In The

Supreme Court of Virginia

RECORD NO. 131584

DINWIDDIE DEPARTMENT OF SOCIAL SERVICES,

Appellant,

v.

RENEE BAGLEY NUNNALLY and TIMOTHY B. NUNNALLY,

Appellees.

BRIEF OF GUARDIAN *AD LITEM*

Sherry L. Gill (VSB No. 38269)
JACOBS CAUDILL & GILL
5608 Grove Avenue
Richmond, Virginia 23226
(804) 440-6200 (Telephone)
(804) 440-6203 (Facsimile)
attysgill@verizon.net

Guardian ad Litem

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

STATEMENT OF THE CASE 2

AUTHORITIES AND ARGUMENT 11

I. The Court of Appeals of Virginia erred in creating a new standard for deciding matters of Transfer under ICWA. In creating a new standard, the Court of Appeals rejected the trial court's finding of good cause, disregarded the Commonwealth's well-established "best interests" doctrine, and vacated Orders terminating the parental rights of both Mother and Father. In actuality, the trial court acted in compliance with 25 U.S.C. § 1901 *et seq*. and, therefore, did not err 11

A. Standard of Review 11

B. Indian Child Welfare Act 12

C. Argument 13

II. The Court of Appeals of Virginia and the trial court erred in failing to consider the Existing Indian Family Doctrine in its analysis 21

CONCLUSION 25

CERTIFICATE 27

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Brown,
30 Va. App. 532, 518 S.E.2d 336 (1999) 11

Chester County Dept. of Social Services v. Coleman,
296 S.C. 355, 372 S.E.2d 912 (1978) 13

Hampton v. J.A.L.,
658 So. 2d 331 (La. Ct. App. 1995) 23

In Re A.B.,
2003 N.D. 98, 663 N.W.2d 625 (2003) 16

In re Bridget R.,
41 Cal. App. 4th 1483,
49 Cal. Rptr. 2d 507 (1996 Cal. Ct. App. 13 Dist. 1996) 22

In Re M.S.,
2010 OK 46, 237 P.3d 161 (2010) 16, 17

In the Matter of A.J.S.,
288 Kan. 429, 204 P.3d 583 (2009) 20

Logan v. Fairfax County Dep't of Human Development,
13 Va. App, 123, 409 S.E.2d 460 (1991) 15

Mississippi Band of Choctaw Indians v. Holyfield,
490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989) 19, 22

Rye v. Weasel,
934 S.W.2d 257 (Ky. 1996) 23

S.A. v. E.J.P.,
571 So. 2d 1187 (Ala. Civ. App. 1990) 22

Thompson v. Fairfax County Department of Family Services,
___ Va. App. ___, 747 S.E.2d 838 (2013) 11, 25

Tombs v. Lynchburg Div. of Soc. Servs.,
223 Va. 225, 228 S.E.2d 794 (1990) 15

STATUTES

25 U.S.C. § 1901 *et seq.* .....*passim*

25 U.S.C. § 1901(5) 12

25 U.S.C. § 1902..... 12

25 U.S.C. § 1902(4) 12

25 U.S.C. § 1911..... 7, 9

25 U.S.C. § 1911(a) 19

25 U.S.C. § 1911(b) 13, 19, 20, 21

25 U.S.C. § 1911(c) 20, 21

25 U.S.C. § 1912(e) 16

25 U.S.C. § 1912(f) 16

25 U.S.C. § 1914..... 10

Va. Code § 4.1-406 14

Va. Code § 8.01-217 14

Va. Code § 16.1-228 6

Va. Code § 16.1-241(A)(1) 5

Va. Code § 16.1-242(B)(4) 15

Va. Code § 19.2-306 14

RULES

Va. Sup. Ct. R. 1:A:4 9

Va. Sup. Ct. R. 5:5 14

Va. Sup. Ct. R. 5:9 14

Va. Sup. Ct. R. 5:11 14

Va. Sup. Ct. R. 5:21 14

Va. Sup. Ct. R. 5:23 14

Va. Sup. Ct. R. 5:25 14

Va. Sup. Ct. R. 5:26 14

Va. Sup. Ct. R. 5:37 14

OTHER AUTHORITIES

H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21,
reprinted in 1978 U.S.C.C.A.N. 7530 13

House Report 95 (1978) 25

Wamser, Child Welfare Under the Indian Child Welfare Act of 1978:
A New Mexico Focus, 10 N.M.L. Rev. 413 (1980) 25

