

Nos. A05-1615 and A05-1631

State of Minnesota
In Supreme Court

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

Parents.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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THE INTEREST OF THE *AMICUS CURIAE*
MINNESOTA COUNTY ATTORNEY'S ASSOCIATION

The Minnesota County Attorney's Association (MCAA) is an organization whose mission is to improve the quality of justice in the State of Minnesota. The MCAA strives to provide leadership on legal and public policy issues related to the duties of County Attorneys throughout the state.

It is one duty of the county attorneys to represent their respective county social service agency in child welfare cases occurring in district court. The county attorney guides and assists the social service agency in implementing and following the controlling child protection and child welfare laws while also maintaining the dual role of representing the public interest.

The MCAA submits this *amicus curiae* brief in support of the Appellant, Hennepin County, supporting reversal of the decision below.¹

¹ This brief is authored by Assistant Crow Wing County Attorney, Janine LePage, on behalf of the Minnesota County Attorney's Association.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS WILL LIKELY HAVE FAR REACHING CONSEQUENCES WHICH WILL DENY CHILDREN TIMELY PERMANENCY AS REQUIRED UNDER STATE AND FEDERAL LAW

The narrow issue raised by Appellant is whether the trial court abused its discretion in denying the motions to transfer jurisdiction to tribal court. The ruling issued by the Court of Appeals, holding that the trial court did abuse its discretion, will have far reaching ramifications in the state's ability to provide timely permanency for children in foster care. If the state is unable to comply with permanency guidelines established by federal law, financial penalties will likely be imposed upon the state which will then impact the state's ongoing ability to provide services to children and families.

A. State and federal laws require permanency be established for all children in out of home placement based upon guidelines which include specific time limitations on establishing permanent homes for children in foster care.

In November 1997 the Adoption and Safe Families Act (ASFA) of 1997 was passed by the federal government in an attempt to address concerns regarding child welfare issues. *Federal Register/ Vol. 65, No. 16/Tuesday, January 25, 2000/Rules and Regulations, p. 4020*. The legislation marked a shift in the focus of child welfare proceedings, from one wherein the priority was placed on the family to one in which the focus more directly highlighted the best interests of the child. *Id.* Concerns leading to the

shift in legislative priority include the finding that the number of children languishing in foster care had increased substantially in the decade preceding ASFA and that many of the children in foster care had experienced multiple foster care placements without finding a permanent home. ASFA established new federal standards in permanency planning for children in foster care. *Id.* at 4035. ASFA required that a permanency hearing be held within 12 months of a child entering foster care and that there exists no statutory flexibility to extend the permanency hearing beyond 12 months. *Id.*

All states were required to pass new legislation and develop new regulations or programs in order to comply with ASFA. Minnesota enacted new legislation in 1999 in compliance with the new federal regulations established by ASFA. *See* Minn. Stat. Chapter 260C. The laws regarding child protection and permanency for children in foster care have continued to evolve since 1999 with a continuous focus on timely permanency for children and best interests of the child. The statutes and rules related to child protection have not changed in content and substance since 2004, when the case at hand was initiated.

When children are alleged to be in need of protection or services, the state may petition the court alleging CHIPS or in limited circumstances the state may petition immediately for termination of parental rights or a transfer of physical and legal custody of the child to a relative.² When a child is placed outside of the parental home under a

²In the case at hand, the county petitioned immediately for termination of parental rights based upon a pending termination of parental rights petition which was pending against the

CHIPS proceeding, the county must make “reasonable” or “active” efforts to reunify the child with the parents. *Minn. Stat. Sec. 260.012 (2004)*. To avoid children remaining in foster care for lengthy periods of time the law limits the amount of time a child may remain in out of home placement.

Minnesota Statutes 260C.201, subd. 11 and 11a (2004) outline permanency guidelines for children in court ordered out of home placement. If the child is over the age of eight years, the court must address the permanent placement of child at the point the child has been in an out of home placement for 12 months.³ When a child is under the age of eight years the issue of permanency must be reviewed at the point that the child has been in a court ordered out of home placement for 6 months. If the parent is complying with his/her case plan and maintaining regular visitation with the child, the permanency placement determination may be extended for up to an additional 6 months. However, under both subsections permanency must be established for all children when they have been out of the parent’s home for 12 months. If, at 12 months a permanency determination has not been made, the court may direct the social services agency to file a termination of parental rights petition. *Minn. Stat. Sec. 260C.201, subd. 11(d)(2)(i) (2004); Minn. R. Juv. Pro. 74.02.*

mother and involving a sibling to the child.

