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 GUARDIAN *AD LITEM*

Sherry L. Gill (VSB No. 38269)
JACOBS, CAUDILL, GILL & RODDY
Post Office Box 455
Chesterfield, Virginia 23832
(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

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REPLY TO MOTHER'S ISSUES WITH THE STATEMENT OF FACTS

Appellee Renee Nunnally (hereinafter "Mother") takes issue with Appellant's (Dinwiddie County Department of Social Services, hereinafter "DSS") characterization of her drug and criminal history. (App. Brief 1-2) In support, Mrs. Nunnally admits to having a prior illegal drug and criminal history, but asserts there have been no further criminal history since her May 30, 2010 conviction of child neglect. (App. Brief 2) Quite the contrary, Mrs. Nunnally was convicted of a Violation of Probation in the Circuit Court of Dinwiddie County on September 28, 2012, just days prior to the entry of the Circuit Court's Order for Involuntary Termination of Parental Rights in this matter on October 2. 2012. (J.A. 746-763, 781-798) Further, Mrs. Nunnally was just sentenced to active incarceration by the Dinwiddie County General District Court on May 8, 2014 for a violation of Virginia Code Section 46.2-300.

Relative to Mother's drug use, there was ample evidence, aside from DSS testimony cited in her Brief, that reflected her drug use was a continual issue, even after May 30, 2010. (App. Brief 1) The Protective Order entered in the Juvenile & Domestic Relations District Court on August 3, 2010 required random drug screens. (J.A. 448-451) The Temporary Consent Order entered on November 9, 2010 required Mother's

submission to a substance abuse evaluation, as well as compliance with all its recommendations. Although there was evidence that Mother completed the substance abuse evaluation, Mother failed to provide any verification that she complied with the recommendation contained therein (J.A. 267). And further, the evaluation conducted by Dr. Michele Nelson, under date of April 6, 2011, states the test data suggests Mother has significant issues with substance abuse. (J.A. 469)

REPLY TO ARGUMENT THAT GOOD CAUSE DID NOT EXIST

In their Briefs, Mother and The Citizen Potawatomi Nation (hereinafter "the Tribe") assert 'good cause' does not exist to deny transfer of this matter to the Tribal Court. (App. Brief 4; Tribe 10) First, they assert the proceedings were not at an "advanced stage," as is contemplated by the Bureau of Indian Affairs' non-binding Guidelines for State Courts: Indian Child Custody Proceedings. (44 Fed. Reg. 67584 (1979)) Specifically, the Guidelines suggest, "The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." (Id.)

While this Guardian *ad litem* (hereinafter "GAL") set forth the timeline of documents filed in this matter in her original brief, it also stands to reason that, in order to determine whether something is "advanced," there

must, first, be a determination of an origin from which advancement can be measured. Thus, the initial question here is, where does this proceeding, or process, really begin? Does it begin when the Commonwealth of Virginia first started rendering services to Mother (at age 14) and her family, who are also members of The Citizen Potawatomi Nation residing in Dinwiddie County and neighboring jurisdictions? (J.A. 227-229) Does it begin with the Dinwiddie Court's involvement with Mother's eldest child, Robert Bagley, when the Tribe chose not to respond and, instead, relied on the Commonwealth of Virginia to remove Robert and provide services to both Mother and child, which ultimately included treatment rendered by the Department of Juvenile Justice? (J.A. 230, 232) Does it begin in June of 2007 with the removal of Mother's substance exposed infant, Erica Bagley, when the Tribe chose not to respond and, instead, relied on the Commonwealth to provide services to both Mother and child, which ultimately culminated in a successful adoption within the Commonwealth? (J.A. 141, 230-232, 248, 549-552) Does it begin when the Tribe was notified in June of 2010 by Dinwiddie DSS, Mother and Mother's family that there were substantial issues with the safety and welfare of the twins and other Indian children in Mother's care? (J.A. 178-179, 258-259, 519) Does it begin in October of 2010 when the Tribe chose to remove the two older

Indian children from Mother, but left the infant twins behind? (J.A. 260-263) Does it begin in November of 2010 when the twins were no longer residing with Mother and Father? (J.A. 511-515) Does it begin when the twins were placed in the custody and care of Dinwiddie DSS on April 15, 2011? (Id.) Or does it begin on June 1, 2011 when the Tribe was given notice that DSS proposed a goal of adoption, which was subsequently approved on June 21, 2011? (J.A. 541-548, 553-555)