INTRODUCTION

This appeal originates from Petitions to terminate parental rights filed by a local Department of Social Services, and the Circuit Court's (trial court) Orders denying transfer of the cases to a Tribal Court. The Mother is a member of The Citizen Potawatomi Nation, which makes the infant children eligible for membership in that tribe. As such, the cases are impacted by federal statute, the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (hereinafter "ICWA"). It is the position of this Guardian *ad litem* (hereinafter "GAL") that ICWA and the laws of the Commonwealth of Virginia must co-exist in one homogenous statutory arrangement to protect the best interests of the Indian children. Where ICWA is incomplete, we must look to Virginia law to fill the void. Where ICWA's construction fails to provide for its practical application to the unique facts of a case, we must, likewise, look to Virginia law to fill the void. Newly created Virginia law must not add to the difficulty of ICWA's practical application. This GAL respectfully asserts the trial court found that balance between federal and state law that ultimately served to protect the best interests of these minor children. This GAL supports the trial court's finding that good cause existed to deny the motions to transfer to the Tribal Court. The recent decisions of the Court of Appeals serves only to further complicate an

already complex situation, disregards a long-established "best interests" doctrine of family law, and disturbs the delicate balance the trial court struck between federal and state law.

ASSIGNMENTS OF ERROR

I. The Court of Appeals of Virginia erred in creating a new standard for deciding matters of Transfer under ICWA. In creating a new standard, the Court of Appeals rejected the trial court's finding of good cause, disregarded the Commonwealth's well-established "best interests" doctrine, and vacated Orders terminating the parental rights of both Mother and Father. In actuality, the trial court acted in compliance with 25 U.S.C. § 1901 *et seq*. and, therefore, did not err. (The Court of Appeals imposed the new standard in its ruling on the appeal, so this is this GAL's first opportunity to preserve this assignment of error).

II. The Court of Appeals of Virginia and the trial court erred in failing to consider the Existing Indian Family Doctrine in its analysis. (J.A. 593-604, 605-615; Brief of GAL, Recs. No. 1713-12-2, 1724-12-2, 1725-12-2, 1726-12-2 at 10-11)

STATEMENT OF THE CASE

This case involves five year old twins, RN and TN (hereinafter "twins"). These infant children are the biological children of Renee Bagley Nunnally (a.k.a. Renee Marie Bagley, hereinafter "Mother"), who possesses 1/8 degree of The Citizen Potawatomi Nation blood, and Father Timothy Nunnally (hereinafter "Father'), a non-Indian. From their birth on February 27, 2009 up until their placement with the Dinwiddie County Department of Social Services (hereinafter "DSS"), the twins resided in the County of

Dinwiddie, Virginia. At no time have either of the twins resided on, or been domiciled within, a reservation of any tribe, or been a ward of a tribal court. Additionally, during the mother's entire pregnancy, she resided within the Commonwealth of Virginia. At no time have the twins been properly subject to any prior Orders of any Tribal Court. The twins were not enrolled with any tribe until application was made on April 18, 2011, after the twins were placed in the Legal and Physical Custody of Dinwiddie DSS. Said application was not made by a parent or legal guardian of the twins, nor was it authorized by DSS, the legal and physical custodian of the twins at the time application was made.

This GAL's appointment to serve the best interests of the twins originated on August 3, 2010, pursuant to the entry of a Child Protective Order against both the Mother and Father by the Dinwiddie County Juvenile & Domestic Relations Court. (J.A. 448-451) Also on this day, Mother was convicted of Contributing to the Delinquency of a Minor, relative to the endangerment of the twins. (J.A. 446-447) Issues relative to the home environment far surpassed this isolated incident and DSS notified the Tribe of the problems. (J.A. 477, 519) There was no response from the Tribe. Ultimately, due to continued concerns for the safety and welfare of the twins, a Family Engagement Meeting (hereinafter "Meeting") was held

on November 4, 2010. Mother and Father were present and acknowledged they were living in separate residences, and had unilaterally placed each of the twins with a family member. Maternal Grandmother, a Maternal Aunt, a Paternal Aunt, as well as other family members, were also present at the meeting, along with this GAL, DSS representatives, and the Intensive In-home service providers (who were already providing intensive in-home services to the family due to concerns for two of Mother's older children, who had recently been placed in Mother's care by the Tribe pursuant to a home visit and a subsequent guardianship agreement (J.A. 478-479)). At the meeting, Mother and Father admitted their inability to care for the twins. Each parent identified the major issues that prevented them from properly parenting the twins, and each requested services from DSS in an effort to address these issues. Mother and Father determined the twins should be placed together and in the care of the Maternal Aunt (a Member of the Tribe and Father's 1st ex-wife). (J.A. 467)

