

Nos. A05-1615 and A05-1631

JUN 7 8 2006

State of Minnesota
In Supreme Court

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

Parents.

Respondent T.T.B.'s Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

LEGAL ISSUE.....3

STATEMENT OF FACTS AND OF THE CASE.....4

ARGUMENT.....7

 I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING
 MOTIONS TO TRANSFER JURISDICTION TO TRIBAL COURT

 A. Introduction.....

 B. State Courts Must Transfer Jurisdiction To Deny Transfer To Tribal
 Court

 C. The Appellate Court Correctly Found That There Was No Good
 Cause To Deny Transfer To Tribal Court

 i. This Case Was Not at an Advanced Stage of the Proceedings

 ii. No Incentives for Delay Exist Under the ICWA

 iii. Transferring a Case To Tribal Court is not the Equivalent of
 Forum Shopping

 D. The ICWA Takes Precedence Over the ASFA

 E. P.L. 280 Has No Bearing on the Present Case

CONCLUSION.....17

TABLE OF AUTHORITIES

FEDERAL CASES

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).....7,9,11

FEDERAL STATUTES, RULES, AND OTHER AUTHORITY

Bureau of Indian Affairs, "Guidelines for State Courts:
Indian child Custody Proceedings" 44 Fed. Reg. 67584,
Nov. 26, 1979.....9,10,12
Indian Child Welfare Act
25 U.S.C. §§ 1901-1923 (2000).....7,8,9,12,13
Adoption and Safe Families Act of 1997.....15, 16
Public Law 280, Pub. L. 280, 67 Stat. 588.....16

MINNESOTA COURT RULES, REGULATIONS AND STATUTES

Minn. R. Juv. Prot. P. 33.04 subd. (1).....13, 14
The Minnesota Indian Family Preservation Act § 257.354 subd. (3).....9

OTHER CASES

Hoots v. K.B., 663 N.W.2d 625, 621 (ND 2003).....10,11
Interest of G.R.F., 569 N.W.2d 29, 35 (SD 1997).14
Montana v. Blackfeet Tribe of Indians, 471 US 759, (1985).....16
People ex rel. J.S.B., Jr., 691 N.W.2d 611 (S.D. 2005).....16
In the Matter of B.A. and C.A., In the Tribal Court of the Confederated Tribes of the
Grand Ronde Community of Oregon Juvenile Court, (Or. Sept. 8, 2000) (VERSUSLAW)12
In the Matter of the Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187,
189 (Ariz. App Div. 2, 1981).....14

LEGAL ISSUE

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTIONS TO TRANSFER JURISDICTION TO TRIBAL COURT?

The Court of Appeals held that the trial court did abuse its discretion in denying motions to transfer to Tribal Court.

Authorities:

25 U.S.C. § 1911 (b)

Minn. Stat. § 260.751

STATEMENT OF FACTS

X.T.B. was born to T.T.B. and G.W. in the State of Rhode Island on November 15, 2003. T.T.B. is a member of the Oglala Sioux Tribe of Pine Ridge, South Dakota. G.W. is a member of the Yankton Sioux Tribe of Marty, South Dakota (Exhibit #1).

These proceedings are governed by the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (2000) (hereinafter, ICWA) and by the Minnesota Indian Family Preservation Act, Minn. Stat. § 260.751-§ 260.835 (2002).

A petition was filed on December 31, 2003 seeking termination of parental rights or, alternatively, a permanent transfer of legal custody. Two weeks later, notices were sent out concerning a hearing on February 17, 2004. The first notice, dated January 14, 2004, did not list the Yankton Sioux Tribe, and listed G.W.'s address as "general delivery" in Minneapolis. The second notice, dated January 15, 2004, listed the Yankton Sioux Tribe but still addressed G.W. in care of "general delivery."

February 17, 2004 was the first hearing on the December 31st petition. G.W. was present and was appointed public counsel (Trans. Feb. 17, 2004 at 16); the Yankton Sioux Tribe was not present, and there is nothing in the record which shows whether it received the January 15, 2004 notice.

The county attorney filed, on July 16, 2004, an amended permanency petition which included a prayer for transfer of legal custody. The petition was scheduled for hearing on August 12th, and a notice was sent to both the Yankton Sioux Tribe and the Oglala Sioux Tribe on July 22nd.

