

A05-1615
A05-1631
STATE OF MINNESOTA
IN SUPREME COURT

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

RESPONDENT G.W.'S BRIEF AND APPENDIX

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RESPONDENT G.W.'S STATEMENT OF FACTS

Cases like this one, which raise important issues of public policy to be decided by the Supreme Court, are neither presented nor decided in a vacuum. When an appellate court decides a unique point of law, the Court's decision affects not only the case books and sometimes the statute books; as the Court surely knows, its decision also affects the living, breathing participants in that case and those who will in the future will be affected by the rule adopted.

This appeal rests upon a lengthy and, for juvenile court, a rather complicated procedural history. It is essential that, more than thirty months after X.T.B. (Xylene) was born, this Court have the correct facts before it. Unfortunately, because of the competing issues and agendas, the passage of time, and now the participation of four parties *amicus curiae*, some of the essential facts in this case have become a bit amorphous.

It is for this reason that Respondent Gabriel Ward has chosen to reiterate some of those facts important to the issue now before the Court. These facts were all before the courts below.

(1) The agency's July 16, 2004 termination/transfer of legal custody petition was the only one of the three petitions which contained any substantive allegations (seven paragraphs) against Gabriel. It's also the

only one of the three petitions which contained Gabriel's age, race, address and tribal affiliation. This petition was filed exactly seven months after Xylene was born. It appears that this third petition was filed because the agency anticipated a motion to dismiss the first two petitions.

The first two petitions, one filed on November 21, 2003 (six days after Xylene's birth) and one filed on December 31, 2003, contained no substantive allegations against Gabriel to support termination of his parental rights. The November petition had been improperly drafted and filed (Trans. Dec. 23, 2003, at 4-5). Both petitions were almost identical to one another. Both contained Gabriel's name, but listed his age, address, race and tribal affiliation as either "unknown" or "none known." Aside from a single paragraph describing the circumstances of Xylene's birth in Rhode Island, both petitions are almost exclusively concerned with the child protection history of a child named Alexandria G. and her parents.¹

Because the third petition was the only one with substantive allegations against Gabriel, the claim that this was merely a minor amendment to an extant lawsuit which had already survived pretrial motions, see Brief for Petitioner HSPHD at 18-19; Brief for *Amicus Curiae* Minnesota County Attorney's Association at 7, is not supported by the record.

¹ Alexandria G. is the daughter of T.T.B. and one M.G. T.T.B. is Xylene's mother. Alexandria G. is thus Xylene's half-sister. Gabriel was never arraigned on either of these two petitions (Trans. Feb. 17, 2004 at 19; Trans. Aug. 12, 2004 at 7). He was arraigned on the third (Trans. Aug. 12, 2004 at 13-14).

(2) By the time this case is argued before the Supreme Court, Xylene will be 32 months old. Because Petitioners and their *amici curiae* have made repeated suggestions that Respondents caused these delays and manipulated the calendars and their motion practice, it is important to set out the procedural history.

(a) There were eight hearings before the juvenile court. These hearings, which began when Xylene was five weeks old and ended when Xylene was one week shy of 18 months old, were scheduled with the court's scheduling clerk. Most of them were about two months apart.²

(b) Gabriel's first appearance in court on the December 31, 2003, petition was scheduled for February 17, 2004, three months after Xylene's birth. He was appointed public counsel (Trans. Feb. 17, 2004 at 16). He and his lawyer met two months later for the first time at the admit/deny/pretrial conference hearing (Trans. April 20, 2004 at 9).³ Gabriel's motion to transfer to tribal court was made only five months after the court found him eligible for public counsel and only three months after he first met his lawyer.

² The October 5, 2004 hearing was for argument on the motion to transfer to tribal court. These arguments were supposed to have been made on August 12, 2004, but the juvenile judge decided not to hear those arguments until he knew whether the tribal court would accept the case. The court did not issue its order denying transfer to tribal court until the day of trial, October 27, 2004.

³ For at least this reason, and contrary to the suggestion of one of Petitioner's *amici*, this case could never have gone to trial in March, 2005. Brief for National Association of Counsel for Children, at 16.

(c) Gabriel's motion to transfer to tribal court was not made on the eve of trial or when the case was ready for trial. It was made three months before trial.

The scheduling history pertinent to the claims made before this Court is as follows:

At the third hearing, the court set trial and pretrial dates (Trans. April 20, 2004 at 9-10).

When the case did not settle at the pretrial, the court was asked to issue a scheduling order for trial (Trans. June 10, 2004, at 3), which was then six weeks off (July 22, 2004).

Gabriel's counsel told the court that she would be away during part of July; she requested that the court set consider her absence in setting a date for motions and discovery. She also indicated that she had received no discovery, and could not comply with motion practice until she received it (Trans. June 10, 2004 at 6, 4).

When the scheduling order came out the next day (see Brief for Petitioner Guardian-ad-Litem at Appendices 17-18), it contained motions and discovery deadlines which fell during counsel's absence.

Counsel wrote to the court on June 24, 2004, a month before the trial date, to remind him about her absence and her scheduling request; she asked the court to adjust *only* the motions and discovery date. She specifically *did not* ask him to reschedule the trial date. She also reported

that she was still having trouble obtaining discovery from the agency (see Appendices 1-2 to this brief; this letter should be filed in the court file).

Three weeks after counsel's letter, on July 15, 2004, the juvenile court struck the July 22nd trial date, converted that date to a motions and discovery deadline, and set the trial for October 27, 2004. *The juvenile court specifically made a finding that the continuance served Xylene's best interests.*⁴ The court made a finding as to complicated nature of the proceedings, and also stated with regard to counsel's discovery problem: "The inability to review all Discovery places all Parties at a disadvantage and would also lead to an inability to effectively plan and prepare pretrial motions or alternate pleadings before the July 15, 2004 deadline [the date set in the first scheduling order]." See Brief for Petitioner HSPHD at Appendices 35-37).

