

NO. A05-1615, A05-1631

State of Minnesota
In Court of Appeals

OFFICE OF
APPELLATE COURTS

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

Parents.

**RESPONDENT GUARDIAN AD LITEM'S
BRIEF AND APPENDIX**

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I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITION TO TRANSFER JURISDICTION TO THE TRIBAL COURT

A. Standard of Review

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 November 9, 2004) (unpublished opinion).

B. There was good cause to deny the petition to transfer jurisdiction

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

According to the BIA Guidelines, the party opposing the transfer has the burden to establish good cause not to transfer. BIA Guidelines C.3(d), 44 Fed. Reg. at 67,591. The

BIA Guidelines enumerate four different circumstances where good cause exists to deny transfer, of which (i) and (iii) are relevant to this appeal:

- (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- (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.

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

The trial court considered the relevant facts and determined that (i) and (iii) of the above-listed circumstances existed, thereby establishing good cause for the court to deny the petition to transfer jurisdiction to the Yankton Sioux Tribal Court.

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

There was good cause for the trial court to deny a transfer of jurisdiction under 25 U.S.C. §1911 because neither X.T.B.'s parents nor the Yankton Sioux Tribe filed a petition for transfer promptly after receiving notice of the hearing, and the proceedings of the case were at an advanced stage. The BIA Guidelines state that there is good cause not to transfer jurisdiction when "the proceeding [is] at an advanced stage when the petition to transfer [is] received and the petitioner did not file the petition promptly after receiving notice of the hearing." BIA Guidelines C.3(b)(i), 44 Fed. Reg. at 67,591. The BIA Guidelines state that this provision serves several purposes. It encourages prompt filing of a motion to transfer to avoid unnecessary delays that could be harmful to the children. BIA Guidelines C.3(b)(i), 44 Fed. Reg. at 67,591-92. "Long-periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." BIA Guidelines C.3 Commentary, 44 Fed. Reg. at 67,591-92.

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

At the time the petitions were filed on July 22, 2004, X.T.B. had been in continuous out-of-home placement for seven months. The state of Minnesota requires that its courts make prompt determinations regarding the permanent placement of children in its custody. Minn. Stat. §260C.201, Subd. 11(a) requires the court in CHIPS proceedings involving a child under the age of eight to conduct a permanency hearing no later than *six months* after the child's placement. In this case, where neither of the parents sought permanent custody of X.T.B., adherence to the six-month period for conducting a permanency hearing would have been desirable as in the best interests of X.T.B. The trial court's June 11, 2004 scheduling order originally established a trial date of July 22, 2004 – seven months after X.T.B.'s out-of-home placement. The petitions to transfer jurisdiction were filed on July 22, 2004. Appendices The trial court properly determined that the petitions for transfer of jurisdiction filed seven months after X.T.B. was in court-ordered out-of-home placement were filed at an advanced stage of the proceedings.

b. The parents and the Tribe had participated in the proceedings

The Yankton Sioux Tribe's ICWA Director, Raymond Courneya had been notified by the State of Minnesota when it discovered X.T.B.'s birth. The Tribe considered sending a representative to Rhode Island. T. Vol. VI, p. 4. An Amended ICWA Notice to the Yankton Sioux Tribe is dated January 15, 2004. Appendices On May 24, 2004, Mr. Courneya signed an affidavit stating that the Tribe had received appropriate notice of the proceedings pursuant to the ICWA and had "determined that the child cannot be

returned to the parents and supports permanency for [him] [sic].” Appendices At the court hearing on June 10, 2004, the tribes supported placement of X.T.B. with S.G. T. Vol. V, p. 5.

c. The proceedings were at a permanency stage

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

d. The case was ready for trial

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

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to

authorize such tactics and the “good cause” provision is ample authority for the court to prevent them.

Id.

At the time the petitions were filed, the interested parties had expressed their preferences regarding the permanent placement of X.T.B. X.T.B.’s parents and the Yankton Sioux Tribe supported placement of X.T.B. with A.M.G. in Rhode Island. Hennepin County and the Guardian Ad Litem were opposed to that proposed custodial plan. Shortly after the petitions were filed, on July 27, 2004, The Interstate Compact Home Assessment was signed by Rhode Island denying placement with A.M.G. The proceedings were at an advanced stage.

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

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

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

Other courts have reached similar holdings, citing a lack of timeliness as sufficient good cause not to transfer. See In re Maricopa Co. Juvenile Action, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); In re Robert T., 246 Cal.Rptr. 168, 171 (Cal. Ct. App. 1988); In the Matter of Wayne R.N., 757 P.2d 1333, 1336 (N.M. Ct. App. 1988); In the Interest of J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995); In the Matter of the Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989).