The Tribe complains that DSS and this GAL set out much extraneous "factual" background. (Tribe 7) Quite the contrary, all of these proceedings are integral to a proper understanding of this Commonwealth's long-term interactions with this family, as well as with the Tribe, of why DSS' initial goal for the twins was that of adoption, and why this matter was truly at an 'advanced stage' when the Tribe filed its Petition to Transfer on September 9, 2011. These proceedings did not begin with the filing of a specific document or notice of hearing, but instead started a generation ago.

Mother states [t]ime can hardly be an issue," because the Virginia Code provides for a trial de novo upon perfection of an appeal. (App. Brief 4-5) To the contrary, time is very much an issue for the twins. (J.A. 210, 294-317, 334-336, 738-745) We know from common sense that with each passing day they had basic needs for food, comfort, shelter, and stability

that had to be met. Too, with the passage of time, they have had developmental windows open and close. (J.A. 288-316) They have special needs due to the impact prior neglect had on their development. (Id.) Their young lives have moved forward. They are making strides in addressing their special needs, deeply rooted in their community, and about to begin kindergarten. (J.A. 738-745)

The matter currently before this court is termination of parental rights (hereinafter "TPR") only. We must remember that it is pursuant to the CHINS Petition that the Court placed custody of the twins with Dinwiddie DSS. As a result, there was a separate and distinct proceeding held on June 21, 2011 wherein a goal of Adoption was established for the twins, as is acknowledged by the Tribe. (Tribe Brief 15) Both Mother and Father were present for the proceeding, and the Tribe had notice (541-548, 553-555). The Tribe didn't intervene, participate, seek to transfer that case, or even appear for the hearing. (Id.) This proceeding was not appealed. The Tribe has only intervened in the Termination case. Certainly, TPR must occur prior to the achievement of the goal, but it seems disjointed to permit TPR to be handled in a totally separate forum from the custody proceedings of the twins.

Appellees also take the position that there is insufficient evidence to apply the doctrine of *forum non conveniens* to support a finding of good cause. (App. Brief 18,Tribe 22) Both assert the Tribe could hold Court in the Commonwealth of Virginia. (Id.) Their position is inconsistent with the evidence before the Court. Testimony illicited from Lisa Beth Otipoby Herbert, Juvenile Prosecutor for the Tribe, was that she had heard that a tribal court could relocate, but had not ever done so personally. (J.A. 395) When pressed further and asked whether she was "aware of the Potawatomi actually doing that," she responded, "I believe it has been done before, although I cannot (inaudible)." (J.A. 398) Never that it actually could or would be done. This was a general statement without specificity or commitment.

Further, Mother concedes that "the issue of how the Tribal Court would be able to issue summons for witness may be a more compelling argument…." (App. Brief 6) She, then, attempts to 'cure' the issue in asserting the world of communication has advanced at a greater speed than the legal environment. (Id.) While this may be a true statement, it does not resolve the issue. Means of communication may have advanced, but the record is silent relative to the availability of any such advancements in rural Dinwiddie County or even Shawnee, Oklahoma. More importantly,

the fact remains, the Tribe lacks jurisdiction and/or subpoena power over the persons that possess the most knowledge about the twins' needs, development and environment, as well as the issues that gave rise to the parents' inability to maintain custody. Ms. Herbert admitted that she did not have any legal authority to support her proposition that a tribal court has the ability to exercise jurisdiction over DSS, for example. (J.A. 399) The twins' pediatrician, daycare workers, babysitters, psychologist, etc. are here in the Commonwealth of Virginia. These folks possess the ability to provide continuity of care, as well as the information necessary for the state court to tender rulings in the best interest of these Indian children. Just as each case is distinct in its facts & circumstances, so is each child, based on their development, experiences and environment. As such, jurisdiction should remain in the Commonwealth of Virginia, and specifically in the County of Dinwiddie, such that a determination based on the "best interest of the Indian child" is possible.

The reality is that the Tribe had an opportunity to step in when they knew there were issues, to have this matter before the Tribal Court. Instead, they did nothing to protect these children, the parents requested services of the Commonwealth of Virginia, services were tendered to parents, as well as the children, professional relationships were established

in the care of the twins, and now the Tribe wants to sever the relationships established because they failed to act.

