

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.

BRIEF OF AMICUS CURIAE
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I. THE INTEREST OF AMICUS CURIAE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501 (c) (3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program.

Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally

be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2000 members representing all 50 states and the District of Columbia. NACC membership comprises primarily attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The NACC submits this amicus brief on behalf of the interests of Indian children in having the law recognize and protect their significant interests in timely, permanent placement in safe, nurturing and--whenever possible--culturally appropriate, homes.¹

II. SUMMARY OF ARGUMENT

The NACC believes that the Minnesota Court of Appeals erred in holding that “good cause” did *not* exist to deny the motion of the Tribe to transfer the case to tribal court in the proceedings below.

- The NACC argues that the Court of Appeal erred in not considering the child’s best interests in addition to the good cause factors listed under the BIA Guidelines. A limited best interests test would recognize a child’s need for timely permanency.
- The NACC argues that while the Court of Appeals correctly set forth

¹ Pursuant to Minn. R. Civ. App. P. 129.02, *amicus curiae* NACC states this brief was not written in whole or in part by counsel for a party, and no individual or entity, other than NACC or their members, has made a monetary contribution to the preparation or submission of this brief.

the applicable “good cause” standards under the Bureau of Indian Affairs Guidelines, the Court incorrectly applied these standards by holding that a transfer motion made more than six months after the child had been placed was not made at an “advanced stage” of the proceedings. This holding is inconsistent with the body of “good cause” case law developed in other states that tie advanced stage analysis to permanency timelines.

- The NACC argues that the Court should interpret the permanency timelines behind the Adoption and Safe Families Act of 1997 coextensively with the “good cause” transfer provision in Indian Child Welfare Act, and that the Court may give effect to both federal laws by finding the existence of good cause to deny transfer in situations where the proceedings at issue would violate the permanency timetables of the ASFA.

III. ARGUMENT

A. Transfer should be denied because there is good cause not to transfer.

NACC believes the Minnesota Court of Appeals erred in holding that good cause did not exist to transfer the proceeding to tribal court under 25 U.S.C. § 1911(b). Under the transfer provisions of the Indian Child Welfare Act (ICWA), a proceeding shall not be transferred to Tribal Court where there is good cause not

to transfer. 25 U.S.C. § 1911(b). Under § 1911(b), “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). But before the Court defines the contours of this “good cause” provision it should consider the jurisdictional backdrop against which the phrase “good cause” is defined. The NACC believes it is critical for a court interpreting this “good cause” provision to understand the jurisdictional framework to which Congress applied Section 1911 and how developing legal precedents might redefine that framework.

The ICWA does not grant tribes *original* jurisdiction over off-reservation foster care and termination proceedings; rather, it provides *transfer* jurisdiction where the parents consent to tribal jurisdiction (as they apparently did in this case) and where “good cause” does *not* exist to transfer. Original and exclusive jurisdiction over child protection matters does, however, lie with the tribe where the child is a ward of tribal court or where the child’s residence or domicile is on the reservation. *See* 25 U.S.C. § 1911(a). In passing the ICWA, Congress did not *grant* tribes exclusive jurisdiction by this statute – rather Congress recognized the jurisdiction they already had under contemporaneous case law. *See Fisher v. District Court*, 424 U.S. 382 (1976)(tribe maintained exclusive jurisdiction under federal grant of jurisdiction and treaties over adoption proceeding where all parties resided on reservation). The legislative history behind ICWA confirms this:

The provisions on exclusive tribal jurisdiction confirms the developing federal and state case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. Wisconsin Potawatomes v. Houston, 393 F. Supp. 719 (1973); Wakefield v. Little Light, 276 MD. 333 (1975); In re Matter of Greybull, 543 P.2d 1079 (1975); Duckhead v. Anderson et al., Wash. Sup. Ct., November 4, 1976.

H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7553-54.

