In The

Supreme Court of Virginia

RECORD NO. 131584

DINWIDDIE DEPARTMENT OF SOCIAL SERVICES,

Appellant,

v.

RENEE BAGLEY NUNNALLY and TIMOTHY B. NUNNALLY,

Appellees.

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS

In response to assertions in the Tribe's brief, this case is most certainly about the fate of these twins. Three witnesses, two of whom qualified as experts, testified that the twins had strong positive bonds with their foster parents in January 2012 and that removing them from the home then (where they remain today) would have an extremely detrimental effect on their health and well-being. (J.A. at 196, 204-06, 234-45, 336-37, 452, 480).

The Tribal social worker testified that, should the trial court grant its motion to transfer, these twins would be removed from their foster home and placed with a new foster family in New Mexico or Oklahoma or both. (J.A. at 370-71, 376, 380). She testified that she planned to take the children with her ***that very day***. (J.A. at 376) (emphasis added). Surely it is not an exaggeration to state that the fate of the twins' mental well-being is at stake.

Furthermore, the Tribe's assertion that this case is merely about jurisdiction ignores practical realities. The Tribe's counsel testified that in addition to transferring jurisdiction, a transfer of proceedings to the Tribal Court would divest DSS of legal custody of the children. (J.A. at 400-03). Consequently, DSS would no longer be the petitioner to proceedings in

Oklahoma and would not participate at all unless it voluntarily subjected itself to jurisdiction of the Tribal Court and appeared as a witness. Id.[1]

The Tribe also made clear its intention to reconsider providing services to the parents in an attempt to reunite them with the twins. (J.A. at 403).[2] In fact, the Tribe's counsel candidly informed the trial court that once the case was transferred, the case would revert to the adjudicatory phase of the proceedings.[3] (J.A. at 393). The Tribal Court would then have a dispositional hearing to determine whether reunification was possible for the family. Id. As a result, the state court orders transferring custody to DSS and approving the Foster Care Service Plan with the goal of adoption would be nullified by the Tribal Court.[4]

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[1] It is unclear how legal custody of the children to the Tribe follows from a change in venue to the Tribal Court. ICWA does not address a transfer of custody under such circumstances, and as legal custodian DSS would remain an indispensable party to any proceeding in Tribal Court.

[2] Despite DSS' evidence of the family's lengthy history with DSS and the termination of the mother's parental rights with respect to siblings of these children. (J.A. at 130-42).

[3] Again, it is unclear how such an adjudication could possibly be made in the Tribal Court without the participation of DSS, its records and its witnesses from Dinwiddie.

[4] These orders were entered in separate proceedings concluded prior to DSS' petitions for termination of parental rights. No appeals were taken from those final orders, which now stand *res judicata* in the state courts of Virginia.

Finally, the Tribe and the mother elected not to intervene until the final legal stage of termination of parental rights.[5] The Tribe had notice of proceedings for two of the mother's older children. The Tribe was familiar with DSS' history with the mother since at least 2009. (J.A. at 137). The Tribe was also aware of the criminal proceedings in June 2010, the deterioration in the twins' home in November 2010, and the transfer of legal custody of the children to DSS in April 2011. (J.A. at 236-37, 272). The Tribe finally attempted to intervene in April 2011, but the father's ambivalence and a mistake by the Tribe's counsel caused further delay. (J.A. at 391). As a result, the motion to transfer was not properly filed until September 9, 2011. (J.A. at 5-6).

B. FIRST ASSIGNMENT OF ERROR

> The Court of Appeals erred in reversing and remanding the case to the trial court for further consideration because the trial court relied on the advanced stage of the proceedings and the undue hardship the transfer would cause, in addition to the best interest of the children, in deciding not to transfer the proceedings to the tribal court. Such decision was well within the trial court's discretion and should not be overruled absent an abuse of discretion. (Br. For Appellee, Rec. No. 1947-12-2, 1948-12-2, at 16, 18; Br. For Appellee, Rec. No. 1949-12-2, at 14).

[5] The Tribe raises issues concerning the sufficiency of Notice, the use of an Indian Expert Witness, and the relevancy of evidence, none of which relate to any of DSS' assignments of error nor were properly raised as a cross-assignment of error. Therefore, such issues are not properly before this Court and cannot be considered on appeal. *See* Rule 5:17(c)(1), 5:18(c)(1), & 5:28.

STANDARD OF REVIEW

This Court must review the decision to deny the Motion to Transfer for an abuse of discretion. See, e.g., Thompson v. Fairfax County Dep't of Fam. Servs., 62 Va. App. 350, 747 S.E.2d 838 (2013); In re Appeal in Maricopa Cnty. Juv. Action No. JS-8287, 828 P.2d 1245, 1248 (Ariz. Ct. App. 1991).

