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 APPELLANT

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A. STATEMENT OF THE CASE

Two cases with remarkably similar facts and issues appeared before the Court of Appeals of Virginia at approximately the same time. Both involved involuntary termination of parental rights where the birth parents had histories of significant substance abuse and criminal activities. Both involved parents for whom rehabilitative services had been provided without success. Both involved children placed in foster care in April 2011, more than three years ago, when the children were less than two years old. Both involved a birth mother who was a member of a federally recognized Indian tribe and a non-Indian birth father.

The issue before this Court is very simply what constitutes good cause not to transfer proceedings for involuntary termination of parental rights from a trial court in Virginia to a tribal court wherever it may sit. The Court of Appeals recognized this as an issue of first impression in Virginia and issued a published opinion in one case, Thompson v. Fairfax County Department of Family Services, 62 Va. App. 350, 747 S.E.2d 838 (2013). It then concluded that the trial court and the parties in this, the other case, should be afforded the opportunity to reconsider this case in light of the newly adopted standards in Thompson.

The Indian Child Welfare Act (herein "ICWA") is a statutory scheme which grants certain Indian children enhanced procedural rights in specific legal proceedings. Only Indian children who are members or eligible to become members of a federally recognized Indian tribe fall within the purview of ICWA. Only legal proceedings in state courts which involve foster care placement, involuntary termination of parental rights or the adoption of such an Indian child are subject to the procedural safeguards of ICWA.

This proceeding is subject to ICWA because the Appellant, Dinwiddie Department of Social Services (herein "DSS"), seeks termination of the residual parental rights for the parents of children who are members or eligible to become members of the Citizen Potawatomie Nation (herein "the Tribe"), a federally recognized tribe. The Appellee, RENEE B. NUNNALLY (herein "the mother"), is a member of the Tribe. The Appellee, TIMOTHY B. NUNNALLY (herein "the father"), is not a member and is not eligible for membership in any federally recognized tribe.[1]

Both parents and the Tribe filed motions in the Juvenile & Domestic Relations Court of Dinwiddie County (herein "J&DR Court") seeking a transfer of this proceeding to the Citizen Potawatomi Nation Tribal Court

[1] The father, however, has consented to the transfer of this proceeding to the tribal court, a prerequisite under ICWA.

(herein “the tribal court”), which is located in Shawnee, Oklahoma. The J&DR Court found good cause not to transfer and denied such Motions. Both parents and the Tribe subsequently filed Motions to Transfer in the Circuit Court of Dinwiddie County (herein “the trial court”), which also found good cause to deny such Motions.

While the sole issue of transfer comes before this honorable Court in a consolidated proceeding, it began as four separate proceedings, one for each child and one for each parent. The children’s circumstances are essentially the same, but the factual basis of terminating parental rights for each parent differs significantly. Nevertheless, the positions of the parties have remained constant – the parents and the Tribe want to transfer the proceedings to the tribal court, and DSS, together with the children’s Guardian ad Litem, opposes the transfer for good cause.

B. STATEMENT OF FACTS

This proceeding will determine the fate of twin girls, now five years old, who have resided in the Commonwealth of Virginia for their entire lives. (J.A. at 146). Their mother claims membership in a federally recognized Indian tribe located in Shawnee, Oklahoma, approximately twelve hundred miles from Dinwiddie County, Virginia. Their father is not of Indian descent. The twins are now in the legal custody of DSS and have remained in the

same foster home since their placement in DSS' custody in April 2011. (J.A. at 516). The children have not lived with their parents for any significant period since June 2010.

The mother has approximately seven other children, none of whom were in her legal custody at any time relevant to this proceeding. (J.A. at 130-38, 156). The father has approximately five other children, none of whom were in his legal custody at any time relevant to this proceeding. The parents were legally married to one another, although it is unknown whether they reside together at this time. (J.A. at 129, 149). These twins are the only children common to the parents. Both parents have a significant history of substance abuse and criminal convictions. (J.A. at 139, 143, 157-58, 172, 182, 255).

In June 2010, when they were approximately 15 months old, the twins were found playing in a drainage ditch by a passerby at approximately 7:00 A.M. (J.A. at 159, 253-55, 523). The passerby called the police, who attempted to locate the twins' parents by questioning residents in the vicinity. (J.A. at 160). The police had no response when they knocked on the front door of the twins' residence. They proceeded to the backdoor which was broken and wide open. (J.A. at 161, 254). The police called into the house, got no response, and proceeded to enter.

