STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0509

In the Matter of the Welfare of the Child of:

R.L.Z. and R.G.L., Parents.

Filed September 8, 2009
Reversed
Schellhas, Judge

Ramsey County District Court
File No. 62-J5-07-550480

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

On appeal from the district court's denial of a tribe's motion to transfer this proceeding to terminate parental rights to tribal court, appellant Leech Lake Band of Ojibwe (the Band) argues that good cause to deny its motion did not exist because: (a) the Band filed its motion promptly after receiving notice of the proceedings, which were not at an advanced stage at that time; (b) the record before the district court did not indicate that transfer would create undue hardship on the parties or the witnesses; and (c) the district court improperly based its denial of the Band's motion on the child's best interests. We reverse.

FACTS

This appeal arises from a termination-of-parental-rights (TPR) proceeding involving an Indian child, J.S.L., who was born in January 2007, and tested positive for methamphetamines at birth. Ramsey County Community Human Services Department (the county), which is not a party to this appeal, took custody of J.S.L. after she was placed on a 72-hour hold at the hospital. The next day, respondent-mother R.L.Z. (mother) and respondent-father R.G.L. (father) signed a voluntary placement agreement. J.S.L was then placed in the home of her paternal great aunt and uncle, A.B. and J.B., who reside in Minnesota.

Soon after J.S.L.'s birth, the county notified the Band that J.S.L. was reported to be of Indian heritage and was receiving services from the county. The Band did not respond to this notice. The county subsequently filed a petition alleging J.S.L. to be a child in need of Protection or Services (CHIPS) and a TPR petition in Ramsey County Juvenile Court. Mother and father failed to appear or contact the district court and, in June 2007, the court ordered their parental rights terminated. The Band received no notice of the filing of the CHIPS petition or TPR petition or notice of commencement of the proceedings.

Mother and father had a previous child in common for whom their parental rights were terminated, and that child was adopted by her paternal aunt and uncle, respondent-intervenors R.L. and J.L. (intervenors), who reside in Florida. In June 2008, over the objections of A.B. and J.B., proceedings were initiated to change J.S.L.'s placement in Minnesota with A.B. and J.B. to a placement in Florida with intervenors. In July 2008, the county placed J.S.L. with intervenors, who have filed a petition to adopt J.S.L.

The Band first learned of the TPR proceedings involving J.S.L. on August 20, 2008, through a phone call from mother. In September 2008, after determining that J.S.L. is eligible for membership in the Band, although not a member, the Band filed a petition to invalidate the termination of parental rights of mother and father on the ground that it was not notified of the proceeding as required by the Indian Child Welfare Act (ICWA).

At the evidentiary hearing on the Band's petition, Mark Meullerleile, a senior child-protection worker for the county, testified that mother indicated that she thought her

father was "100 percent Leech Lake Ojibwe," but that his protocol was to treat a case only as "pending ICWA," and not as an ICWA case, "unless there is more certain information." Meullerleile further testified that he sent the Band a Notice to Tribe of Services to an Indian Child in January 2007, including a family tree documenting J.S.L.'s Indian heritage. The notice stated that: J.S.L. had been in voluntary foster care since January 12; J.S.L. was receiving services from the county that involved conditions that may lead to out-of-home placement; a CHIPS petition was being filed; and the case "falls under the Fast-Track TPR laws." The county received a certified-mail receipt, dated January 24, 2007, showing that the Band received the county's notice, but received no response from the Band. Meullerleile mentioned no other attempts to contact the Band.

At the end of the hearing on the petition to invalidate the termination of parental rights, the district court stated that, even though this case was "pending ICWA the county ceased all efforts to verify and I think that's a mistake. . . . [I]t might be understandable and reasonable but I think it's a non legal way to proceed and I believe it's a curable mistake. It could have been cured much earlier than now." The court also noted that the Band could have made a determination of ICWA eligibility based on the notice it received from the county, but that "two . . . legally separate court proceedings were initiated after that notice" and the county did not make "active efforts to continue to comply with ICWA." The court determined that both the Band and the county were at fault because the case proceeded without ICWA compliance, but that the petition, though late, was timely under "the facts of this case." The court vacated the order terminating parental rights to J.S.L. and ordered the county to "cure the defects in the ICWA

compliance on this case immediately, including but not limited to providing formal notice of the TPR petition as required by ICWA and securing qualified expert witness testimony to address the out of home placement of the child." A pretrial hearing in the TPR proceedings was scheduled for December 31, 2008, and, on December 11, notice of the hearing was issued to the Band.

On December 24, 2008, both the Band and mother filed motions to transfer jurisdiction to the Leech Lake Tribal Court. The district court determined that good cause existed to deny these motions. This appeal follows.