The only exception to exclusive tribal court jurisdiction over children who reside or are domiciled on the reservation is if federal law had divested the tribe of exclusive jurisdiction. 25 U.S. C. § 1911 (a).² This exception holds critical relevance in Minnesota, since it is a state subject to Public Law 28, Pub. L. 280, 67 Stat. 588, as amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations. The question not presented here, but which could inform this Court's "good cause" analysis, is whether state courts in PL 280 states have *concurrent* jurisdiction with tribes over children who reside on or are domiciled on a reservation? If state courts are at some point held to have concurrent child protection jurisdiction, then the issue of how "good cause" is applied to tribal court transfer motions would apply in this context as well. The NACC raises the issue of concurrent jurisdiction becoming the law in Minnesota so that this Court may define "good cause" flexibly enough to accommodate the wide range of circumstances in which good cause may be

² 25 U.S.C. § 1911(a) states, "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal law.*"

defined.

A recent decision by the Ninth Circuit Court of Appeals held that tribes in the State of California, a PL 280 state like Minnesota, do not have exclusive jurisdiction in “on reservation” cases to involuntarily terminate an Indian mother's parental rights and order adoption of a child. The court held California's enforcement of its child dependency laws fell within civil adjudicatory jurisdiction reserved to states by federal law under PL 280 and their jurisdiction was thus concurrent. *See Doe v. Mann*, 415 F. 3rd 1038 (9th Cir. Ct. App. 2005) *cert denied*, 126 S. Ct. 1911. If such a holding as this became precedent in Minnesota, and NACC takes no position herein on whether it should, the class and numbers of cases subject to transfer motions under 1911(b) would be much greater, as tribes or parents could move to transfer *on-reservation* ICWA cases filed by Minnesota Counties from state courts to tribal courts under section 1911(b).³ This Court's decision in this case could, then, potentially apply to Indian children who reside *on or off every reservation in Minnesota save Red Lake*. Thus the Court should consider this policy context as well as it interprets the “good cause” phrase of Section 1911(b). An interpretation that defines good cause should not have the unintended effect of diminishing transfers to tribal courts for children who already reside on the reservation. Considerations as to

³ The only reservation in Minnesota not subject to state civil or criminal jurisdiction under PL 280 is Red Lake, which was exempted from the law at the time of its passage.

whether the proceedings are at an “advanced stage” will be different when tribes or parents move to transfer ICWA cases which concern on-reservation children. It is possible a state trial court would be more inclined to find good cause to deny transfer if the proceeding was at an advanced stage in cases where the tribe could have readily asserted its own original but concurrent jurisdiction in the first instance but allowed a proceeding to proceed in state court. It is also possible that a party would have a harder time convincing a trial court to find good cause to deny transfer under a *forum non conveniens* argument when the child and witnesses already reside on the reservation.

In any event, for Indian children who *neither reside nor are domiciled* on the reservation, as in this case, Minnesota state courts have jurisdiction subject to a presumption of transfer to tribal court. Section 1911(b) states:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child *not domiciled or residing within the reservation of the Indian child's tribe*, the court, in *the absence of good cause to the contrary*, shall transfer such 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)(emphasis added). While “good cause” is not defined in ICWA, the legislative history contained in the House Report indicates a partial basis for a good cause determination, that of *forum non conveniens*:

Subsection (b) [1911(b)] directs a state court, having jurisdiction over an Indian child custody proceeding to transfer such proceedings, absent good

cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a state court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that *the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.*

H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7544. Congressional intent was thus to ensure that the rights of the child as an Indian, the parents, and tribe were protected through the good cause provision. Likewise, this Court's own examination of the legislative history behind ICWA in the *S.E.G.* decision determined that the "good cause" provision in Section 1911(b), like the good cause provision in Section 1915 (the foster care and adoptive placement preferences), was intended to grant state courts flexibility in making that determination. *See In Re Custody of S.E.G.*, 521 N.W. 2d at 362, n 4.

In exercising this flexibility, state courts have consistently applied guidelines developed by the Department of Interior, Bureau of Indian Affairs ("BIA Guidelines") in interpreting and applying the ICWA. *See, e.g., In the Matter of S.N.R.*, 617 N.W.2d 77 at 81 (Minn. Ct. App. 2000); *In the Interest of J.W., B.W., T.W., K.W.-H., and R.W.-H.*, 528 N.W.2d 657 (Iowa Ct. App. 1995); *Chester County Dept. of Social Services*, 399 S.E.2d 773, 775-76 (S.C. 1990); *See, e.g., In the Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988).