(J.A. at 160-61). The house was in disarray as if a burglary or fight had taken place. A few moments later, the mother emerged from an upstairs bedroom. She was unaware of the twins' whereabouts. (J.A. at 254). The mother appeared disheveled and incoherent.

Upon questioning, the mother stated that there had been a domestic dispute the prior evening. (J.A. at 154). She stated that the father was involved with a former wife and the mother found them together in her bedroom. (J.A. at 154-55, 254). The mother stated that the father left the home with his former wife, and he must have left the door open upon his departure. The mother admitted her use of alcohol the prior evening. (J.A. at 160). The mother was charged with and subsequently convicted of criminal neglect. (J.A. at 446). During the ensuing investigation by DSS, both parents tested positive for illegal drugs. (J.A. at 253-54). The twins stayed with their maternal grandmother[2] pending the outcome of DSS' investigation and the criminal proceeding against the mother. Id.

At the time of this incident in June 2010, DSS was aware that the Tribe had placed two of the mother's older children in this household. (J.A. at 137-40, 256, 261). DSS (Donna Harrison) sent a letter by certified mail

[2] The maternal grandmother is also a member of the Tribe.

to Janet Draper, Director of FireLodge Children and Family Services[3], informing the Tribe of this incident involving the twins. (J.A. at 258, 477).

In August 2010, the J&DR Court entered Child Protective Orders ancillary to the mother's criminal proceeding and appointed a Guardian ad Litem for the twins[4]. (J.A. at 448-51). The twins returned to their mother's care subject to the terms of the Child Protective Orders. The GAL soon filed Petitions alleging that the twins were children in need of services (herein "the CHINS proceeding") based upon subsequent events in the parents' household. (J.A. at 511-15).

The Tribe, through Ms. Draper, remained familiar with the ongoing deterioration in the parents' home, and Ms. Draper removed the two older children from the mother's care in November 2010 following the events which led the GAL to file the CHINS Petitions on behalf of the twins. (J.A. at 139, 260-62).

In November 2010, the twins were placed in the temporary legal custody of the mother's sister,[5] with the parents' agreement, pursuant to a Temporary Consent Order entered in the CHINS proceeding. (J.A. at 511-

[3] The Tribe's counterpart to DSS.

[4] This GAL had previously served in such capacity for the mother's two other older children upon their placement in DSS' custody.

[5] The mother's sister is also a member of the Tribe.

15). The parents were allowed supervised visits with the twins and were ordered to complete a rehabilitative program, including but not limited to random drug screens. (J.A. at 511-15). The parents failed to complete services set forth in the Temporary Consent Order. (J.A. at 516).

In April 2011, the twins were found staying in the parents' home without the aunt's supervision in violation of the Temporary Consent Order. (J.A. at 516, 533-38). The mother tested positive for illegal substances and the parents had not participated in rehabilitative services. Id. On or about April 15, 2011, the J&DR Court transferred legal custody of the twins to DSS as disposition of the CHINS proceeding. (J.A. at 516).

On that very evening, the Tribe (by Janet Draper) contacted DSS (by Donna Harrison)[6] to enquire as to the transfer of legal custody to DSS and the twins' placement. (J.A. at 236-37, 272). As the agent designated in the Federal Register, she had previously been the recipient of ICWA Notices from DSS for legal proceedings in which legal custody of two of the mother's other older children was transferred to DSS (not the same two children removed from the mother by the Tribe during the course of these proceedings). Thus, she was not a stranger to DSS. (J.A. at 230-32).

[6] Ms. Draper actually called Ms. Harrison on Ms. Harrison's personal cell phone.

No appeal was noted by either parent from that dispositional Order in the CHINS proceeding. By Tuesday of the following week, on or about April 19, 2011, the Tribe had filed its initial motion to intervene and motion to transfer proceedings to the tribal court (although there was no proceeding then pending in the J&DR Court). (J.A. at 385-87, 492). However, the Tribe eventually withdrew that motion to transfer. (J.A. at 390). Subsequently, on or about June 1, 2011, DSS filed a Petition for Foster Care Review Hearing and initial Foster Care Service Plans with the goal of adoption in the J&DR Court. (J.A. at 521, 531).