No one objected to this continuance; no one ever complained that the continuance exacerbated the violation of the permanency time lines. Within a week of that order, Gabriel's counsel filed her motions in compliance with the court's directive.⁵

⁴ Minn. R. Juv Prot P. 39 02, subd 2; Minn Stat § 260C.163, subd 1(b)

⁵ Given this procedural history, it is unfair to characterize counsel's request as one for "additional time to comply with pretrial orders[.]" and it is even more unfair to then state, "Waiting until after that point to seek transfer is far from prompt." Brief for Petitioner HSPHD at 16

(d) After the stipulated trial was tendered to the court on October 27th, the court did not rule on the transfer of legal custody until February 17, 2005, 3½ months later. By then, Xylene was 15 months old. The court did not hear Gabriel's new-trial motion until May 9, 2005, eleven weeks after the order was issued, and it did not decide that motion for another nine weeks (July 14, 2005). Xylene was then 20 months old.

No one, not agency counsel, not the Guardian, not the juvenile court, ever objected to this passage of time.⁶ Even though by July, 2004, this case was already out of compliance with the permanency time lines, no one ever objected and no one called the court's attention to the statutory requirements.

(3) Gabriel's two motions, one filed on July 21, 2004, and seeking dismissal of the petition, and the other filed on July 22, 2004, and seeking transfer to tribal court, were not alternative motions. They were separate documents and were argued at separate times. These motions were filed less than a week after the second amended petition, and in compliance with the court's amended scheduling order. The Guardian's claim, Brief for Petitioner Guardian-ad-Litem at 3, that the tribal court transfer motion was an alternative motion in case the first motion was denied, is not supported by the record.

⁶ Gabriel's counsel did indicate she was worried about the delay in hearing argument on her tribal court transfer motion when, despite specific scheduling for that argument, the court declined to hear it that day (Trans. Aug 12, 2004 at 5)

(4) The Yankton Sioux Tribe never consented to placement of Xylene in the non-relative, non-Indian home of Sandra G. Brief for Guardian-ad-Litem at 3, 8.⁷

The Guardian's claim is based upon two statements at court hearings by one Nancy Bordeaux (Trans. April 20, 2004 at 10; Trans. June 10, 2004 at 5). Ms. Bordeaux is not affiliated with the Yankton Sioux Tribe and is, instead, an employee of the Minneapolis American Indian Center who provides courtesy representation at local court hearings for distant tribes.

In neither statement did Ms. Bordeaux indicate that the Yankton Sioux Tribe approved the placement with Sandra G. In the April 20th statement, Ms. Bordeaux stated: "I did speak to the *Oglala* Sioux Tribe and they made a recommendation to go with the Department's recommendation while waiting for more information" In her June 10th statement, Ms. Bordeaux stated: "We're collecting the information between the Yankton Sioux Tribe the Oglala Sioux Tribe. At this point, they are in agreement. But I'm here for the *Og[l]ala* Sioux Tribe's recommendation is to support the Department's recommendation."⁸ The Oglala Sioux did not

⁷ Agency counsel's statement at the hearing on the new-trial motion that the Yankton Sioux Tribe supported the placement with Sandra G "throughout the proceedings" is mistaken (Trans. May 9, 2005 at 19). It is contradicted by the agency's own briefs before the Court of Appeals, at 3, and before this Court, at 3. Moreover, Mr. Cournoyer's testimony at the October, 2004 hearing does not support counsel's claim (Trans. Oct. 5, 2004 at 4-15). Nor do Exhibit #'s 5-6

⁸ Ms. Bordeaux could not have meant that last statement to apply to the Yankton Sioux Tribe because that Tribe was by then on record with its own placement recommendation (Exhibit # 5)

take a placement position earlier in the proceeding (Trans. Feb. 17, 2004 at 19).

Xylene was never enrolled with the Oglala Sioux Tribe. Rather, Xylene was (and is) enrolled in the Yankton Sioux Tribe (Gabriel's Tribe) (Trans. Oct. 5, 2004 at 14; Exhibit #'s 2-4).

(5) The motion to transfer to tribal court was filed before, not after, the participants became aware of Rhode Island's home study recommendation against placing Xylene in the Annalyssa Murphy home.⁹ The Guardian is mistaken in her claim that the tribal court transfer motion was only filed because the Interstate Compact study did not come out as expected (Trans. Oct. 5, 2004 at 17), and *Amicus Curiae* National Association of Counsel for Children, at 16, is similarly mistaken when it claims that no transfer motion was filed until after Rhode Island denied placement with the Murphys.

Although the home study was expected in some quarters in April, 2004 (Trans. April 20, 2004 at 7), and thought to be on its way in June (Trans. June 10, 2004 at 5), the fact is that the study was dated July 27, 2004 (Exhibit # 8), and it was not in anyone's hands in written form as of

⁹ This, too, was delayed. A referral for the Interstate Compact study was not made until late February, 2004, when Xylene and these proceedings were three months old. See Exhibit # 8, p.3: the compact study request was signed by the agency on February 25, 2004 and was signed by the Minnesota compact administrator on March 26, 2004, so it didn't arrive in Rhode Island until sometime in April, 2004. See also Trans. Feb. 17, 2004 at 18. Annalyssa Murphy is a Native American and former foster parent of Xylene's mother who was living at the time in Rhode Island where she was teaching at a college and pursuing a doctoral degree. See Exhibit # 11. Xylene's parents have consistently requested that Ms. Murphy and her husband be Xylene's custodians

mid-August (Trans. Aug. 12, 2004 at 9). The motion to transfer to tribal court was filed on July 22nd.

(6) The Human Services Department took no position on the motion to transfer to tribal court (Trans. Oct. 5, 2004 at 3, 20, 22), and did not file a brief. It did not object when the court rescheduled the argument on that motion (Trans. Aug. 12, 2004 at 13), and did not ever suggest that the motion was filed in bad faith or in an attempt to delay the proceedings. When the court heard argument on the motion on October 5, 2004, the court never suggested that it was untimely or that the proceedings were at an advanced stage. The Guardian was the only party who ever opposed this motion.

