

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Justin O., )  
Shawna O., Cody W., and )  
Tyrell W., )  
Children under 18 years of age. )  
State of Nebraska, )  
Appellee, )  
v. )  
Susan O. and John O., )  
Appellants. )

No. A-13-0280

**MEMORANDUM OPINION  
AND  
JUDGMENT ON APPEAL**

**FILED**

NOV 08 2013

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Susan O. and John O. appeal the decision of the Dawes County Court, sitting in its capacity as a juvenile court, denying their motion to transfer jurisdiction to a tribal court pursuant to the Nebraska Indian Child Welfare Act. We find that, although two of the parties' children, Cody W. and Tyrell W. are Indian children within the meaning of the NICWA, the county court did not abuse its discretion in determining that good cause existed not to transfer to the tribal court.

STATEMENT OF FACTS

Susan and John are the biological parents of Justin O., born on November 24, 2008, and Shawna O., born on December 12,

2009. Susan is also the biological mother of two other children, Tyrell, born on May 6, 1997, and Cody, born on January 13, 2001.

On June 20, 2011, Susan's four children were taken into emergency protective custody due to a living situation that threatened the children's safety including a lack of cleanliness, unsanitary living conditions, and health risks such as lice infestation and contact with rotting food and fecal matter in Susan and John's home. Custody of all four children was placed with the Nebraska Department of Health and Human Services on an emergency basis, and the following day the State filed an adjudication petition alleging that each of the children was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). In July, the children were adjudicated as children within the meaning of § 43-247(3)(a). Custody of the children was placed with DHHS and placement of the children was with John's grandmother, Shirley O. Later that year, in late October and early November, with Susan and John's consent, guardianships were established for the children with Shirley as their guardian.

Approximately one year later, on October 11, 2012, Susan and John filed a petition to transfer jurisdiction to the Oglala Sioux tribal court. Apparently, the Oglala Sioux Tribe also filed a motion to intervene and motion to transfer jurisdiction; however, those motions are not contained in the transcript

before this Court. The guardian ad litem objected to the Oglala Sioux Tribe's motion to intervene. A hearing was scheduled for November 19 for Susan and John to provide proof that the children were Indian children as defined in the NICWA and, if so, whether the State could establish that good cause existed not to transfer to the tribal court.

The hearing on the motion to transfer jurisdiction to the tribal court was held on November 19, 2012. No representative appeared from the Oglala Sioux Tribe, nor did any attorney appear on their behalf. The court determined that neither Justin nor Shawna were Indian children as defined in the NICWA and that determination has not been appealed. The court did determine that Cody and Tyrell were Indian children and that NICWA was applicable to them. Thus, the court considered whether good cause existed not to transfer jurisdiction of Cody and Tyrell's cases to the Oglala Sioux tribal court. We summarize the evidence adduced at the hearings which was applicable to this good cause determination. Cody's case was addressed first, followed by Tyrell's case; therefore we address the evidence adduced at the hearing on Cody's case before proceeding to Tyrell's case.

#### *Cody's Case.*

At the time of the hearing, Cody, who was a few months away from turning 12, had been residing with Angela Hawthorne for

about 6 months, after having been placed there by his guardian, Shirley. Cody attends Trunk Butte Christian School where he is doing well and has friends. He attends church and a church youth group, attends counseling, and participates in activities like football and the Christmas program.

Cody testified that he liked living with Hawthorne because she loves him, he felt safe and protected, he had not been left alone the way he had been when he lived with his parents, he likes his school, and he likes the activities that he gets to participate in. Cody expressed that he was attached to Hawthorne and that he felt that Hawthorne's extended family was supportive of him and treated him as a part of the family. According to Cody, he and Hawthorne go on walks on Saturdays, they visit Hawthorne's father at his ranch, and they watch the Nebraska Cornhusker football games. Cody testified that he wanted to continue living with Hawthorne and did not want his case transferred to the tribal court.

Hawthorne testified that when Cody first came into her care, he was fearful of being left alone and very afraid that someone would hurt him. However, during the month prior to the hearing, he had done "incredibly well." Hawthorne described Cody as a happy, normal, child who sings and whistles. During the time that Cody has been in her care, they have developed a "really special bond" and he has become a huge part of her life,

at times even calling her "mom." Hawthorne testified that Cody needs a mother figure in his life that will love him and protect him and she feels that she can do that for him. Hawthorne expressed that transferring Cody's case to South Dakota would be "a terrible mistake" because he has adjusted, was happy, and was doing very well in her home, and he fit into her family and her family loves him. Hawthorne was concerned that if Cody was removed from her home he would regress.

