

Nos. A05-1615 and A05-1631

STATE OF MINNESOTA

IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

JUN 28 2006

FILED

In the Matter of the Welfare of the

Child of T.T.B. and G.W., Parents

RESPONDENT YANKTON SIOUX TRIBE'S BRIEF

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STATEMENT OF LEGAL ISSUE

Was good cause to deny transfer of jurisdiction to tribal court established where:

(1) the motion to transfer was filed only seven days after the trial court ruled—without objection from any party—that a delay in the permanency trial was in X.T.B’s best interests; (2) appellants admit that transfer would have caused no undue hardship; (3) the motion to transfer was timely under the trial court’s scheduling order; (4) no statutory deadline was violated; (5) transfer was supported by both parents and the Tribe; and (6) transfer was unopposed by appellant Hennepin County?

The Court of Appeals held in the negative.

Authorities:

25 U.S.C. Section 1911(b)

In the Matter of Custody of S.E.G., A.L.W. and V.M.G., 521 N.W.2d 357 (Minn. 1994)

Minn. Stat. § 260C.201, Subd. 11(a)

STATEMENT OF THE CASE

This is an appeal by the Hennepin County Human Services and Public Health Department ("Hennepin County") and the Guardian ad Litem from the decision of the Court of Appeals, filed March 21, 2006, reversing the trial court's denial of a motion to transfer jurisdiction of this matter to the Yankton Sioux Tribal Court.

X.T.B. was born on November 15, 2003 in Rhode Island to T.T.B., mother and member of the Oglala Sioux Tribe, and G.W., father and enrolled member of the Yankton Sioux Tribe. At the time of X.T.B.'s birth, the trial court had dismissed its prior juvenile jurisdiction over T.T.B and had preliminarily defaulted her from proceedings on a petition to terminate her rights to another child, A.G., who had a non-Indian father.

On November 21, 2003, Hennepin County requested, and the trial court granted, an *ex parte* Order for Emergency Protective Care to obtain immediate custody of X.T.B. Thereafter, X.T.B. was transferred from Rhode Island to Minnesota, and Hennepin County filed a petition to add X.T.B. to the proceedings regarding A.G.

On December 23, 2003, the trial court granted Hennepin County's request to maintain temporary custody of X.T.B., who was placed in the home of S.G., the paternal grandmother and custodian of A.G. S.G. is not Native American and has no blood relationship with X.T.B.

On December 31, 2003, Hennepin County filed an independent petition seeking termination of T.T.B.'s parental rights with respect to X.T.B.

On April 23, 2004, the Yankton Sioux Tribe ("Tribe") moved to intervene. The motion was unopposed.

On July 15, 2004, the trial court entered an "Amended Scheduling Order/Notice of Need to Reschedule Trial Date" ("Scheduling Order"). The Scheduling Order noted a concern that Hennepin County had not provided all discovery and concluded:

It is in the best interests of the child that the matter be continued to allow all parties to have an opportunity to file any alternate pleading and/or motions, so that all available permanency options are presented.

There was no objection by appellant Hennepin County or appellant Guardian ad Litem. Neither appellant claimed that the proceedings were at an advanced stage, such that any party's right to file pleadings or motions should be restricted in any way. Neither appellant claimed that continuing the trial date well beyond six months after out-of-home placement raised any issue or concern whatsoever.

On July 16, 2004, appellant Hennepin County availed itself of the right of all parties under the Scheduling Order to file "any alternate pleading" by filing an Amended Petition that, for the first time, set forth alleged grounds for terminating G.W.'s parental rights.

Six days later, on July 22, 2004, G.W. and T.T.B. similarly availed themselves of the right of all parties under the Scheduling Order to file "any motion" by, among other things, jointly moving to transfer jurisdiction of the matter to tribal court. Appellant Hennepin County did not oppose the transfer to tribal court.

Three weeks later, on August 12, 2004, the trial court requested a statement by the Tribe that it would accept jurisdiction.

Thereafter, on September 8, 2004, the Tribe filed its own motion to transfer to its Tribal Court. The Tribe's motion was also unopposed by appellant Hennepin County.

On October 27, 2004—97 days after the parents' motion was filed—the trial court denied the motion to transfer. As support for its denial of the motion, the trial court noted that the Tribe's offices are located four hundred miles from Minneapolis and that the Tribe's motion—not the parents'—came thirty-eight weeks after the permanency petition was filed. The trial court did not note its August 12, 2004 request that the Tribe file a written statement accepting jurisdiction, nor did the trial court even attempt to establish that the proceedings were at an "advanced stage" when the parents filed their motion.

