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 STATE OF MINNESOTA  
 IN COURT OF APPEALS

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 APPELLATE COURTS

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In the Matter of the Welfare of the Child of G.W. and T.T.B., Parent

**RESPONDENT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

### I. DID THE TRIAL COURT HAVE PERSONAL AND SUBJECT MATTER JURISDICTION?

The trial court was not presented with these questions.

*Authorities:*

Minn. Stat. §260C.101, subd. 1 (2003).

Minn. R. Juv. P. 65 (2003).

### II. DID THE TRIAL COURT ERR IN TRANSFERRING LEGAL CUSTODY OF THE CHILD X.L.B.?

The trial court ruled in the negative.

*Authorities:*

Welfare of A.R.G.-B, 551 N.W.2d 256 (Minn. App. 1996).

Minn. Stat. §260C.201, subd. 11 (2003).

25 U.S.C. 1901 *et seq* (2003).

## STATEMENT OF FACTS

On November 15, 2003, the child X.T.B. was born in Rhode Island.

*Exhibit 8 at 6.* T.T.B. and G.W. had traveled together to the Rhode Island home of A.G.M. and N.M. in the weeks prior to the child's birth. *Exhibit 8 at 6; Exhibit 11.* T.T.B. was seventeen years old at the time and had been living in a facility for teenagers in Minnesota while her first child, A.G., was in foster care placement. *Exhibit 7 at 1; Exhibit 8 at 6; Order filed 2/25/2004.* The facility knew of T.T.B.'s trip to Rhode Island, although the Hennepin County trial court with ongoing jurisdiction over T.T.B. through A.G.'s child protection case plan did not know of T.T.B.'s pregnancy. *Order filed 2/25/2004.* The trial court held T.T.B. in default on Hennepin County's petition to terminate her parental rights as to A.G. on November 10, 2003. *Order filed 1/5/2004.*

Statements made by T.T.B. while in hospital following X.T.B.'s birth raised suspicions and within days child protection officials in Rhode Island removed the child from T.T.B.'s care. *Exhibit 8 at 6.* The child protection officials also noted inconsistencies in the story T.T.B. and A.G.M. provided to authorities. *Exhibit 8 at 6.* Hennepin County asserted jurisdiction over X.T.B. *Order filed 11/21/2003(at Appendix 1).* After proceedings in Rhode Island the child was transferred to Minnesota. *Exhibit 8 at 6.* On December 23, 2003, the trial court made findings that the amended petition before it established a prima facie showing that a child protection matter existed as to the child X.T.B. *Order*

*filed 1/5/2004.* With permission of the court, the Department dismissed X.T.B. from that petition and filed a new, separate petition. *Order filed 1/5/2004.* The trial court issued a new order incorporating the initial findings under the new petition number. *Order filed 1/5/2004.* X.T.B. was placed with S.G., foster care provider and paternal grandmother of X.T.B.'s half-sibling, A.G. *Exhibit 9 at 1.*

Appellant G.W. made an initial appearance at a February 2004 hearing and was assigned counsel. *Order filed 2/25/2004.* After moving for dismissal, G.W. moved for a transfer of legal custody of X.L.B. to A.G.M. and N.M. in Rhode Island. *Motion Filed 7/16/2004.* The Yankton Sioux Tribe filed an Expert Testimony Affidavit for Permanency that indicated that the Tribe had received appropriate notice and that the Tribe supported permanency. *Exhibit 5.* The Tribe testified by affidavit that it supported the parents' plan to transfer legal custody to A.G.M. and N.M. *Exhibit 6.* The Tribe had participated in a Family Group Conference in June 2004 at which the parents sought placement with A.G.M. and N.M. *Exhibit 7.*

In March 2004, Minnesota began an Interstate Compact study of the home of A.G.M. and N.M. *Exhibit 8.* At the end of July 2004, the Rhode Island Department of Children, Youth, and Families denied the proposed placement. *Exhibit 8 at 9.* The Rhode Island Department stated that the decision was based on a number of factors including the manner in which the child X.L.B. first came into contact with the Rhode Island child protection system just after his birth. *Exhibit 8 at 9.*