Shannon Shuck, Cody's teacher, testified that Cody is doing well in school, he is outgoing, well-liked, works hard, and he seems happy. Shuck testified that based upon her training and experience, she felt that there would be an adverse impact on Cody if he was removed from his school. According to Shuck, she has built a good teacher/student relationship with Cody and he feels comfortable asking her for help; in her opinion, a new environment with teachers and students that he does not know would be detrimental to Cody's grades and his learning.

Teena Kendrick, Cody's counselor, testified that she has been counseling Cody on an ongoing basis since February 2012 and his emotional health has improved considerably since he was removed from Susan and John's home. Kendrick testified that a transfer of the case to the tribal court would be detrimental to Cody's mental health and progress made thus far because each time a placement is severed, the prognosis becomes worse and it

becomes harder for the child to have good, solid, attached relationships.

Susan testified that she lived in Martin, South Dakota from 1996 to 2006, near the Pine Ridge Indian reservation. Cody was born in 2001, so he lived in Martin for about 5 years. Although they never lived on the reservation, she and Cody participated in various cultural activities such as pow-wows. However, since 2006, when she moved to Nebraska, Susan has had little or no contact with the tribe. Cody testified that he knew that he had relatives in Martin, South Dakota, but he does not see them often and they do not come to Nebraska to see him. Additionally, when Cody would travel to South Dakota to visit his relatives, he stated that he spent time with them at their house and they would not go to other places.

Regarding the timing of the filing of the motion to transfer, Susan admitted that she was represented by counsel and she knew that she could have filed a motion to transfer the case to the tribe in 2011 but she chose not to do so; instead, she waited over a year to file a motion to transfer the proceedings.

*Tyrell's Case.*

Although Tyrell's case was immediately taken up after Cody's case, Tyrell's case is not included in the bill of exceptions before this court. We can ascertain from Susan's

testimony in Cody's case that at the time of the hearing, Tyrell was attending school in Norfolk, Nebraska.

*County Court Order.*

The county court, sitting in its capacity as a juvenile court, found that both Cody and Tyrell were Indian children within the meaning of the NICWA. Although both Cody and Tyrell were Indian children, the county court found that there was good cause to deny transfer of jurisdiction to the Oglala Sioux tribal court. The court found that because the Oglala Sioux Tribe did not appear at the hearing and did not present any evidence in support of the motion to transfer, the motion was considered abandoned and was denied.

#### ASSIGNMENT OF ERROR

On appeal, Susan and John contend that the county court abused its discretion in denying their motion to transfer jurisdiction to the Oglala Sioux tribal court.

#### STANDARD OF REVIEW

A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Zylena R.*, 284 Neb. 834, 825 N.W.2d 173 (2012); *In re Melaya F.*, 19 Neb. App. 235, 810 N.W.2d 429 (2011). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a

litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *In re Melaya F., supra.*

#### ANALYSIS

Susan and John contend that the county court abused its discretion in denying their motion to transfer jurisdiction to the Oglala Sioux tribal court.

Neb. Rev. Stat. § 43-1504(2) (Reissue 2008) provides:

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, except that such transfer shall be subject to declination by the tribal court of such tribe.

The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists. *In re Melaya F., supra; In re Interest of Brittany C.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). That a state court may take jurisdiction under the ICWA does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance

the interests of the state and the tribe. *In re Melaya F.*,  
*supra*.

The Indian Child Welfare Act does not define "good cause," but the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. *Id.* The Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified), states in part:

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the [ICWA] to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) 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.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) 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.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social

services or judicial systems may not be considered in a determination that good cause exists.

Additionally, a state court may not consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court. *In re Interest of Zylena R., supra.*

We first note that this case began on July 21, 2011, with the filing of the adjudication petition; however, Susan and John did not file the motion to transfer the case to the tribe until October 11, 2012. Susan admitted that she was represented by counsel and she knew that she could have filed a motion to transfer the case to the tribe in 2011, but she chose not to do so; instead, she waited over a year to file a motion to transfer the proceedings to the tribe. Thus, this proceeding was already at an advanced stage when the motion to transfer the case was filed. Based upon this, we find that the county court did not abuse its discretion in denying Susan and John's motion to transfer jurisdiction to the Oglala Sioux Tribe. We also note that, although the guidelines provide that good cause may exist if the Indian child is over 12 years of age and objects to the transfer, and Cody was a few months shy of turning 12 at the time of the hearing, he did testify that he did not want his case transferred to the tribal court.

CONCLUSION

Having found that the county court did not abuse its discretion in denying the motion to transfer to the tribal court, the decision of the county court is affirmed.

AFFIRMED.