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

2. Transferring this Matter to the Tribal Court Would Result in Undue Hardship to the Parties and Witnesses

The trial court found good cause for the court to deny a transfer of jurisdiction under 25 U.S.C. §1911 because transferring the case to the Yankton Sioux Tribal Court would cause undue hardship to the parties and witnesses. The BIA Guidelines state that there is good cause to deny transfer of jurisdiction when "[t]he evidence necessary to decide the case could not be adequately presented in the tribal court without undue

hardship to the parties or the witnesses.” BIA Guidelines, C.3.(iii), 44 Fed. Reg. at 67591. This provision allows State courts to apply “a modified doctrine of *forum non conveniens* in appropriate cases.” BIA Guidelines, C.3. Commentary, 44 Fed. Reg. at 67591 (citations omitted).

Geographical inconvenience is a factor that courts consider. In In re Matter of Maricopa Co. Juv. Action No. JS-8287, 828 P.2d 1245, 1249 (Ariz. Ct. App. 1991), the court found that where the majority of the evidence for the case was found in Phoenix, moving to an out of state tribe location created undue hardship and therefore, in addition to an untimely transfer request, provided sufficient good cause to deny transfer. See also Chester Co. of Soc. Serv. v. Coleman, 399 S.E.2d 773 (So. Car. Sup. Ct. (1998)).

In this case, the trial court properly considered the location of the Yankton Sioux tribal court and the impact of such location upon the parties, participants, witnesses and involved service providers. The court considered the nature of the request made by Tribe on behalf of the father, and the current intention and ability of the tribal court to assume jurisdiction and custody of X.T.B. The documentary evidence and witnesses relevant to the issues in dispute were located primarily in Hennepin County. The trial court properly exercised its discretion in finding good cause to deny the transfer based on *forum non conveniens*.

C. Appellants cannot demonstrate a clear abuse of discretion.

The district court record contains sufficient evidentiary support for the trial court’s findings that the petitions to transfer custody were brought at an advanced stage of the proceeding, and that a transfer of jurisdiction to the tribal court could have caused undue

hardship to the parties. The trial court carefully considered and respected the rights of the Tribe to intervene and participate in the case, and was sensitive to the purposes of the ICWA and the MIFPA. The trial court properly exercised its discretion in denying the transfer of jurisdiction and its decision should not be reversed absent evidence of a clear abuse of discretion. Welfare of the Children of C.V., No. A04-441, 2004 Minn.App.LEXIS 1250 (Minn. Ct. App. November 9, 2004) (unpublished opinion).

II. THE COURT ORDER TRANSFERRING CUSTODY OF X.T.B. IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

Consistent with the level of proof generally required in child protection proceedings, the allegations of a petition for permanent placement must be proved by clear and convincing evidence. Minn. R. Juv. P. 39.04 (2004). The reviewing court determines on appeal whether the trial court's findings address the statutory criteria and are supported by "substantial evidence," or whether they are clearly erroneous. Welfare of A.R.G.-B., 551 N.W.2d 256, 261 (Minn.Ct.App. 1996)

B. The trial court's findings address the statutory criteria, are supported by substantial evidence, and are not clearly erroneous

The evidence introduced at the hearing clearly and convincingly establishes that it is in X.T.B.'s best interests for his custody to be permanently transferred to S.G. Neither of the parents sought custody for themselves. Contrary to the arguments of Appellant G.W. (Appellant G.W.'s Brief, pp. 26-30), the trial court properly considered and rejected placement of X.T.B. with B.W. or A.G.M. The evidence is clear and convincing that placement of X.T.B. in S.G.'s custody was in his best interests.

The ICWA and MIFPA establish placement preferences in certain circumstances *absent good cause to the contrary*. The trial court's findings of fact describe at length the "good cause" for not placing X.T.B. with B.W. or A.M.G. With regard to B.W., see Findings of Fact and Order for Transfer of Legal Custody, Finding Nos. 23-29, 38.4; Order Denying Motion For New Trial, Findings of Fact Nos. 6, 7. With regard to A.M.G., see Findings of Fact and Order for Transfer of Legal Custody, Finding Nos. 12-15; Order Denying Motion For New Trial, Findings of Fact Nos. 4, 8. The trial court also considered the issue of placement of X.T.B. with other paternal or maternal relatives. See Findings of Fact and Order for Transfer of Legal Custody, Finding No. 30; Order Denying Motion For New Trial, Findings of Fact No. 8. The trial court determined that there was good cause for placing X.T.B. outside the order of preference established by ICWA. Findings of Fact and Order for Transfer of Legal Custody, Finding No. 39; Order Denying Motion For New Trial, Findings of Fact No. 4.