The June 2004 Family Group Conference resulted in two plans; the participants agreed to disagree. *Exhibit 7 at 2.* T.T.B., and G.W. participated, along with two relatives of G.W., S.G. and two family members, and A.G.M., as well as a number of non-family participants from the agencies and the Yankton Sioux Tribe. *Exhibit 7 at 1-2.* The first plan was supported by the parents and Tribe, and prioritized a transfer of legal custody to A.G.M. and N.M. in Rhode Island with a “Plan B” of Appellant G.W. assuming custody. Appellant G.W.’s mother, B.W., was present at the Family Group Conference. The second plan from the family of S.G. was that she would adopt X.T.B. *Exhibit at 3.*

X.T.B. remained in the home of S.G. throughout the proceedings. At the time of the initial placement, the Department consulted with both the Pine Ridge Reservation and the Yankton Sioux Tribe as well as the parents. *Exhibit 9 at 1-2.* At the time the Yankton Sioux Tribe submitted its affidavit in July 2004, it agreed the Tribe had received appropriate notice and did not challenge the placement. *Exhibit 5.* The Department considered B.W. as a placement resource and the primary social worker made a pre-licensing visit to her home in May 2004. *Exhibit 9 at 2.* Appellant G.W. lived in her home at that time. *Exhibit 9 at 2.* B.W. was offered visits with X.T.B. and did not take any advantage of independent visits or make other inquiries about X.T.B.. *Exhibit 9 at 2.* B.W. did report calling a second social worker. *Exhibit 9 at 2.*

The parties appeared in August 2004 on a request by the parents for a transfer of jurisdiction to tribal court and on Appellant G.W.’s motion to dismiss.

*T5 at 1-3.* The trial court denied the motion to dismiss. *T5 at 12.* The trial court deferred the motion on transfer of jurisdiction until the involved Tribes had a chance to participate formally. *T5 at 13.* On October 5, 2004, the parties appeared on arguments on transfer of jurisdiction. *T6 at 1-2.* The Yankton Sioux Tribe's ICWA Director, Raymond Courmoyer, testified in support of the Tribe's request for a transfer of jurisdiction. *T6 at 4.* Mr. Courmoyer testified that he had the approval of the Tribe's prosecutor to proceed and that he would petition the Tribal Court for jurisdiction if the case was transferred by Hennepin County. *T6 at 8-11.* The trial court denied the Motions for Transfer of Jurisdiction in a written order. *Order filed 10/27/2004.*

The parties proceeded on a primarily stipulated facts trial on October 27, 2004 as to disposition on the transfer of legal custody. The Tribe supported a transfer of custody to B.W. *T7 at 19.* Counsel for both parents argued primarily for a transfer to A.G.M. and secondarily to B.W. *T7 at 23-26.* The Department and Guardian ad Litem supported a transfer of legal custody to S.G.

## ARGUMENT

### I. THE TRIAL COURT EXERCISED PROPER PERSONAL AND SUBJECT MATTER JURISDICTION.

#### A. Subject matter jurisdiction properly attached.

An unmarried mother is the sole legal custodian of a child. *Minn. Stat. §257.541, subd. 1(2003)*. If a parent has had one child involuntarily terminated, the parent is presumed unfit and a social services agency must file a permanency petition when it knows of new children. *Minn. Stat. §260C.301, subd. 1(b)(4), subd. 3; Minn. Stat. §260C.307*. Juvenile courts possess sole jurisdiction in child protection cases. *Minn. Stat. §260C.101, subd. 1*. A parent of a child subject to the jurisdiction of the court is also subject to the court's jurisdiction if the parent has a right to notice. *Minn. Stat. §260C.101, subd. 4*.

A trial court may issue an order for immediate custody, or Emergency Protective Care, upon application in conjunction with a proper petition. *Minn. Stat. §260C.151, subd. 6, §260C.175; Minn. R. Juv. P. 65 (2003)*. If the child comes into custody following that order, a hearing must be held within 72 hours. *Minn. Stat. §260C.178; see also Minn. R. Juv. P. 67*. Emergency Protective care orders are enforceable in any jurisdiction. *Minn. R. Juv. P. 65.06*.