Too, the Tribe has been allowed to intervene relative to the TPR cases at both the Juvenile Court and Circuit Court levels. Despite the Juvenile Court's ruling that all efforts at rehabilitation of the Mother and/or Father had failed and, therefore approved a goal of adoption, the Circuit Court afforded the Tribe an opportunity to provide the 'active efforts' they felt the Mother and Father needed in an effort to rehabilitate. (J.A. 578-582) In essence, this only served to cause further delay, as well as a duplication of findings that all efforts had proven unsuccessful made by the Juvenile & Domestic Court back on April 15, 2011. (J.A. 516-518) The Tribe's efforts proved unsuccessful.

In order to divert from their inability to rehabilitate either of the parents, the Tribe tries to attack the credibility of the experts. Specifically, the Tribe makes much ado about Dr. Arnold Stolberg's admission that his work with families of Native American culture were not one of his specialties. (Tribe 28) The fact is, Dr. Stolberg testified that he has worked with families of Native American culture. (J.A. 317) Likewise, he has conducted research on families who change cultures, to include those moving into the United States from other countries with very strongly

defined cultures. (Id.) Thus, Dr. Stolberg offers a very broad and experienced background to this case.

It is true that the Tribe's plan to immediately remove the twins from their current environment was prior to the Court of Appeal's decision in *Thompson v. Fairfax County Department of Family Services*, ___ Va. App. ___, 747 S.E.2d 838 (2013) (Tribe 23) The Tribe now desires the opportunity to present evidence to allow the children to remain. (Id.) This is another reason why the standard in *Thompson* should be negated. In order to achieve transfer, what Tribe wouldn't offer assurances the Court that a child(ren) would be allowed to remain in their current placement until pending adjudication of the case on the merits of termination and/or placement? (Id.) What happens after the transfer is granted, and the Tribe doesn't maintain the placement thereby causing damage to the child(ren)? There are absolutely no assurances that a Tribe will, in fact, maintain the placement, nor is there any defined consequence for misleading the Court. Accordingly, *Thompson* cannot be allowed to stand.

The provisions of the federal statute do not demand the result sought by the Appellees. ICWA clearly gives the states the ability to hold onto the case if there is good cause. Good cause has been established on several bases.

The twins have special needs and, based on the opinions of three expert witnesses, contemplating another placement is not conducive to meeting those needs. (J.A. 299-300) The evidence is clear that, based on the expert testimony of Dr. Michele Nelson, the twins' current placement rescued them from the likelihood of detrimental emotional impact that would cause severe damage. (J.A. 205-206, 452-460) Licensed Clinical Social Worker Shel Bolyard-Douglas opined the twins' removal from their current placement would shatter their emotional stability. (J.A. 332, 337) Dr. Arnold Stolberg likewise testified of the probability that the twins would suffer immediate and long-term profound psychological damage. (J.A. 301-320, 480-491) Thus, it is in the best interest of the twins to remain in the Commonwealth, as the Commonwealth simply cannot tolerate placing the children at risk for such a grave consequence of transfer. There are other ways in which to preserve membership and protect Indian heritage. A finding of good cause doesn't necessarily equate to the extinguishment of a culture, as the Tribe asserts. (Tribe 29) The Court oversees the service plans for the twins and, as such, can require that the twins participate in tribal events, visits, etc., and that their environment be educated and support the customs of the Potawatomi. And perhaps this is the route to

take, in light of the constitutional and policy concerns raised by the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

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 infant children
Jacobs, Caudill, Gill & Roddy
Post Office Box 455
Chesterfield, Virginia 23832
Telephone: (804) 440-6200
Facsimile: (804) 440-6203
Email: attysgill@verizon.net

CERTIFICATE

I hereby certify that Rules 5:6 and 5:26 of the Rules of the Supreme Court of Virginia have been satisfied and that on this 23rd day of June, 2014, the fifteen copies of this "Reply Brief of the Guardian *ad litem*", with one electronic copy on CD were hand delivered to the Clerk's Office. This same date, three copies of the Reply Brief, with one electronic copy on CD, were forwarded via first-class U.S. Mail 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, GAL