With those Petitions,[7] DSS became a party for the first time to legal proceedings. DSS accordingly provided an ICWA Notice to the Tribe through Janet Draper as its registered agent. (J.A. at 553). The Tribe exercised its right to intervene, granted through ICWA, and participated in the hearing at which the initial Foster Care Service Plans were considered. (J.A. at 541, 545). The J&DR Court entered Dispositional Orders[8] approving the goal of adoption, and no appeals were noted. Id.

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[7] DSS was not a party to the criminal proceeding or the CHINS proceeding, although it was tangentially involved through services provided pursuant to the Child Protective Orders and the Temporary Consent Orders.

[8] The Foster Care Service Plans with the goal of adoption remain in full force and effect as of this writing.

DSS then filed the Petitions underlying this proceeding and again provided a timely ICWA Notice to the Tribe through Janet Draper as the registered agent. (J.A. at 21-25, 712-14). Again, the Tribe exercised its right to intervene and has actively participated in every hearing at every stage of this proceeding with both local and tribal counsel. (J.A. at 5-8).

The Tribe and each parent initially filed a motion to transfer the proceedings for involuntary termination of residual parental rights to the tribal court in the J&DR Court. (J.A. at 5-8). The J&DR Court heard and denied the motions to transfer and also denied DSS' Petitions.[9] (J.A. at 5-20). Both DSS and the GAL filed timely Notices of Appeal to the Circuit Court of Dinwiddie County (herein "the trial court"). (J.A. at 21-24).

Both parents and the Tribe again filed motions to transfer the proceedings to the tribal court in the trial court. (J.A. at 41-64). Following a pretrial conference and the submission of briefs by each party, including the Tribe, the trial court held a hearing solely on the motions to transfer. (J.A. at 65-66). At the conclusion of that hearing on or about January 9, 2012, the trial court found good cause not to transfer the proceedings for

[9] DSS' expert witness (necessary in accordance with the procedural safeguards of ICWA) was required to leave before the J&DR Court ruled on the motions to transfer. DSS' motion for a continuance was denied by the J&DR Court. (J.A. at 9-18)

involuntary termination of parental rights to the tribal court. (J.A. at 632-705).

This became the law of the case, although both parents and the Tribe renewed their respective motions to transfer at subsequent hearings on January 30, 2012 and June 4, 2012. (J.A. at 556-60). There was no additional evidence admitted on this issue, however, and the trial court entered an Order Denying Transfer on or about August 24, 2012 in each proceeding with the trial court's specific findings and the objections of counsel attached thereto.[10] (J.A. at 632-705).

On or about September 11, 2012, the trial court proceeded to hear the ultimate issue of termination of parental rights and at the conclusion of such hearing granted DSS' Petitions, entering final Orders which terminated the parental rights of each parent for each twin. (J.A. at 746, 764, 781, 799). The parents each filed a Notice of Appeal, arguing inter

[10] The Tribe filed a Notice of Appeal from each Order Denying Transfer. In an unpublished opinion, the Court of Appeals dismissed the Tribe's appeal for lack of jurisdiction, finding that such Orders were not final and therefore were not subject to appeal. Citizen Potawatomi Nation v. Dinwiddie Dep't of Soc. Servs. (Va. App., 2013, Record Nos. 1713-12-2, 1724-12-2, 1725-12-2 and 726-12-2, September 10, 2013). The Tribe did not file an appeal from such ruling.

alia that the trial court erred in finding good cause not to transfer the proceedings to the tribal court.[11]

On the same day as the dismissal of the Tribe's appeal, the Court of Appeals reversed, vacated and remanded the orders of the trial court terminating parental rights in this proceeding based on the following analysis:

> In announcing its finding of good cause not to transfer, the circuit court referred to "the best interests of the children." The circuit court also concluded that the proceedings were at an advanced stage when the motion to transfer was filed and that the case could not be presented in a tribal court without undue hardship to the parties or witnesses. Today, however, we have rejected the traditional "best interests of the child" test in lieu of a more limited test involving an immediate serious emotional or physical harm, or a substantial risk of such harm, to a child arising from the transfer. Thompson v. Fairfax Cnty. Dep't of Family Servs., ___ Va. App. ___, ___ S.E.2d ___ (Sept. 10, 2013). In Thompson, we also addressed the advanced stage of the proceedings and undue hardship components of good cause. We recognize that Thompson is a case of first impression and that the standards we have announced amount to a middle ground approach to the issue of best interests of the child. We also recognize that the trial court relied on best interest, advanced stage, and undue hardship in finding that there was good cause to retain jurisdiction. We cannot presume that its decision would have been the same in light of our decision in Thompson. Because of this, we conclude that the circuit court and the parties should be afforded the opportunity to reconsider this case in light of our newly adopted standards.