When the trial court initially issued an order for emergency protective care, it had before it a number of relevant facts to support seeking immediate custody of the child and thus both the right to immediate custody and establishing subject

matter jurisdiction. T.T.B. was a minor still under the jurisdiction of juvenile court through the pending child protection case involving A.G. T.T.B. lived in Minnesota in a teen facility until the weeks just before X.T.B.'s birth became known. T.T.B. had not disclosed her pregnancy to the court or to Department officials. *TI at 5-6; Orders filed 1/5/2004.*

The trial court had also held T.T.B. in default on a termination of parental rights petition. That case ultimately concluded with a voluntary termination of T.T.B.'s parental rights, but at the time of the trial court's November 21, 2003 order, it is clear that the trial court had made a factual finding of default. *Order 11/21/2003 (at Appendix 1); Order 1/5/2004.* Parents previously subject to an involuntary termination of parental rights are presumed unfit as to other children. *Minn. Stat. §260C.301, subd. 1(b)(4).* The finding of default alone at least arguably creates the grounds necessary to seek jurisdiction over X.T.B. Combined with the mother's age, known behavior at the time of the November order, her residence in Minnesota, and the fact the child protection authorities in Rhode Island had initiated contact with Minnesota, subject matter jurisdiction firmly attaches in Minnesota.

In addition, the applicable laws in Rhode Island and Minnesota both look to the reason the child comes to be in the more recent state and disfavor jurisdiction improperly obtained. *RI GL 1956 §15.14.1-20(2005); Minn. Stat. §518D.208* T.T.B. traveled out of the state of Minnesota where she resided under court jurisdiction in a child protection matter without informing the court or Department

of her pregnancy. Even the most favorable account of her journey, that provided by A.G.M. in her affidavit, makes it clear that T.T.B. did not truthfully disclose the purpose of her trip to Rhode Island. T.T.B. herself never offered another version of events. Appellant G.W. may or may not have been aware of the situation, but it is clear he had no connection to Rhode Island other than to help the baby be born there and possibly to ensure his own connection with A.G.M. and her family. X.T.B. was born in Rhode Island at least to evade child protection authorities in Minnesota and as a result neither T.T.B. nor G.W. may benefit from their action in taking the child there.

Finally, both Appellants contend that no factual reason existed to believe the child was not properly cared for in Rhode Island. However, Rhode Island authorities removed the child from T.T.B.'s physical custody in the days after the child's birth. *Exhibit 7 at 6*. The contact with Minnesota occurred during an already opened investigation based on T.T.B.'s behavior. *Exhibit 7 at 6*. It is also worth noting the Rhode Island also disfavors parents with terminations of parental rights. *RI GL 1956 §15-7-7(a)(2)(iv)(reasonable efforts not required)*. As a legal child of T.T.B., X.T.B. was susceptible to court intervention in either state. The ongoing jurisdiction over T.T.B. related to A.G. and the degree of connections to Minnesota through court, placement, and customary residence, all make Minnesota the state with the greatest connection to the welfare of the child. As a result, neither Rhode Island nor Minnesota courts erred in attaching jurisdiction to Minnesota.

Appellants' reliance on *In re Shady*, 118 N.W.2d 449 (Minn. 1962), is misplaced. As an initial matter, *Shady* at least arguably addresses immediate custody, governed by a separate set of rules, and is thus not clearly on point. To the extent that it does address subject matter jurisdiction, the case is not persuasive here. At the time the trial court in Minnesota issued its order in the case at hand, it had no information that X.T.B. was in the care of the father, no information that the father had established paternity or sought to do so, and indeed little information about father. Even if it had, the statutory position of T.T.B. would have given the Minnesota court a legitimate interest in the child. More important, though, is the fact that Rhode Island had already instigated an investigation and brought the child into placement by the time the trial court sought to establish jurisdiction.

In *Shady*, the parents were married adults seeking to have the child adopted by the biological father. 118 N.W.2d at 450-51. The mother had proper custody of her other children and the record shows no indications of neglect of those children. 118 N.W.2d at 450. The father had no children but his whereabouts, address, and marital status were all known to the petitioner county. 118 N.W.2d at 451. The petition did not explain how the child's situation constituted either neglect or abandonment, applicable statutes at the time. *Id.* In contrast, the mother in this case had a child in the late stages of a permanency case and indeed had been held in factual default by the time the Minnesota court learned of X.T.B.'s birth. The local authorities on the scene in Rhode Island deemed the

situation unsuitable for the child. The trial court here did not act on a mere unsupported assertion, but proceeded on facts and well-grounded law providing subject matter jurisdiction. The trial court most certainly did not proceed only because the child is 'illegitimate' which is the primary issue in *Shady*.

It is also worth noting that Appellant G.W. had a full opportunity to engage in court here in Minnesota to seek to gain custody of his child. He appeared first at the February 2004 hearing and had at least some contact with the Department from that point onward. *Exhibit 9*. He did not do so and by the time of trial was seeking his choice for a transfer of legal custody rather than custody for himself. This does not place him in the shoes of the father in *Shady* who was actively parenting the child and sought to do so permanently.

