In the

Supreme Court of Virginia

At Richmond

Record No. 131584

DINWIDDIE DEPARTMENT OF SOCIAL SERVICES,

Appellant,

– v. –

RENEE B. NUNNALLY and TIMOTHY B. NUNNALLY,

Appellees.

BRIEF OF INTERVENOR CITIZEN POTAWATOMI NATION

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INTRODUCTION

This issues in this case revolve around the transfer of proceedings involving Indian children from the Dinwiddie County Circuit Court to the Citizen Potawatomi Nation District Court, Juvenile Division (hereinafter the "Tribal Court"). The trial court denied motions filed by the Citizen Potawatomi Nation and both parents for such a transfer pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. (hereinafter "ICWA"). The issues are jurisdictional rather than substantive and the determination for this Court is who will hear the case and not what will be heard.

This brief will refer to the Appellant, Dinwiddie Department of Social Services, as DSS, to the Guardian *ad litem*, as GAL, and to the Appellees by their first names or as Mother or Father. References to the Appendix will be to page number as (__). References to the Appellant's Brief will be made to "(DSS, __)" and references to the Guardian *ad litem*'s Brief as "(GAL, ___)."

STATEMENT OF THE CASE

This is an appeal of a decision of the Court of Appeals of Virginia in reference to the transfer of a termination of parental rights case involving two Indian children from the circuit court to a tribal court pursuant to the Indian Child Welfare Act (hereinafter ICWA), 25 U.S.C. § 1901 et. seq.

Nunnally v. Dinwiddie Department of Social Services, Unpublished (Record Nos. 1947-12-2, 1948-12-2, 1949-12-2, 2013). There were four cases in the trial court involving each of the parents of each of the twins. Those four cases were consolidated for appeal.

The case began in the Juvenile and Domestic Relations District Court for Dinwiddie County (hereinafter JDR court). Although there had previously been proceedings in that court in reference to emergency removal and foster care placement, the petitions for termination of residual parental rights were filed on June 21, 2011. (1-4). The Tribe's motions to intervene were granted on September 16, 2011. (6). On October 18, 2011, the JDR court denied the petitions for termination because DSS did not comply with the ICWA requirements of having an expert witness. (9-20). On October 18, 2011, DSS and the GAL both appealed the JDR rulings to the Dinwiddie County Circuit Court. (21-28).

The Notices of Appeal were filed with the Circuit Court on November 1, 2011. (21-28). The Citizen Potawatomi Nation (hereinafter "Tribe") timely intervened and moved to transfer the cases from the Circuit Court to the Tribal Court. (47-57).

There were three hearings in the Dinwiddie County Circuit Court. The primary hearing on the motions to transfer which had been filed by the

Tribe and each parent, was held on January 9, 2012. At the conclusion of that hearing, the trial court denied the motion to transfer. Although DSS states that this was the only hearing on this issue (DSS,10), the trial court did not set out its findings and conclusions on this issue until the June 4, 2012 hearing. The order incorporating those findings referenced all three hearing. (589-590).

On January 30, 2012, the court heard evidence on the Father's motion to invalidate the prior proceedings under 25 U.S.C. § 1914. The Father had not been represented by a lawyer at the JDR foster care hearing. He had not been asked income questions by the court and had never executed a waiver of his right to court appointed counsel. (80). He received court appointed counsel only <u>after</u> the foster care hearing. (79).

On June 4, 2012, the court reconvened and the trial court made certain findings based on its understanding of ICWA. (588-591). The court found that both children are Indian children and are members of or eligible to be members of the Tribe. It acknowledged that their placement is covered by ICWA but held that the Dinwiddie County Circuit Court has jurisdiction over the proceedings because the children were residents and domiciliaries of Dinwiddie County when the court acquired jurisdiction. The

court further found that appropriate notice had been sent to the Tribe. (589).

The trial court recognized that requests had been made for transfer to the Tribal Court and acknowledged that the law requires the transfer unless the court determines that there is good cause for not transferring the case. The court found that good cause existed for not transferring the case. (588-591). The good cause consisted of 1) the advanced stage of the case when the petition for transfer was filed; 2) the case could not have been presented in tribal court without undue hardship to the parties or witnesses; and 3) the testimony of a psychologist in reference to the children's secure attachment relationships in the foster home, which was in essence a consideration of the children's best interests. The court further found that to the extent that the court should not have considered testimony from the psychologist, it was relying on common sense in its everyday experience with young children in reference to attachment bonds. (590-591). The court commented that the children lacked stability until they were placed in the foster home and that they had special emotional and psychological needs. (591).

