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Nos. A05-1615 and A05-1631

State of Minnesota  
In Supreme Court

OFFICE OF APPELLATE COURTS

JUN - 5 2006

FILED

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

Appendix  
Confidential

APPELLANT GUARDIAN AD LITEM'S  
BRIEF AND APPENDIX

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## LEGAL ISSUE

**IS IT AN ABUSE OF DISCRETION FOR A TRIAL COURT TO DENY A TRANSFER OF JURISDICTION TO A TRIBAL COURT WHEN THE PETITIONS FOR TRANSFER ARE FILED AFTER THE SIX-MONTH STATUTORY DEADLINE FOR CONDUCTING A PERMANENCY HEARING?**

**The Court of Appeals held in the affirmative.**

*Authorities:*

*In the Matter of the Welfare of the Children of C.V., Mother*, No. A04-441, 2004 Minn.App. LEXIS 1250 (Minn. Ct. App. November 9, 2004) (unpublished);

*In the Matter of Wayne R.N.*, 757 P.2d 1333 (N.M. Ct. App. 1988);

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

25 U.S.C. §1911(b) (2003).

## STATEMENT OF THE CASE AND OF FACTS

This is an appeal by the Guardian Ad Litem and Hennepin County from a decision of the Court of Appeals filed March 21, 2006 reversing the order of the trial court denying transfer of jurisdiction to the Yankton Sioux Tribal Court.

The child, X.T.B., who is the subject of this proceeding, was born on November 15, 2003 in Rhode Island to G.W. and T.T.B. On November 21, 2003, the Hennepin County Human Services Department filed a motion in Minnesota to obtain immediate custody of X.T.B. that was granted by the Honorable Herbert P. Lefler, Judge of Hennepin County District Court, who presided over this and all subsequent trial court proceedings.

After court proceedings in Rhode Island, custody of X.T.B. was transferred to the State of Minnesota. On December 23, 2003, the County filed a permanency petition requesting the alternative relief of termination of parental rights or a transfer of legal custody, and X.T.B. was placed out of home. X.T.B. was placed with S.G. who was the permanent custodian and grandmother of T.T.B.'s first child (i.e. X.T.B.'s half sibling), A.G.

The Yankton Sioux Tribe's ICWA Director was notified by the State of Minnesota when it discovered X.T.B.'s birth. T. Vol. VI, p. 4. An Amended ICWA Notice to the Yankton Sioux Tribe is dated January 15, 2004. Appendix 19. G.W. and T.T.B. received notice of the County's petition and appeared in

court on February 17, 2004. A pretrial conference and motion hearing was held on April 20, 2004. The Tribe's April 23, 2004 motion to intervene was unopposed. On May 24, 2004, the Tribe's ICWA Director signed an affidavit stating that the Tribe had received appropriate notice of the proceedings pursuant to ICWA and had "determined that the child cannot be returned to the parents and supports permanency for [him] [sic]." Appendix 14. The tribe participated in the Family Group Conference on June 4, 2004. At a court hearing on June 10, 2004, the Tribe supported placement of X.T.B. with S.G. T. Vol. V. p. 5.

The trial court's June 11, 2004 scheduling order established a July 22, 2004 trial date, but the trial date was continued. Appendix 17. On July 22, 2004, Respondent G.W. moved for dismissal or in the alternative for transfer of jurisdiction to the Tribal Court. The Tribe filed its own motion to transfer jurisdiction on September 8, 2004.

The motions to transfer jurisdiction were heard on October 5, 2004. On October 27, 2004, the trial court filed its order denying the motions to transfer jurisdiction to the Tribal Court, and the trial was held. On February 17, 2005, the trial court entered an order transferring custody of X.T.B. to S.G.

Respondents G.W. and the Yankton Sioux Tribal Court appealed the trial court's orders, including its order denying transfer of jurisdiction. The

Minnesota Court of Appeals reversed the decision of the trial court denying transfer of jurisdiction, and remanded the case to the trial court to transfer jurisdiction to the Tribal Court.

This appeal by Hennepin County and by the Guardian Ad Litem followed.

## ARGUMENT

### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITIONS TO TRANSFER JURISDICTION TO THE TRIBAL COURT

#### **A. Standard of Review**

The appropriate standard of review for a district court's decision on a motion to transfer a matter to the tribal court under the Indian Child Welfare Act (ICWA) and the Minnesota Indian Family Preservation Act (MIFPA) is abuse of discretion. This is a very deferential standard. Even if an appellate court might have reached a different conclusion, it will not reverse absent a clear abuse of discretion. Welfare of the Children of C.V., No. A04-441, 2004 Minn. App. LEXIS 1250 at \*6 (Minn. Ct. App. November 9, 2004) (unpublished opinion).