Minnesota did not reach improperly across state boundaries but merely acted in a manner consistent with Rhode Island's laws and child protection practice. The parents did not live in Rhode Island and the legal custodian, T.T.B., remained under Minnesota jurisdiction as a parent in another child protection case. Neither parent made serious attempts to establish domiciles there and both lived in Minnesota following the return of the child to Minnesota. X.T.B's situation gave enough concern to Rhode Island's child protection authorities that they opened an investigation and took the child into placement. Rhode Island opened the contact with Minnesota. Given the need for court intervention, the lack of connection to Rhode Island and the manner in which what connection there is was created, and the ongoing connection of both parents to Minnesota, it is clear that Minnesota is

the proper place to resolve issues regarding the child. The fact that the case began with X.T.B.'s birth in Rhode Island does not deprive Minnesota of subject matter jurisdiction, and the trial court properly exercised its jurisdiction in the child's best interests.

**B. Personal jurisdiction is waived.**

No party made clear arguments concerning personal jurisdiction to the trial court. After several appearances, Appellant G.W. did seek to have the petition dismissed as to his rights, but in doing so spoke to issues of subject matter rather than personal jurisdiction on either his or the child's behalf. Personal jurisdiction not properly presented to the trial court is waived. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 493-92 (Minn. App. 1995).

Even if the issue is before the court, the trial court clearly had appropriate jurisdiction over X.T.B. As discussed above in the subject matter section, the trial court had appropriate statutory authority to establish jurisdiction and followed applicable laws of the Uniform Child Custody Jurisdiction and Enforcement Act. *Minn. Stat. §518D.101 et seq.* The physical presence of the child or parent in Rhode Island does not automatically bar personal jurisdiction attaching in another state. *Minn. Stat. §518.201(c)*. The UCCJEA specifically forbids using physical presence as an automatic trump to assertion of jurisdiction. *Minn. Stat. §518D.208*. The child was present in Rhode Island as part of an attempt to avoid the consequences of the mother's actions in Minnesota courts. Even if Appellant G.W. were totally innocent of this attempt, which Respondent does not concede,

the Minnesota court had an appropriate basis to exercise personal jurisdiction as a result. Personal as well as subject matter jurisdiction are proper in this case.

## **II. THE TRIAL COURT DID NOT ERR IN TRANSFERRING LEGAL CUSTODY OF X.T.B. TO S.G.**

### **A. Introduction and Standard of Review.**

An appellate court reviews a transfer of legal custody order in a child protection matter to determine whether the trial court's "findings address the statutory criteria and are supported by 'substantial evidence,' or whether the are clearly erroneous." *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996), quoting *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). The court's factual findings must be clearly erroneous, manifestly contrary to the weight of the evidence, or not reasonably supported by the evidence as a whole to warrant reversal. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The petitioner must prove the petition by clear and convincing evidence. *Minn. R. Juv. P. 74.94* (2003); see also *Welfare of the Child of T.L.C.*, A05-922, (Minn. App. 11/22/2005). Evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. *A.R.G.-B.*, 551 N.W.2d at 261.

The federal Indian Child Welfare Law Act ("ICWA") generally applies to child protection proceedings involving an Indian child. 25 U.S.C. § 1903(2003). A child falls within the ICWA if she is eligible for membership in a federally recognized tribe. 25 U.S.C. §1903 (4). The ICWA establishes placement

preferences in child protection proceedings that must be followed absent “good cause” to the contrary.

**B. The transfer of legal custody is in the child’s best interests.**

The trial court conducted two related analyses regarding the transfer of legal custody, the best interests issue separately and when combined with the necessary concerns raised by the ICWA. Because this is a transfer of legal custody and the only issue is disposition, not whether active efforts were expended or whether the child could be in parental care in the future, the trial court’s analysis of the ICWA focused on the placement preferences. That issue is addressed in the section below, but is also part of the overall best interests analysis.

X.T.B. was placed just after birth in the home where his half-sibling lived in placement. That child, A.G., falls within the ICWA. *T2 at 5*. Although the home has been treated as non-relative throughout the proceedings, placement with a half-sibling who is both an Indian child with the ICWA and a blood relation to the home is significantly different from a placement in a completely non-relative or non-Indian home. In any case, it is clear that X.T.B. would be raised with a half-sibling in the home of S.G. In addition, it is clear that the child, who has some special needs, has been well cared for in the home of S.G.. *Order filed 10/27/2004*.