The trial court also properly addressed X.T.B.'s best interests in ordering custody to S.G. Findings of Fact and Order for Transfer of Legal Custody, Finding Nos. 17, 18, 32-38, 40, 41.

The trial court's findings address the statutory criteria, are supported by substantial evidence, and are not clearly erroneous.

III. THE JUVENILE COURT HAD SUBJECT MATTER AND PERSONAL JURISDICTION OVER THE CHILD

A. The court had subject matter jurisdiction

1. Standard of Review

An appellate court reviews de novo the existence of subject matter jurisdiction. State Farm Mutual v. Ahmed, 689 N.W.2d 306 (Minn. Ct. App. 2004). Because subject matter jurisdiction goes to the authority of the court to hear a particular class of actions, lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal. [citations omitted] Welfare of the Children of: C.W. and R.E.M., A05-1081, 2005 Minn. App. Unpub. LEXIS 547 (December 6, 2005).

2. X.T.B. was alleged to be a child in need of protection and services and was the subject of termination of parental rights proceedings.

Minn. Stat. §260C.10, Subd. 1 provides that the juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services. Minn. Stat. §260C.10, Subd. 2(a) provides that the juvenile court has original and exclusive jurisdiction in proceedings concerning the termination of parental rights to a child. In this case, X.T.B. was alleged to be in need of protection or services, and X.T.B. was the subject of termination of parental rights proceedings.

The facts supporting allegations that X.T.B. was a child in need of protection and services in November 2003 included the following: T.T.B. was 17 years old; she was a minor and recently had been herself the subject of a CHIPS proceeding; she had been residing in a residential treatment program; she had a child, A.G., who was a child in need of protection and services and subject to the jurisdiction of the juvenile court; she

had concealed her pregnancy with X.T.B. from child protection workers and the juvenile court; she failed to appear at court hearings in October and November concerning the welfare of her child, A.G.; the trial court was misled as to the reason(s) for her non-appearance on November 10, 2003; T.T.B. was X.T.B.'s sole legal custodian. These facts and others establish that X.T.B. was a child in need of protection and services in November 2003.

Appellants' reliance upon the Minn. Stat. §260C.175 and In Re Shady, 118 N.W.2d 449 (Minn. 1962) is misplaced. The issue of the court's subject matter jurisdiction is distinct from the issue of the court's authority to order the immediate custody of a child.

Even assuming *arguendo* the applicability of Minn. Stat. §260C.175 and In Re Shady, the facts in this case establish the juvenile court's subject matter jurisdiction. In In Re Shady, there were no facts in the court record demonstrating that the child was in need of protection or services; the child was not in his mother's custody, who was alleged to be an unfit parent; the child was in the father's care, and the father desired to have custody; neither the father nor the mother consented to relinquish custody of the child. In this case, there were facts in the court record, described above, demonstrating that X.T.B. was a child in need of protection or services; X.T.B. was in his mother's care, who was alleged to be an unfit parent with regard to A.G.; neither father nor mother desired to have custody of X.T.B., but traveled to Rhode Island to relinquish custody to A.M.G.

In Welfare of the Children of: C.W. and R.E.M., A05-1081, 2005 Minn. App. Unpub. LEXIS 547 (December 6, 2005), the Minnesota Court of Appeals determined that a district court does not 'lose' its jurisdiction to hear a TPR case based upon a technical error in a prior CHIPS disposition. Similarly, in this case, even assuming *arguendo* that there may have been a technical error in the initial drafting of the permanency petition, the facts before the trial court in November 2003 established that X.T.B. was a child in need of protection and services and that the juvenile court had original and exclusive subject matter jurisdiction over the proceeding.

B. The court had personal jurisdiction over X.T.B.

1. Standard of Review

The determination of whether personal jurisdiction exists is a question of law that appellate courts review de novo. Patterson vs. Wu Family Corporation, 608 N.W.2d 863 (Minn. 2000).

2. The facts support the exercise of personal jurisdiction over X.T.B.

Appellant's argue that the courts of the state of Rhode Island, and not of Minnesota properly had personal jurisdiction of X.T.B. in 2003. However, Rhode Island determined that the courts of Minnesota properly had jurisdiction.