The BIA Guidelines enumerate four different circumstances where good cause exists to deny transfer:

(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;

(ii) The Indian child is over twelve years of age and objects to the transfer;

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67591 (1979). Paragraphs (i) and (iii) apply to this case.

Some state appellate courts have also applied a "best interests of the child" test in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). *See, e.g., In the Matter of T.S.*, 801 P.2d 77, 80-81 (Mont. 1990); *T.R.M.*, 525 N.E.2d at 307-08; *The People of the State of South Dakota in the Interest of J.J. and S.J.*, 454 N.W. 2d 317, 331 (S.D. 1990); *In re Interest of C.W., M.W., K.W. and J.W.*, 479 N.W.2d 105, 117-118 (Neb. 1992). As the court stated in *T.S.*, "In Indian child cases such as this, the first step is to determine the § 1911(b) jurisdiction issue by applying the 'best interests of the child' test and considering the BIA Guidelines to determine good cause." *T.S.*, 801 P.2d at 80-81.

The NACC endorses the application of a "best interests of the child" test to resolve whether a case should be transferred to tribal court. However, given the

subjective nature of the test, and the chance that it could be used to impose non-Indian values, the test should be cautiously used *in combination* with an analysis of the good cause factors under the BIA Guidelines. Such a “best interests *plus* good cause” approach simultaneously ensures recognition of the interests of the child and ties that concern with the more objective and less culturally-laden “good cause factors” under the BIA Guidelines.⁴

The broad “best interests of the child” test has been discussed by this Court in the only other ICWA case it has decided. In the landmark case, *In re Custody of S.E.G.*, this Court considered the best interests of the child in the context of analyzing BIA “good cause” factors to determine whether Indian children may be placed outside of the order of placement preferences established in ICWA at 25 U.S.C. § 1915. This Court cautiously considered best interests concept in the following passage:

We believe...that a *finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests.* The plain language of the Act read as a whole and its legislative history clearly indicate that state courts are a part of the problem the ICWA was intended to remedy. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 44-45, 109 S. Ct. at 1606-07. Furthermore, the report from our own Task Force on Racial Bias in the Judicial System indicates that insensitivity

⁴ The Montana Supreme Court further qualified the “best interests of the child” test by stating what the test was *not*: “This “best interests of the child” test should not be confused with the “best interests of the child” test applied under § 40-4-212, MCA, in custody determinations between parents in a dissolution. It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent-child legal relationships under Title 41, Chapter 3, MCA.” T.S. 801 P. 2d at 80. Here, the NACC observes that the best interests of the child principle should not be defined pursuant to the factors set out in Minn. Stat. § 518.17.

to minority cultures remains a problem in child welfare cases. See *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report*, 16 Hamline L. Rev. 477, 624-646 (1993). [FN6] The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause *whenever* they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests. Cf. *Mississippi Band of Choctaw Indians*, 490 U.S. at 45, 109 S. Ct. at 1606-07.

In Re Custody of S.E.G., 521, N.W. 2d 357, 362-363 (Minn. 1994)(emphasis added).

While not dismissing the "best interests of the child" consideration outright, this Court went on to hold "that a determination that good cause exists to avoid the placement preferences of § 1915 should be based upon a finding of one or more of the factors described in the guidelines." *Id.* at 363. Notably, this Court stated, "In light of the Act, its legislative history, the BIA guidelines and their commentary, it does not seem that a need for permanence or stability *cannot* be considered in determining whether good cause exists in a particular case." The NACC believes this court should, as it did in *S.E.G.*, recognize the critical importance of a child's need for timely permanency, the basis of current federal and state permanency laws, when it determines whether "good cause" exists to deny transfer under Section 1911(b). Unless the court considers the child's need for timely permanency determination under a limited best interests test, it is unclear how, under the BIA Guidelines, the child's need for permanency would be addressed. Neither the "advanced stage" nor "forum non-conveniens" factors

embrace a concern for children's need for permanence or their growing attachments to caregivers. However a limited best interests test, coupled with analysis of the BIA Guidelines factors, would ensure that the child's permanency needs are considered. Here, the Court should take into account the delay in permanency resulting from the late transfer motions as part of its analysis.