In contrast, the couple in Rhode Island are specifically excluded by action of Minnesota law as a result of the Interstate Compact on the Placement of

Juveniles ("ICPC") denial of placement. Once a referral has been made for an ICPC study, that process is binding. *Minn. Stat. §260.851, ICPC Art 3(a), Art. 4.* A.G.M. is connected to the parents of X.T.B., but not formally related. In addition, the situation through which X.T.B. came to be in Rhode Island was clearly supported by A.G.M. The ICPC gave the social service agencies involved a chance to assess the suitability of placement given all the circumstances involved. Once the ICPC process resulted in a denial, an action of Minnesota courts may not send a child to the state. The trial court did not abuse its discretion in refusing to transfer custody to A.G.M. as a result.

Even if they had not been excluded by law, the trial court did not abuse its discretion in declining to transfer legal custody to A.G.M. and her husband. While A.G.M. has a history with both parents, she lived in Rhode Island at the time proceedings began, a place where neither parent had other apparent connections. A transfer of legal custody operates in part to give the parents continued access to the child and living in a new state would not have helped either of the young parents in this case. Appellant G.W. contends that the fact that A.G.M. and N.M. moved to Nova Scotia and possibly somewhere else during the proceedings provides them relief from the ICPC process. Instead, this factor creates more need to know about the stability of the family, the ability to maintain healthy connections with the parents and extended family, and the situation of the family. These questions would take a significant period of time to resolve. It was not an

abuse of the trial court's discretion to reject A.G.M. and N.M. as it sought to determine permanency.

In addition, it was clear throughout the proceedings that the trial court was concerned about A.G.M.'s role in arranging for T.T.B. to give birth in Rhode Island. The court's concerns were supported in part by the ICPC study which noted that A.G.M.'s behavior in part contributed to the initial child protection investigation in Rhode Island. *Exhibit 8 at 6*. Even in the best light, A.G.M.'s actions show poor judgment and poor boundaries in dealing with the young parents and the infant involved here. This is further support for the trial court's decision to avoid placement or transfer of custody to the couple.

B.W., Appellant G.W.'s mother, was another candidate at the time of trial. She was forwarded as a back-up placement to A.G.M. and N.M. by the parents and was the primary choice of the Tribe. *T7 at 12-16, 19, 25*. Appellant G.W. appeared in some ways to prefer a transfer to his mother. *T7 at 13*.

B.W. expressed a willingness to be a permanency resource for the child, and stated that she had made herself available for an initial meeting with the Department in May of 2004. *Exhibit 12*. Ward, however, never followed up on the foster care placement process, after that May meeting, although she says that she attempted a phone call with a different worker. B.W. never visited X.T.B. independently and did not follow up with Department offers to facilitate such visitation. *Exhibit 9*. B.W. also participated in the June 2004 Family Group

Conference and supported two plans, neither of which sought her a custodian or caretaker for X.T.B. *Exhibit 7 at 3.*

In addition, until the permanency trial, neither parent nor the Tribe requested placement with B.W. Appellant G.W. did live with her through the time of trial, and a foster care placement cannot exist where the parent is in the home. *Minn. Stat. §260C.007, subd. 18.* Although this prioritizing of G.W. might be understandable in light of the parents' desire to transfer legal custody to A.G.M., once that became unlikely by the late summer of 2004 other arrangements could have been made if the family truly desired custody. Far better for the child would have been for the parents and Tribe to request a foster care placement with B.W. from the earliest possible stage. Instead, the family made minimal efforts to establish contact between X.T.B. and B.W. and made no apparent efforts to place B.W. in a position to be a foster parent. B.W. does fall within the ICWA placement preferences to a clearer degree than does S.G. This creates a preference, however, and as discussed below is not sufficient to require placement or a transfer of custody to her. Considering the lack of contact between X.T.B. and B.W., especially in contrast with the long-standing placement in the home of his half-sibling, the trial court did not commit an abuse of discretion in declining to transfer legal custody to B.W. and instead choosing S.G.

**C. The trial court did not err in finding good cause to go beyond the placement preferences of the ICWA.**

The ICWA has two sets of placement preferences. One applies to adoption placements and the second to preadoptive and foster care placements. *25 U.S.C. §1915*. The “good cause” to deviate standard applies to both. An abuse of discretion review applies to “good cause” decisions regarding adoption. *Custody of S.E.G., 521 N.W.2d 357, 363 (Minn. 1994)*.

