's best interests are served. Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994), *cert. denied*, 513 U.S. 1127 (1995).

Second, the orders do not discuss the "good cause" criteria contained in the BIA Guidelines or the Social Services Manual; yet the Court in S.E.G. specifically held that a "good cause" finding *must* be limited to those very factors. Custody of S.E.G., 521 N.W.2d at 363.

Third, with the exception of four paragraphs, the orders do not discuss A.G.M. and N.M., the home that both parents preferred in the stipulation. The record is quite clear throughout these proceedings that the agency never considered this home for a moment, because of its belief that A.G.M. had assisted T.T.B. in concealing her pregnancy from the juvenile court. But there is no evidence which supports this supposition, and A.G.M. categorically denied it in her sworn affidavit (Exhibit # 11). As counsel for T.T.B. pointed out on the day of the stipulation, A.G.M. and N.M. were not eliminated from all consideration because of the Rhode Island home study—they were just eliminated from Rhode Island licensing (Trans. Oct. 27, 2004 at 19-22). But, at the time of the stipulation, they weren't living in Rhode Island any longer, and should have been considered (Exhibit # 13).

Given the fact that the agency and the Guardian so obviously favored placement with S.G., it is no wonder that B.W., who had no lawyer, did not file any pleadings seeking custody of X.T.B. (another factor important to the court).

Fourth, the order justifies the placement with S.G. because S.G. is caring for A.G., a half-sister of X.T.B. But the Social Services Manual specifically states that a half-sibling's home does not qualify as an exception to the placement preferences. Social Services Manual, § XIII-3555; see also Trans. Oct. 27, 2004 at 23.

Fifth, the court seems to rely upon the assumption that X.T.B. has bonded with S.G. (Order, February 17, 2004 at ¶ 38). But a child's bonding with a care provider is not an exception to the placement preferences; moreover, this Court has explicitly held that the possibility of separation-caused pain to a child resulting from a change in placement does not justify disregarding the ICWA. Adoption of M.T.S., 489 N.W.2d 285, 288 (Minn. Ct. App. 1992).

Sixth, the court's findings that T.T.B. and G.W. requested placement with B.W. are clearly erroneous. Compare Order, February 17, 2004, ¶'s 16 and 21 with Stipulation, Oct. 27, 2004 at ¶ 15.

For at least these reasons, the juvenile court erred in transferring permanent legal and physical custody of X.T.B. to S.G., and its orders must be reversed.

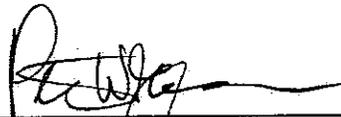
CONCLUSION

Appellant G.W. asks the Court of Appeals to reverse the juvenile court's decision to award permanent legal and physical custody of X.T.B. to S.G., a non-relative and non-Indian person. He also seeks reversal of the court's orders denying transfer to tribal court, denying A.G.M.'s motion to intervene, and the court's decision in November, 2003 to entertain jurisdiction over X.T.B.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).