#### **B. There was good cause to deny the petitions to transfer jurisdiction**

When good cause exists, a state court may deny a request to transfer a child protection case to a tribal court. Under both the ICWA and the MIFPA, "the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe." 25 U.S.C. §1911(b) (2000); Minn. Stat. §260.771, Subd. 3 (emphasis added). "Good cause" is not defined in either statute, but Minnesota courts look to the Bureau of Indian Affairs (BIA) Guidelines (44 Fed. Reg. 67,584 – 67,595) for guidance in interpreting the ICWA. In the Matter of S.N.R., 617 N.W.2d 77 at 81 (Minn. Ct. App. 2000).

According to the BIA Guidelines, the party opposing the transfer has the burden to establish good cause not to transfer. BIA Guidelines C.3(d), 44 Fed. Reg. at 67,591. The BIA Guidelines enumerate four different circumstances where good cause exists to deny transfer, of which (i) is relevant to this appeal:

- (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.

BIA Guidelines C.3(b), 44 Fed. Reg. at 67,591

The trial court considered the relevant facts and determined that the proceeding was at an advanced stage, thereby establishing good cause for the court to deny the petition to transfer jurisdiction to the Yankton Sioux Tribal Court.

**The proceeding was at an advanced stage when the petitions to transfer were received and the petitioners did not file the petitions promptly after receiving notice of the hearing**

There was good cause for the trial court to deny a transfer of jurisdiction under 25 U.S.C. §1911 because neither X.T.B.'s parents nor the Yankton Sioux Tribe filed a petition for transfer promptly after receiving notice of the hearing, and the proceedings of the case were at an advanced stage. The BIA Guidelines state that there is good cause not to transfer jurisdiction when "the proceeding [is] at an advanced stage when the petition to transfer [is] received and the petitioner did not file the petition promptly after receiving notice of the hearing." BIA Guidelines C.3(b)(i), 44 Fed. Reg. at 67,591. The BIA Guidelines state that this provision

serves several purposes. It encourages prompt filing of a motion to transfer to avoid unnecessary delays that could be harmful to the children. BIA Guidelines C.3(b)(i), 44 Fed. Reg. at 67,591-92. "Long-periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." BIA Guidelines C.3 Commentary, 44 Fed. Reg. at 67,591-92.

**1. X.T.B. had been in out-of home placement for seven months**

At the time G.W.'s petition was filed on July 22, 2004, X.T.B. had been in continuous out-of-home placement for seven months. The state of Minnesota requires that a trial court make a prompt determination regarding the permanent placement of children in its custody. Minn. Stat. §260C.201, Subd. 11(a) requires the trial court in CHIPS proceedings involving a child under the age of eight to conduct a permanency hearing no later than *six months* after the child's placement. In this case, where neither of the parents sought permanent custody of X.T.B., adherence to the six-month period for commencing a permanency hearing would have been desirable as in the best interests of X.T.B.

The trial court's June 11, 2004 scheduling order originally established a trial date of July 22, 2004 – seven months after X.T.B.'s out-of-home placement. The petitions to transfer jurisdiction were filed on July 22, 2004. The trial court properly determined that the petitions for transfer of jurisdiction filed seven months after X.T.B. was in court-ordered out-of-home placement

were filed at an advanced stage of the proceedings. In Minnesota, a child protection proceeding is at “an advanced stage” for a child under the age of eight after the legislatively mandated six-month period for commencing a permanency hearing has passed.

**2. The parents and the Tribe participated in the proceedings and did not file the petitions promptly**

The Yankton Sioux Tribe’s ICWA Director, Raymond Courneya had been notified by the State of Minnesota when it discovered X.T.B.’s birth. The Tribe considered sending a representative to Rhode Island. T. Vol. VI, p. 4. An Amended ICWA Notice to the Yankton Sioux Tribe is dated January 15, 2004. G.W. and T.T.B. received notice of the County’s petition and appeared in court on February 17, 2004. A pretrial conference and motion hearing was held on April 20, 2004. The Tribe’s April 23, 2004 motion to intervene was unopposed. On May 24, 2004, Mr. Courneya signed an affidavit stating that the Tribe had received appropriate notice of the proceedings pursuant to the ICWA and had “determined that the child cannot be returned to the parents and supports permanency for [him] [sic].” The tribe and parents participated in the Family Group Conference on June 4, 2004. At the court hearing on June 10, 2004, the tribe supported placement of X.T.B. with S.G. T. Vol. V, p. 5.

G.W. and the Tribe filed their motions to transfer jurisdiction more than seven months after court proceedings involving X.T.B. commenced. The trial

court properly determined that the petitions were not filed promptly as required by the BIA Guidelines.

**3. The proceedings were at a permanency stage**

Courts generally agree that an “advanced stage” in the proceeding must be determined on a case-by-case basis, but that a permanency hearing stage is generally an advanced stage. In the Interest of A.T.W.S., 899 P.2d 223, 225 (Colo. Ct. App. 1994); In the Interest of J.W., 528 N.W.2d 657, 660 (Iowa Ct. App. 1995).