[11] As a result, the Court of Appeals did not address any other assignments of error.

This appeal flows from those newly adopted standards announced by the Court of Appeals in Thompson. (J.A. at 816, 820).

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. Juv. 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

To determine whether jurisdiction should be transferred to the tribal court pursuant to the Indian Child Welfare Act, the trial court looked to the Act itself, which states:

> In any State court proceeding for the foster care placement of, or termination of parental rights, to an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, ***in the absence of good cause to the contrary***, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or

> the Indian custodian or the Indian child's tribe: Provided that such transfer shall be subject to declination by the tribal court of such tribe. 25 U.S.C. § 1911(b) (emphasis added).

Though "good cause" is not defined in the Act, § 1911(b) was designed to provide state courts with ***flexibility*** in determining the disposition of a child custody proceeding involving an Indian child. H.R. Rep. No. 1386, 95th Cong., 2nd Sess. 21, reprinted in 1978 U.S.C.C.A.N. 7530, 7544 (emphasis added). The Bureau of Indian Affairs has also published non-binding guidelines to aid state courts in interpreting the Act (herein "the BIA Guidelines"). See Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979).

The BIA Guidelines list several factors which may constitute "good cause" to deny transfer of jurisdiction to a tribal court, which include the following:

1. Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

    a. The proceeding is 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;

b. The Indian child is over 12 years of age and objects to the transfer;

c. The evidence necessary to decide the case cannot be adequately presented in the tribal court without ***undue hardship*** to the parties or the witnesses;

d. The parents of a child over 5 years of age are not available and the child has little or no contact with the child's tribe or members of the child's tribe;

2. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

A determination of "good cause" is necessarily made on a case-by-case basis after consideration ***of all the circumstances*** involved. Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 163-64 (Tex. App.-Hous. 1995) (emphasis added). The determination is by its nature subjective requiring a ***balancing process*** of the rights of the state to decide issues relating to a child's welfare. Id.; see also Chester County Department of Social Services v. Coleman, 399 S.E.2d 773 (S.C. 1990) (emphasis added). Most appellate decisions have upheld the use of BIA guidelines as an acceptable means of defining and interpreting "good cause." See, e.g., In re Adoption of Baby Girl B, 67 P.3d 359, 371 (2003) (holding "good cause" is

determined by looking to many different factors, including the BIA guidelines).

Several jurisdictions have used the B.I.A Guidelines to interpret "good cause" to decline transfer based on the parties' failure to timely intervene. See, e.g., In re Guardianship of J.O., 743 A.2d 341, 327 N.J. Super. 304 (N.J. Super., 2000)(three years); In Interest of DM, 2004 S.D. 90, 685 N.W.2d 768 (S.D. 2004)(one year after initial motion to intervene); In re Welfare of T.T.B., 724 N.W.2d 300 (Minn., 2006); and In the Matter of Welfare of Child of R.L.Z., No. A09-0509 (Minn. App. Sept. 8, 2009) (Minn. App., 2009). Many of these cases focus on the amount of time lapsed from when the tribal court was given notice of the proceedings and when the tribal court moved to intervene in the proceedings in state court. In Ex Parte C.L.J., for example, the court held that the sixteen months between notice to the tribe and the tribe's petition for intervention and transfer was too long. 946 So. 2d 880, 883 (Ala. Civ. App., 2006).

At first glance, the advanced stage of the proceedings does not appear to be an issue in this case. However, there was clear and convincing evidence of the Tribe's history with DSS and this particular mother for the trial court to conclude, based upon the totality of the circumstances, that good cause existed.

