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 APPELLEE RENEE BAGLEY NUNNALLY

George H. Edwards (VSB No. 17664)
GEORGE H. EDWARDS, J.D., P.C.
9910 Wagners Way
Post Office Box 670
Chesterfield, Virginia 23832
(804) 748-4045 (Telephone)
(804) 796-1121 (Facsimile)
evabarrister@gmail.com

Counsel for Appellee Renee Bagley Nunnally

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

A. STATEMENT OF THE CASE 1

B. STATEMENT OF FACTS 1

C. ASSIGNMENTS OF ERROR 2

D. FIRST ASSIGNMENT OF ERROR 3

STANDARD OF REVIEW 3

ARGUMENT 4

E. SECOND ASSIGNMENT OF ERROR 7

F. THIRD ASSIGNMENT OF ERROR 8

STANDARD OF REVIEW 8

ARGUMENT 9

G. CONCLUSION 9

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(h) 11

TABLE OF AUTHORITIES

Page(s)

CASES

Box v. Talley,
1 Va. App. 289, 338 S.E.2d 349 (1986) 5

Chester County Department of Social Services v. Coleman,
303 S.C. 226, 399 S.E.2d 773 (1990) 6

Hines v. Commonwealth,
59 Va. App. 561, 721 S.E.2d 792 (2012) 8

In re Appeal in Maricopa Cnty. Juv. Action No. JS-8287,
171 Ariz. 104, 828 P.2d 1245 (Ariz. Ct. App. 1991) 3

In re. Welfare of T.T.B.,
724 N.W. 2d 300 (Minn. 2006) 7

Jones v. Commonwealth,
76 Va. 121, 661 S.E.2d 412 (2008) 8

Lawlor v. Commonwealth,
285 Va. 187, 738 S.E.2d 847 (2013) 3

Thompson v. Fairfax County Department of Family Services,
62 Va. App. 350, 747 S.E.2d 838 (2013) 3, 7, 10

Walker v. Department of Public Welfare,
233 Va. 557, 290 S.E.2d 887 (1982) 5

Yavapai-Apache Tribe v. Mejia,
906 S.W.2d 152 (TEX. App.- Hous. 1995) 6, 7

STATUTES

25 U.S.C. § 1911 9

25 U.S.C. § 1911(b) 4, 7, 8, 9

Va. Code § 16.1-136 5

Va. Code § 16.1-296 5

Va. Code § 16.1-296(a) 4

Va. Code § 16.2-123 5

RULE

Va. Sup. Ct. R. 4:3 6

REGULATION

Guidelines for State Courts: Indian Child Custody Proceedings
44 Fed. Reg. 67584 (1979) 4

A. STATEMENT OF THE CASE

The appellee Renee Bagley Nunnally concurs with the STATEMENT of the case as presented by the Appellant.

B. STATEMENT OF FACTS

The appellee Renee Bagley Nunally basically concurs with the overall factual recitation provided by the appellant Department of Social Services with the exception of the characterization of the appellee Renee Bagley Nunnally's drug and criminal history from May 30th, 2010 when the infant twins were found outside their parents' home (JA at 446) through the trial court's decision. The appellant states that both parents were tested positive for illegal drugs; however, during the investigation conducted by DSS (JA at 254-264) it is clear that the appellee mother tested positive for Adderall for which she presented a permanent prescription and there was no recollection by DSS of her being positive for anything else. The father was tested in June 2010 and also came back positive for an amphetamine for which he presented a prescription bottle however DSS was unable to recall for what. The appellee also completed her substance abuse evaluation as requested (JA at 267).

The criminal charge concerning neglect was heard by the Juvenile Court of Dinwiddie and was amended from a felony to a misdemeanor on

August 3rd, 2010 when she was sentenced to twelve months in jail with twelve months suspended (JA 447).

The appellant concurs with the record that she had a prior illegal drug and criminal history, but subsequent to the May 30th 2010 incident there has been no record of illegal drug use and, other than the above cited conviction, there has been no further criminal history.

The appellee will acknowledge that paragraph 1 of the Foster Care service plan (JA 533) states that it was reported that the appellee would binge on alcohol and drugs and attempted to buy drugs however, the record had no testimony or findings to support these hearsay allegations.

C. ASSIGNMENTS OF ERROR

1. 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).

2. The Court of Appeals erred in holding that the best interest of the child is not a relevant consideration in determining whether good cause exists not to transfer. (Br. For Appellee, Rec. No. 1947-12-2, 1948-21-2 at 10-18; Br. For Appellee, Rec. No. 1949:12-2, at 12-14).

3. 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 an opinion published after Appellant's appeal.)

D. 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)

STANDARD OF REVIEW

The appropriate standard is whether the trial court abused its discretion when it considered the advanced stage of the proceedings and the undue hardship the transfer would cause, in addition to the best interests of the children, in deciding not to transfer the proceedings to the tribal court. 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. JV. Action No. JS-8287, 828 P.2d 1245, 1248 (Ariz. Ct. App. 1991). This standard includes a "review to determine that the discretion was not guided by erroneous legal conclusions." Lawlor v. Commonwealth, 285 Va. 187, 212, 738 S.E.2d 847, 861 (2013).