In this case, the County petitioned immediately for a permanency determination in November and December 2003. Neither of the parents sought custody. For over seven months, the parties litigated the issue of the permanent placement of X.T.B. A home study was commenced in Rhode Island. A Family Group Conference was held. The parties appeared in court and argued various motions.

Respondent G.W.’s petition to transfer jurisdiction to the Tribal Court was filed on July 22, 2004, after the six-month statutory deadline for holding a permanency hearing in CHIPS cases had passed. The trial court properly concluded that G.W.’s petition was filed at an advanced stage of the proceedings.

#### **4. The case was ready for trial**

Prompt filing of a motion to transfer jurisdiction prevents parties from requesting a transfer at the last minute as either a delay tactic or as an alternative strategy if proceedings in state court do not look like they will go in the party's favor. *See* BIA Guidelines C.1 Commentary, 44 Fed. Reg. at 67,590. Although the ICWA allows tribal intervention at any point in the proceedings, this does not mean that the ICWA authorizes transfers at any time because a late transfer is much more disruptive to the proceedings than a late intervention. *Id.* The Guidelines specifically provide:

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. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

Id.

At the time the petitions were filed, the interested parties had expressed their preferences regarding the permanent placement of X.T.B. X.T.B.'s parents and the Yankton Sioux Tribe supported placement of X.T.B. with A.M.G. in Rhode Island. Hennepin County and the Guardian Ad Litem were opposed to that proposed custodial plan. Shortly after the petitions were filed, on July 27,

2004, The Interstate Compact Home Assessment was signed by Rhode Island denying placement with A.M.G. The trial court properly concluded that the proceedings were at an advanced stage on July 22, 2004.

**5. The trial court carefully considered the facts and the applicable law in concluding that the proceeding was at an advanced stage**

A number of cases have upheld denials of transfer of jurisdiction for good cause. The Minnesota Court of Appeals found no abuse of discretion where a trial court denied transfer of jurisdiction to the Leech Lake Tribal Court in Welfare of the Children of C.V., No. A04-441, 2004 Minn. App. LEXIS 1250 (Minn. Ct. App. November 9, 2004) (unpublished opinion). The trial court did not err by considering the effect of the request on the well being of the children. 2004 Minn.App. LEXIS at \*16.

In Long v. Geldert, No. C8-92-1502, 1993 Minn. App. LEXIS 152, the Minnesota Court of Appeals held that the trial court properly denied transfer of jurisdiction when the Oglala Sioux Tribe had notice of the custody hearing in 1990, but petitioned for transfer in April 1992.

Other courts have reached similar holdings, citing a lack of timeliness as sufficient good cause not to transfer. See In re Maricopa Co. Juvenile Action, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); In re Robert T., 246 Cal. Rptr. 168, 171 (Cal. Ct. App. 1988); In the Matter of Wayne R.N., 757 P.2d 1333, 1336

(N.M. Ct. App. 1988) (a period of almost six months between service of the pleadings and filing of the petition for transfer deemed to be a factor supporting denial of the petition to transfer); In the Interest of J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995); In the Matter of the Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989).

In making the decision not to transfer jurisdiction of this case to the Yankton Sioux Tribal Court, the district court considered the written memoranda of the parties in addition to witness testimony and oral arguments. The trial court carefully considered the procedural history of the case, the placement history and age of X.T.B., the proceedings in Rhode Island, the involvement of the Yankton Sioux tribe in the proceedings, and the parents and Tribe's petitions for transfer of jurisdiction. The trial court reviewed and considered the relevant facts and made a determination based upon the applicable law in a proper exercise of its discretion.

**C. Respondents cannot demonstrate a clear abuse of discretion**

The district court record contains sufficient evidentiary support for the trial court's findings that the petitions to transfer custody were brought at an advanced stage of the proceeding and that the petitions were not promptly filed. The trial court carefully considered and respected the right of the Tribe to intervene and participate in the case, and was sensitive to the purposes of the

ICWA and the MIFPA. The trial court properly exercised its discretion in denying the transfer of jurisdiction and its decision should not be reversed absent evidence of a clear abuse of discretion. Welfare of the Children of C.V., No. A04-441, 2004 Minn.App.LEXIS 1250 (Minn. Ct. App. November 9, 2004) (unpublished opinion).

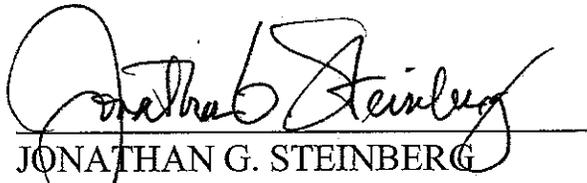
## CONCLUSION

The trial court did not abuse its discretion in denying the petitions to transfer jurisdiction to the Tribal Court. The court order transferring custody of X.T.B. to S.G. is supported by substantial evidence and should be affirmed.

Respectfully submitted,

Dated:

June 1, 2006



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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).