The Dinwiddie County Circuit Court denied the transfer to the Tribal Court, relying on the best interests of the children, the conclusion that the

motions to transfer were filed at an advanced stage of the proceedings, and the conclusion that the transfer would cause undue hardship to the parties or witnesses. (588-591). The trial court's findings were incorporated into orders in each of the cases entered on August 27, 2012. (632-633; 652-658; 672-673;692-693).

The actual trial on the merits was not held until September 11, 2012. The parental rights of both parents were terminated and both appealed to the Court of Appeals. (746,764,777,781).

In an unpublished opinion, the Court of Appeals reversed the Circuit Court's decision on the denial of motions to transfer, vacated the order terminating the parental rights of both parents and remanded the case for further proceedings consistent with the published case issued on the same date, *Thompson v. Fairfax County Dep't of Family Servs.*, 62 Va. App. 350, 747 S.E.2d 838(2013). *Nunnally v. Dinwiddie Department of Social Services*, Unpublished (Record Nos. 1947-12-2,1948-12-2,1949-12-2, 2013).

DSS and the GAL appealed to this Court. This Court permitted the Tribe to intervene in these appellate proceedings by Order dated January 13, 2014.

The controlling law is the Indian Child Welfare Act of 1978 (hereinafter "ICWA"), 25 U.S.C. § 1901, et. seq. ICWA was promulgated based on the concern over the consequences to Indian children, Indian families and Indian tribes over child welfare practices that separated large numbers of Indian children from their families and tribes through adoption and foster care placement. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 1600, 104 L.Ed.2d 29, 36 (1989). Congress considered the harm to children and parents as well as the impact on the tribes themselves. 490 U.S. at 34, 109 S.Ct. at 1600, 104 L.Ed.2d 37, fn. 1.

Under ICWA, there is a presumption that cases involving Indian children are to be transferred to a tribal court.

STATEMENT OF FACTS

The children who are the subjects to these legal proceedings are twin girls, R.N. and T.N. They will be referred to only by their initials or as "the twins." The parents are Renee Bagley Nunnally and Timothy B. Nunnally. Renee is an enrolled member of the Citizen Potawatomi Nation who is proud of her Indian heritage. (168). Timothy is not an Indian.

DSS begins its Statement of Facts with the allegation that this proceeding will determine the fate of twin girls. (DSS,3). This statement is

incorrect. The proceeding will determine the *jurisdiction* in which the fate of the children would be determined. This is in furtherance of the public policy transfer pursuant to ICWA.

The Guardian *ad litem*'s brief does not include a separate Statement of Facts. Rather, she inserts into her Statement of the Case many details related to the children's history. Both the GAL and DSS set out much extraneous "factual" background, including the history of the twins' older siblings, and the facts surrounding how the twins came into custody of DSS. Many of these "facts," were included without references to the Appendix and many are not contained in the Record. For example, the GAL alleged that in 2010 the maternal grandmother made certain communications to DSS. (GAL, 5). However, there are no citations to the Record, the grandmother did not testify, and there is no allegation that her statements were brought to the attention of the trial court. The GAL also discusses testimony from a juvenile court hearing. (GAL,7).

Some of this background will indeed be relevant in the actual trial on the merits. However, they are not relevant in the determination as to the issue of transfer of the case from Dinwiddie County, Virginia to the Citizen Potawatomi Nation Tribal Court (hereinafter "Tribal Court"). The Tribal

Court would be required to consider these facts in determining the issues of termination of parental rights and placement of the children.

The relevant facts for the jurisdictional issue in this case are those involving the various motions to transfer, notice requirements, delays brought about by DSS, and the ability of the Tribal Court to conduct a hearing without inconveniencing the participants.

There was evidence that DSS did not cooperate with the Tribe. For example, a representative of DSS admitted that she refused to give information about the foster parents to a social worker for the Tribe. (244-245). There was much testimony about whether the Tribe received the proper notice of hearings which would allow it to participate. Another DSS representative was unclear about mailing a notice of earlier proceedings to the Tribe. (278). Another DSS representative was unclear about mailing a notice of earlier proceedings to the Tribe. (278).

The twins were initially placed in the custody of DSS on April 15, 2021. The Tribe filed its first motion of intervention on April 19, 2011. However, based on Father's indecision, the Tribe withdrew that motion. (391-556). After Father agreed to the transfer, the Tribe filed another motion to transfer, albeit by foreign counsel, on July 7, 2011. (391).