A1. Analysis under paragraph (i) of the BIA Guidelines provides good cause not to transfer this matter to tribal court.

Under paragraph (i) of the BIA Guidelines, good cause to deny a transfer of jurisdiction may be found where 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. *See* BIA Guidelines, 44 Fed. Reg. at 67591. As the commentary on the BIA Guidelines explains, "Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. 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." *Id.* at 67590. "Timeliness" criteria, according to the commentary, "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 trial⁵ is going in state court and then obtain another trial if it appears the other side will win....The Act was not intended to authorize such tactics and the ‘good cause’ provision is ample authority for the court to prevent them.” 44 Fed. Reg. C.1 at 67590. The “good cause” provision prevents forum shopping. Moreover, “[l]ong-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 67591-92.

Courts have frequently applied the “advanced stage” criterion in denying motions to transfer. *See, e.g., In re Maricopa Co. Juvenile Action*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991) (denying transfer when the tribe had received notice of the proceedings two years before filing the petition to transfer); *In re Robert T.*, 246 Cal. Rptr. 168, 171 (Cal. Ct. App. 1988) (holding a 16-month delay between the time that permanency planning began and the tribe’s expression of intent to intervene constituted good cause not to transfer); *In the Matter of Wayne R.N.*, 757

⁵ It is critical to note that under ICWA, a foster care or termination *trial* may be held as soon as ten days after notice to the parties, with an absolute right to a twenty-day continuance upon request prepare. *See* 25 U.S.C. § 1912(a). Therefore, when the BIA Guidelines suggested the time of *trial* was “too late” to be making transfer requests, it was not contemplating the six or twelve-month dispositional or permanency hearings eventually mandated nearly 20 years later under the Adoption and Safe Families Act--it was contemplating an adjudicatory hearing. In Minnesota, under modern child protection timelines, the adjudicatory trial contemplated under Section 1911(a) could occur with sixty days of an emergency protective care hearing for a CHIPs proceeding under Minn. R. Juvenile Protect P. 39.02, subd. 1(a) or ninety days from filing of a termination petition under Minn. R. Juv. Protect P. 39.02, subd. 1(c). This legislative history suggest just how early in proceedings the BIA considered an advanced stage to be.

P.2d 1333, 1336 (NM Ct. App. 1988) (indicating that a petition filed six months after notice of the hearing weighed against transfer).

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. See *In the Interest of A.T.W.S.*, 899 P.2d 223, 226 (Colo. Ct. App. 1994); *In the Interest of J.W.*, 528 N.W.2d 657, 660 (Iowa Ct. App. 1995). In *J.W.*, the Iowa court determined that good cause to deny a transfer existed when the tribe filed the petition to transfer on the morning that permanency hearings were scheduled to begin. *J.W.*, 528 N.W.2d at 660. Similarly, in *A.T.W.S.*, the Colorado Court of Appeals held that “before an advanced stage” does *not* mean “before the final permanency hearing.” *A.T.W.S.*, 899 P.2d at 225. The court found that after a permanency planning and custody hearing had been scheduled, the trial court had good cause to deny the transfer of jurisdiction. *Id.* at 227. Likewise, in an unpublished opinion, the Minnesota Court of Appeals held that good cause to deny transfer existed—under an “advanced stage” analysis—where a tribe moved to transfer one day before a permanency trial. See *Welfare of Children of C.V.*, 2004 WL 2523127 (Minn. App.).

Here, the Tribe and parents could have brought their motion to transfer at any time in the proceedings. Even though the child, X.T.B., was placed into foster care by Rhode Island authorities shortly after her birth on November 15, 2003, the parties could have moved to transfer the case when it was under Rhode

Island jurisdiction. A petition for transfer could have been filed after the case had been transferred to the State of Minnesota, apparently in late November, 2003.⁶ It is unclear what legal excuse the parents and tribe proffered to justify filing their transfer motions when they did.