The trial court found good cause to act outside the placement preferences based on the characteristics of the caregiver S.G., the fact that X.T.B. would live with a half-sibling, the lack of significant contact between the child and the alternative care giver, B.W., and the unsuitability of the Rhode Island couple due to denial of the ICPC study and related factors. The trial court placed significant on the fact that the child was in placement with a half-sibling, that the child did well there, would maintain contact with his parents and that S.G. would work with the child’s Tribe to ensure her cultural needs would be met. The court also found that X.T.B.’s best interests would be met by transfer of legal custody to S.G.

As an initial matter, the trial court did not find that X.T.B.’s best interests created good cause to deviate from placement preferences. The court clearly made a best interests finding and then in the next findings paragraph found that “based on all the findings above” good cause exists for the preferences. The trial court clearly considered the traditional best interests standard as part of its good cause

analysis, but not the only analysis. Instead, the court looked to the specific factors of this case and considered the cultural issues clearly required by law.

This process stands in clear contrast to the trial court's analysis in *S.E.G.* In that case, the trial court conducted a traditional best interests analysis and found that was sufficient to justify good cause to go outside the adoption placement preferences. *521 N.W.2d 362*. The Minnesota Supreme Court held that the best interests analysis alone is insufficient within the context of adoption cases within the ICWA and that any good cause analysis must extend to cultural and family factors. *521 N.W.2d at 362-5*. Here, the trial court clearly considered factors involving X.T.B.'s family, contact with parents and Tribe, the placement history within the ICWA context, and the lack of contact between the child and the custodian proposed by the Tribe. These factors clearly go beyond the traditional best interests factors described in paragraph 38 of the findings. The trial court thus conducted the proper analysis on this issue.

It is also well worth noting that the facts of this case are very different than in *S.E.G.* In *S.E.G.* the children were in placement in a Native foster home and a trial court granted the adoption petition of a non-Native couple who had provided foster care previously. *521 N.W.2d at 360*. The primary reason for granting the petition was that adoption, not offered in the placement home, was in the children's best interests. *521 N.W.2d at 364*.

The placement situation is very different here. The parents and Tribe initially preferred a connected but non-Indian home within the meaning of the

ICWA as A.G.M. is not a tribal member. The parents and Tribe both initially agreed to the placement in S.G.'s home and the child will be with a half-sibling, something he would not have in B.W.'s home. The home was at least arguably within the pre-adoptive preferences because it was a licensed home approved by the Tribe. *25 U.S.C. §1915(b)(ii)*. The Tribe did not clearly prefer B.W. until the very final stage of the permanency proceedings, at which point the trial court knew primarily that she had little contact with the child. This is very different from the situation in *S.E.G.* where the Tribe had apparently made all efforts possible to place the children in a Native home.

Appellants also ignore a crucial difference between this case and most cases under the ICWA. This is a transfer of legal custody. Both parents retain rights to visitation and information about the child, enforceable in court if necessary. The parents even have the opportunity to seek a change in custody in the future if their or the child's circumstances change. *Minn. Stat. §518.18*. S.G. has committed to maintaining relations with the Tribe and this is at least arguably a legitimate circumstance for future changes if necessary. A transfer of legal custody is thus very different from an adoption where the parents lose all rights to contact and have no legal recourse in the future regarding the child.

For all these factors, the trial court did not abuse its discretion in transferring legal custody of X.T.B. to S.G. The initial placement was within the foster care placement preferences. The child resides with a half-sibling who is an Indian child with the ICWA. The parents and Tribe's initial preferred custodian is

not a member of any tribe and thus similarly situated in regards to the preferences. The parents and Tribe made no arrangements to prioritize a placement higher in the preferences order until the time of trial by actually requesting a move of the child to B.W. The child was nearly one by the time of the initial permanency decision, and is now well past that point. While permanency in and of itself does not establish good cause, it can be considered. *521 N.W.2d at 363*. In light of the initially approved placement, the lack of efforts in securing a placement higher in the preferences, and the time involved, it is clear that the trial court did not abuse its discretion in finding good cause to deviate from the preadoptive placement preferences.

