

A05-1631 & A05-1615

STATE OF MINNESOTA

IN SUPREME COURT

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

HENNEPIN COUNTY' S RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

Respondents G.W. and the Yankton Sioux Tribe (the “Tribe”) petitioned for rehearing in this matter. Respondents contend that rehearing is necessary under Minnesota Rule of Civil Appellate Procedure 140.01 through Rule 140.03. The arguments rest on a misconception of this Court’s holding and analysis and thus do not establish a need for rehearing.

Hennepin County considers the decision a complete and thorough resolution of the issues of the case. This response briefly addresses Respondents’ arguments. In doing so, Hennepin County does not intend to waive any other arguments or issues.

ARGUMENT

I. THE HOLDING REQUIRES A CASE BY CASE ANALYSIS OF TRANSFER TO TRIBAL JURISDICTION.

G.W. and the Tribe contend that this Court's holding relied on finding a violation of the federal AFSA, 42 U.S.C. §675 (5)(C)(2000), a finding that AFSA supersedes the ICWA, and a finding of violation of state permanency law, as well as making a holding that violated the supremacy clause by creating a statute of limitations. All of these arguments fail to understand that this Court conducted an analysis of the specific factors at issue in this case and held that in this particular case the trial court did not err in denying the motions to transfer jurisdiction. As a result, these arguments provide no basis for a rehearing. *Minn. R. Civ. App. P. 140.01(2006)*.

The Court did not hold that the facts of this case represent a violation of the ASFA or of Minnesota permanency law. The Court did rely on the posture of this case relative to the permanency statutes to help determine whether this particular case was at an advanced stage. The statutory framework as to timelines constitutes one factor among several in this Court's decision. Similarly, this Court did not rule that the ASFA supersedes the ICWA, either explicitly or implicitly. This Court appropriately considered the existence of the ASFA but did not consider it to rule over the ICWA or to create any difference in the general preference under the ICWA to transfer cases to tribal court. As a result, none of Respondents' first three arguments provide any basis for the relief requested.

Respondents also argue that the Court's holding creates a "statute of limitations" of state law that violates the Supremacy Clause. Again, Respondents misconstrue the Court's holding. The six month timeline for permanency decision-making for children under the age of eight is not a statute of limitations because it does not bound the point at which relief may be sought. In addition, the Court's interpretation appropriately leaves untouched the ICWA requirements for notice and other procedures. As a result, the Court's holding does not create a Supremacy Clause issue as construed by Respondents. Additionally, the Court's holding clearly makes the state permanency law one factor in determining whether this particular case was at an advanced stage. Considering the passage of time creates no inconsistency with the ICWA either on its face or in its application. As a result, the Supremacy Clause does not become a consideration.

Respondents' first four arguments fail to appreciate this Court's fact specific analysis. The Court carefully considered the ICWA and other relevant statutes and found no disharmony between the analysis of the trial court and the ICWA in this particular situation. As a result, rehearing is neither necessary nor appropriate.

II. THE HOLDING CREATES NO NEW RULE OF LAW

Respondents urge a prospective application of the rule in this case. The Court's holding, however, creates no new rule and thus is not susceptible to this type of application analysis. As a result, rehearing is not appropriate on this basis.

To create a new rule, a decision must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by

deciding an issue of first impression whose resolution was not clearly foreshadowed....” *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 768 (Minn. 2006), quoting *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982)(Tax court appeal; ellipses in original; *Hoff* internal quotations omitted). To the extent that the Court’s holding uses any rule, it is that the decision about whether a case is at an advanced stage for analysis of a state trial court’s decision to transfer jurisdiction to tribal court goes forward on a case by case basis. This analysis does not overrule clear past precedent and Respondents point to no precedent to support their contention. Similarly, while this case does not clearly present an issue of first impression, even if it does so the case by case, and therefore fact and procedurally specific analysis, clearly conforms to practice in this area and thus was fully without reasonable expectations.

Perhaps most importantly, this Court simply did not hold that a motion for transfer must occur within six months after placement of a child irrespective of other factors, as Respondents contend. Considering time, again not a concept inconsistent with the ICWA, is a factor for consideration, but the ICWA still applies as well as other factors appropriate for consideration. No fair reading creates the bald rule as stated by Respondents in their request for rehearing. Finally, even if the Court’s opinion does announce a new rule, which Hennepin County does not concede, Respondents have not met this Court’s requirements for the unusual relief of prospective application. *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002). As a result, Respondents are due no rehearing on this basis.

CONCLUSION

The Court's decision in this matter was clear and consistent. Respondents have established no basis for rehearing. As a result, this Hennepin County respectfully requests this Court deny Respondents' petition for rehearing.

Respectfully submitted,

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