On February 17, 2005—210 days after the parents' motion to transfer was filed—the trial court issued its order to transfer permanent legal custody to S.G. In that order, the trial court acknowledged that it was placing X.T.B. outside of the placement preferences of Indian Child Welfare Act ("ICWA") and in opposition to the placement preferences of X.T.B.'s Indian parents and the Tribe.

On July 14, 2005—357 days after the parents' motion to transfer was filed—the trial court denied motions for a new trial, thereby rendering its permanency order appealable for the first time. The Tribe and G.W. then filed timely appeals with the Court of Appeals.

On March 21, 2006, the Court of Appeals filed a decision in which it held that good cause to deny transfer of jurisdiction to Tribal Court had not been established and ordered the case remanded for transfer of jurisdiction to the Yankton Sioux Tribal Court.

Appellants petitioned for review solely on the issue of whether the proceedings were at an "advanced stage" when the motion to transfer was made. On May 16, 2006, this Court granted review.

STATEMENT OF FACTS

The appellants and their supporting *amici* rely heavily upon the following assertions to attempt to establish the required 'good cause' to deny the joint motion of X.T.B.'s parents to transfer to tribal court:

- The proceedings were at an 'advanced stage' when the motion was filed on July 22, 2004;
- A transfer at that time would have violated Minn. Stat. Section 260C.201, Subd. 11(a); and
- The best interests of X.T.B. would not have been served because of a *presumed* delay in obtaining permanency if the requested transfer had been granted.

There is no support in the record for any of these assertions. As such, the Court of Appeals correctly concluded that the trial court abused its discretion by denying the motion to transfer.

A. The Proceedings Were Not At An Advanced Stage On July 22, 2004.

As noted in the "Statement of the Case" above, the trial court entered its Scheduling Order on July 15, 2004. The appellants did not challenge, object to or appeal from any aspect of that Order which, by its express terms, conclusively demonstrates that the proceedings were not in an advanced stage on July 15, 2004. On the contrary, the trial court ruled on that date that the best interests of X.T.B. would be served by continuing the permanency trial to an undetermined date and allowing all parties the opportunity to file any alternate pleadings and motions on all available permanency options.

There is no evidence that the proceedings were appreciably more advanced seven days later, on July 22, 2004, when X.T.B.'s parents filed their joint motion to transfer to tribal court. That motion was timely filed in full conformance with the Scheduling Order at a point in time when the trial date was not set and all parties remained free to file any pleadings and motions on all available permanency options.

As such, nothing in the record supports a finding that the proceedings were at an advanced stage on July 22, 2004, and the trial court did not even try to support such a finding. Instead, the trial court based its finding that the proceedings were at an advanced stage solely on the date that the Tribe filed its *follow-on* motion (at the trial court's request) in September 2004. The trial court made no attempt to establish that the proceedings were at an advanced stage in July 2004.

In sum, there is nothing in the record to establish that the proceedings were at an advanced stage on July 22, 2004. The evidence is entirely to the contrary.

B. The Requested Transfer Would Not Have Violated Minn. Stat. Section 260C.201, Subd. 11(a).

As noted by the appellants and *amici*, Minn. Stat. Section 260C.201, Subd. 11(a) provides that permanency for a child under the age of eight must be reviewed when the child has been in court ordered out-of-home placement for six months, with an option to extend that review for up to an additional six months. As such, permanency is to be established for all children when they have been out of the parent's home for twelve

months. *See e.g. Amicus Curiae* brief of Minnesota County Attorneys Association at p. 4.¹

There is no evidence in the record that granting the parents' July 22, 2004 motion to transfer the proceedings to tribal court would have resulted in any violation of those Minnesota statutory timelines. The motion was timely filed at a time when the trial court had already ruled that the best interests of X.T.B. would be served by delaying the permanency hearing to a yet-to-be-determined date beyond six months. Appellants have not and cannot point to any provision of the statute that would have been violated by granting the parents' motion to transfer.

C. There Is No Evidence That The Requested Transfer Would Have Delayed The Permanency Decision For X.T.B.

The trial court did not hold a permanency hearing until 97 days after the parents filed their motion to transfer to tribal court. The initial—unappealable—permanency order was not entered until 210 days after they filed that motion, and that order did not become appealable until 357 days after the motion to transfer was filed.