The events underlying these proceedings occurred in June 2010 with the filing of charges against the mother for criminal neglect. (J.A. at 130-38). The mother sent those warrants to the Tribe and then discussed entry of the Child Protective Orders in August 2010. (J.A. at 260-62). When the Tribe (Janet Draper) called DSS (Donna Harrison) on April 15, 2011, the Tribe knew that the J&DR Court had transferred legal custody of the children to DSS. (J.A. at 236-37). Only then did the Tribe file motions in the J&DR Court seeking transfer of the proceedings. (J.A. at 385-86).

In addition, the Tribe had previously intervened and provided extensive services to the mother with regard to several older children (in particular S.M., T.M. and R.B.); the Tribe was aware of proceedings in the same jurisdiction with regard to the placement of R.B. in DSS' custody; the Tribe was aware of proceedings in the same jurisdiction with regard to involuntary termination of the mother's parental rights to another older child, (E.B.); and the Tribe was aware of the circumstances in the mother's home due to its placement and subsequent removal of two older children (S.M. and T.M.) in her care since the birth of these children. (J.A. at 130-41).

Thus, when the Petitions seeking termination of parental rights were filed in June 2011, it was clearly an advanced stage of the legal

proceedings with regard to these children. Accordingly, DSS believes that the trial court properly considered the totality of these circumstances in determining good cause not to transfer based on an advanced stage of the proceedings.

Other courts have focused on the hardship transfer would cause. In Chester, for example, the state court looked to the BIA's definition of "good cause" to determine whether jurisdiction should be transferred to the tribal court. 399 S.E.2d at 775. Similar to the case presented, the tribal court was located in a different state from the place where the incident occurred and where the involved parties resided. Id. at 774. The Chester court relied on the BIA guidelines of "good cause" and determined that undue hardship would be placed on the parties and the witnesses due to the distance of the tribal court from the location where the parties and witnesses resided. Id. at 775-76. Hence, the Chester court held that jurisdiction should not be transferred to the tribal court. Id.

In this case, transfer would undoubtedly create an undue burden on the parties and their witnesses. The Court heard the testimony of Laurie Clerk, social worker for the Tribe, and Lisa Herbert, tribal counsel for the Tribe. The Tribe's social worker testified that she traveled to Dinwiddie from the Tribe's office in Shawnee, Oklahoma by driving to Oklahoma City

to Dulles airport, then flying from Dulles to Richmond and renting a car. (J.A. at 570-74). She estimated the airfare was approximately $600 and the time was about five hours each way. Id. Needless to say, the cost of transferring the proceeding, with counsel and all necessary witnesses, to the tribal court in Oklahoma would be prohibitive.

Upon direct examination, the Tribe's attorney described for the trial court what would happen if the trial court granted the motion to transfer. She testified that "the case would be transferred in its entirety," and "the case filed in Dinwiddie County would transfer to the Citizen Potawatomi Nation court. The record[12] thus far would become the record of the court of the Citizen Potawatomi Nation." (J.A. at 392-95).

In addition, the Tribe's attorney testified that "…the tribal court can relocate to any jurisdiction to be heard… The court would move. That would be the judge, the prosecutor, the court clerk, court staff, all of the necessary service providers would appear wherever they need to appear, convene court, and process the case" including any location in Virginia. (J.A. at 396).

Upon cross examination, the father's counsel asked the Tribe's lawyer to explain how that can happen, and she stated that:

[12] It is not clear what the Tribe's lawyer meant by "that record" in view of the fact that the J&DR Court is not a court of record.

> The [tribal] court would make a determination that it would be important for the case to be heard in a certain locality, wherever that would be, such as the State of Virginia. The [tribal] court would make arrangements to (inaudible) at a forum that would be convenient for the family, and we would move the entire operation of the court for purposes of that hearing to that location: judge, prosecutor, service workers, bailiff, court reporter, court clerk. (J.A. at 397-98).

However, when asked whether she was aware of the Tribe actually doing that, the Tribe's lawyer responded only that she "believed" it had been done before. (J.A. at 398).

Clearly, a transfer of the proceedings to the tribal court would have certain limitations. Upon cross examination by DSS counsel, the Tribe's lawyer acknowledged that she had no legal authority to indicate that the tribal court had authority to exercise jurisdiction over DSS. (J.A. at 400). Similarly, she acknowledged that the tribal court had no jurisdiction over the general public in Virginia. (J.A. at 400-01). Moreover, the tribal court would have no authority to issue summons for witnesses or conduct discovery or compel the production of documents or otherwise carry out the usual business of a legal tribunal.