At the Meeting, Maternal Grandmother reported she had contacted the Tribe several weeks prior, to report the significant problems that existed within Mother's home, as well as Mother's current inability to parent. (J.A. 465) As a result, the Tribe, once again, removed Mother's two older children, and temporarily placed them in Maternal Grandmother's care.

Maternal Grandmother, at the Tribe's direction, took the two older children to Florida for permanent placement. Of significance is the fact the Tribe failed to take any action with regard to the twins, despite their knowledge from a prior home visit, that they existed. And further, neither Mother, or any member of the maternal family, made any request of the Tribe for services for Mother or the twins. Despite its knowledge of the issues as communicated by DSS via correspondence and as reported to it by the Maternal Grandmother, the Tribe did not offer any services at that time. And specifically, there was never a request for Tribal intervention on behalf of Mother or the twins.

Based on concerns for the children's welfare, the current needs of the twins (i.e., Maternal Aunt needed authority to pursue overdue medical care and vaccinations), and the significant level of services requested by the Mother and Father, this GAL filed a CHINS (Child In Need of Services) Petition for each child on November 4, 2010 (the same day as the Meeting) with the Dinwiddie County Juvenile & Domestic Relations District Court. (J.A. 558-559) Virginia Code Section 16.1-241(A)(1) establishes the jurisdiction of the Juvenile & Domestic Relations District Court as matters pertaining to "[t]he custody, visitation, support, control, or disposition of a child who is alleged to be abused, neglected, in need of services,...except

for where the jurisdiction of the juvenile court has been terminated or divested." Said Petition requested the Court's determination that each child was a Child In Need of Services (CHINS). Pursuant to Virginia Code Section 16.1-228, a "Child In Need of Services" is defined as:

> "[A] child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child or (ii) a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person; however, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be a child in need of services, nor shall any child who habitually remains away from or habitually deserts or abandons his family as a result of what the court or the local child protective services unit determines to be incidents of physical, emotional or sexual abuse in the home be considered a child in need of services for that reason alone.
>
> However, to find that a child falls within these provisions, (i) the conduct complained of must present a clear and substantial danger to the child's life or health or to the life or health of another person, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family."

An initial hearing on the CHINS Petitions was held November 9, 2010. At the hearing, the evidence was summarized, and the CHINS Order was entered, but only after the Court made its own independent inquiry of each parent to ensure his/her agreement with respect to each and every

provision of the Consent Order. (J.A. 511-515) Upon inquiry, each parent responded in the affirmative. The CHINS cases were continued on the juvenile court's docket to January 21, 2011, for review. On January 21, 2011, the parents had not yet begun to address all of the provisions of the CHINS Order, and the matters were again continued to April 15, 2011 to give Mother and Father additional time to begin services.

On the eve of the April 15th hearing, information that reflected a blatant disregard of the CHINS Order by the Maternal Aunt, Mother and Father, and that tended to endanger the safety and welfare of the twins, was reported and investigated. This information was received within the forty-eight (48) hours that immediately preceded the hearing. Based on the results of the investigation, coupled with the parents' failure to comply almost completely with the services and treatment they had requested, the Court placed the twins in the legal and physical custody of DSS. (J.A. 516-518)

On April 19, 2011, the following Tuesday, the Tribe filed a "Notice of Intervention and Motion to Transfer Case Under 25 U.S.C. 1911." On May 31, 2011, the Tribe filed a "Motion to Withdraw Request to Transfer Case" under 25 U.S.C. § 1911. (J.A. 556-557) Their Motion to Withdraw cites the

Tribe's inability to "provide the services necessary to assist the family toward their goal of reunification" as the basis for its withdrawal. Id.