(7) No participant or party to these proceedings nor any of the lawyers ever argued, in oral argument, brief or any other format, that the proceedings were out of compliance with the statutory time lines for permanency. No one ever argued that the Adoptions and Safe Families Act of 1997 (*hereinafter*, ASFA) governed these proceedings, and, in particular, no one ever argued that either the Minnesota permanency statute or the ASFA controlled over the Indian Child Welfare Act (*hereinafter*, ICWA).

ARGUMENT

I.

THE COURT OF APPEALS WAS CORRECT IN ITS DECISION THAT THE MOTIONS TO TRANSFER THE PROCEEDINGS TO THE TRIBAL COURT SHOULD HAVE BEEN GRANTED.

Section 1911(b) of the ICWA states in pertinent part:

[T]he court, in the absence of good cause to the contrary, *shall* transfer [the] proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b) (2000)(emphasis supplied).¹⁰

Minnesota has a similar provision as part of the Indian Family Preservation Act. Minn. Stat. § 260.771, subd. 3. So does the Tribal-State Agreement on Indian Child Welfare, adopted in 1998 by the Minnesota Human Services Department and all of Minnesota's Dakota and Ojibwe Tribes (§ III.B.2).¹¹

This provision is at the "heart" of the ICWA and creates concurrent "but presumptively tribal jurisdiction" over Indian children who do not live

¹⁰ *Amicus Curiae* National Association of Counsel for Children is mistaken when it says, at 4, that the ICWA provides for transfer "where 'good cause' does *not* exist to transfer."

¹¹ This is reproduced in Respondent Ward's Brief Before the Court of Appeals at Appendix 23

on a reservation. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989); Custody of S.E.G., 521 N.W.2d 357, 359 (Minn. 1994).

The Department of the Interior wrote implementing regulations for the ICWA. Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," 44 Fed. Reg. 67584 (Nov. 26, 1979) (*hereinafter*, BIA Guidelines). They have not been changed since they were written.

The BIA Guidelines suggest several circumstances which *might* constitute "good cause" not to transfer to tribal court. *Id.* at 67591 (§ C.3.b). Of those, only one is at issue here:

- (i) 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.

(emphasis supplied). This is a conjunctive sentence—both clauses must be proven before this Guideline will apply.

By contrast, the Minnesota Department of Human Services, in its ICWA regulations, does not use the "good cause" exceptions which appear in the BIA Guidelines. See Minnesota Department of Human Services, Social Services Manual, § XIII-3544 (October 15, 1999).¹²

Although Petitioners HSPHD and the Guardian cited other provisions of the BIA Guidelines to the juvenile court and to the Court of Appeals,

¹² This is reproduced in Respondent Ward's Brief Before the Court of Appeals at Appendix 28

they abandoned those other grounds in their Petition For Review. Thus, the references made in some of the briefs to “undue hardship,” “forum shopping,” and “*forum non conveniens*,” are to claims which are no longer live.¹³

Two of the factors mentioned by the juvenile court as providing “good cause” are not mentioned in either the BIA Guidelines or the DHS Social Services Manual (see Brief for Petitioner HSPHD at Appendices 48-51, Findings of Fact ¶’s 9, 10, 12).

The BIA Guidelines, *supra* at 67591 (§ C.3.d), state that the party opposing the transfer to tribal court for “good cause” bear the burden of proof and production. All parties to the appeal agree, and the Court of Appeals so held in this case. Welfare of the Child of T.T.B. & G.W., Parents, 710 N.W.2d 799, 805 (Minn. Ct. App. March 21, 2006). Some jurisdictions hold that this burden must be carried by clear and convincing evidence. People in the Interest of T.I., 707 N.W.2d 826 (S.D. 2005); Interest of A.P., 961 P.2d 706, 713 (Kans. Ct. App. 1998).

Petitioners and one of their *two amici curiae* argue that whether “good cause” existed to deny a motion to transfer to tribal court should be decided on a case-by-case basis. See Brief for Petitioner HSPHD at 11-12; Brief for Petitioner Guardian-ad-Litem at 9; *see also* Brief for *Amicus*

¹³ Brief for Petitioner HSPHD at 10 & 20; Brief for *Amicus Curiae* National Association of Counsel for Children at 7 & 9

Curiae Minnesota County Attorney's Association at 9-10. Respondent Ward agrees, and has argued, *infra* at 33-36, that the *per se* rule urged by the National Association of Counsel for Children should not be adopted.

To respond to the claims that "good cause" existed to deny transfer to tribal court, we must return to the facts as shown above.

The Proceeding Was Not At An Advanced Stage:

It is true that this case was filed as a permanency petition; but it's also true that there was no underlying C.H.I.P.S. proceeding and Gabriel had no prior child protection history. We have argued, *infra* at 35-36, that the Court should not decide whether a tribal court transfer motion is too late if filed at the permanency stage; we have also argued there that any such rule would be pre-empted by the ICWA.

On the facts here, the proceedings here were not at an advanced stage when Gabriel filed his July 22, 2004 motion to transfer to tribal court.

- Gabriel's first appearance, and that on a petition which dealt almost exclusively with Xylene's mother, was on February 17, 2004, only five months before his motion was filed;
- Gabriel was assigned public counsel at his first appearance, but did not meet with her until April 20, 2004, three months before his motion was filed;
- The only petition which made any substantive claims concerning Gabriel's parental rights was filed on July 16, 2004, six days before

Gabriel's motion was filed;

-Gabriel was never formally arraigned on the first two petitions, and was not arraigned on the third petition until after his motion was filed;

-Gabriel's motion was filed before the Interstate Compact home study on the Murphy home was completed; if he were truly as manipulative as some of the parties to this appeal claim, he would have waited to see what the study said and only then decided whether to file his motion;

-Gabriel's motion, and two others, were filed by his counsel in keeping with the motions and discovery deadline set by the court when the trial date was continued;

-Gabriel did not ask for a trial continuance, merely for a change in the motions and discovery dates;

-The court found that because of the discovery delays, Gabriel would be at a disadvantage and would not be able to plan for his motion practice;

-Gabriel's motion was filed when the trial date was three months away.