In addition to clear and convincing evidence of the advanced stage of the proceedings and undue burden to be created by transfer to the tribal court, the trial court also heard expert testimony that a return of the children to their parents would be detrimental to their well-being. Many appellate

courts have held the best interests as being relevant to determining whether "good cause" exists. See, e.g., In re Guardianship of J.O., 743 A.2d 341, 327 N.J. Super 304 (2000); Matter of Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245, 171 Ariz. 104 (1991).

In In re Adoption of B.G.J., for example, the court held that good cause is a matter of discretion and should be exercised in the light of many factors, including but not limited to the best interest of the child, the child's ability to adapt to any cultural adjustments necessitated by a particular placement, the child's ties to the tribe, the wishes of the biological parents and the suitability of foster or adoptive parents. 33 Kan. App. 2d 894, 111 P.3d 651 (2005).

In In re Welfare of T.T.B., the court also relied on the BIA's definition of "good cause" to decline transfer to the tribal court. 724 N.W.2d 300 (Minn., 2006). Unlike Chester, the Minnesota court held that, in addition to the BIA guidelines, it is a child's constitutional right to be able to object the transfer, regardless of the child's age, and to introduce evidence of what is in the child's best interests. Id.

In this case, DSS presented clear and convincing evidence that transfer was contrary to the children's best interests. On cross examination by DSS counsel, the Tribe's social worker testified that if the trial court were

to grant the motion for transfer, the children were to be placed with a foster family in New Mexico, although there was some possibility of a second family or placement in Oklahoma. (J.A. at 370-71, 380). She reiterated this plan when asked by the GAL, saying that she would take the children with her that very day. (J.A. at 376).

The Tribe's counsel also stated that the tribe had a family placement for the twins in New Mexico. (J.A. at 389-90). Though the parents and the Tribe filed motions to transfer the proceedings to the tribal court, the Tribe was asking the trial court to divest DSS of legal custody because DSS would no longer be a party to the proceeding. (J.A. at 400-03).

Michelle K. Nelson, Ph.D. performed psychological evaluations of the parents at the request and the expense of DSS. (J.A. at 196). In her expert opinion, unless further treatment was put in place, the impact of transfer on the children would be quite detrimental. (J.A. at 204-06).

Arnold L. Stolberg, Ph.D., was an expert witness who performed an attachment assessment of the twins at the request of the GAL. (J.A. at 288). In his opinion, the deficiencies or the delays in the children's development were more likely to be because of environment or learning opportunity, and not biology. (J.A. at 234-45). Dr. Stolberg referred to the overall distress and terror that the children would feel if pulled from their

current foster family abruptly, including substantial and immediate profound distress. (J.A. at 309-18). In his opinion, there would be immediate and deep long term psychological damage. Id.

On cross examination by DSS counsel, Dr. Stolberg opined that a return of the children to their parents' care would be highly likely to cause serious emotional damage to the children. (J.A. at 319). The Tribe's counsel, on cross examination, asked Dr. Stolberg whether he was saying that these children would be detrimentally affected if they were removed from the foster home and placed with someone else, and Dr. Stolberg succinctly responded that in the affirmative. (J.A. at 328).

Shel Bolyard-Douglas, L.C.S.W., has a background in the fields of child and behavioral mental health and child development. (J.A. at 332). She saw the children at the time of their placement in DSS' custody in April 2011 and once or twice a month thereafter. (J.A. at 333-34). She testified that:

> Their demeanor has changed completely. They went from very fragile looking little girls to little girls that sort of sparkle and ballerina twirl and those kinds of things. They're very engaging with the two other children that are in the home, which is very different than the children I saw back in the spring. (J.A. at 336).

When asked by DSS counsel what impact, if any, would a removal from their foster home have on the children, Ms. Douglas replied that it would "shatter" their emotional stability. (J.A. at 337).

In view of this testimony, the trial court concluded that the Tribe's plan to take the children back to Oklahoma with them immediately if the motion to transfer were granted "flies in the face of the expert testimony." (J.A. at 435-38). However, the trial court speaks through its written orders. On or about August 27, 2012, the trial court entered in each case an Order Denying Motions to Transfer.

In Thompson, the Court of Appeals concluded that "the traditional best interest of the child analysis is too broad a consideration" and held that "the sole focus under this aspect of the good cause analysis should be on the immediate effect a transfer of jurisdiction would have on the well-being of the child."