Based on DSS' long history with the family, to include many failed attempts at rehabilitation, as well as a prior Involuntary Termination of Parental Rights for the Mother, DSS filed a Petition for Foster Care Review, denoting a single Goal of Adoption. (J.A. 521-540, 549-552) Notice of Hearing, along with the Petition, was sent to the Tribe, as is required by ICWA. (J.A. 553-555) On June 9, 2011, Counsel for Mother filed a "Motion For Continuance," indicating his notice to the Tribe. Mother's "Motion For Continuance" was granted. Father was advised of his right to counsel, Father waived his right to counsel. The matter was, once again, continued to June 21, 2011 for hearing.

On June 21, 2011, Mother and Father were present, but the Tribe failed to make any appearance. After hearing the evidence, the Court approved the Goal of Adoption for the twins. There was no objection to the goal of Adoption, and no appeal of the goal was filed. (J.A. 541-548) With an approved goal of Adoption, DSS presented its Petitions to Terminate Parental Rights. (J.A. 1-4) The Petitions were served on the parents that same day, and Notice was given to the Tribe as is required by ICWA. (J.A. 712-734)

On July 5, 2011, the Tribe filed its "Renewed Notice of Intervention and Motion to Transfer [the] Case Under 25 U.S.C. 1911 And Request For Hearing", more than a month *after* it received Notice that DSS intended to pursue the Goal of Adoption for the twins. Too, the Goal had already been approved by the Court.

On July 27, 2011, Mother filed a "Motion" indicating her intent to join in the Tribe's Motion to transfer the case to the Tribal Court. On July 29, 2011, a Hearing was held on the Tribe's Motion. It was determined that Tribal counsel had not followed the required protocol to properly appear in Virginia courts and, as a result, the documents filed by the Tribe were void, pursuant to Virginia Rule 1:A:4. Mother's Motion was dismissed as she could not "join" matters deemed to be void.

On September 9, 2011, the Tribe filed a "Notice of Intervention and Motion to Transfer Case Under 25 U.S.C. 1911 and Request For Hearing." Father also filed a "Motion to Transfer" on this date. On September 13, 2011, Mother filed a "Motion to Transfer." On September 16, 2011, a Hearing was held on the Motions to Transfer. The Motions were denied because DSS presented clear and convincing evidence that Good Cause existed to deny the Transfer of the matters to the Tribal Court. (J.A. 5-8) The Tribe's Motion to Intervene, however, was granted. Id.

On October 7, 2011, Father filed a "Motion to Invalidate Proceedings Pursuant to 25 U.S.C. 1914." The Tribe filed an "Objection to Termination of Parental Rights of Indian Children Pursuant to 25 U.S.C. 1901 et seq. and Motion to Dismiss Petition." On October 13, 2011, Mother filed a "Motion to Invalidate Proceedings Pursuant to 25 U.S.C. 1914." A hearing was scheduled for October 14, 2011. Due to DSS's inability to produce an "expert witness" in accordance with ICWA the Petitions to Terminate Parental Rights were denied. (J.A. 9-20)

DSS and this GAL timely noted their respective appeals to the Circuit Court for the County of Dinwiddie, providing Notice to Mother, Father and the Tribe. (J.A. 21-28) The Circuit Court heard evidence on January 9, 2012; January 30, 2012; June 4, 2012; and September 11, 2012. At the conclusion of the Circuit Court hearing on January 9, 2012, the Court denied the Motions to Transfer, having found good cause not to transfer the cases to the Tribal Court. (J.A. 632-711) At the conclusion of the Circuit Court hearing on September 11, 2012, the Court terminated the parental rights of both Mother and Father. (J.A. 746-815) Mother and Father noted their respective appeals to the Court of Appeals of Virginia. The Court of Appeals reversed the Circuit Court's decision on the issue of Transfer, vacated the Orders terminating parental rights, and remanded the matter

back to the Circuit Court for reconsideration in light of a newly created standard set forth in *Thompson v. Fairfax County Department of Family Services*, ___ Va. App. ___, 747 S.E.2d 838 (2013). (J.A. 816-821) DSS and this Guardian *ad litem* noted their appeal to this Honorable Court.

AUTHORITIES AND ARGUMENT

I. The Court of Appeals of Virginia erred in creating a new standard for deciding matters of Transfer under ICWA. In creating a new standard, the Court of Appeals rejected the trial court's finding of good cause, disregarded the Commonwealth's well-established "best interests" doctrine, and vacated Orders terminating the parental rights of both Mother and Father. In actuality, the trial court acted in compliance with 25 U.S.C. § 1901 *et seq*. and, therefore, did not err.