ARGUMENT

The appellee agrees that “good cause” is not defined in § 1911(b) of the Indian Child Welfare Act and the appellee further agrees the true issue of this case is whether the jurisdiction should be transferred to the tribal courts. The emphasis however should be on the words “shall transfer” as the facts throughout show that there has been no objection by either parent; that both parents have petitioned for such transfer as well as the tribe. To counter that the opposing party, the DSS, must show by clear and convincing evidence that there exists a good cause to the contrary. It is true that the Act § 1911(b) does not define “good cause” but the Bureau of Indian Affairs has published non –binding guidelines in their Guidelines for State Courts: Indian Child Custody Proceedings 44 Fed. Reg. 67584 (1979).

The appellant has raised the issue whether the proceedings is at an advanced stage when the petition to transfer was received. Time can hardly be an issue. Even if the children in question and the parties involved had no connection with any Indian tribe § 16.1-296(a) Code of Virginia, 1950, as amended is unequivocal when it states:

“From any Final Order or Judgment of the Juvenile Court affecting the rights or interests of any person coming from within its jurisdiction, an

appeal may be taken to the Circuit Court within ten (10) days from the entry of a final judgment, order or conviction and shall be heard de novo ****."

Virginia has consistently ruled "an appeal to the Circuit Court from a court not of record under Code § 16.1-136 annuls the judgment of the inferior tribunal as completely as if there had been no previous trial. Box v. Talley, 1 Va. App. 289 (1996) quoting Walker v. Department of Public Welfare, 233 Va. 557 (1982).

The apparent code differences cited in these cases show that the references to § 16.1-136 refer to § 16.2-123 repealed by the Act 1984 which is now cited § 16.1-296.

As our state statutes require a complete rehearing as if there had been no previous trial then it would be impossible for the appellees to be barred claiming that they were at a late stage of the proceedings when the records show they were both in the Juvenile Court and the de novo proceedings of the Circuit Court.

As the children are not over 12 and as both parents are available as conceded in appellant's Statement of Facts this leaves the possibility of the issue of undue hardship.

The facts of this case as cited by all parties began in May 2010, and this brief is being filed almost four years later. The appellee does not

dispute that the tribes offer to bring its entire staff to Virginia could be cumbersome; however, it was undisputed that it could be done (JA at 396). The issue of how the Tribal Court would be able to issue summons for witness may be a more compelling argument however this position ignores completely that the world of communication has advanced at a much greater speed than the ability to move through the necessary legal environment to resolve a case. Technology removes the argument of undue hardship in hearing a case on its merits as a Judge sitting in any location can see and hear proceedings almost anywhere on the globe. In comparison a Virginia case with Virginia issues could get out of state testimony by the use of depositions pursuant to Rule 4:3. It is inconceivable that the tribal court would not have such discovery tools available. Distance is no longer an issue in these cases due to technology. The Chester decision relied on was a case decided some twenty-four years ago. Principles of law may stay the same for generations; however, technology does not stand still. Both appellant and appellee agree that “good cause” is necessarily made on a case by case basis of all the circumstances included. Yavapai-Apache Tribe v. Mejia 906 S.W.2d 152, 163-164 (TEX. App.- Hous. 1995). This is telling in the case at hand as a United Nations study shows in 2002 under 15% of the people in the world had cell phones

which increased to 60% in May 2009. The position of undue hardship in 2014 should be much more constricted based on the leaps in technology.

The appellant than attempts to introduce “best interest” evidence as was allowed in Re Welfare of T.T.B. 724 N.W. 2d 300 (Minn. 2006) which was a factor clearly disallowed in Mejia where it states “After reviewing all of the available case law on both sides of the issue, we hold that the courts that reject the best interest test when determining motions to transfer are correct.”

The appellant has stated that the Act § 1911(b) was designed to provide state courts with flexibility. The appellee also agrees but has always held the position that the best interest is immaterial on the issue of transfer.

In Thompson the appellant court was faced with studying decisions throughout the United States in order to articulate a clear standard for the Commonwealth. After its review it used the flexibility provided by the Act § 1911(b) and determined what would be “good cause shown within this Commonwealth.” As such its decision should stand as written.

E. SECOND ASSIGNMENT OF ERROR

The Court of Appeals erred in holding that the best interest of the child is not a relevant consideration in determining whether good cause exists not to transfer. (Br. For Appellee, Rec. No. 1947-12-2, 1948-21-2 at 10-18; Br. For Appellee, Rec. No. 1949-12-2, at 12-14).

As the appellant has withdrawn its second assignment and as the appellee throughout these proceedings has contended that the best interests of the child are not a relevant factor prior to a decision on transfer the appellee will make no further response to this assignment of error.