On July 22, 2004, T.T.B. and G.W. jointly filed a motion to transfer the proceedings to the tribal court of the Yankton Sioux Tribe. This was two months before

the adjudicatory hearing, then scheduled for October 27, 2004. On September 8, 2004, the Yankton Sioux Tribe itself also filed a motion to transfer the matter to its tribal court (Trans. Oct. 5, 2004 at 2). The transfer motion was to have been heard at the August 12th hearing (Trans. Aug. 12, 2004 at 4), but the court indicated that it wanted to know whether the tribal court would accept jurisdiction before it heard arguments (Trans. Aug. 12, 2004 at 13).

This motion was heard on October 5, 2004. The agency took no position on it (Trans. Oct. 5, 2004 at 3). The ICWA Director for the Yankton Sioux Tribe, Mr. Raymond Cournoyer, was present and was examined by all parties (Trans. Oct. 5, 2004 at 4-16). Mr. Cournoyer indicated that, while G.W. had asked him in June, 2004, to seek a transfer to tribal court, that he had also had a lengthy discussion with the tribal prosecutor who signed the request. The request, once made, had to be approved by the tribal court before jurisdiction would be accepted (Trans. Oct. 5, 2004 at 10-11). Mr. Cournoyer had met with every party and participant in the matter, aside from the Rhode Island authorities (Trans. Oct 5, 2004 at 5-6, 10-12). The Guardian was the only party to oppose the transfer, in both brief and argument (Trans. Oct. 5, 2004 at 16-17). The Guardian's objections were that the motion had been filed too late, when the proceeding was at an advanced stage, that it was inconvenient for parties and witnesses to travel to Marty, South Dakota for tribal court proceedings, that X.T.B. had bonded with his half-sister, and that the parents were guilty of forum-shopping. It should be noted that these statements were made in argument only; no actual testimony was given regarding these facts. (Trans. Oct. 5, 2005 at 16-17).

On October 27, 2004, the date of the adjudicatory hearing, the court denied the motion for transfer to tribal court. The court gave the following reasons: (a) the Tribe had received notice of the proceeding in May, 2004, but had not filed its motion until September, 2004; (b) Marty, South Dakota is 400 miles from Minneapolis and traveling this distance is a hardship to parties, participants and witnesses; (c) the Tribe did not state that it had a tribally-approved placement ready for X.T.B.; and (d) transfer to tribal court would delay permanency. *See* Appendices 48-51 of Appellant's brief. Yankton Sioux Tribe's brief. This is the order that was reversed and remanded by the Court of Appeals on March 21, 2006.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTIONS TO TRANSFER TO TRIBAL COURT.

A. Introduction.

This case is about the meaningful exercise of tribal sovereignty. In order to fully exercise legal and political authority as sovereign nations and to ensure the survival of tribal customs and culture, Indian tribes must be able to adjudicate matters arising which involve Indian children who are members of that tribe. The Minnesota Court of Appeals correctly held that the trial court abused its discretion by denying the motions to transfer jurisdiction to Tribal Court.

B. State Courts Must Transfer Jurisdiction To Tribal Courts in The Absence Of Good Cause To The Contrary.

The Indian Child Welfare Act was enacted to address the failures of state courts and local agencies in the placement of Indian children. For this reason, Congress sought, through the ICWA, to remove proceedings involving Indian Children to Tribal Courts whenever possible. This policy is exemplified in sections 1911 (a) and (b) of the ICWA. The Supreme Court recognizes Congress' intent in *Holyfield*, "[t]he importance of tribal primacy in matters of child custody and adoption cannot be minimized, for the ICWA is grounded on the premise that tribal self-government is to be fostered and that few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children." See, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

The ICWA contains provisions which specifically address the issue of tribal jurisdiction. Section 1911 of the ICWA outlines a “dual jurisdictional scheme,” which lies “[a]t the heart” of the Act. *Id.* at 36. This section of the ICWA contains a set of jurisdictional provisions in which Congress affirmed inherent tribal authority in proceedings involving the custody of Indian Children. At its core, ICWA’s jurisdictional scheme reflects Congressional intent to confirm, preserve, and enhance tribes’ inherent jurisdictional authority. Tribal courts are specifically authorized under § 1911 to exercise jurisdiction over child custody matters. *See* § 1911 (a) – (d). When enacting the ICWA in 1978, Congress recognized the failures of state courts and authorities to be sufficiently receptive to the interests of tribes and Indian families. *See*, 25 U.S.C. § 1901. To address these failures, the ICWA established numerous procedural and substantive requirements aimed at increasing participation by, and protecting the rights of tribes, tribal members, and Indian children in state child custody proceedings. Therefore, the Act’s jurisdictional scheme is not just dual in nature; it is also remedial and must be liberally applied as to achieve the purpose of the Act. In this case, that would involve upholding the decision of the Court of Appeals and remanding this case to the trial court for a finding consistent with the ICWA.