A. Standard of Review

Factual determinations made by a trial court, to include whether good cause exists as well as that which constitutes the best interests of a child, shall only be reviewed for an abuse of discretion and, therefore, will not be overturned unless it was plainly wrong or without evidence to support it. See *Brown v. Brown*, 30 Va. App. 532, 538, 518 S.E.2d 336, 338 (1999) ("As long as evidence in the record supports the trial court's ruling and the trial court has not abused its discretion, its ruling must be affirmed on appeal.").

B. Indian Child Welfare Act

When applying the Indian Child Welfare Act of 1978 (hereinafter "ICWA"), at U.S.C. § 1901, et. seq., it is appropriate to review the purpose for which the law was enacted. In the 1960-70's there was a concern relative to the number of Indian Families being separated due to the *unwarranted* removal of Indian children from their community, and placed into "non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1902(4), *emphasis added*. 25 U.S.C. § 1902 sets forth the policy of ICWA as "to protect the best interests of Indian children". ICWA established a minimum standard for the removal of Indian children due to a recognition that the States, in exercising jurisdiction over Indian child custody proceedings *prior to 1978*, "have often failed to recognize the essential tribal relations of Indian people and cultural and social standards prevailing in Indian communities and families". 25 U.S.C. § 1901(5). In other words, this law has been enacted to prevent the destruction of *Indian homes* and *Indian customs*, based upon a lack of understanding by the State Courts of the tribal and cultural norms. (emphasis added)

C. Argument

25 U.S.C. § 1911(b) provides that,

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled within the reservation, 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. (emphasis added)

Thus, there are three specific instances in which the jurisdiction shall not transfer. The first two instances are self-explanatory: either a parent objects, or the tribe declines jurisdiction. Id. The third instance, however, requires the trial court to find good cause *not* to transfer. Id. Good cause is not defined in the text of ICWA. "The legislative history of ICWA states that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Chester County Dept. of Social Services v. Coleman*, 372 S.E.2d 912, 914 (S.C. Ct. App. 1978) (citing H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21, reprinted in 1978 U.S.C.C.A.N. 7530, 7544). ICWA's "good cause" provision, therefore, allows for a plethora of adequate reasons not to transfer. In seeking to reconcile the realties presented in each unique case, with the incompleteness of this ICWA provision, various

states have identified bases that constitute “good cause” not to transfer the proceedings to the jurisdiction of a Tribe, to include the best interests of the child, forum non conveniens, advanced stage of the proceedings, and an Existing Indian Family Doctrine.

We must look to the essence of Virginia’s law when developing a defining what this Commonwealth deems sufficient to satisfy “good cause.” Courts throughout this Commonwealth are required to find “good cause” in a multitude of situations. (See Va. Code § 8.01-217 (requiring trial court to find “good cause” relative to applications for name change); Va. Code § 4.1-406 (good cause to alter winery agreements); Va. Code § 19.2-306 (good cause to revoke suspended sentence); Rule 5:5 of the Rules of the Supreme Court of Virginia (…a showing of “good cause” sufficient to excuse the delay), as well as Rules 5:9, 5:11, 5:21, 5:23, 5:25, 5:26, and 5:37). Where ICWA is incomplete and, indeed, designed to allow for state court determination, we must rely on the experience of the trial court, which is routinely called upon to make “good cause” findings pursuant to Virginia rules and statutes.

It is not appropriate for the Court of Appeals to design a new standard that is not contemplated by ICWA, nor has ever been contemplated by the history or laws of this Commonwealth. In defining “good cause,” this

Commonwealth must reflect its well-established history of recognizing and considering the best interest of the child. (*Logan v. Fairfax County Dep't of Human Development*, 13 Va. App, 123, 126, 409 S.E.2d 460, 463 (1991); see also *Tombs v. Lynchburg Div. of Soc. Servs.*, 223 Va. 225, 23-31, 228 S.E.2d 794, 796 (1990), Va. Code Section 16.1-242(B)(4).