The tribe and parents make no claim of inadequate notice under the ICWA. See 25 U.S.C. § 1912(a)(requiring registered mail notice). The NACC believes that good cause should not be found to deny transfer where the petitioner fails to properly notify the tribe and the tribe's delay in requesting transfer can be attributed to lack of notice. As the United States Supreme Court stated in *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 54 (1989) the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." But the ICWA appears by all accounts to have been followed in this case. The county filed a termination petition on December 31, 2003 and served the parents at that same time. The county served the amended petition on both tribes involved in this case, Oglala Sioux Tribe and the Yankton Sioux Tribe, by registered mail, on January 16, 2004. Here, the father's motion for transfer was not filed until July 22, 2004, over six months after the infant child had been placed in Minnesota. The Yankton Sioux Tribe's motion for transfer

⁶ The Emergency Protective Care Order directing that X.T.B. be taken into custody in Minnesota was signed and filed on November 21, 2003. Appellant's Appendix at 13.

was not made until September 24, 2004, two months after the parents made their motion. These petitions for transfer are both untimely.

A termination petition is a permanency petition and should be tried by the trial court no later than ninety days after the filing of the petition. *See* Minn. R. Juv. Protect P. 39.02(c).⁷ Under this rule, the court should have tried the termination petition by late March 2004. Had the tribe or parents moved for transfer prior to a timely held trial, as suggested by the BIA Guidelines, it is doubtful the trial court would have found good cause to deny transfer. The Tribe supported placement of the child with B.W., the paternal grandmother. The County supported placement with the child's foster parent, S.G. Despite this disagreement over where X.T.B. should be placed, no transfer request was filed after Rhode Island denied the placement. The trial, which was at one time scheduled for July 22, 2004, was later continued to October 27, 2004, just before X.T.B.'s first birthday.

Had the Tribe or parents moved to transfer the proceedings earlier, the trial court would have had no basis to deny transfer on "advanced stage"

⁷ The permanency guidelines require that for a child under eight, the court must hold a permanency hearing within six months of placement. Minn. R. Juv. Prot. P. 34.03, subd. 2 (a). Here, the only reason this six month permanency guidelines did not apply – in which case a hearing must have been held by June 2004 – is that the county had commenced a termination proceeding, obviating the need for a separate permanency hearing. Thus if had a termination petition not been filed, the July 24 transfer motion of the parents still was made only *after* a permanency hearing on the transfer of legal custody petition would have been held (the County's petition pleaded transfer of legal custody in the alternative).

grounds. The child might have avoided spending almost the first year of his young life in foster care only to see his placement disrupted. Had the tribal court promptly assumed jurisdiction, it would have presumably by now identified a relative or other Indian home, where the child would now be laying down a new attachment and bond to his permanent caregiver and forming ties with her extended family and kin.

It is unclear why the Tribe and parents requested transfer at this late date. The Federal Administration for Children, Youth and Families has studied the implementation of federal permanency and child welfare laws on Indian reservations and made the following findings concerning tribal court transfer issues:

Responsibility for the delivery of foster care and adoption placement services varies on and off the reservation, as well. As with CAN [child abuse and neglect] investigations, the division of labor between the tribe and the state is determined by jurisdiction. When a child living on the reservation or trust land is placed in out-of-home care and the tribe has jurisdiction, the tribe typically provides services and makes placements within the extended family or tribe. When a child lives off the reservation, however, the tribe must petition the state for custody [or transfer of jurisdiction].

Among the study sites, decisions regarding the transfer of custody were found to be primarily influenced by available financing and cultural norms. For instance, if the tribe has a title IV-E intergovernmental agreement with the state, then the tribe will be reimbursed for the cost of foster care placement and maintenance for income-eligible children (e.g., Kiowa, Navajo, Omaha, and Tanana Chiefs Conference). However, if the tribe does not have a IV-E agreement, then it is often advantageous for the tribe that the child remain in state custody, reimbursed under title IV-E. In these cases, the tribal ICWA specialist will liaison with the state social worker to

ensure that the child receives services and is in a culturally appropriate placement. Through the ICWA specialist, the tribe will continue to monitor the child's placement and participate in all court proceedings and make recommendations for services.