C. The Appellate Court Correctly Found That There Was Not Good Cause To Deny Transfer To Tribal Court.

i. This Case Was Not At An Advanced Stage Of Proceedings.

The Bureau of Indian Affairs (hereinafter BIA) Guidelines offer assistance to determine when a case is at an advanced stage, differentiating between granting intervention of the tribe and the tribe request to transfer the proceeding to tribal court.

The commentary to Comment C.1. states:

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be *retried* when intervention is permitted...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.”

44 Fed. Reg. 67584, 675971, (§ C.1.), Nov. 26, 1979. (emphasis supplied).

The Guidelines make it clear that motions to transfer to tribal court during the course of a trial are disruptive, thus a court should not look kindly on them. In the case at bar, the motion to transfer to tribal court was made within a reasonable time *before* the case went to trial. Thus, the Tribe’s motion to transfer was timely as the case was not at an advanced stage; there was nothing to be retried at the time of the Tribe’s motion.

Federal and Minnesota state law both presume a transfer to tribal court upon a petition to transfer in child welfare proceedings. The United States Supreme Court held that under the ICWA there is concurrent but presumptive tribal court jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Federal law under the ICWA requires a transfer from state court to tribal court upon request in the absence of good cause to the contrary. 25 U.S.C. § 1911(b). The Minnesota Indian Family Preservation Act, also mandates transfer from state court to tribal court absent good cause to the contrary. *The Minnesota Indian Family Preservation Act* §257.354 at subd. 3. Neither the ICWA nor Minnesota state law mandate a timeline in order to request transfer to tribal court. However, the BIA Guidelines interpreting the ICWA indicate that a request to transfer should be made promptly upon notice of a proceeding. 44 Fed. Reg. 67584, 67590, (§ C.1.), Nov. 26, 1979. The BIA Guidelines Commentary indicates that timeliness is mentioned primarily to prevent a petition to transfer to tribal

court when the case is almost complete and when such a late petition would be an “obstructionist tactic” by counsel. *Id.*

Furthermore, the BIA Guidelines designate specific circumstances in which “good cause” not to transfer the proceeding may exist under the ICWA. 44 Fed. Reg. 67584, 67591, (§ C.3.), Nov. 26, 1979. One such particular circumstance includes when the “proceeding was at an advanced stage when the petition to transfer was received.” 44 Fed. Reg. 67584, 67591, (§ C.3) (b)(i), Nov. 26, 1979. This advanced stage denial of a transfer is reflected in the Commentary to recognize that long delays are harmful to the well being of children in child welfare proceedings. 44 Fed. Reg. 67584, 67590, (§ C.1.), Nov. 26, 1979. Under the ICWA the “burden of establishing good cause to the contrary shall be on the party opposing the transfer.” 44 Fed. Reg. 67584, 67591, (§ C.3.) (d), Nov. 29, 1979. The BIA Commentary indicates this requirement reflects Congress’ established policy “preferring tribal court control over custody decisions.” *Id.*

In order to determine whether a child welfare proceeding is at an advanced stage the relevant time period must be defined. In a 2003 North Dakota Supreme Court decision the court held that it was not the foster care proceeding which determined the timeliness of the transfer petition, but the petition to terminate parental rights. *Hoots v. K.B.*, 663 N.W.2d 625, 621 (ND 2003). The court deemed the foster care proceeding and the termination proceeding two separate proceedings. *Id.* To do otherwise would “subsume an Indian tribe’s right to request transfer.” *Id.* The Court held that the tribe’s motion filed seven weeks after the filing of the petition to terminate parental rights and filed two weeks before the scheduled trial did not constitute an advanced stage of the proceedings. *Id.*

The argument that a request for transfer to Tribal Court is untimely if it comes after the filing of a permanency petition requires a reading of the Indian Child Welfare Act's good cause exceptions so narrowly as to preclude tribes from ever transferring to Tribal Court once a permanency petition is filed. This interpretation of the good cause exception is so conservative that it would essentially render § 1911(b) inapplicable to all permanency petitions. This was not the intent of Congress in enacting the ICWA; rather, Congress intended to confirm and preserve, against state encroachment, the inherent jurisdiction that tribes already possessed. *See, Holyfield*, 490 U.S. at 42. The jurisdictional provisions of ICWA are a manifestation of Congress' intent to increase tribal participation in child custody matters and to recognize, protect, and empower a tribal government to exercise its inherent authority to adjudicate child custody matters in its own forum.