The GAL complains in her brief that the Tribe filed a motion to transfer the cases to the Tribal Court on September 9, 2011 in the JDR court and that the filing was not timely. (GAL,18). DSS sent the Tribe a notice of an involuntary child custody proceeding on September 11, 2012. The Tribe's motion for intervention was granted. (6). This issue became moot when the JDR court denied DSS's motions for termination of parental rights. Both the GAL and DSS filed notices of appeal to the JDR orders.

This case was tried *de novo* in the Circuit Court**.** The Tribe filed a Notice of Intervention and a Motion to Transfer the case under 25 U.S.C. § 1911 in the circuit court in each of the four cases on December 12, 2011. (47-57). The Mother and Father filed their respective motions to transfer on December 5, 2011 and December 12, 2011. (41-45; 59-63).

DSS presented evidence that the family did not display evidence of participation in Indian customs. (279) Neither DSS nor the GAL sought expert witnesses with experience in Indian culture as required by 25 USC §1912. Although two psychologists testified on behalf of DSS, Dr. Stolberg admitted that he had no expertise in Indian families (327-328); and Dr. Nelson testified that she did not run any tests or see if the Tribe had different social norms from the typical Anglo-Saxon society. (Transcript 1/30/12, pp.1121-1122).

Dorothea Townes, a representative of DSS, admitted that they did not consider a licensed home approved by the Indian child's tribe. DSS did not contact the Tribe and inquire about alternate foster home placement. (Transcript 1/30/12, pp.282-283). She did not believe that there were customs or protocol of the Tribe involved in the family. She did not think about ICWA placement requirements. (224-225).

Additional facts will be set out in reference to specific arguments.

RESPONSE TO DEPARTMENT OF SOCIAL SERVICES' FIRST ASSIGNMENT OF ERROR

The Court of Appeals properly reversed and remanded this case to the trial court for further consideration because the trial court erred in relying on the advanced stage of the proceedings, the undue hardship of the transfer, and the best interest of the children in deciding not to transfer the proceedings to the tribal court.

Standard of Review

DSS correctly identifies the standard of review for the transfer of cases pursuant to ICWA as that of abuse of discretion. (DSS,13). However, the party opposing transfer must establish good cause by clear and convincing evidence. *Thompson v. Fairfax County Dep't of Family Servs.*, 62 Va. App. 350, 361, 747 S.E.2d 838, 844 (2013).

Argument

This case falls clearly under the purview of ICWA. 25 U.S.C. § 1901, et. seq. The Mother is an enrolled member of the Tribe and the children

were eligible for membership in the Tribe. The trial court acknowledged that the twins were Indian children. (104).

The policy behind ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum* Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902 (emphasis added). A child custody proceeding includes a foster care placement and the termination of parental rights. 25 U.S.C. § 1903(1)(i),(ii).

In enacting ICWA, the United States Congress recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). In addition "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Indeed, the Supreme Court noted that

there were studies showing that between 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions. The majority of those placements were in non-Indian homes. 490 U.S. at 33, 109 S.Ct. at 1600, 104 L.Ed.2d at 36-37.

There is a dual jurisdictional scheme under ICWA. The Indian tribal court has exclusive jurisdiction as to any case involving a child who resides in or is domiciled within the reservation of such tribe. 25 U.S.C. § 1911(a). ICWA creates concurrent, but **presumptively tribal**, jurisdiction with the state courts in cases of children not domiciled on the reservation. "In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled within the reservation, the court, in the absence of good cause to the contrary, <u>shall</u> transfer such proceeding to the jurisdiction of the tribe, absence objection by either parent, upon the petition of either parent … or the Indian child's tribe." 25 U.S.C. § 1911(b) (emphasis added); 490 U.S. at 36, 109 S.Ct. at 1601-1602, 104 L.Ed.2d at 38-39, fn. 4.

Because neither Renee nor the children were living on a reservation, Section 1911(b) is the controlling statute in this case.

The ICWA does not define "good cause to the contrary." However, the Bureau of Indian Affairs has published guidelines (hereinafter "BIA guidelines") for guidance in the interpretation and application of ICWA. *Thompson*, 62 Va. App. at 365, 747 S.E.2d at 846. These guidelines are not binding. *Id*. Under the BIA guidelines, good cause to refuse transfer may be present if the proceeding was at an advanced stage when the petition to transfer was filed or if "[t]he evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses." *Thompson*, 62 Va. App. at 366, 747 S.E.2d at 846, quoting 44 Fed. Reg. 67, 591C.3(b).[1]

Courts in other jurisdictions have found good cause based on the advanced stage of the proceedings, undue hardship or both.

The Guardian *ad litem* quotes the BIA guidelines to support her position that the Tribe's request for transfer was not timely. (GAL 17). According to the GAL, when the Tribe withdrew its motion to transfer, it represented "that it was *unable to provide services*." (18, emphasis in Brief). As soon as the twins were taken into custody, counsel for the Tribe prepared a motion in the JDR court to transfer the case to the Tribal Court.