Applying such principles to this case, the clear and convincing evidence before the trial court from three expert witnesses was that the transfer itself would cause immediate and substantial harm to the children. In addition, the trial court heard testimony from the Tribe's counsel that the cost of transferring the proceedings to the tribal court would be prohibitive and that, although she was unaware of its having been done, she thought it

more practical to bring the tribal court, with judge, clerk and staff, to Virginia. Further, the trial court heard DSS' long history with the mother herself, her older children and the Tribe. And finally, the trial court heard that DSS informed the Tribe of the parents' domestic problems as early as June 2010, and the Tribe took no action for the sake of these children.

DSS posits that there was clear and convincing evidence for the trial court to find good cause not to transfer these proceedings to the tribal court. Apart from the BIA Guidelines, the finding of good cause is not defined or clarified in any meaningful way by ICWA. The trial court's decision was well within its discretion and the application of existing law, even if Thompson stands as precedent.

Accordingly, DSS respectfully requests this Court to overrule the decision of the Court of Appeals and allow each Order for involuntary termination of parental rights stand. In the alternative, DSS requests this Court to remand this matter to the Court of Appeals for further consideration of the remaining Assignments of Error raised by the parents in their respective appeals.

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).

Upon further consideration, DSS finds no holding by the Court of Appeals that the best interest of the child is not a relevant consideration, either in Thompson or in this matter. Accordingly, DSS respectfully withdraws this second 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, 276 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.

ARGUMENT

The "primary objective" of statutory construction is to give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1985). Courts must "not apply an 'unreasonably restrictive interpretation of the statute that would subvert the legislative intent expressed therein." Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002). Virginia courts are "bound, where possible, to give meaning to every word of the statute" and cannot reject a word as surplus unless "it appears to have been inserted through inadvertence or mistake." Monument Assocs. v. Arlington Co. Bd., 242 Va. 145, 149, 408 S.E.2d 859 (1991); Burnette v. Commonwealth, 194 Va. 785, 788-89, 75 S.E.2d 482, 485 (1953).

Congress explicitly states that the ICWA's purpose and intent is to both "protect the best interests of Indian children and to promote stability and security of Indian tribes." 25 U.S.C. § 1902. As far as § 1911(b) goes, legislative history indicates that the provision was intended to provide state courts with ***flexibility*** in determining the disposition of a child custody proceeding involving an Indian child. 1978 U.S.C.C.A.N. 7530, 7544. Thus, any interpretation of the Act and its provisions must be done with

these policies in mind and words must not be "unreasonably" restricted in their meaning such that it would subvert the intent of Congress.

In this case, the Court of Appeals' decision in Thompson unreasonably restricts the meaning of "good cause" in such a way that it subverts the intent of Congress. Thompson "rejected the traditional 'best interests of the child' test in lieu of a more limited test involving an immediate serious emotional or physical harm, or a substantial risk of such harm, to a child arising from the transfer" despite the fact that ICWA explicitly mandates interpretation in a way that protects "the best interests of Indian children."

The Thompson decision instead adopts a middle ground approach which limits the definition of "good cause" and creates a higher standard for trial courts to apply. While DSS presented a substantial amount of evidence relevant to the "immediate serious emotion or physical harm" that transfer would have on the children, this does not alleviate the problem. The Thompson decision limits evidence a trial court may hear in transfer proceedings and limits a trial court's ability to protect the best interests of Indian children. Moreover, the decision severely inhibits a Virginia state trial court's flexibility in making good cause determinations. As a result, it

runs afoul of the mandate to interpret statutory language consistent with legislative intent.

The same can be said of Thompson's interpretations of the B.I.A. guidelines with respect to the advanced stage of the proceedings and the undue hardship transfer would cause. As the comments explain, "[L]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." 44 Fed. Reg. 67, 591, C.3. The "advanced stage" rule is designed to avoid "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.

Based on Thompson, a tribe may delay such motion throughout the foster care proceedings, throughout the termination proceedings in the J&DR Court, and all the way up to the date of the trial in the Circuit Court on termination. Id. More significantly, it allows for the parents and the Tribe to transfer a case after a court approves the goal of adoption. If allowed, this provides the parents and the Tribe the ability to circumvent Virginia state court orders, entered to protect the welfare of the children, ***after*** the foster care proceedings have concluded and a Virginia state court

has approved a goal of adoption.[13] The practical result of this is a retrial of a Virginia state court's decision to approve the goal of adoption. This is precisely the "obstructionist tactics" the guidelines sought to prevent.