In the instant case, the trial court was afforded a veritable cornucopia of evidence that showed that the continued custody of the children by the parents would lead to the children being harmed. (J.A. 461-469) The record reflects that in November 2012, the children came to the attention of the court when they were found crawling in the street in the dark and nearly hit by a car, while Mother was asleep, and the Father wasn't home due to a domestic event the day prior. (J.A. 448-451, 446-447) The Mother had a long history of substance abuse in addition to her own testimony that she had all of her other children removed from her care under a variety of circumstances. (J.A. 521-540) Aside from the twins, five of the mother's children had been previously placed for adoption, and another was previously in foster care and then committed under the serious offender statute to the Department of Juvenile Justice. The father has an extensive criminal history, including domestic violence and substance abuse. (J.A. 472) The trial court had before it multiple home studies, psychological

examinations of the parents, drug screens, and outlines of all the previous services afforded to Mother and Father by DSS and other providers. (J.A. 461-476) Mother was even convicted of child neglect in relation to the children at issue. (J.A. 446-447) The trial court properly denied the Motions to Transfer, as the expert testimony did not stand alone, but added to the overwhelming evidence that these children suffer imminent harm if allowed to remain with their parents, thereby satisfying 25 U.S.C. § 1912(e) and (f) and proving that it was not in the best interests for the twins to return to the care of Mother and Father. (J.A. 632-711) Too, it should be noted that the children had to be removed from a maternal relative, another member of the Tribe, for violating the Court's Order in unison w/ the parents that, once again, placed the children at risk. (J.A. 516-518)

Further, it would be improper to transfer the matter to the Tribal Court due to the advanced stage of the proceedings, which was exacerbated by the Tribe's untimely delay. It is helpful to review the Bureau of Indian Affairs guidelines which contemplate a factor for determining when a motion to transfer is not timely. One factor for determining whether the motion to transfer is timely is whether the transfer, if granted, "would lead to a retrial". *In Re M.S.*, 2010 OK 46, citing *In Re A.B.*, 2003 N.D. 98. It is clear from the testimony presented by the Tribe at trial that re-trial would be

necessary if the transfer were granted. Lisa Herbert, a representative for the Tribe, testified that a new Guardian *ad litem* would be appointed, a plan would be reviewed for services to the family, the Tribal court would set a new timeline, and send out new notices to the families.

It is further compelling that the Bureau of Indian Affairs, Guideline for State Courts Indian Child Custody Proceeding (herein after "BIA"), speaks directly to the issue of how timeliness of transfer motions can create good cause not to transfer. BIA C.1. Commentary states that,

> 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. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.
>
> 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*. (emphasis added)

In addition to acknowledging this one particular factor, *In Re M.S.* goes on to recognize that whether a motion to transfer should be granted is a "case by case basis"; this makes the timeline, and each parties' actions, particularly relevant in examining whether the motion to transfer was made

timely. Id. In the instant case, the Tribe filed their initial motion to transfer on April 19, 2011, only days after the twins were placed with DSS on an emergency basis. In their filing, the Tribe represents that neither parent objected to the transfer. By May 31, 2011, the tribe withdrew their motion to transfer, but did not withdraw their motion to intervene. In its pleading to withdraw, the Tribe represented it was *unable to provide services* to the family. On June 1, 2011, the Department of Social Services presented a Foster Care plan with a goal of adoption, giving Notice to the Tribe pursuant to the protocol set forth in ICWA. On June 21, 2011, the goal of adoption was approved by the Juvenile and Domestic Relations District Court. Immediately thereafter, Petitions to Terminate the Parental Rights were filed and served upon the parents. It wasn't until July 5, 2011, after the goal of adoption was approved by the Juvenile and Domestic Relations District Court, that the Tribe re-filed their motion to transfer. This filing was found to be void because Tribal counsel did not follow the required protocol to properly appear in Virginia courts, pursuant to Virginia Rule 1:A:4. It was not until September 9, 2011 that the Tribe finally filed a proper Motion to Transfer the cases to the Tribal Court. Thus, the Tribe's motion was not timely, and the blame for the delay rests squarely on the Tribe's shoulders.

In *Mississippi Band of Choctaw Indians v. Holyfield*, the children similarly were born and lived over 200 miles away from the reservation and had never been on the reservation. However, in *Holyfield*, the children were only one month old when the parents executed the consent for adoption. While the Supreme Court heard the case while the children were 3, the case was initiated while they were infants. At that point, had the trial court of South Carolina applied the facts of the case and balanced the Uniform Child Custody Jurisdiction with ICWA, they would have arrived at a different result, and one that would not have been reversed by the Supreme Court. As the Supreme Court rightfully points out, "Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain… We have been asked to decide the legal question of *who* should make the legal custody determination concerning these children – not what the outcome of that determination should be." 490 U.S. at 53, 109 S. Ct. 1611, 104 L. Ed. 2d at 49-50 (emphasis in original). This decision, however, was focused upon the *exclusive* jurisdiction described in 25 U.S.C. § 1911(a), which is not the fact pattern in the instant case. However, as indicated in the Court's dicta, if the Supreme Court had the twins' set of facts before it such that its focus was on 25 U.S.C. § 1911(b), the Court, most assuredly, would have seized the

opportunity to evaluate the children's best interest in its application of ICWA.