[1] There are other situations that could provide good cause under the BIA guidelines, but they are irrelevant in this case because they are related either to children over five years old whose parents are unavailable or children over twelve years old.

(750). In June 2011, Ms. Herbert withdrew the motion to transfer because it was her understanding that the Father was going to object to the transfer. (754-755; 1598). Under 25 U.S.C. § 1911(b), a transfer cannot occur if a parent objects to that transfer.

The JDR court denied the petitions for termination and DSS and the GAL appealed. The Notice of Appeal was filed in the circuit court on November 1, 2011.

The Tribe filed transfer motions in the circuit court on December 12, 2011. (182;185;188;191). Mother filed a motion to transfer on December 5, 2011 and Father filed a motion to transfer on December 12, 2011. Therefore, the transfer motions were filed approximately six weeks after the initiation of the circuit court proceedings.

Under the facts presented in the *Thompson* case, the Court of Appeals found that those proceedings were not at an advanced stage. There the tribe participated informally in various hearings in the juvenile court in reference to foster care proceedings. The tribe filed its motion to intervene in the juvenile court at a time when the case was pending in the circuit court. The initial hearing to terminate parental rights had been scheduled for August 6, 2012 in the Fairfax Circuit Court. The case was continued and the tribe filed a motion to transfer jurisdiction to the tribal

court on September 10, 2012. Although the county and the parents argued that transfer was not appropriate because of the advanced stage and because the tribe failed to promptly petition for a transfer of jurisdiction, the Court of Appeals concluded that failure to seek transfer at the earliest opportunity is not an unreasonable delay.

Under ICWA, tribes can seek a transfer to a tribal court in either a foster care placement proceeding or a termination of parental rights proceeding. 25 U.S.C. § 1911(b). These are two separate and materially different proceedings and the tribe can intervene in either or both cases. 62 Va. App. at 379, 747 S.E.2d at 853. In *Thompson*, the tribe moved to intervene, albeit in the wrong court on August 1, 2012, signaling to the parties that the tribe intended to intervene. There was no indication that the delay in intervention, which occurred before the *de novo* trial, caused prejudice to the parties. In the instant case, the Tribe indicated its intention to intervene and transfer, albeit without local counsel, in time to alert the parties of its intentions to intervene and transfer. This motion was made well before the *de novo* trial occurred and there has been no argument that there was any prejudice to the parties.

In this case, the GAL emphasizes the five month delay between July 29, 2011 when at a hearing in the JDR court, the court rejected the Tribe's

motions to transfer because tribal counsel had not followed the proper protocol to appear and September 2011 when the Tribe filed its motion to transfer in the JDR court. However, the GAL ignores that counsel for DSS gave the Tribe formal notice two days after the Tribe's motion to transfer. (712)

DSS and the GAL further ignore their own responsibility for the delay. The juvenile court case was dismissed because DSS was not prepared and did not have an expert witness. Under Virginia's dual jurisdiction system, DSS and the GAL were able to appeal that case *de novo*, resulting in a new case and separate motions to transfer.

The Supreme Court of the United States found in 1989 "[h]ad the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as to automatically reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation. *Mississippi Band of Choctaw Indians* v. Holyfield, 490 U.S. 30, 54,109 S. Ct. 1597, 1611, 104 L. Ed. 2d 29, 50 (1989).

The *Holyfield* opinion is instructive even though it was decided under 25 U.S.C. § 1911(a) and this case must be decided under 25 U.S.C. § 1911(b). Here, as in *Holyfield*, had DSS notified the Tribe of the

proceedings in a timely fashion, the potential anguish might have been avoided. Instead, there was a significant delay from the transfer of custody to DSS and placement of the twins in a foster home and the notice to the Tribe. The delay was the result of the failure to comply with ICWA and notify the Tribe in a timely manner.

The North Dakota Supreme Court determined that "at a minimum, the BIA Guidelines contemplate that a motion to transfer is not timely if transfer would require a re-trial." *In re A.B.*, 2003 N.D. 98, ¶ 20, 663 N.W.2d 625, 632 (2003). Accordingly, where the petition for transfer was filed seven weeks after the petition to terminate parental rights and two weeks before the scheduled trial, the transfer motion was not made at an advanced stage of the proceedings and the motion to transfer was not untimely. See also *In re M.S. and K.S.*, 2010 OK 46, 237 P.3d 161 (2010) (reversing and remanding the trial court's denial of transfer to a tribal court because the tribe's transfer request came after the termination proceeding ended; holding that there was good cause to transfer because the tribe sought to intervene within three months after the petition was filed where there had been delays through circumstances outside the tribe's control).