³The date of the child’s placement out of the home of the parent is the earlier of the first court-ordered placement of 60 days after the date on which the child has been voluntarily placed out of the home. 260C.201, subd. 11(a)

The guidelines as outlined in the Adoption and Safe Families Act of 1997 and Minnesota Statutes Chapter 260 and 260C do not exempt children who fall under the Indian Child Welfare Law from timely permanency determinations. *Federal Register/ Vol. 65, No. 16/Tuesday, January 25, 2000/Rules and Regulations, p. 4029*. Minnesota Statutes require that the provisions of ICWA be followed in all cases involving Indian children.⁴ Under ICWA and the Minnesota Indian Family Preservation Act (MIFPA), notice must be given to the tribe when a child is at risk of out of home placement. *Minn. Stat. Sec. 260.761, subd. 2 (2004)*. MIFPA requires that the tribe be notified within 7 days of an Indian child's out of home placement. *Minn. Stat. 260.765, subd. 2 (2004)*. Following notification the tribe is allowed to intervene as a party in the proceeding. *Minn. Stat. Sec. 260.761, subd. 6 (2004)*. Although the tribe may intervene at any point in the proceeding, there are benefits to intervening immediately upon receiving notice. These include the ability to actively participate in the action and to have input regarding case planning, services offered to aid in reunification, relative searches and permanency planning for the child. MIFPA defines "permanency planning" as the "systematic process of carrying out, within a **short time**, a set of goal oriented activities designed to help children live in families that offer **continuity of relationships** with nurturing parents or caretakers, and the **opportunity to establish lifetime relationships**." *Minn. Stat.*

⁴Minnesota passed the Minnesota Indian Family Preservation Act (Minn. Stat. 260.751-260.835)(MIFPA) in 1985 to strengthen and expand parts of the federal act.

260.755, *subd. 15 (2004)*(*emphasis added*).

Timely permanency is mandatory for every child in any child protection case where a child is placed outside of the parent's home. The value of placing children in a permanent home as quickly as possible and with as few moves as possible has been recognized by the state and federal governments. This need for stability for children has been incorporated in the development of the current legal framework under which social service agencies and the courts operate in child protection cases. Failure on the part of individual states to comply with ASFA's 12 months to permanency rule will result in financial penalties to the state and will require that the state enter into a program improvement plan. *Federal Register/ Vol. 65, No. 16/Tuesday, January 25, 2000/Rules and Regulations, p. 4024-4026.*

B. The decision of the Court of Appeals will conceivably have a detrimental impact on the states ability to pursue permanency for children, particularly those whose cases require compliance with the Indian Child Welfare Act (ICWA).

In an ICWA case, the tribe or the parent may file a motion to transfer the case to tribal court or they may choose to maintain the case in the district court. *Minn Stat. Sec. 260.771, subd. 3 (2004).*

If a party makes a motion to transfer jurisdiction to tribal court, the district court must grant the request except when "good cause" exists not to transfer the proceeding to tribal court. Neither federal nor state law have specifically defined the term "good cause." Minnesota court have historically referred to the Guidelines for State Courts; Indian

Child custody Proceedings, §C1 et seq, 44 Fed Reg. 67584, 67591 (1979) (hereinafter "BLA Guidelines"); *In the Matter of S.N.R.*, 617 N.W.2d 77, 81 (Minn. App. 2000).

"Good cause" not to transfer may exist if 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. *BLA Guidelines C.3(d)*, 44 Fed Reg. at 67591.

In the instant case, the Court of Appeals appears to have defined "advanced stage" as solely related to the date of filing of the most recent petition. The Court of Appeals appears to have mainly considered the timing of the filing with respect to the timing of the litigation. The Court reasoned that an Amended Petition for Termination of Parental Rights was filed on July 16, 2004, and that the Motion for Transfer to Tribal Court was received by the Court six days later on July 22, 2004; that the motion to transfer jurisdiction was received within the deadline for filing pre-trial motions and that the permanency trial had not yet occurred, as the basis of its determination that the case was not at an advanced stage in the proceeding.