Numerous decisions from other jurisdictions have considered the question of whether a proceeding was at an advanced stage when the

motion to transfer to tribal court was filed. The ones cited by Petitioners and their *amici* hold that transfer was properly denied. See Brief for Petitioner HSPHD at 12-17; Brief for Petitioner Guardian-ad-Litem at 9, 11-12; and Brief for *Amicus Curiae* National Association of Counsel for Children at 13-14.

Aside from the fact that many of the cases which deny transfer to tribal court were decided *before* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), the case which stated emphatically that transfer to tribal court under ICWA is presumed when sought, there are other factors which distinguish them.

Many of these cases involve huge delays in filing the motion to transfer, resulting in the motion literally being filed as the trial began or even later. Those cases are not comparable to the motion filed here three months before trial and only three months after meeting counsel. See, e.g., Matter of Lucas, 33 P.3d 1001 (Or. Ct. App. 2001)(petition filed during trial); Interest of S.G.V.E., 634 N.W.2d 88 (S.D. 2001)(petition filed after final disposition); Matter of A.P., 962 P.2d 1186 (Mont. 1998)(petition filed after state court proceedings closed); Interest of J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995)(petition filed on morning of trial); People ex. rel. A.T.W.S., 899 P.2d 223 (Colo. Ct. App. 1994)(3½ year delay after notice); In re Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. Ct. App. 1991)(two year delay after notice); Dependency of A.L., 442 N.W.2d 233

(S.D. 1989)(one year delay); In re Robert T., 246 Cal.Rptr. 168 (Ct. App. 1988)(sixteen month delay); In re Laurie R., 760 P.2d 1295 (N.M. Ct. App. 1988)(petition filed after trial began).

In fact, we do not know of a single decision in the United States which holds that a proceeding was at an advanced stage so as to preclude transfer to tribal court where the proceeding is a total of seven months old, where it is six *days* old as to the charging document, where the parent has had a lawyer only three months, and where the motion was filed when ordered by the court.

Moreover, a few of the cases betray some evidence of jurisdiction manipulation. See, e.g., Welfare of the Children of C.V., No. A04-0441 (Minn. Ct. App. Nov. 9, 2004)(appears in Brief of Petitioner HSPHD at Appendix 68).

Last, some of them are completely distinguishable on their facts. In In re Wayne R.N., 757 P.2d 1333 (N.M. Ct. App. 1988), repeatedly cited by Petitioners and their *amici*, the motion was made orally on the morning of trial, the tribes opposed transfer to tribal court, and the tribes indicated they would decline jurisdiction if transferred. The Tribes also indicated that they lacked subpoena power in another state. *Id.* at 1335-36.

Gabriel Filed His Petition Promptly:

The facts of this case show that Gabriel filed his petition promptly after receiving notice. Some of the same facts which indicate that the proceeding was not at an advanced stage apply here as well.

- Gabriel's first appearance in court was on February 17, 2004, only five months before his motion was filed;
- Gabriel was assigned public counsel, but did not meet with her until April 20, 2004, three months before his motion was filed;
- Of the three petitions, only the last one, filed on July 16, 2004, made any substantive parenting claims against Gabriel and, though he had not yet been arraigned on this petition, he filed his motion six days later;
- Gabriel's motion was filed before the Interstate Compact home study on the Murphy home was completed;
- Gabriel's motion was filed in keeping with the motions and discovery deadline set by the court;
- Gabriel was handicapped in his trial and motion preparation, as the juvenile court found, by delays in obtaining discovery;

Petitioners and their *amici* do not cite a lot of authority on this point.

See Brief for Petitioner Guardian-ad-Litem at 8; Brief for Petitioner HSPHD

at 11-12; Brief for *Amicus Curiae* National Association of Counsel for Children at 12, 14-15.

The thread which runs through the argument of those who say that Gabriel did not file his motion to transfer promptly, and which is advanced by both of Petitioners' *Amici Curiae*, is based in part upon a comment to BIA Guideline § C.1, *supra* at 67590:

When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win.

This argument is so far removed from the facts of this case that it is hard to believe that anyone making it has any familiarity with the record. This case was not "almost complete;" the trial here was not underway; and Gabriel did not wait to see how things were going before moving to transfer—in fact, he didn't even wait to see if the Murphys were going to be approved as care providers.

But, aside from that objection, the cases most often cited in support of the claim that the motion to transfer was not filed promptly involve

different facts and much longer periods of delay than the three to five months at issue here. See, e.g., Matter of Lucas, 33 P.3d 1001 (Or. Ct. App. 2001)(petition filed 18 months after notice); Matter of A.P., 962 P.2d 1186 (Mont. 1998)(petition filed 22 months after notice); People ex. rel. A.T.W.S., 899 P.2d 223 (Colo. Ct. App. 1994)(3½ year delay after notice); In re Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. Ct. App. 1991)(two year delay after notice); Dependency of A.L., 442 N.W.2d 233 (S.D. 1989)(one year delay); In re Robert T., 246 Cal.Rptr. 168 (Ct. App. 1988)(sixteen month delay).

We believe the Court would be better served by consulting those cases which approve a transfer to tribal court, thus effectuating the purpose of the ICWA as stated in the *Mississippi Choctaw* case. Some of those cases are: Interest of A.B., 663 N.W.2d 625 (N.D. 2003)(motion to transfer within seven weeks of petition is timely); Interest of J.L.P., 870 P.2d 1252, 1256-59 (Colo. Ct. App. 1994)(petition one year after receiving notice is timely); Guardianship of Ashley Elizabeth R., 863 P.2d 451 (N.M. Ct. App. 1993)(petition six weeks after notice is timely); Interest of M.C., 504 N.W.2d 598 (S.D. 1993)(five months after receiving notice and one month after petition filed is prompt); see also, Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994); Matter of C.R.H., 29 P.3d 849 (Alaska 2001)(remand for re-determination of transfer question).