The GAL cites *Chester County Dept. of Social Services v. Coleman*, 296 S.C. 355, 372 S.E.2d 912 (S.C. App. 1988), in reference to the

legislative history of ICWA indicates that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. In that case, the Court of Appeals set forth guidelines to determine good cause.

After remand, the case was appealed to the Supreme Court of South Carolina. DSS cites the South Carolina Supreme Court case for the proposition that there would be undue hardship in transferring jurisdiction to the Tribe. *Chester County Dept. of Social Services v. Coleman*, 303 S.C. 226, 399 S.E.2d 773 (1990). The sole issue presented on that appeal was whether jurisdiction should be transferred to the tribal court. The Supreme Court of South Carolina considered the hardship to the witnesses if the case were to be transferred and determined that it was more practical to allow the case to proceed in South Carolina. The witnesses in that case involved doctors, psychologists, social workers, and child abuse specialists. The children in question were removed from their parents in November 1983. The trial court issued an order transferring jurisdiction to the Tribe in November 1986.[2] The remand hearing was held in July 1989 and the Court of Appeals rendered its decision in December 1990. The Supreme

[2] Indeed, there was a previous appeal to the South Carolina Supreme Court on the issue of sexual abuse. 296 S.C. 355, 356-357, 272 S.E.2d 912, 913.

Court commented "we realize that by retaining jurisdiction, we are imposing some hardship on the parties and witnesses from South Dakota. However, this case has been in our court system seven years, during which numerous hearing [sic] have been held, and volumes of records have been compilated." 303 S.C. at 232, 399 S.E.2d at 776-777. Therefore, South Carolina denied the transfer based both on the best interests of the child and the undue hardship.

The instant case is distinguished from *A.B.*and *Chester* because the case involving these children involved a juvenile court proceeding, an appeal by DSS, and a resulting trial *de novo* in the circuit court. Part of the delay, therefore was due to Virginia's judicial system which permits an appeal of juvenile proceedings to the circuit court and to DSS's actions in appealing the first order.

The Nebraska Court of Appeals recently reversed a trial court's decision not to transfer a case to the tribal court. *In re Jayden D. and Dayten J.*, 21 Neb. App. 666, 842 N.W.2d 199 (2014). There, in a termination of parental rights proceeding, the trial court found good cause to deny the transfer to a tribal court based on the advanced stage and the distance involved in transfer to a tribal court. However, the Nebraska appellate court held that the trial court was in error because the mother's

motion to transfer was filed very shortly after the current termination motion was filed and so the termination proceeding was not at advanced stage; the appellate court did not consider the two years that the case had been pending prior to dismissal of the first termination motion. The appellate court further found that although the tribe was located in South Dakota and the mother and children resided in Nebraska, there was no evidence on the witnesses that might be called in the proceeding, where those witnesses were located, where the trial court was located, or the ease with which evidence might be presented at the tribal court. Accordingly, the trial court abused its discretion in determining that transferring the termination proceeding to the tribal court would result in a *forum non conveniens*.

The North Dakota Supreme Court has rejected the issue of forum inconveniens. The Supreme Court of North Dakota considered a similar situation. *In re A.B.*, 663 N.W.2d 625 (N.D. S.Ct. 2003). There, the father of the child was an enrolled member of the Turtle Mountain Tribe, living in Washington. The child and her mother were living in North Dakota when the mother was arrested, and the child was placed in foster care in a non-Indian foster home. The tribe moved to transfer the custody proceedings to the tribal court and the mother objected.

On June 3, 2002, the county in North Dakota petitioned to terminate the parental rights of both parents. On July 23, 2002, the tribe moved to transfer jurisdiction of the proceeding to the tribal court; the mother did not object to this motion. At a September hearing, a judicial referee denied the motion to transfer jurisdiction, concluding that it was not timely because the proceeding was at an advanced stage and a transfer of jurisdiction would create a *forum inconveniens*. The court reversed the recommendation and granted the motion to transfer. The Supreme Court of North Dakota affirmed.

The court explained that an "Indian child includes one who is eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4)(b), 663 N.W.2d at 631. "Absent good cause to the contrary, 25 U.S.C. § 1911(b) thus creates presumptive Tribal Court jurisdiction over any child custody proceeding involving A.B., including a foster care placement proceeding or a termination of parental rights proceeding." 663 N.W.2d at 631.