D E C I S I O N

"Under the Supremacy Clause, U.S. Const. art. VI, the decision whether to transfer jurisdiction of child custody proceedings to a tribal court must meet the minimum requirements of the Indian Child Welfare Act." *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 304 (Minn. 2006). "Congress enacted ICWA to address the rising concern in the mid-1970s over the consequences of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Id.* (quotation omitted). The aim of ICWA is "to protect the interests of Indian children and to promote the stability and security of Indian communities and tribes." *Id.* at 304-05 (citing 25 U.S.C. § 1902 (2000)).

Where an Indian child resides off the reservation, jurisdiction between a tribe and the state is concurrent, but presumptively tribal. *Id.* at 305; *see also* 25 U.S.C. § 1911 (a) (2006) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child

custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."). The child's tribe can intervene at any point in a state court proceeding, and the court is required to transfer a TPR proceeding involving an Indian child to the jurisdiction of the child's tribe absent "good cause to the contrary" or an objection by either parent. 25 U.S.C. § 1911 (b), (c) (2006). For the purposes of ICWA, it is essential to allow appropriate tribal authorities to determine Indian child-custody matters "according to tribal law, customs and mores best known to them." *In re Welfare of B.W.*, 454 N.W.2d 437, 446 (Minn. App. 1990). As noted by the U.S. Supreme Court, state agencies and courts contribute to the problems that ICWA was intended to remedy. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45, 109 S. Ct. 1597, 1601, 1606 (1989). Therefore, "transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by the ICWA whenever possible." *B.W.*, 454 N.W.2d at 443, 446.

Whether "good cause" to deny transfer exists is a mixed question of law and fact and will be reversed if the district court made factual findings that are unsupported by the record, erroneously applied the law, or abused its discretion in reaching its conclusion. *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007). Where the facts surrounding the timing of a motion to transfer jurisdiction to a tribal court are not in dispute, the issue becomes one of application of a statute to essentially undisputed facts, which is a question of law that this court reviews de novo. *T.T.B.*, 724 N.W.2d at 307. The Bureau of Indian Affairs

Guidelines for state courts in Indian child-custody proceedings (BIA Guidelines) provide that the burden of establishing good cause to deny transfer is on the party opposing the transfer. BIA Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,591 (November 26, 1979). These guidelines, published for use by state courts in Indian child-custody proceedings, were not intended to have binding legislative effect but offer "some structure to state courts." *T.T.B.*, 724 N.W.2d at 305 (quotation omitted). "While the BIA Guidelines are not binding on courts . . . Minnesota appellate courts have consistently utilized the Guidelines to answer as a matter of law questions unanswered by the language of the ICWA itself." *In re Welfare of S.N.R.*, 617 N.W.2d 77, 81 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000).

Although neither ICWA nor Minnesota law defines "good cause" to deny a motion to transfer jurisdiction, the BIA Guidelines describe the circumstances under which good cause may exist. *T.T.B.*, 724 N.W.2d at 305-06; *see also* BIA Guidelines, 44 Fed. Reg. 67,591. The district court concluded that good cause for denying transfer existed for three reasons. We address each reason in turn.

Advanced Stage of Proceeding

The BIA Guidelines provide that good cause for denying transfer may exist when "[t]he 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." BIA Guidelines, 44 Fed. Reg. at 67,591. The BIA Guidelines commentary indicates that this provision was intended to prevent a party from waiting until the late stages of the proceedings to seek a transfer and, thus, disrupting the proceedings. *Id.* at 67,590-91.

But while "[p]ermitting late transfer requests by persons and tribes who were notified late may cause some disruption," it also "provide[s] an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions." *Id.* at 67,590.

Here, the record reflects that the Band received no notice of the initial TPR proceedings, and that it promptly filed its motion to transfer jurisdiction to tribal court after receiving notice of the new TPR proceedings. Respondents argue that the Band received actual notice of the proceedings when it received the "Notice to Tribe of Services to an Indian Child" in January 2007, citing *In re Dependency of E.S.*, 964 P.2d 404, 412 (Wash. Ct. App. 1998), in which the appellate court determined that the trial court did not abuse its discretion when it denied a motion to transfer jurisdiction despite the tribe's lack of formal notice of the proceedings. But, in *E.S.*, the tribe had actual notice of and intervened in the termination proceedings and did not promptly move to transfer jurisdiction. Here, the Band had no notice, formal or actual, of the initial TPR proceedings.

Moreover, we do not agree that the proceedings were at an "advanced stage" when the Band submitted its motion to transfer jurisdiction. In denying the Band's and mother's motions to transfer jurisdiction, the district court stated that this case had been "active in excess of two years" and was at an "advanced stage" with respect to: (1) J.S.L., who "has been waiting for permanency for two years"; (2) mother (despite the fact that mother also moved to transfer jurisdiction to the tribal court); and (3) the county. The district court's determination that the case was at an "advanced stage" is not consistent with the fact that, when the Band filed its motion to transfer jurisdiction, the district court

had only recently ordered that new TPR proceedings be initiated because of the Band's lack of notice.