This proceeding was not at an advanced stage when Gabriel filed his motion to transfer, and Gabriel filed his motion promptly. For these reasons, there was no "good cause" to deny transfer to tribal court. The Court of Appeals was correct and should be affirmed.

Petitioners' real issue, although they don't state it, is that they can't control what the tribal court might do. Before the juvenile court, Petitioners desperately sought to avoid placing Xylene with the Murphys, even though both parents wanted Xylene placed with the Murphys and even though Ms. Murphy was the former foster parent of T.T.B. and a long-time acquaintance of Gabriel's. But the evidence before the juvenile court on October 5, 2004 established that the Yankton Sioux Tribal Court is a cautious, deliberative body which will make no rash judgments or placements (Trans. Oct. 5, 2004 at 4-15). The purpose of the ICWA, of course, is to convey exactly that authority to that body without second-guessing by state court officials.

Petitioners also appear to fear that transferring to tribal court will cause great delay in placing Xylene. See Brief for *Amicus Curiae* Minnesota County Attorney's Association as 11. But the time period described by the tribal court's witness, Raymond Cournoyer, was measured in days rather than in weeks or months (Trans. Oct. 5, 2004 at

7-13). Based on that testimony, Petitioners have caused Xylene a far greater delay in permanency by bringing this Petition.

Before leaving this subject, we must address the claim made by *Amicus Curiae* Minnesota County Attorney's Association about the effect of the Court of Appeals' decision in this case. MCAA claims that the effect of the decision below will be that juvenile courts will lose discretion to decide whether "good cause" exists to deny transfer. According to MCAA, all cases in which a petition is filed will have to be transferred. Brief for *Amicus Curiae* Minnesota County Attorney's Association at 9-11.

We do not believe that the Court of Appeals' ruling is anywhere close to being that broad. The Court ruled, on the facts before it, that the transfer to tribal court would not cause an undue hardship, and that the petition was not filed when the proceedings were at an advanced stage. Therefore, it held that "good cause" did not exist to deny transfer to tribal court. Welfare of the Child of T.T.B. & G.W., Parents, 710 N.W.2d 799, 806 (Minn. Ct. App. March 21, 2006).

It's hard to see how the Court's opinion establishes the *mandatory* transfer claimed by *amicus*. The ICWA as interpreted by the *Mississippi Choctaw* case calls for *presumptive* transfer, but there remains plenty of room for trial court discretion that the Court of Appeals did not touch.

II.

**THE COURT SHOULD NOT DECIDE THE QUESTIONS
RELATING TO THE PERMANENT PLACEMENT TIME
LINES BECAUSE THESE ISSUES WERE NEITHER RAISED
BEFORE NOR DECIDED BY EITHER OF THE COURTS BELOW.**

When this case was brought to the Court of Appeals by Gabriel and by Respondent Yankton Sioux Tribe, the question presented was quite narrow and specific to the facts of that case. Gabriel raised this issue: "Did the Juvenile Court err in denying the motion to transfer this matter to the tribal court?" Brief for Appellant G.W. Before Court of Appeals, at iv and 20. The Yankton Sioux Tribe's statement of the issue was almost identical: "Did the Juvenile Court commit reversible error by not transferring the proceedings to the Yankton Sioux Tribal Court?" Brief for Appellant Yankton Sioux Tribe Before Court of Appeals, at 1 and 13.¹⁴

The then-Respondents Hennepin County Human Services and Public Health Departments (HSPHD) and the Guardian-ad-Litem followed suit. Brief for Respondent HSPHD before Court of Appeals, at 20; Brief for Guardian-ad-Litem Before Court of Appeals, at 1.

¹⁴ The argument heading substitutes the words "abuse its discretion" for the words "commit reversible error" on the legal issues page.

That is the question the Court of Appeals decided. Welfare of the Child of T.T.B. and G.W., Parents, 710 N.W.2d 799, 805-806 (Minn. Ct. App. March 21, 2006).¹⁵

However, in their Petition for Review, Petitioners raised this entirely-different question:

Is it an abuse of discretion to deny a transfer of jurisdiction to tribal court for good cause when the motion was made after the statutory timelines for permanency had passed and several months after the Tribe and moving parties had received notice of the permanency proceeding?

Petitioners' Petition for Review, at 1.

Following this issue statement, Petitioners continue: "The Court of Appeals held in the affirmative." Petitioners' Petition for Review, at 1.

Actually, the Court of Appeals made no such holding. The Court of Appeals could not have made that decision because that issue was not presented to it for decision. Nor was this issue presented to or decided by the juvenile court.

One can search the transcripts of the eight hearings in this case, the two briefs filed with the juvenile court, and the five briefs filed with the Court of Appeals, seeking the argument raised in the Petition for Review.

¹⁵ The Court of Appeals decided two other issues and declined to decide two issues, but no party petitioned this Court for review of those questions.

One can also search those same sources for a single objection to the passage of time, or a single claim that the case was in violation of federal or state permanency time lines. Both searches would be in vain.¹⁶

Of course, it's not surprising that Petitioner HSPHD did not make this claim before either lower court—the agency *did not take a position* before the juvenile court *on the motion to transfer to tribal court* (Trans. Oct. 54, 2004 at 3, 20, 22). The agency could hardly have objected to transfer to tribal court for the reason stated in its Petition for Review and, at the same time, take no position on that issue.

There are two reasons why the Court should not consider the claim advanced in the Petition For Review.