The North Dakota court also considered the argument of the Social Services Department that the tribe failed to file a timely motion to transfer. The court ruled that the transfer motion was filed about seven weeks after the termination petition was filed and two weeks before the scheduled trial.

The court commented that while the tribe could have made its motion to transfer earlier, the transfer motion was not at an advanced stage of the proceeding. 663 N.W.2d at 633.

In the instant case, the motions to transfer in the circuit court were made approximately six weeks after the termination petition was filed in that court. The Tribe had previously filed transfer motions in the JDR court.

In determining that there was no forum in which to present evidence related to the child, the North Dakota trial court ignored the presumptive jurisdiction of the tribal court over child custody proceedings. There was no reason to believe that the tribal court would not fulfill its obligations. The problem of cases involving Indian children and a significant distance "may be alleviated by having tribal courts come to the witnesses and a transfer may be conditioned on having a tribal court meet in the city where the family lives." *In re A.B.*, 2003 N.D. 98, ¶ 24, 663 N.W.2d 625, 633 (2003).

Here, there has been no showing of undue hardship. Ms. Herbert, the tribal attorney, explained that the Tribal Court could relocate to any jurisdiction, including Virginia. The entire court, consisting of the judge, the prosecutor, and the court's staff would convene court wherever they needed to appear. (393; 397-398). Both the lawyer for DSS and the GAL would, as members of the Virginia State Bar, be allowed to practice in the

Tribal Court. (406). She acknowledged that the parents may have told others that they would have their children back promptly if they went to Oklahoma; her opinion was that the parents are desperate for a positive answer. (407-408).

The *Thompson* case set out a new standard for transfer based on technological advances, such as video conferencing, that could be employed in order to prevent this undue hardship. Although the Tribe did not put on evidence as to using technology to hold hearings, certainly, the Tribe should be given that opportunity under the new rule articulated by the *Thompson* case and as contemplated by the Court of Appeals in this case.

Although representatives of the Tribe initially testified that they would take the children to Oklahoma immediately (356-357), this position was taken prior to the Court of Appeals decision in *Thompson*. The Tribe should be given the opportunity, as contemplated by the Court of Appeals decision, to meet the requirements of *Thompson* and present evidence of a plan that would allow the children to stay in their current environment pending adjudication of the case on the merits. 62 Va. App. at 376, 747 S.E.2d at 851.

There was no evidence that the motions to transfer were not timely filed and created any delay. Indeed, the motions to transfer were filed in December 2011 and the trial on the merits was not until September 2012.

RESPONSE TO DEPARTMENT OF SOCIAL SERVICES' THIRD ASSIGNMENT OF ERROR AND THE GUARDIAN *AD LITEM*'S FIRST ASSIGNMENT OF ERROR

The Court of Appeals of Virginia did not err in creating a new standard for deciding matters of transfer under the Indian Child Welfare Act under the facts of this case.

Standard of Review

The Department of Social Services correctly identifies the issue as interpretation of a statute which requires a *de novo* review.[3]

Argument

After analyzing cases from other jurisdictions which address whether the best interests of the child can establish good cause not to transfer, the Virginia Court of Appeals concluded that the traditional best interest of the child analysis is too broad to use in deciding whether good cause exists to retain jurisdiction. 62 Va. App. at 374, 747 S.E.2d at 850.

[3] The Guardian *ad litem* is incorrect in her assertion that, because this assignment of error deals with factual determinations by the trial court, the standard of review is that of abuse of discretion.

> [W]e hold 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. Thus we conclude that the appropriate test is 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.

62 Va. App. at 374-375, 747 S.E.2d at 850.

In reaching its conclusion, the Court found that the "overriding purpose of ICWA cannot be ignored altogether in making the transfer decision." 62 Va. App. at 375, 747 S.E.2d at 851. The Court further emphasized that "the focus in a transfer decision under 25 U.S.C. § 1911(b) must remain on the *immediate, serious . . . damage flowing from the transfer itself*." 62 Va. App. at 376, 747 S.E.2d at 851 (emphasis in original).

The GAL argues that the Court of Appeals has disregarded the best interests of the children in deciding whether to transfer to the tribal court. DSS and the GAL would prefer a standard which would allow the best interests of the child to control the issue of transfer.

The United States Supreme Court recognized that it had to consider a strictly **jurisdictional issue** and not the substantive issue:

> We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.
>
> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.' It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the Choctaw community. Rather, 'we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.'

490 U.S. at 53-54, 109 S.Ct. at 1611, 104 L.Ed.2d at 49-50 (emphasis in original) (internal citations omitted). Therefore, the Supreme Court rejected the best interests of the child standard.