Along with resource issues, the provision of foster care and adoption services is further embedded in deep-seated historical and cultural concerns. *At the point at which the termination of parental rights becomes a viable option, many tribes will request that jurisdiction over the case be transferred from the state to the tribe.* Tribes' often redouble their efforts to locate tribal placement options at *this* point, as the concept of terminating parental rights is often contrary to tribal culture and kinship systems. A permanent guardianship arrangement or tribal kinship care program is the preferred permanency goal with most tribes.

Administration for Children and Families, U.S. Department of Health and Human Services, *Implementation of Promoting Safe and Stable Families by American Indian Tribes--Final Report - Volume I*, p. 27, February 27, 2004.⁸ Clearly, the tribe and parents were on notice that termination was a "viable" option in state court proceedings when the termination petition was filed on December 31, 2003. This would have been a very reasonable point at which to request transfer. Waiting until July of 2004 to request transfer was not a reasonable time for the tribe or parent to be looking for another forum. Here, the trial court correctly found good cause to deny transfer.

The denial of transfer to a tribal court jurisdiction does not mean that tribal concerns and values are given short shrift. To the contrary, all the provisions of ICWA would continue to apply to ensure that the tribe's values are given effect.

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http://www.acf.hhs.gov/programs/opre/abuse_neglect/imple_prom/reports/imp_of_pro/imp_of_pro.pdf

For example, the termination of parental rights would require the testimony of a “qualified expert witness” who is knowledgeable of tribal child rearing practices. *See In Re Custody of S.E.G.*, 521 N.W. 2d at 364-365 (discussing qualified witness requirements). Proof of “serious emotional or physical harm” would have to be established by beyond a reasonable doubt to support termination. *See* 25 U.S.C. 1912(f). The court would also have to find by beyond a reasonable doubt that active efforts were made to locate suitable family members so as to avoid termination. *See Matter of Welfare of M.S.S.*, 465 N.W. 2d 412 (Minn. Ct. App. 1991). The placement decisions made by the court must reflect prevailing cultural standards of the Indian community. *See* 25 U.S.C. § 1915(d).

Furthermore, the Tribe has the right of any party in termination proceedings *in state court* to argue that termination is not in the best interest of the child for reasons of culture that legal custody is the more culturally appropriate disposition. Thus the issue of whether “good cause” exists to deny transfer is not about whether the Indian Child Welfare Act will be applied to protect the interests of Indian children. Rather, it is about whether ICWA will be applied to ensure that Indian children’s cases are resolved in a timely manner.

A2. A finding of good cause effectuates the permanency provisions of the Adoption and Safe Families Act, the Indian Child Welfare Act, and State Permanency Guidelines.

The NACC believes the Adoption and Safe Families Act of 1997, Public

Law 105-89 (ASFA) should be read to not conflict with the Indian Child Welfare Act. Indeed, the policies and purposes of the ASFA show that Congress intended the ASFA to apply to all children and did not intend to exclude Indian children from the ASFA's protection. The ASFA's main concern is the health and safety of children and it was enacted to respond to concerns that the pre-existing laws were preventing the adoption of abused and neglected children. 42 U.S.C. § 671(a)(15); H.R. Rep 105-77 (1997) at 11 ("in determining the reasonable efforts to be made, the child's health and safety must be of paramount concern"). The ASFA mandates that the health and safety of all children should be of highest priority. Protecting the child's health and safety also means that permanency hearings must be held within twelve months of the child's placement:

... with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (*including a tribal court*) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care....

42 U.S.C. § 675(5)(C)(mandating that "State Plans" provide for compliance with permanency timelines as one of many conditions for the receipt of federal IV-E funding).

When two statutes are capable of coexistence, the court's duty, absent clearly expressed congressional intent to the contrary, is to regard each as effective. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124 (2001).

That is, the court should give effect to both statutes if it can do so while preserving their sense and purpose. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). The ASFA and ICWA can be interpreted to give meaning to both statutes by this Court finding good cause to deny transfer where the parents' and tribe's transfer motions, if granted, would have violated ASFA's mandate that a permanent placement hearing be held no later than twelve months after a child's foster care placement. By the time the trial court ruled on the transfer motions on October 27, 2004, the state court would have had little time to transfer the case to tribal court so as to meet the ASFA twelve month deadline. Transferring a proceeding from state court to tribal court requires transferring court records, agencies' arranging for continued foster care payments, scheduling the matter in tribal court, and allowing time for tribal authorities to file appropriate pleadings.