There is no evidence in the record to support a conclusion—or even a supposition—that the Yankton Sioux Tribal Court would not have issued a permanency decision for X.T.B. as quickly, or more quickly, than the Minnesota trial court.

¹ Appellant Guardian ad Litem wrongly asserts at page 7 of its brief that the statute requires a permanency hearing no later than six months after the child's placement. The statute provides no such thing, nor did the Guardian ad Litem object when the trial court originally scheduled the permanency hearing outside of six months or when the hearing was subsequently continued for an additional three months.

ARGUMENT

BASED UPON THE COMPLETE ABSENCE OF SUPPORTING EVIDENCE, THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION BY HOLDING THAT PROCEEDINGS WERE AT AN 'ADVANCED STAGE' ON JULY 22, 2004.

A. Standard of Review.

A trial court's refusal to transfer a proceeding to tribal court is reviewed for abuse of discretion. *In the Matter of the Welfare of the Children of C.V.*, 2004 WL 2523127 (Minn. App. 2004). Moreover, the trial court's factual determinations must be reversed if they are clearly erroneous. *In the Matter of the Custody of S.E.G., A.L.W., and V.M.G.*, 521 N.W.2d 357, 363 (Minn. 1994).

B. There is No Support in the Record for the Trial Court's Finding that Proceedings were at an 'Advanced Stage' on July 22, 2004.

A court must grant a motion to transfer a custody proceeding involving an Indian Child to tribal court unless good cause is shown. 25 U.S.C. § 1911(b); *see also, In the Matter of Welfare of B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990) ("transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by the ICWA whenever possible"). In enacting ICWA, Congress specifically provided that:

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

25 U.S.C. § 1911(b). In this case, both parents petitioned for transfer. The petition was supported by the Tribe. The petition was unopposed by Hennepin County.

As this Court has stated, the purpose of ICWA is:

to prevent the destruction of Indian families by reducing removal of Indian children from their communities and to relieve the difficulties experienced by Indian children raised in non-Indian homes by providing preferences for placements within Indian communities.

* * * *

One important way in which the Act achieves its goals is by . . . providing for transfer of jurisdiction to the tribe, absent good cause to the contrary, of child custody proceedings involving Indian children living off the reservation.

In the Matter of the Custody of S.E.G., A.L.W., and V.M.G., 521 N.W.2d 357, 358-359 (Minn. 1994). The party opposing the transfer bears the burden of establishing that good cause exists for denying the transfer. *In the Interest of J.L.P., S.D.P., W.J.P., and C.P.*, 870 P.2d 1252, 1257 (Colo. Ct. App. 1994).

In this case, the trial court proffered two grounds to support its denial of transfer to tribal court: (1) undue hardship might result from the fact that the Tribe's tribal courts are 400 miles from Minneapolis; and (2) the Tribe's formal petition was not filed until "thirty eight weeks after the permanency petition was filed." The Court of Appeals ruled that both findings were unsupported by the evidence and, hence, an abuse of the trial court's discretion. Appellants do not challenge the Court of Appeals' decision that the trial court's 'undue hardship' finding was an abuse its discretion. Their challenge is limited to the trial court's 'advanced stage' of the proceedings finding; however, the absence of evidentiary support for that findings is equally clear.

As noted by appellant Guardian ad Litem at page 6 of its brief, there is only one BIA guideline that is relevant to the question of whether good cause not to transfer was established before the trial court:

- (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. That guideline utilizes the conjunctive (“and”); therefore, in order to deny transfer, the evidence in the record had to establish that the proceedings were at an advanced stage and that the petition was not filed promptly after receipt of notice of the hearing.

1. ‘Advanced Stage’

The Court of Appeals held that there was insufficient evidence that the proceedings were at an advanced stage when X.T.B.’s parents jointly filed their petition to transfer on July 22, 2004. That holding is clearly correct. It is not possible to credibly argue that the proceedings were at an ‘advanced stage’ when, just seven days earlier, the trial court ruled that it was in X.T.B.’s best interests to continue the permanency hearing to an undetermined future date and throw open the doors to all parties to file any pleadings and motions on all available permanency options.