In the case before the Court, the relevant time frame to determine advanced stage is from the time the amended petition was filed on July 16, 2004 to the time the parent's filed a transfer to tribal court petition on July 22, 2004. Unlike the North Dakota case, in the case at bar, the initial petition was a permanency petition. However, because it was at permanency immediately it raises the same concern the North Dakota Supreme Court had, namely that by not allowing for a petition of transfer to tribal court because of the permanency stage it would subsume the Indian tribe's right. Furthermore, the Court of Appeals found that at the time of the parent's petition to transfer to tribal court on July 22, 2004 the case was not at an advanced stage. The petition to transfer was filed a mere six days following the amended petition for transfer of legal custody, significantly less time than the seven weeks in *Hoots*. More importantly, the Court of Appeals noted that

it was a significant factor that the petition to transfer was filed before the deadline to file pretrial motions and before the permanency trial. Because, the proceeding was not at an advanced stage, good cause did not exist to deny the transfer.

Moreover, there is no reason to suspect that the tribal court is not as concerned with a timely disposition of a child welfare matter as the state court. As stated by the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon Juvenile Court, "time is of the essence in these cases." *In the Matter of B.A. and C.A.*, In the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon Juvenile Court, (Or. Sept. 8, 2000) (VERSUSLAW).

ii. No Incentives for Delay Exist Under the ICWA

The County's position that the Court of Appeals holding creates "invidious incentives for delay" is unfounded. The fact that the proceedings were ready for trial does not preclude transfer to Tribal court. The ICWA provides the Tribe with the right to seek transfer of any child protection proceeding involving an Indian child at any time in the proceeding. *See*, 25 U.S.C. § 1911(b). The BIA Guidelines, in providing guidance on when it is proper for a state court to grant a transfer petition, suggests limiting denials of transfers to tribal court only when the Tribe has waited until a case is almost complete before seeking transfer. *See*, 44 Fed: Reg. 67584, 67590, (§ C.1.), Nov. 29, 1979. Here, there was no such request as the Tribe made its transfer request prior to the commencement of the trial and only six days after the petition on the termination was filed; this is affirmative proof that the transfer request was timely. Thus, the Court of Appeals correctly gave little credence to this issue.

The Appellant criticizes the Court of Appeals emphasis on the County's filing of an amended petition. While the Appellant's are correct that the Rules of Juvenile Protection Procedure allow parties to amend their petitions "at any time prior to the commencement of the trial," Minn. R. Juv. Prot. Proc. 33.04, subd. 1 (2006) (The County incorrectly cited to Minn. R. Juv. Proc. 70.04 in their brief. This Rule provides the same language as the current rule), the Rule also goes on to state that "[w]hen the petition is amended, the court shall grant all other parties sufficient time to respond to the amendments." *Id.* Therefore, allowing all parties a chance to respond to the new information in an amended petition, submitting such petition is synonymous to submitting a new petition regardless of the information provided in the amended petition. It is especially imperative that the tribe have sufficient time to respond to a permanency petition. A termination of parental rights or transfer of legal custody of an Indian child can have a significant impact on the families involved and the on the tribe. Therefore, as allowed by the ICWA, the tribe must be given ample time to respond to an amended petition, including the ability to transfer state proceedings to Tribal Court.

The Appellants minimized the changes that appeared in the Amended Petition. The changes, in fact, were substantial. A new party was added; in this case the father was affirmatively named as such in the petition. The Yankton Sioux Tribe was named in the Amended Petition, but was previously not named. Many facts were added to the petition. Most significantly, in this case, available caregivers were noted in this petition, one of which met the placement preferences of the ICWA. *See*, 25 U.S.C. § 1915. Given the extent of the amendments made to the petition, it is disingenuous for the Appellants to say that the changes were not significant.