The majority rule in other jurisdictions has also rejected a consideration of the best interests in determining the threshold jurisdictional issue of *what forum* should decide the best interests of an Indian child.

This is the core issue addressed by *Thompson* and in other states. The North Dakota court concluded that "the best interest of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court." *In re A.B.,* 2003 N.D. 98, ¶ 26, 663 N.W.2d 625, 634 (2003). *In re Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990) (the best interests of a child are relevant to ascertain placement but are not relevant in determining jurisdiction); *People ex rel. J.L.P.*, 870 P.2d 1252, 1258 (Colo. Ct. App., 1994) (adoption of a best interests of the child standard would defeat the purpose of the ICWA); *T.W. v. L.M.W.* (*In re C.E.H.)*, 837 S.W.2d 947 (Mo. Ct. App. 1992) (adopting the holding of *Armell* in reference to best interests); *State v. Elise M.*, 284 Neb. 834, 825 N.W.2d 173, 184-186 (2012) (ICWA is based on an assumption that protection of an Indian child's relationship to the tribe is in the child's best interests; the best interests of the child is not a consideration for the threshold determination of good cause not to transfer jurisdiction to a tribal court); *In re Guardianship of Ashley Elizabeth R.*, 116 N.M. 416, 863 P.2d 451 (N.M. Ct. App. 1993) (best interest standard is used to ascertain placement and not to determine jurisdiction); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995) (consideration of the best interest of the child in determining good cause is improper because "it

defeats the very purpose for which the ICWA was enacted, in that, it allows Anglo cultural biases into the analysis" and because questions of best interest are appropriate to placement and not jurisdiction).

The rationale of the aforesaid cases rejecting the best interests of children in order to determine the proper jurisdiction does not mean that there will never be consideration for best interests. Instead, those courts have made it clear that best interests are not relevant in reference to whether the state or the tribe has jurisdiction to decide the actual best interests of the children. Best interests will always be applicable to the trial on the merits in the Tribal court. The policy decisions related to ICWA recognize the specialized knowledge of the tribal court in its ability to determine the issues specific to Indian children. 25 U.S.C. 1901(5); Holyfield, 490 U.S. at 36, 109 S.Ct. at 1602, 104 L.Ed.2d at 39.

In addressing the best interests of the children, the trial court relied on the testimony of Dr. Arnold Stolberg, a psychologist, who testified, over the objection of the Tribe and both parents, about human development and attachment relationships of the twins. However, Dr. Stolberg admitted that families of Native American culture are not one of his specialties. (317). He attempted to compare Native American culture to children from families from other countries with strongly defined cultures and to compare identity

with the Native American culture to the attachment of the children to the person who was trying to promote that identity. (322-323). His opinion was that placing the extinguishment of culture over the child's needs would cause a significant emotional harm in the immediate and long-term. He felt the immediate and long-term psychological growth of the children should supersede the requirements of the larger culture. (322-323). Of course, his opinion is contrary to the intent of ICWA. One reason for the enactment of ICWA was the strong criticism of the way professionals who are unaware of Indian family life look at the underlying social and cultural values. *Holyfield,* 490 U.S. at 34, 109 S.Ct. at 1601, 104 L.Ed.2d at 37-38.

In a termination case involving Indian children, "the termination must be supported by evidence beyond a reasonable doubt including the testimony of a qualified expert witness." 25 U.S.C. §1912(f). A Minnesota appellate court recognized that "Non-Indian lawyers, social workers and judges perceive the necessity of terminating parental rights through quite different cultural lenses in their attempts to help Indian children. *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990).

The Nunnally trial court did not include consideration of any alleged substantial harm that could result from the transfer decision alone. For that

reason, the *Nunnally* appellate decision remanded the case for a determination in light of *Thompson*.

After a thorough review of the cases addressing best interests of the child at the transfer stage, the Thompson decision recognized the limited application of best interests in making transfer decisions under ICWA. *Thompson* limited the consideration of best interests to "a substantial harm" in crafting its opinion. Accordingly, the court determined a middle ground for transfer decisions. The overall best interests of the child are not a consideration in determining the jurisdiction to determine the ultimate issue. However, Virginia courts are to determine whether the *transfer itself* will result in serious emotional or physical harm. This rule places the application of best interests only where it is directly related to the jurisdictional issue.

The Court of Appeals in *Thompson* did not err because the holding was appropriate for Virginia's unique *de novo* appeal system from a juvenile court to a circuit court. This system, by its nature, creates delays in the transfer decision which may allow bonding. The substantial harm standard may not be applicable in a court system which has only one trial court so that there is less chance for significant delays. However, as in the instant case, there are rulings in the JDR court which can be delayed by

appeal (here by the parties opposing transfer) to the circuit court, the new standard may be applicable.