Congressional intent *not* to exempt ICWA cases from ASFA is made clear by the fact that the twelve month provisions of ASFA apply to decisions made by tribal courts under 42 U.S.C. § 675(5)(C). Moreover, implementing regulations issued by Department of Health and Human Services also declare Congressional intent to *not* exempt ICWA from the requirement of ASFA:

Several issues of note recurred as themes throughout the comments and the regulation [implementing ASFA]. One was the application of the rules to certain populations, such as Indian tribal children, adjudicated delinquent children, and unaccompanied refugee minors. We clarify how in particular the provisions of the final rule apply to these populations of children, but also emphasize that *overall the statute must apply to these children as they would any other child in foster care*. We have no statutory

authority to exempt any group from provisions such as the safety requirements or termination of parental rights requirements. Furthermore, we strongly believe that, while these requirements must apply to all children, the statute affords the State agency the flexibility to engage in appropriate individual case planning.

Fed Reg., Vol. 65, No. 16, Tuesday, January 25, 2000, Rules and Regulations, at 4029. In cases where a state court transfers an ICWA proceeding to tribal court, the tribal court is bound to apply the twelve month permanency timelines if, like a state, it wishes to receive federal funds.⁹

In Minnesota, the Legislature has chosen to add additional permanency protections for children under eight by requiring that a placement hearing be held within six months of foster care placement. *See* Minn. Stat. § 260C.201, subd. 11(a). Where ICWA contains no longer permanency guidelines--indeed it allows trial to held with ten days of notice--it cannot be argued that either ICWA or ASFA preempts Minnesota's six month permanency deadline for children under eight. Consequently, good cause may also be found where a transfer request was made after the six month permanency timeline had passed.

Minnesota state courts, like all state courts, are challenged in complying with the requirements of ASFA. Meeting the requirements of ASFA has meant this Court has dramatically rewritten the Rules of Juvenile Protection and Procedure by accelerating juvenile protection proceedings to ensure compliance

⁹ Federal IV-E funding may be provided to tribes if they enter into an agreement with a state. If they do, they are bound by the same parameters of ASFA as the state. *See* Fed Reg., Vol. 65, No. 16, Tuesday, January 25, 2000, Rules and Regulations, at 4029.

with ASFA. This Court has launched the Children's Justice Initiative, whose mission "is to ensure that in a fair and *timely manner* abused and neglected children involved in the juvenile protection court system have safe, stable, permanent families."

As part of CJI, this Court has set performance measures which include the goal that Minnesota courts shall meet the twelve month permanency timeline in 90 percent of cases in the year 2005. According to CJI data, however, Minnesota Courts failed to meet the twelve month guideline in twenty-three percent of cases.¹⁰ See Children's Justice Initiative, Minnesota Supreme Court, *Core Standards and Measures-Statewide-Child Protection Cases*, June 2005. Appendix at 1. While progress has been made, challenges lie ahead. Meeting the timelines of ASFA will no doubt be difficult in an ICWA case, where additional procedural protections apply. Yet Congress has made clear that ASFA applies to ICWA cases.

Accordingly, this Court should ensure that that it emphasizes the critical importance that the ICWA be promptly applied when adopting a good cause standard. Indian children's right to their cultural heritage should not come at the expense of their right to a timely permanency determination. The converse is just as true: children's right to a timely permanency determination should not

¹⁰ Appendix at 1.

come at the expense of losing their cultural heritage. Therefore, to give effect to ICWA good cause provisions and ASFA's permanency timelines, the Court should find "good cause" to deny transfer if transfer would result in violating ASFA's permanency guidelines or the six month permanency timeline for children under eight years old under Minnesota law. Here, transfer of the case at this advanced stage of proceedings would violate ASFA and Minnesota law.

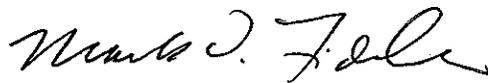
IV. CONCLUSION

For the reasons stated, the National Association of Counsel for Children respectfully requests that this Court reverse the decision of the Minnesota Court of Appeals.

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).