First, on the facts of this case, HSPHD is position-shifting on appeal—not once but twice. Its first position shift is between the juvenile court, where it took no position, and the Court of Appeals, where it argued that the juvenile court did not abuse its discretion in denying the tribal-court transfer motion. Brief for HSPHD Before Court of Appeals, at 20. Its second position shift is between the Court of Appeals, where it argued this simple, abuse-of-discretion claim, and this Court, where it is arguing that a

¹⁶ Agency counsel's closing argument at the stipulation/trial hearing in October 27, 2004, does not raise this issue. The motion to transfer to tribal court had been denied by then Counsel was not arguing the issue posed in the Petition for Review. Rather, she was arguing against placing Xylene with Gabriel's mother because Gabriel hasn't moved out of her home yet and further delay would be caused for that reason if Xylene were to be placed there (Trans Oct. 27, 2004 at 30)

federal remedy should be denied a litigant when a state statutory time line has expired (a question the Court of Appeals did not decide).

This Court normally does not allow a litigant to assume inconsistent and/or contradictory positions in the same appeal. The Court has referred to this as “shift[ing] their claims or the facts at their pleasure.” Welfare of Larson, 312 Minn. 210, 217, 251 N.W.2d 325, 330 (1977)(internal citation omitted); see also Valentine v. Lutz, 512 N.W.2d 868, 871 (Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

HSPHD’s claims before this Court clearly come within the rule of these cases, both as to shifting claims and, to a lesser extent, shifting facts.

Second, both Petitioners are advancing a claim before this Court that they did not argue before the trial court or before the Court of Appeals, and which was not decided by either Court.

This Court rarely hears issues not preserved before the lower courts.¹⁷ See, e.g., Goeb v. Tharaldson, 615 N.W.2d 800, 818 & n.12 (Minn. 2000); Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988).

The Court has occasionally vacated an order granting review of the Court of Appeals, presumably after concluding that the issue raised was not ripe for Supreme Court review. See Schwardt, et. al. v. Modern Grain

¹⁷ As noted *supra*, at 1, judicial decision making on issues of public policy is not done in a vacuum. Normally, issues are decided by a trial court upon pleadings, testimony, affidavits and briefs and then reviewed by the Court of Appeals upon a complete record. If the Court resolves the question in the Petition For Review, it will be deciding it in a vacuum.

Systems, Inc., 434 N.W.2d 469 (Minn. 1989); Lukens v. State, 408 N.W.2d 569 (Minn. 1987); Westbrook State Bank v. Johnson, 401 N.W.2d 68 (Minn. 1985).¹⁸ The Court ought to consider vacating the order granting review in this case because the issue accepted was not raised, briefed, argued or decided in either of the lower courts.

Petitioners' *amici curiae*, the Minnesota County Attorney's Association and the National Association of Counsel for Children, have raised a plethora of issues in their briefs. Notable among those issues are these:

Brief of Minnesota County Attorney's Association (MCAA):

- (a) if the ICWA prevents the state from complying with federal permanency time lines, the state will suffer financial penalties (2-3);
- (b) operation of Minnesota's permanency statute (3-4);
- (c) federal regulations under Adoptions and Safe Families Act of 1997 (5-6);
- (d) operation of Minnesota Indian Family Preservation Act (5);
- (e) Court of Appeals' decision results in mandatory transfer to tribal court regardless of specific facts and trial court will have no discretion to deny transfer (8-9);

¹⁸ We are aware that the *Westbrook State Bank* case does not appear in the Lexis data base. It is, however, the correct citation and does appear in the Westlaw data base

- (f) Court of Appeals' decision will allow parents to seek transfer to tribal court at any point in the proceedings, including a case which is almost completed, without any role for trial court discretion (9-10);
- (g) a transfer to tribal court will require social service planning to start all over, wasting the time and services already provided (11).

Brief of National Association of Counsel for Children (NACC):

- (a) the Court of Appeals erred in not considering the child's best interests as part of the "good cause" analysis (2, 9-11);
- (b) whether or not a proceeding is at an "advanced stage" must be judged by the state's permanency time lines (2-3, 11-12);
- (c) the Adoptions and Safe Families Act ought to be interpreted coextensively with the ICWA and Minnesota's permanency time lines so that transfer to tribal court should be denied for "good cause" when the resultant permanency hearing would be later than 12 months after placement (or 6 months under Minnesota law) (3, 17-24);
- (d) transfer to tribal court was properly rejected because the tribal court was a *forum non conveniens* (7, 9, 13);

- (e) Gabriel abused the transfer provision by waiting to see how the “trial” was going before moving to transfer to tribal court (12-13);
- (f) a permanency hearing is an “advanced stage” for purposes of the ICWA (14);
- (g) tribes which have financial agreements with the federal government must comply with federal time lines (17-18).

Virtually none of these issues was raised, briefed, argued or decided in either the juvenile court or the Court of Appeals. For the same reasons as above, *supra* at 25, the Court should decline to consider them in this case. Concerning NACC’s argument that best interests ought to be part of the “good cause” calculus, there are numerous decisions from other states, on both sides of that issue, but none of those cases was considered by either the trial court or the Court of Appeals. This Court has already “leaned against” that argument as applied to a different section of the ICWA. Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994). Moreover, NACC’s *forum non conveniens* argument was abandoned by Petitioners; that claim and others made by NACC betray a surprising unfamiliarity with the facts of this case.

Perhaps in another case, in which these issues are first presented to a trial court and then to the Court of Appeals, this Court may decide to review them.

III.

THE ADOPTIONS AND SAFE FAMILIES ACT AND THE MINNESOTA PERMANENCY STATUTES MAY NOT BE APPLIED IN A MANNER WHICH WOULD CONFLICT WITH THE INDIAN CHILD WELFARE ACT.

We consider ourselves a bit handicapped in responding to the arguments, made primarily by Petitioners' *amici curiae*, that federal and state permanency time lines should control application and implementation of the ICWA. As we pointed out in § II of this brief, virtually none of these arguments were made in any form before the juvenile court or before the Court of Appeals—they appear for the first time in the Petition For Review.