Finally, the application of *In the Matter of A.J.S.*, is compelling in that it discusses the controversy of a denial of a motion to intervene, rather than a motion to transfer jurisdiction. 288 Kan. 429, 204 P.3d 583 (2009). The mother of the child in *A.J.S.*, had no involvement in the tribe or its customs, and did not even know that the father was an enrolled member of the Cherokee Nation. The Kansas trial court denied the motion to intervene filed by the Cherokee Nation on the basis that ICWA wasn't applicable because the child had never been a part of an Indian family relationship. The Kansas Supreme overturned the decision of the trial court because of the failure to apply the clear language of ICWA. In the instant case, the motion to intervene was not denied; rather, it was the motion to transfer jurisdiction that was denied. (J.A. 632-711) This is an important distinction that is made clear by the very language of ICWA, § 1911(b) and § 1911(c). The plain language of these sections gives a very different standard for the ability of the tribe to intervene verses the transfer of jurisdiction. In fact, the intervention by the tribe, when the state court is so moved, had *no exceptions*, unlike the determination on whether to transfer the matter to the tribal court. Even in the instance where the state proceedings are quite

advanced prior to the tribe's intervention is still appropriate. For the Indian child or the Indian custodian of the child requesting intervention, upon a proper motion, *intervention* shall be permitted "*at any point in the proceeding".* 25 U.S.C. § 1911(c) (emphasis added). This language is simply not found in § 1911(b). Therefore it is clear, by the plain language of ICWA, that the determinations of when to transfer, and when to allow intervention, are quite different in application.

Hence, in this case, the trial court complied with ICWA. The trial court applied the language in 25 U.S.C. § 1911(b) to the facts in the instant case and found that good cause existed to not transfer the case to the Tribal Court on the basis of it was not in the best interests of the twins, and the case was in an advanced stage of the proceedings. In its determination of the appropriate jurisdiction, the Tribe was permitted to intervene and actively participated in all stages of the hearing.

II. The Court of Appeals of Virginia and the trial court erred in failing to consider the Existing Indian Family Doctrine in its analysis. (J.A. 593-604, 605-615; Brief of GAL, Recs. No. 1713-12-2, 1724-12-2, 1725-12-2, 1726-12-2 at 10-11)

The Policy of ICWA intends to recognize the essential tribal relations of Indian people, and seeks to cure what is perceived as the failure of state courts to exercise sensitivity to the unique values and social standards of Indian communities and families. This policy, however presupposes Indian

culture already existed in the child's home, the child's family, and/or the child's community. See *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989).

This GAL respectfully asserts that the twins were not genuinely part of any Indian community or family and, in fact, have no substantial connection with any Tribe. The children possess a minor blood connection to the Tribe, as their Mother is 1/8 blood connection and their Father is a non-Indian. That is the extent of their connection. Neither child has ever resided, nor been domiciled on the Tribe's reservation in Oklahoma. In fact, they have absolutely no connection to Oklahoma whatsoever. They have never lived in an Indian village or tribal environment. Neither parent thought it important to register the twins as members of the Tribe.

The Existing Indian Family Doctrine has been applied by the states in two different ways and, admittedly, has received mixed reviews. First, the Doctrine has been used by some courts to negate ICWA's application in cases in which the parents fail to have substantial political, social or cultural ties to the tribe where they are members. *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (1996 Cal. Ct. App. 13 Dist. 1996). Other states recognizing the Doctrine include, but are not necessarily limited to, Alabama (See *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990));

Kentucky (See *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996)); and Louisiana (See *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995)). Accordingly, under our facts, ICWA does not pertain to these minor children, or these proceedings, as their parents have not, and do not, have substantial political, social or cultural ties to the Tribe. To totally disregard the Doctrine would raise profound constitutional problems with ICWA. The statute would violate equal protection because the statute treats people differently solely on the basis of race.