**D. The trial court did not abuse its discretion in denying transfer to tribal court.**

The Department did not take an initial position on the Tribe's request for a transfer of jurisdiction. Given the trial court's decision, it is clear from the record that the decision to deny transfer did not constitute an abuse of discretion. As a result, this factor provides no grounds for relief at this point.

Cases with the ICWA will be transferred to tribal court on request absent good cause to do so. *25 U.S.C. §1911(b)*. The party opposing the transfer generally has the burden of establishing good cause. *BIA Guidelines C.3(d), 44 Fed Reg at 67591*. Among established grounds for good cause are when the proceeding is at an advanced stage or if the transfer would create undue hardship on witnesses or parties. *BIA Guidelines C.3(d), 44 Fed Reg. at 67591*.

The proceedings in this matter were at an advanced stage by the time a transfer of jurisdiction became an issue. The case had been in litigation for over six months before any request was made by the parents and nearly ten months before the Tribe requested transfer. No party requested transfer immediately, and the issue was not formally presented until the permanency trial was within sight and other factors in the litigation had frustrated the parties' goals. Forum shopping is discouraged as is unnecessary delay in proceedings. *BIA Guidelines C.3 Commentary 44 Fed Reg. at 67590-91.*

This case was at a very advanced stage before the trial court had before it a viable request to transfer jurisdiction in the form of the Tribe's formal Motion. The trial court did not commit an abuse of discretion in determining that the proceedings were sufficiently advanced as to constitute good cause. Similarly, the trial court did not commit an abuse of discretion on these facts in finding that the distance and time involved would create an undue hardship on the parties and witnesses. As a result, Appellant's are due no relief on this basis.

**E. Denial of A.G.M.'s motion to intervene as a participant is not a basis for relief.**

Appellant G.W. also seeks relief based on the trial court's decision to deny participant status to A.G.M. This Court reviews for an abuse of discretion. *J.W. v. C.M.*, 627 N.W.2d 687, 691 (Minn. App. 2001). The trial court did not abuse its discretion on this record. The trial court explained its reasons, ordered that notice be provided to all the persons situated similarly to A.G.M., and clearly carefully

considered A.G.M. as well as the other proposed custodians relative to the child's best interests. As the child's best interests are the guiding determination in granting participant status, the trial court was not required to make an additional step by granting one of the proposed custodians participant status.

In addition, Appellant shows no harm to him in the decision not to grant participant status. A.M.G. had the opportunity to present information through affidavit, and could have engaged through attending hearings in person. The parties could also have chosen to call her as a witness. Appellant thus cannot show how A.M.G.'s failure to obtain participant status prejudiced him and as a result this issue forms no basis for relief.

**F. The trial court's decision as a whole is not an abuse of discretion.**

This was a difficult case. The trial court clearly took care to comply with the letter and the spirit of the ICWA, seeking engagement with the appropriate Tribes, allowing the parents and active Tribe to pursue their desired choice, and clearly respecting Tribal sovereignty throughout. The decision to seek a resolution less favored under the ICWA was not taken lightly, by either the Department or, on the record, by the trial court.

The ICWA, however, on its face creates preferences in nonadoptive placements, not absolute requirements. That structure allows for flexibility as necessary. The deviation from the ICWA only occurred in this case at the very end of the case, when the parents decided to support B.W. as a secondary

alternative and the Tribe presented B.W. as a primary choice. Until that point, the parties had not been in agreement as to the final outcome, but they had been similarly situated in seeking a transfer to a home not clearly within the preferences, although for different reasons.

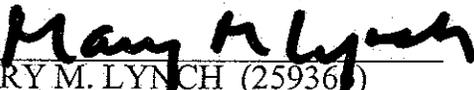
At the point of trial, the case was already well past permanency guidelines under Minnesota law. *Minn. Stat. §260C.201, subd. 11(a)*. Given the length of the proceedings, the late date at which alternative resolutions within the ICWA were forwarded, and the lack of connection between B.W. and X.T.B. despite the chance to have established such an important element, the trial court did not act rashly or without regard to the ICWA in making its final decision. Similarly, given the specific factors in this case, the trial court did not abuse its discretion in transferring legal custody of X.T.B. to S.G.

## CONCLUSION

The trial court applied the proper standard of proof and conducted a full and proper analysis regarding the Department's petition and the evidence before it. The trial court's findings were complete and the record provides substantial support for those findings. As a result, Respondent respectfully requests that this Court affirm the transfer of legal and physical custody of X.T.B. to S.G.

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).