To reverse the Court of Appeals’ decision, this Court would have to rule that X.T.B.’s parents had the right to file any and all motions under the Scheduling Order except a motion to transfer jurisdiction to tribal court. Such a ruling would flatly contravene ICWA’s unquestioned presumption in favor of allowing a tribe’s tribal court

to adjudicate placement of the children of that tribe. To the Tribe's knowledge, there is no support in any statute, regulation or reported or unreported decision for such a result.

In sum, there is no evidentiary support for a finding that the proceedings were at an 'advanced stage' on July 22, 2004 when X.T.B.'s parents filed their motion to transfer jurisdiction to the Tribe's tribal court. The evidence is all to the contrary. Therefore, the Court of Appeals correctly held that the trial court abused its discretion by denying transfer, and that decision should be affirmed.

2. Prompt Filing

Given the absence of evidence supporting the trial court's 'advanced stage' finding, it is not necessary for the Court to reach the issue of whether X.T.B.'s parents complied with the Guideline with respect to prompt filing of the motion to transfer after receiving notice of the hearing. Still, a number of points regarding that issue buttress the conclusion that the trial court abused its discretion by denying the parents' motion to transfer.

First, as is noted above, the trial court included no finding that the parents' motion was untimely or otherwise violated the Guideline in its order denying transfer. The trial court instead focused exclusively—and improperly—on the timing of the Tribe's subsequent motion. Nothing in ICWA mandated *any* motion or communication from the Tribe prior to acting on the parents' motion. The Tribe's motion is therefore irrelevant to any analysis of the parents' earlier motion, and its timing provides no evidentiary support for denial of transfer.

X.T.B.'s parents filed their motion in conformance with the Scheduling Order, months before the scheduled trial date and much less than a year after the case was commenced. This is not a case where the parents or the Tribe sought multiple continuances or moved to transfer on the eve of or after trial. No party was prejudiced by the timing of the motion; indeed, three weeks later, the trial court invited the Tribe to file its own motion to transfer.

The Tribe is unaware of any reported decision that has denied transfer in similar circumstances. In *In the Interest of A.B.*, 663 N.W.2d 625, 632 (N.D. 2003), the court did not find untimely a transfer motion that "was filed about one week before a pre-trial conference and about two weeks before the scheduled trial." See also *In the Interest of J.L.P., S.D.P., and C.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994) (motion filed one year after tribe received notice of proceedings was not untimely). No case has been cited by appellants or their *amici* upholding denial of transfer where the motion was filed less than a year after commencement of proceedings, months before trial and in conformance with the trial court's scheduling order.

Nor was there any warning contained in ICWA, the BIA Guidelines or any reported decision to alert the Tribe or X.T.B.'s parents that their statutorily-mandated right to transfer jurisdiction to tribal court of the placement decision regarding an enrolled child member would or could be irrevocably lost six months or less after the initial temporary out-of-home placement of that child. Yet, that is exactly what is being proposed by the appellants and their *amici*.

There is no precedent for the extinguishment of a federally-enacted substantive right through the mechanism of importing an undisclosed—and nonexistent—State statute of limitations into ICWA. Nothing in Minn. Stat. Section 260C.201, Subd. 11(a) requires a permanency hearing within six months of temporary out-of-home placement. Moreover, the retroactive importation and application of such an undisclosed statute of limitations to foreclose substantive rights established in ICWA would violate the Tribe's, the parents' and X.T.B.'s due process rights. It would also subject the Tribe—and all other Tribes—to a 'crazy quilt' of time limits regarding ICWA motions to transfer depending upon the State in which a tribal member resides.

In sum, appellants' request that this Court announce and retroactively impose against X.T.B.'s parents and the Tribe a six month (or less) deadline after an initial temporary out-of-home placement for the filing of ICWA motions to transfer jurisdiction to tribal court is fundamentally and fatally flawed for a multitude of reasons and, as such, must be rejected.

C. None Of The Remaining Appellant and Amici Arguments Are Well-Founded.

None of the other arguments presented by the appellants or their *amici* support reversal of the Court of Appeals' decision.

1. Alleged State-Wide Impact if Transfer is Allowed

It is telling that Hennepin County only *now* asserts that allowing the transfer to tribal court could have far-reaching adverse impact. In July 2004, when X.T.B.'s parents

filed their motion, Hennepin County had no objection. In September 2004, when the Tribe filed its follow-on motion, Hennepin County had no objection.