Because Petitioners and their *amici curiae*, in the course of developing these arguments, rather strongly imply that most of the delay here should be laid at Gabriel's and/or the Yankton Sioux's feet, it is worth noting again:

First, the juvenile court's schedule would only permit that court to hear these proceedings every second month, on average (hearings were December, 2003, and February, April, June, August and October, 2004).

Second, HSPHD took two months (February 17, 2004) after the emergency custody hearing (December 23, 2003) to schedule the parents for an admit-deny hearing (three months after Xylene's birth). It was two more months before Gabriel was provided (February 17th hearing), and met with, his counsel (April 20, 2004).

Third, HSPHD and the Minnesota DHS did not even process the Interstate Compact home study request and send it to Rhode Island until the end of March, 2004, more than four months after Xylene's birth and about six weeks after the mother's admit-deny hearing. See n.9, *supra*.

Fourth, one entire two-month cycle was taken up by the Murphy intervention motion, which took up almost all of the hearing on April 20, 2004.

Fifth, the juvenile court caused additional delay when he cancelled oral arguments on the tribal court transfer motion in August, 2004, and demanded that the Yankton Sioux Tribe indicate in writing that it would accept the case if jurisdiction were transferred (Trans. Aug. 12, 2004 at 13). This is not required by the ICWA or the BIA Guidelines, and there was already a motion to transfer on file.

Sixth, this case was already out of compliance with the permanency time lines when the first trial date was set for July 22, 2004. As of that date, Xylene had already been in placement for eight months.

Seventh, adjudicatory delays caused an additional 8½ month delay. The court did not rule on the stipulated trial until February 17, 2005, about 3½ months after the stipulation, did not hear argument on Gabriel's new-trial motion until May 9, 2005, about 6½ months after the stipulation, and did not rule on that motion until July 14, 2005, about 8½ months after the stipulation and 20 months after Xylene was born.

Petitioners, to a limited extent, and their *amici curiae*, to a much broader extent, argue here that the federal Adoptions and Safe Families Act (ASFA), federal regulations construing it, and Minnesota's permanency time lines all control the application of ICWA and its § 1911(b). Brief for Petitioner HSPHD at 15 & 19; Brief for Petitioner Guardian-ad-Litem at 7-9; Brief for *Amicus Curiae* Minnesota County Attorney's Association at 2-6 & 8; Brief for *Amicus Curiae* National Association of Counsel for Children at 19-24.

In considering these arguments, we know the Court will understand that ASFA does not require the State of Minnesota to do anything. The United States Congress has no authority under the Commerce Clause (Art. I, § 8, cl. 3) or, presumably, under the General Welfare Clause (Art. I, § 8,

cl. 1), to regulate purely local functions such as schools (and juvenile courts).¹⁹ See, e.g., United States v. Lopez, 514 U.S. 549, 565-67 (1995).

Nevertheless, we are told that Minnesota was required to pass placement statutes containing permanency time lines which complied with federal law. Brief for *Amicus Curiae* Minnesota County Attorney's Association at 3; Brief for *Amicus Curiae* National Association of Counsel for Children at 20 & 22. This claim, particularly the one made by the County Attorney's Association, *supra* at 3, appears to ignore the fact that Minnesota had a permanency time line statute years before enactment of the ASFA. Minn. Stat. § 260.191, subd. 3b (1994-96).

However, *amici's* claims are wide of the mark. ASFA is nothing more than an aspirational enactment. It is not a prescriptive, regulatory or prohibitory statute.²⁰ In ASFA, Congress has told the states that it believes, as a matter of public policy, that children should have a permanency hearing in state court within twelve months of placement. If the states comply, the federal government will provide grants to the states to use for foster care expenses.²¹ If they don't comply to a satisfactory

¹⁹ It does, of course, have authority to regulate local Indian affairs and to enact the Indian Child Welfare Act under the Indian Commerce Clause, Art. I, § 8, cl. 3; see 19 U.S.C. § 1901(1).

²⁰ For that reason, neither ASFA nor its regulations pose a head-to-head conflict with the ICWA requiring use of the rules of statutory construction suggested by *Amicus Curiae* National Association of Counsel for Children, at 20-21.

²¹ The federal government follows its funds with periodic visits by HHS officials to Minnesota to inspect selected placement files. According to briefing by HSPHD in a case now before the Court of Appeals, the last such inspection was in 2004 Welfare of the Children of D.B., Parent, App. Ct. File No. A05-2426

degree, they won't get these funds, or they will get fewer funds.²² (Just as the federal government deprived Minnesota of highway funds for years because it refused to criminalize 0.08% B.A.C. drunk driving.)

Amicus Curiae National Association of Counsel for Children has proposed that the Court adopt a rule that good cause to deny transfer to tribal court exists when the motions, if granted, would have violated ASFA's 12-month time line, or Minnesota's six-month time line. Brief for *Amicus Curiae* National Association of Counsel for Children at 21-24.

The Court should reject this proposal, for a number of reasons.

First, this argument was not briefed, argued, or otherwise presented to either the juvenile court or the Court of Appeals, and it was not presented to this Court in the Petition for Review.

Second, a bright-line rule like that suggested by NACC can never be fairly applied to all litigants. This very case shows why. Gabriel Ward is not responsible for the delay which occurred in this case (that delay reposes almost entirely on the doorsteps of the court and HSPHD), yet he would be deprived of his right under the ICWA to seek transfer to tribal court.