While it could be argued that the Court of Appeals' opinion still does not comply with ICWA, the Tribe accepts this ruling. DSS's Brief argues the facts against placement with the parents and discusses foster parent placement before reaching the issue of who makes the determination to terminate parental rights. This is putting the cart before the horse.

RESPONSE TO THE GUARDIAN *AD LITEM*'S SECOND ASSIGNMENT OF ERROR

The Court of Appeals of Virginia properly rejected the Existing Indian Family Exception.

Standard of Review

The Guardian *ad litem* did not set out the standard of review for this assignment of error. The issue is whether ICWA allows application of the Existing Indian Family Exception. Because the issue involves interpretation of a statute, it requires de novo review.

Argument

In enacting ICWA, the United States Congress recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of *or*

eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3) (emphasis added). In addition "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Indeed the Supreme Court noted that there were studies showing that between 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions. The majority of those placements were in non-Indian homes. 490 U.S. at 33, 109 S.Ct. at 1600, 104 L.Ed.2d at 36-37.

Despite this Congressional intent, the GAL invokes the Existing Indian Family Doctrine, asserts that the children were not part of an Indian community, and that ICWA should not apply to them. (GAL 22). She argues that the trial court and the *Thompson* court have erred in rejecting this doctrine. (GAL 21).

That exception, which some courts have used to avoid application of ICWA, allows courts to consider whether the child in question was actually a member of an existing Indian family. However, this exception has been

rejected by the majority of courts as being inconsistent with the *Holyfield* decision.

In *Thompson*, the Court of Appeals declined to recognize the existing Indian family exception and joined the majority of courts that have rejected this doctrine. 62 Va. App. at 367-368, 747 S.E.2d at 847.

The *Thompson* court held that the plain text of ICWA does not recognize the exception and there is no threshold requirement that the child must have either been born into or living with an existing Indian family. *Thompson* further found that the states recognizing the exception ignored the Congressional intent "to protect the best interest of Indian children *and* to promote the stability and security of Indian tribes and families." 62 Va. App. at 367, 747 S.E.2d at 847, quoting 25 U.S.C. § 1902. (emphasis in *Thompson*). The *Thompson* court finally found that the existing Indian family exception requires courts to assess the "Indianness" of the child or family.

In support of her argument, the GAL cites cases from four states. One of the GAL's cases comes from California whose appellate courts have split on the issue. See *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 996, 48 Cal. Rptr. 3d 605, ___ (2006) (the existing Indian family doctrine has no place in the application of ICWA).

Indeed, the Kansas Supreme Court overruled its prior adoption of the existing Indian family exception. *In re A.J.S.*, 288 Kan. 429, 204 P.3d 583 (2009).

In addition to the numerous cases cited in Thompson, courts in other jurisdictions have ruled that there is no exception based on perceived lack of Indian culture. *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 48 Cal. Rptr. 3d 605 (2006) (rejecting the existing Indian family doctrine in a stepparent adoption and stating that the "judicial creation of additional exceptions of any kind are not permitted"); *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099 (2004) (based on an Oklahoma law which codified the *Holyfield* decision, the "existing Indian Family Exception" is not pertinent to Indian child custody proceedings in Oklahoma); *In re Baby Boy C.*, N.Y. S.Ct., App. Div., 27 A.D.3d 34, 49, 805 N.Y.S.2d 313, 324 (2005) (refusing to apply the existing Indian Family Exception even though the mother had rejected Indian life and culture and voluntarily relinquished her Indian child for adoption by a non-Indian couple, "the detriment to the Tribe is quite significant – the loss of two generations of Indian children instead of just one"); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. S.Ct. 2003) (the doctrine is contrary to ICWA); see also, *Ex Parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ.

App. 2006) (Alabama courts have applied the exception only to cases in which a non-Indian mother relinquishes her child).

The *Thompson* court correctly rejected the Existing Indian Family Exception.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all of the reasons stated above, the Intervenor prays that this Court affirm the decision of the Court of Appeals in *Nunnally v. DSS* and that this case be remanded to the trial court for reconsideration of the transfer issue in light of the standards adopted in *Thompson v. Fairfax County Dep't of Family Servs.*

Respectfully Submitted,

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CERTIFICATE

I hereby certify that Rule 5:26 and Rule 5:28 of the Rules of the Supreme Court of Virginia have been complied with and that on this 9th day of June, 2014, 15 copies of this Brief were hand delivered to the clerk's office, along with one copy on CD. This same date, 3 copies of the Brief, along with a copy on CD, were sent via third party commercial carrier to:

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