In this case, the filing was an amended petition for transfer of physical and legal custody, but the Court of Appeals' definition of "advanced stage" will have far reaching effects on any proceeding wherein a petition or pleading is filed. Minnesota Rules of Juvenile Procedure 70.01 and Minn. Stat. §260C.201, subd. 11 and 11a (2004) require that a new petition be filed, in the CHIPS file if one exists, when a party is seeking termination of parental rights of transfer of physical and legal custody of the child to a

relative. The decision does not differentiate between CHIPS cases which move to permanency at 6-12 months after the filing of the CHIPS and cases where a termination of parental rights or other permanency petition is filed immediately from the outset. As written, the decision of the Court of Appeals will likely result in a mandatory transfer to tribal court of any case wherein a petition for permanency is filed in accordance with the time lines required by statute and the parent or tribe moves for a transfer following the filing of the permanency petition, without individual consideration of the specific facts involved. Minnesota courts will no longer be able to review each case individually and consider how long the underlying case has been pending before the court or how long the child has been in a court ordered out of home placement in making an individualized determination as to whether the case is at an "advanced stage in the proceeding."

The concerns of the MCAA are much broader than the specific facts involved in the underlying case. The Court of Appeals decision will directly impact any CHIPS case which is governed by the ICWA wherein the county must petition for some form of permanency which does not involve reunification of the child with the parent. There is a serious danger that in any ICWA case which reaches permanency time limits without reunification, that upon the county's filing of a petition for termination of parental rights one of the parents or the tribe will file a motion to transfer the proceeding to tribal court.

While the [ICWA] permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers

do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

BIA Guidelines, 25 U.S.C. § 1911(c).

Based upon the Court of Appeals decision, the trial court would then have no discretion to deny the motion irrespective of the specific facts present in each case, thus destabilizing a child who has settled into a home which might otherwise have served as the child's permanent placement. If the parent and the tribe were in agreement with the permanency plan for the child, no motion for transfer to tribal court would likely be filed. The main purpose for such a transfer would be to change the course of the proceeding.

- C. The trial court must be granted discretion to determine whether a case is at an "advanced stage of the proceeding" under ICWA in order to avoid automatic transfers of cases to tribal court when such transfers are requested following the filing of a permanency petition.**

In a typical child protection case, the social services agency is mandated to develop an out of home placement plan within 30 days of a child's placement in foster care. *Minn. Stat. §260C.178, subd. 7 (2004) and §260C.212, subd. 1 (2004)*. The date of the child's out of home placement is the triggering factor for the development of the out of home placement plan. The plan provides for the provision of programs and

services to assist in reunification of the parent with the child.⁵ During the six to 12 months following the child's out of home placement, the case is moving forward and much activity is occurring with the parent working on services, with provision of services to the child and in finding a permanency home for the child in the event the child cannot eventually go home. Also, throughout the six to 12 month process the parties, including the any tribe, have an opportunity to participate in the case planning and reunification process.

Motions for relief typically may be made at any point in the process, but in denying or granting the relief requested the trial court should look at the case individually and have the discretion to determine how to best serve the child's need for safety and permanency. Motions for transfer of venue, whether it be an ICWA or non-ICWA case, should be made early on in the case. By transferring jurisdiction or changing the venue of the case after the case has involved substantial activity on behalf of the parent and/or the child, the result for the child is a significant time delay in resolving the case and in establishing permanency for the child.

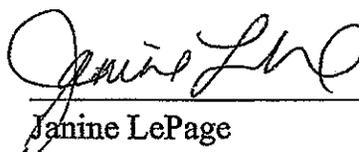
The determination of the Court of Appeals in the case at hand sets a definite bright line rule as to what constitutes "advanced stage of the proceeding." and takes away the trial court's discretion in determining individually what has taken place in the case, how much time has elapsed in providing case planning services to the family, and most importantly, how long the child has been in a court ordered out of home placement.

⁵ Minn. Stat. 260.012 provides for limited circumstances when reunification efforts are not required.

CONCLUSION

Timely permanency for children who can't be safely returned to their parents care has been one of the main focal points of the most recent changes in child protection legislation. The ruling issued by the Court of Appeals in will likely result in cases being transferred to tribal court after the filing of a permanency petition. A transfer of jurisdiction to tribal court six months to one year after a child has been placed in a court ordered out of home placement will likely result in children being moved from long term stable placements and case planning starting all over at a time when permanency should instead be established.

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