Minnesota properly exercised personal jurisdiction over X.T.B. In November 2003, T.T.B.'s child A.G. was personally subject to the jurisdiction of the Hennepin County juvenile court in a CHIPS proceeding, as was T.T.B. See Minn. Stat. §260C.101, Subd. 4. The issue of T.T.B.'s parenting abilities with regard to A.G. was essentially the same as the issue of T.T.B.'s parenting abilities with regard to X.T.B.

Appellants' argument that, in the context of custody determinations, the state of the child's domicile is the state with the power to determine custody of the child, is incomplete. Since Minnesota is exercising its police powers in child protection matters, its interests and powers are different than in the context of custody determinations.

Even in the context of custody determinations, where children have been forcibly removed by a parent from Minnesota, Minnesota retains jurisdiction to determine custody. Willmore v. Willmore, 273 Minn. 537; 143 N.W.2d 630 (Minn 1966). The courts do not simply consider a child's domicile in deciding jurisdictional matters, but decisions rest on the policy of 'comity' and practical considerations - such as which state has the greatest interest in the child. In Re Longseth v. Wisconsin, 282 Minn. 28, 162 N.W.2d 365 (Minn. 1968). The provisions of the Uniform Child Custody Jurisdiction and Enforcement Act that permit states to accept or decline jurisdiction on the basis of a party's bad acts, or considerations of forum non conveniens, are instructive. Minn. Stat. §518D.201, §518D.207, §518D.208. The law with regard to jurisdiction in custody matters, therefore, supports the determination of Rhode Island and of the trial court that personal jurisdiction of X.T.B. in this matter was most appropriately exercised by the courts of Minnesota.

3. Appellants waived their objections to the exercise of personal jurisdiction over X.T.B.

Any party may bring a motion to dismiss the petition based upon lack of jurisdiction over the child. Minn. R. Juv. Prot. P. 15.04. However, an objection to personal jurisdiction can be waived, or for various reasons, a defendant may be

estopped from raising the issue. Welfare of the Children of: C.W. and R.E.M., A05-1081, 2005 Minn. App. Unpub. LEXIS 547 (December 6, 2005); Patterson vs. Wu Family Corporation, 608 N.W.2d 863 (Minn. 2000).

The issue of waiver or estoppel should be considered in the context of this proceeding that involves the welfare of X.T.B. He is not a defendant. The legal system is designed to protect him and make decisions in his best interests, and he should benefit from the exercise of the court's jurisdiction.

An objection to personal jurisdiction may be waived if not asserted seasonably. In a child protection proceeding, time is of the essence. Appellants did not make this objection in the Minnesota court proceedings, and the trial court had no opportunity to consider and rule on the objection. In addition, Appellants participated extensively in the court proceedings, including trial.

For these reasons, Appellants have waived, or should be estopped from raising an objection to personal jurisdiction of the court over X.T.B.

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A.G.M.'S MOTION TO INTERVENE AS A PARTICIPANT

A. Standard of Review

The appropriate standard of review for a district court's decision on a motion to intervene as a participant is abuse of discretion. J.W. v. C.M., 627 N.W.2d 687 (Minn. Ct. App. 2001).

B. The trial court did not abuse its discretion

Minn. R. Juv. Prot. P 22.01(i) provides that participants shall include any other person "deemed by the court" to be important to a resolution that is in the best interests of the child. Minn. R. Juv. Prot. P. 23.02 provides that a person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child. These provisions grant broad discretion to the court. The trial court determined that A.M.G., B.W. and S.G. were equally important as potential custodians of X.T.B. but that none of them needed to be participants in order to resolve the child protection matter. T. Vol. III, p. 8. The court noted that it might not be in X.T.B.'s best interests to make only A.M.G. a participant. T. Vol. III, p. 8.

The trial court did not abuse its discretion in denying the motion.

C. Appellant can demonstrate no harm

The trial court authorized notice of the hearings to be given to A.M.G. T. Vol. III, p. 8. A.M.G. continued to offer information to the court. Appellants offered information on behalf of A.M.G. to the court. Appellant G.W. can demonstrate no harm by the trial court's ruling.

CONCLUSION

The juvenile court had subject matter and personal jurisdiction over X.T.B. The trial court did not abuse its discretion in denying the petition to transfer jurisdiction to the tribal court. The trial court did not abuse its discretion in denying A.G.M.'s motion to intervene as a participant. The court order transferring custody of X.T.B. to S.G. is supported by substantial evidence and should be affirmed.

Respectfully submitted,

Dated: _____

1-6-06



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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).