ARGUMENT

The Indian Child Welfare Act promotes two policies, the first of which is to protect the "best interests of Indian Children." See 25 U.S.C. § 1902. To achieve this policy, Congress created a "dual jurisdictional scheme" which favors the transfer of cases involving Indian children to tribal courts. *See* 25 U.S.C. §§ 1911(a), (b); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989). Congress, however, did not require that ***all cases*** be transferred to tribal courts, but instead enacted a provision allowing for state courts to retain jurisdiction "for good cause shown." 25 U.S.C. § 1911(b).

Congress did not define good cause and left the determination of good cause to state courts. 44 Fed. Reg. 67, 584. Congress granted state courts flexibility to determine, in their discretion, when it was not in the

Indian child's best interests for the case to be transferred to a tribal court. See 1978 U.S.C.C.A.N. 7530, 7544.

DSS believes that the clear and convincing evidence admitted in the trial court in fact satisfies the new standard announced by the Court of Appeals in Thompson v. Fairfax County Dep't of Fam. Servs., 62 Va. App. at 375, 747 S.E.2d at 850 (2013). In response to the Tribe's arguments, however, DSS notes that the trial court quite specifically relied on the B.I.A guidelines and the evidence before it in reaching its decision to deny the motions to transfer.[6] (J.A. at 588-91). By relying on the explicit legislative policy of ICWA and the guidelines enacted by the Bureau of Indian Affairs, the trial court clearly acted well within its discretion.

The rule regarding the advanced stage of the proceedings was designed to prevent "obstructionist tactics" such as where a "party waits until the case is almost complete to ask that it be transferred to another court and retried." 44 Fed. Reg. 67, 591, C.1 Commentary. As the comments explain, "Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." 44 Fed. Reg. 67, 591, C.3.

[6] The trial court also relied on "common sense…everyday experience with young children, that sudden, immediate and permanent removal from the home where attachment bonds were formed would have been extremely harmful to the children." (J.A. at 590-91).

Here, the Tribe and parents waited until the case was almost complete to ask that it be "transferred to another court and retried." Donna Harrison informed the Tribe in June 2010 of the original incident that led to the criminal charges which precipitated these proceedings. (J.A. at 258, 477). The Tribe was also well aware of the risk of harm these children faced in November 2010 when the Tribe removed two siblings from the twins' home. (J.A. at 139, 260-62).

A full year later, after custody was transferred to DSS and a Foster Care Service Plan with the goal of adoption was approved, the Tribe finally intervened. (J.A. at 236-37, 272, 541, 545). The Tribe then made clear its intention to reconsider providing services to the parents in order to reunite the twins. (J.A. at 393).

Thus, the predominant purpose of their intervention and motion to transfer was to undo the Foster Care Service Plan with the goal of adoption and retry the proceedings in a potentially friendlier forum. (J.A. at 393, 403). The Tribe failed to promptly exercise the "right to petition to transfer in order to avoid unnecessary delays" and, as a result, the twins will be subjected to more uncertainty as the Tribe contemplates more services to their parents.

The trial court also relied on the undue hardship guideline. DSS was legal custodian of the twins as well as a material witness to their family history. The Tribe's witnesses testified that it took five hours of travel each way by airplane and car at a cost of approximately six hundred dollars to reach the Tribal Court in Shawnee, Oklahoma. (J.A. at 570-74).

The only solution the Tribe offered to alleviate this hardship was to have the Tribal Court sit within the Commonwealth of Virginia. (J.A. at 396).[7] Upon cross-examination, the Tribe's counsel acknowledged (1) that she had no personal knowledge or experience where the Tribe actually sat in another state; and (2) that the Tribal Court has no jurisdiction over the general public in Virginia and lacks authority to issue summons. (J.A. at 400-01). More importantly, the Tribe's counsel could not cite adequate authority for the proposition of a sovereign nation conducting judicial proceedings within the Commonwealth of Virginia. Id. Based on actual evidence, the trial court acted well within its discretion in finding that the transfer would cause undue hardship.

Finally, the trial court relied on the "best interests" of the children in denying the motion to transfer. Again, one of ICWA's fundamental purposes is to "protect the best interests of Indian children." See 25 U.S.C.

[7] There was no evidence before the trial court concerning the availability of technology.

§ 1902. Virginia law also recognizes that when making determinations concerning a child, "including termination of a parent's residual rights, the paramount consideration of a trial court is the child's best interests." 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, 230-31, 288 S.E.2d 405, 407-08 (1982); Farley v. Farley, 9 Va. App. 326, 327, 387 S.E.2d 794, 796 (1990).

The trial court in this case heard clear and convincing evidence to retain jurisdiction. The trial court simply interpreted good cause in a way congruent with the policies of ICWA and Virginia child welfare law. To ask the trial court to ignore the welfare of children when making decisions concerning a child would "subvert the legislative intent expressed therein." Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002). As a result, it cannot be said that the trial court's decision was an abuse of discretion.