The lack of any objection at the time is clear evidence that Hennepin County understood and agreed that granting of a motion to transfer filed in compliance with the Scheduling Order, months prior to trial and much less than a year after initial filing of the permanency petition had no “conceivably detrimental impact” on the State’s ability to pursue permanency. Had the requested transfer raised any legitimate risk of a violation of State or federal law or policy, Hennepin County would have objected. There was no such risk, so it did not object.

2. Compliance with Federal and State Law

There is no support in the record, any statute (State or federal) or any rule or regulation for the assertion of appellants and their *amici* that granting the parents’ July 22, 2004 motion to transfer would have violated State or federal law or risked the imposition of financial penalties against the State of Minnesota. That transfer could have taken place well inside of twelve months after filing of the permanency petition and, as such, would have fully complied with Minn. Stat. Section 260C.201 and the federal Adoption and Safe Families Act (ASFA) of 1997.

3. Best Interests of X.T.B.

There is no evidence that the best interests of X.T.B. were served by denying transfer to the tribal court of the tribe in which he is enrolled. To argue otherwise is to stand ICWA on its head. ICWA incontrovertibly stands for the proposition that the best interests of X.T.B. are served by having his permanency determined by his tribe absent

good cause to the contrary. No such good cause was established here. That lack of good cause is fully—if inadvertently—supported by the brief of *Amicus Curiae* National Association of Counsel for Children, at page 16:

Had the tribe or parents moved for transfer prior to a timely held trial, as suggested by the BIA guidelines, it is doubtful that the trial court would have found good cause to deny transfer.

In fact, the parents did move for transfer months prior to the timely held trial and at a time when the trial court had expressly ruled that X.T.B.'s best interests would be served by delaying that trial so that all parties could file any pleadings and motions on all available permanency options.

Nor is there any evidence that granting the requested transfer would have delayed permanency. There is nothing in the record to support a presumption that the Tribe's tribal court would not have issued a permanency decision more quickly than the trial court in this case.

4. Trial Court Discretion to Determine 'Good Cause'

Finally, it is simply not true that the Court of Appeals announced any 'bright line' rule or divested trial courts of their discretion in determining 'good cause' under ICWA. The Court of Appeals did nothing more than determine—correctly—that, based upon the record, there was no evidentiary support for the trial court's denial of the motion to transfer, meaning that the denial was an abuse of the trial court's discretion. Appellants concede that abuse of discretion with respect to the trial court's 'undue hardship' finding and, for the reasons discussed above, the same conclusion applies to its 'advanced stage' finding.

Nothing in the Court of Appeals' analysis of the specific facts and circumstances of this case does anything to divest trial courts of their discretion, so long as there is adequate factual support for the application of that discretion. In this specific case, as correctly found by the Court of Appeals, there was no such support.

It is the appellants and their *amici*—not the Court of Appeals—who seek to strip away all trial court discretion by imposing a retroactive 'bright line' rule that motions to transfer must be filed in Minnesota (it will vary in other states) less than six months after initial filing of the petition—regardless of the circumstances of the specific case. That attempt has no support in the law and should be rejected.

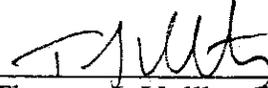
CONCLUSION

There is no factual support in the record, nor is there legal support in any statute, regulation, rule, guideline or reported decision, for the trial court's denial of X.T.B.'s parents' July 22, 2004 motion to transfer jurisdiction to the Tribe's tribal court. That motion was timely filed in compliance with the Scheduling Order months before the trial, months short of one year after the initial permanency petition was filed and at a time when the trial court had determined—without objection from either appellant—that it was in X.T.B.'s best interests to delay the trial and allow all parties to file any pleadings and motions on all available permanency options. No party was prejudiced by the timing of the motion, and there is no evidence that granting of the transfer would have delayed X.T.B.'s permanency decision. It is therefore clear that the Court of Appeals correctly ruled that denial of the motion to transfer was an abuse of the trial court's discretion.

Respondent Yankton Sioux Tribe therefore respectfully asks this Court to affirm that decision.

Dated: June 28, 2006

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STATE OF MINNESOTA

IN SUPREME COURT

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CERTIFICATION
OF BRIEF LENGTH

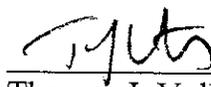
Child of T.T.B. and G.W., Parents

Appellate Court
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with proportional font. The length of this brief is 4,758 words. This brief was prepared using Microsoft Word 2003 software.

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