F. 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 vs. 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 thus require a de novo standard of review. Jones v. Commonwealth, 76 Va. 121, 123, 661 S.E.2d 412, 414 (Va. 2008); Hines v. Commonwealth, 59 Va. App. 561, 721 S.E.2d 792 (2012). Therefore, the determination by the Court of Appeals that the new standard for "good cause to the contrary" under 25 U.S.C. § 1911(b) requires a showing of immediate, serious emotional or physical damage to the child is subject to de novo review 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).

ARGUMENT

Appellant's argument is misdirected. The Act 25 U.S.C. § 1911(b) would actually be quite restrictive. Federal law mandates that the state "shall transfer" such proceedings to the jurisdiction of the tribe if certain conditions are met. The appellees met all such conditions; however the individual states are then allowed their flexibility by the escape clause of "absent good cause to the contrary."

The appellant court in this state as well as all the other cases cited by appellee have indicated that these decisions fall on a "case by case basis. "The appellant court did not forget state statutes such as ours, which guarantee a right to a trial de novo as previously discussed and concluded that the interpretation of the Federal statute was of a jurisdictional nature but the variable of "good cause" had to be addressed. The Court of Appeals did this by creating this new standard articulated in Thompson and its Decision is without error.

CONCLUSION

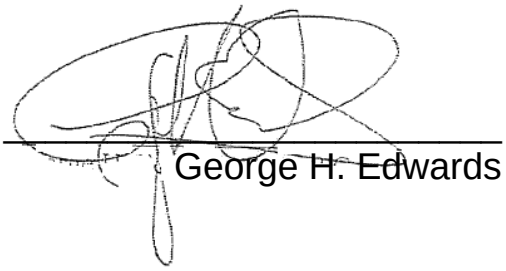
Based on the salient position that the federal mandate in 25 U.S.C. § 1911 specifically dictates that under certain circumstances the jurisdiction of cases of this nature "shall be transferred" and when these circumstances are met as in the case at hand the state court has the variable of "absence

of good cause to the contrary." To clarify the appellant court in Thompson when speaking of the Federal Code states:

"The statutory structure makes clear Congress presumption that in the event of a transfer, tribal courts are fully competent to consider the child's best interests ****."

The appellant court weighed the Federal mandate and the laws of the Commonwealth to structure the Virginia standard for transfer or retention based on good cause to the contrary.

As such the Appellant Court did not abuse its discretion and its decision should be affirmed.



George H. Edwards

George H. Edwards (VSB:17664)
George H. Edwards, J.D., P.C.
9910 Wagners Way
P. O. Box 670
Chesterfield, VA 23832
Telephone: (804) 748-4045
Facsimile: (804) 796-1121
evabarrister@gmail.com

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(h)

I hereby certify that on this 9th day of June 2014 fifteen bound copies of the Brief of Appellee, with one electronic copy on CD, were hand filed with the Clerk of the Supreme Court of Virginia. On this same day three bound copies of the Brief of Appellee, with one electronic copy on CD, were served via U.S mail, postage prepaid to all counsel at the following addresses.

Sherry L. Gill, Esquire
5608 Grove Avenue
Richmond, Virginia 23226
(804) 440-6200
Facsimile: (804) 440-6203
Guardian-ad-Litem for the minor children

Joan M. O'Donnell, Esquire
P. O. Box 518
110 North 2nd Avenue
Hopewell, Virginia 23860
(804) 452-2667
Facsimile: (804) 862-4948
podjod@msn.com
Counsel for the Department of Social Services of Dinwiddie County

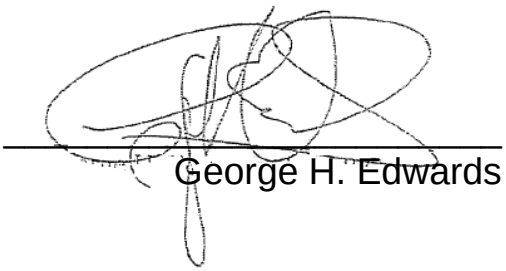
Kevin B. O'Donnell, Esquire
P. O. Box 518
110 North 2nd Avenue
Hopewell, Virginia 23860
(804) 452-2667
Facsimile: (804) 862-4948
kevin.odonnell@richmond.edu
Counsel for the Department of Social Services of Dinwiddie County

Marlene A. Harris, Esquire
P. O. Box 4279
Midlothian, Virginia 23112
(804) 938-4912
Facsimile: (804) 275-2225
maharris@justice.com
Counsel for Timothy Nunnally

Lawrence D. Diehl, Esquire
Barnes & Diehl, P.C.
Centre Court- Suite A
9401 Courthouse Road
Chesterfield, Virginia 23832
(804) 414-1622
Facsimile: (804) 796-1730
Counsel for the Citizen Potawatomi Nation

This Brief does not exceed 8,750 words, the actual count being 2,215 with headings footnotes and quotations included.

Counsel for Appellee does not waive oral argument.



George H. Edwards