Finally, the Court of Appeals held that technology would alleviate any hardship, stating that although the Tribe was located 1600 miles away, "modern technology, audio visual communication, and hearings by telephone, will allow the tribal court to hear the evidence without undue hardship." While one may presume that, in this modern age, technology is available to all jurisdictions, it is simply not reality. Such a sweeping interpretation calls for the most urban, populated jurisdictions to be treated the same as the most rural jurisdictions.

Furthermore, such a sweeping interpretation ignores the practical dilemmas raised in the first assignment of error. Nothing indicates that the "undue hardship" guideline was mistakenly included, but the practical effect of such an interpretation is the removal of any real power of the Guideline. More importantly, Thompson's overall interpretation of § 1911(b) and the Guidelines is contrary to Congress's purpose and intent in enacting the law.

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[13] The tribal attorney testified, "An adjudication's already part of the record. I would file a motion with the court to accept that, or I can file a new petition based upon that…I would file a motion with the court to accept that adjudication and set the matter for disposition…At the dispositional hearing, the court would determine whether there's an adequate case plan for reunification." (J.A. at 393).

G. CONCLUSION

Pursuant to 25 U.S.C. § 1911, state courts have the right to continue to exercise jurisdiction in proceedings for termination of parental rights and to decline a motion to transfer such proceedings to a tribal court, if a party opposing transfer demonstrates either that a parent objects to the transfer or that there is "good cause" to the contrary. See 25 U.S.C. § 1911(b). "Good cause" is not defined in the Act itself.

As a practical matter, if the trial court were to grant the motions to transfer this proceeding for termination of parental rights to the tribal court in Shawnee, Oklahoma, then DSS is effectively deprived of its constitutional right for an opportunity to be heard on its Petitions. DSS would have the undue hardship of trying its case in a foreign jurisdiction, retaining local counsel in addition to existing counsel, transporting witnesses and records and otherwise incurring excessive expenses when all of the parties, all of the witnesses and all of the evidence is readily available in the Commonwealth of Virginia.

Similarly, this proceeding is another chapter in DSS' long and extensive history with this family. While the Tribe has participated in recent legal proceedings with regard to these children, it has been involved with the mother and has been aware of her circumstances due to its placement

and subsequent removal of two older children in her home since the birth of these children. Termination of parental rights is an advanced stage of the proceedings which were initiated by the criminal proceedings against the mother for child neglect in June 2010.

Finally, DSS considered and even attempted placement with extended family. The children were placed with their maternal grandmother in June 2010 and returned to their parents in August 2010. They were placed with their maternal aunt in November 2010 and returned to the parents again in April 2011. The Tribe identified family in New Mexico as a potential placement, but did not provide DSS with sufficient information for consideration. To its credit, DSS has in fact placed the children in a home with foster parents who not only are willing to proceed with adoption but also have Indian heritage.[14]

For these reasons, DSS believes that the Court of Appeals erred in deciding to vacate, reverse and remand the proceedings for consideration of the trial court in light of its decision in Thompson. DSS believes that even in accordance with Thompson the trial court did not abuse its discretion in finding good cause by clearing and convincing evidence not to transfer jurisdiction of this proceeding to the District Court of the Citizens of

[14] Dr. Stolberg testified that the foster family has a Native American heritage. (1/9/12 Tr. 258, l. 11-15)

Potawatomi Nations located in Shawnee, Oklahoma, approximately 1,242 miles from Dinwiddie County, Virginia.

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CERTIFICATE OF COMPIANCE WITH RULE 5:26(h)

I hereby certify that on this 14th day of May, 2014, fifteen bound copies of the Brief of Appellant and ten copies of the Sealed Appendix, with ten electronic copies on CDs of both, were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, three bound copies of the Brief of Appellant and one copy of the Sealed Appendix, with one electronic copy on CD of the Brief, were served, via U.S. Mail, postage prepaid to all counsel at the following addresses:

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This Brief does not exceed 8,750 words, the actual count being 7,669 with headings, footnotes, and quotations included.

Counsel for Appellee does NOT waive oral argument.

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