Third, the bright-line rule suggested by NACC works an obvious conflict between Minnesota's six-month permanency statute and the ICWA

²² Despite their claims about the statute's mandatory nature, *amici curiae* admit its true, financial, "carrot or stick" nature. Brief for *Amicus Curiae* Minnesota County Attorney's Association at 2 & 6; Brief for *Amicus Curiae* National Association of Counsel for Children at 20 & 22 and n.9.

in the sense that there are circumstances in which a six-month delay would *not* constitute “good cause to the contrary” within the meaning of ICWA § 1911(b). The ICWA pre-empts conflicting state statutes under the Supremacy Clause of the Constitution. U.S. Const. art. VI, ¶ 2; see Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994); Adoption of Halloway, 732 P.2d 962, 967-68 (Utah 1986); see also Engvall v. Soo Line R.R. Co., 632 N.W.2d 560, 569-70 (Minn. 2001); Midwest Motor Expr. v. I.B.T., Local 120, 512 N.W.2d 881, 889 (Minn. 1994).

Fourth, the rule would require re-writing this portion of the Interior Department’s Guidelines for State Courts, something that department has not done since the Guidelines were promulgated in 1979.

Fifth, the bright-line rule urged by NACC is inconsistent with both the Petitioners’ position and with a number of state courts which have held that whether a proceeding is at an advanced stage is considered on a “case-by-case” basis. See Brief for Petitioner HSPHD at 11-12; Brief for Petitioner Guardian-ad-Litem at 9; see also Brief for *Amicus Curiae* Minnesota County Attorney’s Association at 9-10.

The case-by-case rule developed in the state courts which have applied the ICWA for the 27 years since its enactment is the better practice and is more fair for all participants: children, parents, Tribes, local social services agencies. In this case, for instance, the Court of Appeals was clearly correct when it balanced all the facts before it, and found that

Gabriel's motion to transfer to tribal court should have been granted: the first petition alleging anything about him had just been filed, his motion had been filed by the motions deadline, and it was filed before any adjudicatory permanency proceedings. But under NACC's proposed rule, Gabriel would have been out of luck, even though the various delays were not attributable to him.

There is no showing that a new, bright-line rule is necessary. No one, whether Indian parent, relative, guardian-ad-litem, tribal official, lawyer, thinks that young children should dry out in foster care while they grow up. Everyone agrees that children should be brought up in a loving, stable home, not in foster care. The officials who make these decisions do not need a bright-line rule to guide them, and are accustomed to making decisions in the best interests of each child in each case.

An additional claim, also driven by ASFA and the state permanency time lines, has been made here that a motion to transfer to tribal court is too late if the case is at the permanency stage. Brief for Petitioner Guardian-ad-Litem at 9; Brief for *Amicus Curiae* National Association of Counsel for Children at 14.

This suggestion, too, should be rejected.

First, it was not argued before the juvenile court or the Court of Appeals, and was not raised in the Petition for Review.

Second, it would violate § 1911(b) of the ICWA which requires transfer to tribal court on request absent good cause to the contrary and would thus violate the Supremacy Clause as discussed above, *supra* at 34.

Third, and perhaps most important, HSPHD and its counsel are filing a lot of these cases immediately as permanency proceedings, without a preliminary C.H.I.P.S. proceeding. This case was one of them.²³ Under this proposed rule, a parent would not be able to seek transfer, even on the first day of the case or at the initial hearing, if the case is filed as a permanency. Such a rule obviously would be unsustainable as in direct conflict with ICWA.

For these reasons, we urge the Court to save for another day, and a proper record in the courts below, questions relating to the ASFA, its regulations, state permanency statutes and their effect upon the ICWA.

²³ *Amicus Curiae* Minnesota County Attorney's Association, Brief at 7-8, apparently does not know that this case was always a permanency proceeding. Although it contained an alternative prayer for transfer of legal custody, its primary prayer for relief was termination.

IV.

THE ORDER DENYING THE PARENTS' AND THE TRIBE'S MOTIONS TO TRANSFER TO TRIBAL COURT WAS NOT APPEALABLE BEFORE TRIAL.

Petitioner HSPHD argues before this Court that Gabriel and the Yankton Sioux Tribe should have immediately appealed the juvenile court's October 27, 2004 order denying transfer to tribal court. Brief for Petitioner HSPHD at 5, 20.

This argument was not raised before the Court of Appeals, and was not raised before the juvenile court in the spring of 2005 at the new-trial-motion stage. Nor was it raised in Petitioner's Petition for Review to this Court. It is waived.

However, an order denying transfer to tribal court (and thus retaining the matter in state court) is not a final order *viz. a viz.* a parent, Tribe or custodian who *lost* the motion, within the meaning of Minn. R. Juv. Prot. P. 47.02, subd. 1 and Minn. Stat. § 260C.415, subd. 1. It is a pretrial order and not appealable at that point, just as is an order denying a pretrial motion to change venue in a criminal case.

There can't possibly be many courts which guard their jurisdiction more zealously than the Court of Appeals. Throughout the proceedings before the Court of Appeals, there was never any question raised by the judges of that Court, by its staff, or by any of the parties, as to whether the

appeal should have been taken from the October 27, 2004 order instead of from the February 17 and July 14, 2005 orders. If HSPHD considered it a final order, Brief for Petitioner HSPHD at 20, it should have moved to dismiss the appeal taken in August of 2005. But it filed no motion to dismiss the appeal. Because it has sought review of the Court of Appeals' decision in this Court, HSPHD ought to be estopped from making this claim.

Last, an appeal of the October 27, 2004 order at that time would have required a stay and further delay of some seven months in the adjudicatory and placement process, a delay which is rather inconsistent with HSPHD's position before this Court.

CONCLUSION

For these reasons, Respondent Gabriel Ward asks this Court to affirm the Court of Appeals.

If this Court should reverse the Court of Appeals, Respondent Ward asks that this matter be remanded to that Court for decision of the two issues the Court felt unnecessary to decide, 710 N.W.2d at 806.

In the event that the Court should accept the invitation to interpret and apply the ICWA as limited by state and federal permanency guidelines, we ask that the Court make its decision applicable only to

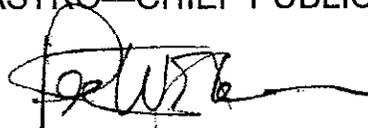
future cases. It would be unfair to these Respondents to apply to them a new and wholly-unanticipated rule.

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).