C. THIRD ASSIGNMENT OF ERROR

> The Court of Appeals erred in creating a new standard that the trial court must consider whether the transfer of jurisdiction itself would cause, or would present a substantial risk of causing immediate, serious emotional or physical damage to the child. (Appellant was unable to preserve this Assignment because the standard was created by the Court of Appeals in Thompson v. Fairfax County Department of Family Services, an opinion published after Appellant's appeal.)

STANDARD OF REVIEW

Questions involving the interpretation of statutes are questions of law and require de novo review. Jones v. Commonwealth, 276 Va. 121, 123, 661 S.E.2d 412, 414 (2008); Hines v. Commonwealth, 59 Va. App. 561, 721 S.E.2d 792 (2012).

ARGUMENT

When interpreting a statute, this Court must give effect to the legislative intent and must, when possible, give meaning to every word of the statute. See Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1985); Monument Assocs. v. Arlington Co. Bd., 242 Va. 145, 149, 408 S.E.2d 859 (1991). ICWA was intended to "protect the best interests of Indian children," and § 1911(b) was designed to allow state courts flexibility in determining the disposition of child custody proceedings involving Indian children. *See* 25 U.S.C. § 1902; 1978 U.S.C.C.A.N. 7530, 7544.

The trial court's decision to retain jurisdiction exemplifies ICWA's policies at their best. The trial court initially gathered legal memoranda by all parties, including the Tribe, to inform the trial court about ICWA and its application to these proceedings. The trial court acknowledged the presumption that the transfer was proper and heard evidence from DSS

and the Guardian ad Litem in opposition to the transfer. The parents and the Tribe had an opportunity to offer evidence in support of the transfer.

There was no evidence to contradict testimony from two expert witnesses that continued placement of the children with the parent or Indian custodian was likely to result in serious emotional damage. Rather, the Tribal social worker testified as to plans for immediate removal of the children and then Tribal counsel testified as to the nature of proceedings in the Tribal Court. (J.A. at 196, 204-06, 234-45, 336-37, 452, 480, 370-71, 376, 380, 393, 403).

Section 1911(b) awards flexibility for the trial court to follow ICWA's mandate to protect the best interests of the child. See 25 U.S.C. § 1902. Furthermore, while the proceedings remained in state court, the state court protected the Tribe's interests, in addition to the interests of the other parties, throughout the proceedings through ICWA's procedural safeguards. *See* 25 U.S.C. §§ 1911 *et seq.*

The new standard announced by the Court of Appeals in Thompson unreasonably restricts any balance between "the best interests" of Indian children and "good cause." Under Thompson, with regard to the best interest of the child, state courts can only consider "immediate serious emotional or physical harm, or a substantial risk of such harm, to a child

arising from the transfer itself." Thompson, 62 Va. App. at 362, 747 S.E.2d at 850 (2013).

There is no flexibility within this standard for a state court to consider the subsequent impact on the child or procedural implications of the transfer, such as is found in safeguards of the Interstate Compact for the Placement of Children. See Va. Code § 63.2-1000. Under Thompson, if a state court transfers the proceeding to a tribal court using this very narrow standard, then the state court essentially abdicates any responsibility of the Commonwealth for the welfare of an Indian child who is also citizen of the Commonwealth.

In addition, when combined with the opinion by the Court of Appeals in this matter, Thompson inherently eviscerates altogether good cause based on distance alone by citing advances in technology and good cause based on an advanced stage of the proceedings by allowing tribal intervention regardless of a tribe's prior knowledge and role with the family. As with the new standard for consideration of the best interest of the child, these combined rulings of the Court of Appeals make it virtually impossible for any good cause to exist, which is certainly contrary to the explicit language of ICWA.

For these reasons, DSS respectfully requests this Court to overrule the decision of the Court of Appeals in both Thompson and this matter.

D. RESPONSE TO MOTHER'S BRIEF

DSS incorporates the principles of law, arguments, and authority from this brief as its reply to Mother's Brief in Opposition. DSS only notes that the record does not support the Mother's claims with respect to her substance abuse issues after May 30, 2010.

Once the twins were in DSS' custody, DSS filed an initial Foster Care Service Plan with the goal of adoption. (J.A. at 521, 531). The facts of this Plan were approved and incorporated into the Dispositional Orders entered on June 22, 2011. (J.A. at 541, 545). There were no appeals from these final orders.

E. CONCLUSION

For the foregoing reasons, DSS respectfully requests this Court to (1) reverse the Court of Appeals' decision in Thompson; (2) reverse the Court of Appeals' decision to reverse and remand the trial court's decision in this matter; and (3) affirm the trial court's denial of the Motion to Transfer and the Orders terminating mother and father's parental rights.

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CERTIFICATE OF COMPIANCE WITH RULE 5:26

I hereby certify that on this 23rd day of June, 2014 the fifteen bound copies of this Reply Brief, with one electronic copy on CD, were hand delivered to the Clerk's office of the Supreme Court of Virginia.

Counsel for Appellant does NOT waive oral argument.

This same date, three bound copies of the Reply Brief with one electronic copy on CD were served, via U.S. Mail, postage prepaid to the following:

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