We conclude that the district court erred in determining that the proceedings were at an advanced stage when the tribe moved to transfer jurisdiction, and that it also erred in determining that good cause existed to deny transfer of jurisdiction to the tribal court even though the Band promptly filed its motion to transfer after receiving notice of the proceedings.

Undue Hardship

Good cause to deny a transfer of jurisdiction may also exist when the "evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses." BIA Guidelines 44 Fed. Reg. at 67,591. The commentary to the BIA Guidelines describe the "undue hardship" definition of "good cause" as permitting state courts to apply "a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." *Id.* (quotation omitted). Generally, this definition of "good cause" has been used to weigh the burden on parties and witnesses created by the distance of the tribal forum. *See, e.g.*, *In the Interest of J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984) ("Good cause to deny transfer of the proceedings to the tribal court may arise from geographical obstacles."); *In the Interest of M.F.*, 206 P.3d 57, 62 (Kan. Ct. App. 2009) (determining that transfer of a case from Kansas to Wyoming "at such a late stage in the process" created undue hardship); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 650 (S.D. 2004) (citing cases where undue

hardship has been found as "good cause" under ICWA, and stating that "[g]enerally, courts have denied transfer where very long distances existed between the parties and the tribal court"); *see also* BIA Guidelines 44 Fed. Reg. at 67,591 (recognizing that the application of the "undue hardship" criterion "will tend to limit transfers to cases involving Indian children who do not live very far from the reservation," but that this problem may be mitigated by having the tribal court "come to the witnesses").

Here, the district court stated that "it is clear that an undue hardship would be placed upon many of the parties should this matter be moved to the Tribal Court." The court did not specifically identify the factors that would cause undue hardship, but apparently based its determination on its findings that transfer would end the involvement of respondents and the guardian ad litem in the case, eliminate the "historical memory" of the county and the district court, and could delay J.S.L.'s permanent placement. The district court did not mention the distance to, or the burden on parties or witnesses of traveling to, the Leech Lake Tribal Court in Minnesota.

Undoubtedly the district court and the county have accumulated significant knowledge of and familiarity with the facts of this case. But if "good cause" to deny transfer could be based on the fact that an informed or interested party could participate in the proceedings in district court but not a tribal court, denial of transfer would arguably be appropriate in every case. *See In re Welfare of Child of T.T.B.*, 710 N.W.2d 799, 805 (Minn. App. 2006) ("The distance between the district court and the tribal court is not alone sufficient to establish undue hardship because, under this reasoning, almost every

case involving a child not residing on a reservation could be denied transfer." (quotation omitted)), *reversed on other grounds*, 724 N.W.2d 300.

The district court's findings do not support its conclusion that good cause to deny transfer in this case existed because of undue hardship.

Best Interests

The district court also concluded that:

> It is not in the best interests of the minor child that jurisdiction be transferred at this late stage given the impact and party status of the persons involved in the matter in Tribal Court, the length of time that the child has been awaiting permanency and the placement considerations for the child.

The "best interests of the child" standard is "not one of the good cause factors enumerated in the BIA Guidelines and has only been applied in a few states." *People in Interest of J.L.P.*, 870 P.2d 1252, 1258 (Colo. Ct. App. 1994); *see also In re Guardianship of J.O.*, 743 A.2d 341, 318 (N.J. Super. Ct. App. Div. 2000) (identifying six states in which the best-interests standard may be used to determine good cause). Our supreme court has opined that "[t]he plain language of [ICWA] read as a whole and its legislative history clearly indicate that state courts are a part of the problem the ICWA was intended to remedy." *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994). And, in addressing the placement preferences of ICWA, the *S.E.G.* court observed that "[t]he best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture," and "[i]t therefore seems most improbable that Congress intended to allow state courts to find good cause whenever they determined that a placement outside

the preferences of [ICWA] was in the Indian child's best interests." *Id.* at 363 (quotation omitted).

"The paramount concern in any child-welfare proceeding is the best interests of the child." *In re Welfare of Children of R.A.J.*, ___ N.W.2d ___, ___, No. A09-0140, slip op. at 11 (Minn. App. July 21, 2009). "And Minnesota law requires that the best interests of Indian children be determined consistent with ICWA." *R.A.J.*, 769 N.W.2d at 304 (citing Minn. Stat. § 260C.301, subd. 7 (2008)). But the policy underlying ICWA is "to promote the stability and security of Indian communities and tribes," as well as "to protect the interests of Indian children." *T.T.B.*, 724 N.W.2d at 304-05 (citing 25 U.S.C. § 1902 (2000)). Following the reasoning of the supreme court in *S.E.G.*, we conclude that the policy underlying ICWA is undermined when a district court denies the transfer of jurisdiction to a tribe based on its own determination of an Indian child's best interests.

We therefore conclude that the district court abused its discretion in determining that good cause to deny transfer existed in this case, and we reverse the district court's order.

Reversed.