Other states have applied the Doctrine as a part of the best interest analysis. As here, would it be in the best interests of the children to transfer jurisdiction to an entity who, despite actual knowledge of the twins being at risk in the home and under the care of Mother and Father, took no action to protect them and offered nothing to help stabilize the situation. The Tribe was notified that the twins were in harm's way via letter by DSS in June of 2010, was notified by the Maternal Grandmother of the conditions that existed in the home and Mother's inability to parent in November of 2010. (J.A. 465, 477, 519) It was at that time that the Tribe chose to remove the twins' older half-siblings from the environment. (J.A. 465) It was state resources, specifically Dinwiddie DSS and its designated vendors, in addition to the Dinwiddie Family Assessment and Planning

Team, that offered a plethora of services and financial support in an effort to provide treatment and stabilize the family. (J.A. 511-515) Ultimately, the twins had to be removed by a Court of this Commonwealth on an emergency basis, on April 15, 2011. (J.A. 516-518)

The Tribe finally formally acknowledges their concern for the twins in its filings of April 19, 2011. The Tribe *chose* not to participate when it withdrew its Motion to Transfer on May 31, 2011. (J.A. 556-557) The motion sites the "best interests" of the children as a basis for withdrawing.

Still, the Tribe was in error when it filed both the first and second motions to transfer by not obtaining local counsel. Even after its motion was dismissed for improper filing on July 29, 2011, the tribe still delayed until September 2011, to properly move the court to transfer and intervene. (J.A. 556-557) These delays alone created a five month period in which the children needed to be placed somewhere for their safety. The Commonwealth of Virginia, through its DSS and other agencies, kept the twins safe and provided for their needs and, based on these actions, the Commonwealth has created the stability and secure attachment that these children lacked at the time of placement and continue to need. (J.A. 228-328) DSS did a great deal of investigation in an attempt to place the children with family and several Home Studies were presented to the trial

court, each of the homes being unsuitable. Likewise, it attempted to consult with the Tribe, and the *only* placement possibility the Tribe presented was a family in Arizona with whom DSS could not engage in meaningful communication about their availability for placement. Even this family, by the Tribe's own admission, had not yet been certified by the State of Arizona.

By transferring jurisdiction to the Tribe, the Commonwealth would not only undue the efforts to cure the damage previously done by the Mother and Father but would, in fact, damage the twins. (J.A. 738-745)

CONCLUSION

Legislative history clearly indicates that Congress did not intend "to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." (House Report 95, 1978; Wamser, Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus, 10 N.M.L. Rev. 413, 416 (1980)). For the reasons set forth above, this Guardian *ad litem* respectfully seeks an Order from this Honorable Court rejecting the new standard created by the Court of Appeals in *Thompson*, and affirming the decision of the Circuit Court in denying transfer of these matters to the Tribal Court, as well as terminating the rights of both parents.

Respectfully submitted,
RN and TN, minor children

By: Sherry L. Gill, Guardian *ad litem*

Sherry L. Gill (VSB #38269)
Guardian *ad litem* for the minor children
Jacobs, Caudill & Gill
5608 Grove Avenue
Richmond, Virginia 23226
Telephone: (804) 440-6200
Facsimile: (804) 440-6203
attysgill@verizon.net

CERTIFICATE

I hereby certify that Rules 5:6 and 5:26(h) of the Rules of the Supreme Court of Virginia have been satisfied and that on this 14th day of May, 2014, fifteen bound copies of this "Brief of the Guardian *ad litem*" with one electronic copy on CD, were hand delivered to the Clerk's Office. On this same date, three copies, with one electronic copy on CD of the same was served, via U.S. Mail, postage prepaid to:

Joan M. O'Donnell, Esquire
110 N. 2nd Avenue
P.O. Box 518
Hopewell, Virginia 23860
Counsel for Dinwiddie County Department of Social Services

Lawrence D. Diehl, Esquire
Centre Court – Suite A
9401 Courthouse Road
Chesterfield, Virginia 23832
Counsel for The Citizen Potawatomi Nation

Marlene A. Harris, Esquire
P.O. Box 4279
Midlothian, Virginia 23112
Counsel for Timothy B. Nunnally

George H. Edwards, Esquire
Post Office Box 670
Chesterfield, Virginia 23832-670
Counsel for Renee Bagley Nunnally

Sherry L. Gill