The Court of Appeals' determination of the issue was based on the plain language of Rule 33.04 of the Rules of Juvenile Protection Procedure and does not link the "definition of advanced stage of the proceedings to procedural motions," *See*, Appellant's Brief p. 19. Moreover, the Court of Appeals' decision does not create an incentive for parties to delay a proceeding when transfer petitions are filed in good faith. Submitting transfer petitions solely for the purpose of causing delay would be antithetical to the best interests of the child as well in opposition of the plain meaning of both state child protection statutes and the ICWA.

iii. Transferring A Case To Tribal Court Is Not The Equivalent Of Forum Shopping

Regarding the Appellant's claim that the Court of Appeals decision encourages forum shopping is not logical, nor has the Appellant provided sufficient support for this claim. Although no Minnesota court has directly addressed forum-shopping in an The ICWA case, courts in other jurisdictions have. "The typical concerns of 'forum shopping' ...do not stand on the same ground when the question of proper forum involves ICWA, which has as its purpose tribal self-government and the tribe's interest in the welfare of its children." *Interest of G.R.F.*, 569 N.W.2d 29, 35 (SD 1997). Claiming the Tribe is asserting its right to hear this case and accusing the moving parties of forum shopping neglects the reasoning behind Congress' specific grant to Indian tribes of the right to intervene in child protection proceedings involving Indian children. Congress was clear when it provided tribes the ability to retain a voice in the upbringing of the tribe's children. Preserving the rights of Indian Tribes, parents and children is central to the ICWA.

The [ICWA] is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected. By its enactment, Congress legislatively created a new jurisdictional framework in Indian child welfare, replacing the outmoded geographical concepts of presence or domicile with a jurisdictional standard based on the ethnic origin of the child. This standard avoids the problems of forum shopping and gives real authority to tribal courts to adjudicate child custody issues. The Act reflects Congressional recognition of the importance of child rearing to the tribe.

In the Matter of the Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 189 (Ariz. App Div. 2, 1981) cert. denied *sub nom. Catholic Social Svcs of Tucson v. P. C.*, 455 U.S. 1007 (1982); *See also In re the Dependency of Smith*, 731 P.2d 1149 (Wash. App. 1987).

Thus, Congress' grant to tribes to remain involved in child protection proceedings, including those involving Indian children domiciled off the reservation, supersedes claims of forum shopping and any such argument should be disregarded as against the spirit and letter of the ICWA.

D. The Adoptions and Safe Families Act Does Not Modify the Indian Child Welfare Act.

In their Amicus Brief, the NACC argues an issue that is not reviewable, as these issues were not raised in the lower courts and not currently raised by the Appellants. One such issue surrounds the Adoption and Safe Family Act (ASFA) as it interacts with the ICWA.

The ASFA has never been interpreted as modifying the provisions of the ICWA and the NACC cites no cases to the contrary. Rules of statutory construction determine that ASFA does not effect provisions of the ICWA. First, ASFA makes no mention of the ICWA and in no way specifically purports to modify the ICWA; the ASFA does not

state that cases should not be transferred to Tribal Court once the ASFA Permanency guidelines have passed.

Secondly, rules of statutory construction imply that specific legislative enactments would take precedence over general statutes. The ICWA is a specific statute; the ASFA is a general statute. The ICWA was enacted for the specific purpose; preservation of tribes and Indian families. The ASFA was enacted as a general protection to all children in state custody. Therefore, the more specific statute, the ICWA shall take precedence.

Finally, as set out in *Montana v. Blackfeet Tribe of Indians* and which has been consistently upheld, when a statute pertains to American Indians the statute must be, "...construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit..." *Montana v. Blackfeet Tribe of Indians*, 471 US 759, (1985). See *Generally, People ex rel. J.S.B., Jr.*, 691 N.W.2d 611 (S.D. 2005).

E. Public Law 280 Has No Bearing On This Case.

The second non-reviewable issue that the NACC brief brings up is a Public Law 280 argument. The NACC attempts to argue that the court should consider policy regarding PL 280 and its effect on good cause not to transfer jurisdiction. This convoluted argument, in direct contradiction to practice and policy in the state of Minnesota and is contrary to the intent of the ICWA, should not be considered in this case.

Conclusion

The Minnesota state legislature clearly wants statewide compliance with the ICWA and places great importance on the protection of Indian Child, families, and Tribes. The Minnesota Supreme Court should affirm the decision of the Court of appeals and remand this case, directing the trial court to uphold § 1911 (b) of the ICWA and dismiss state court proceedings and transfer the matter to Tribal Court.

Respectfully submitted,

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