

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF ZYLENA R. & ADRIONNA R.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF ZYLENA R. AND ADRIONNA R.,  
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

v.

ELISE M., APPELLANT, AND OMAHA TRIBE OF NEBRASKA,  
INTERVENOR-APPELLEE AND CROSS-APPELLANT.

Filed March 27, 2012. Nos. A-11-659, A-11-660.

Appeals from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN,  
Judge. Affirmed.

Norman Langemach for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Christopher M. Turner  
for appellee.

Rita Grimm and Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for  
intervenor-appellee.

Hazell G. Rodriguez, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Elise M. is the biological mother of Zylena R., born in June 2007, and Adrionna R., born  
in December 2008. Francisco R. is the children's biological father. Elise, an enrolled member of  
the Omaha Tribe (the Tribe), appeals from an order of the separate juvenile court of Lancaster  
County that denied the Tribe's motion to transfer this juvenile proceeding to the Omaha Tribal  
Court (the Tribal Court) because the case was at an advanced stage. Allegedly due to an  
erroneous determination in July 2008 that Zylena was not eligible for enrollment in the Tribe, the

transfer motion was not filed until 1 week after the State petitioned to terminate Elise's and Francisco's parental rights and nearly 2 years after Zylena and Adrionna were placed in their current foster home. After our review, we find that the denial of the motion to transfer was not an abuse of discretion, and thus, we affirm.

## BACKGROUND

At the outset, we note that we have consolidated Zylena's case, No. A-11-659, with the case of Zylena and Adrionna, No. A-11-660.

Elise has been an enrolled member of the Tribe since April 1, 1991. Elise's application for enrollment, dated the day of her birth, appears in evidence. The application lists Elise's mother as an enrolled Tribe member with 15/16 degree Omaha blood. Elise's biological father is listed on the application, but information regarding his enrollment with the Tribe and his degree of Omaha blood is lacking--the spaces on the form for such information were left blank. Elise's degree of Omaha blood is listed as 15/32 on the enrollment application, and the same is reflected on her "Certification of Degree of [Omaha] Blood" in evidence dated July 17, 2008.

The record reflects that the Nebraska Department of Health and Human Services (DHHS) inquired into Zylena's eligibility for enrollment with the Tribe on July 1, 2008. A "Tribal Enrollment Inquiry" form for Zylena, dated July 16, 2008, is in evidence. The form is from the Tribe's Child Protective Services department and is signed by an enrollment clerk and an "ICWA" representative--referencing the Nebraska Indian Child Welfare Act (ICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008). The form lists Elise's degree of Omaha blood, 15/32, and provides that Zylena's father, Francisco, is not an enrolled member of the Tribe, nor is he eligible for enrollment. There are checkmarks on the form indicating that Zylena is not an enrolled member of the Tribe and that she is not eligible for enrollment. Because Zylena and Adrionna have the same biological parents, their blood quantum would be the same.

On May 1, 2009, the State filed a petition in the separate juvenile court of Lancaster County alleging in count I that Zylena was previously adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), and her legal custody was placed with DHHS. The record reveals that Zylena was adjudicated on September 22, 2008, due to domestic violence between Elise and Francisco in the child's presence. The petition further alleges that Elise and Francisco have failed to correct the conditions that led to Zylena's adjudication (i.e., domestic violence) and that the situation and/or the actions of Elise and Francisco place Zylena and Adrionna at risk for harm. Count II of the petition alleges that Zylena and Adrionna lack proper parental care due to the faults or habits of Elise or that they are in a situation dangerous to life and limb or injurious to their health or morals, in that Elise left them in the care of another person without sufficient provisions or means to appropriately care for them and without information on how to contact her.

An adjudication hearing was held, and the allegations alleged in the adjudication petition were found to be true by a preponderance of the evidence, though no record of the hearing appears in evidence. Zylena and Adrionna were placed in temporary DHHS custody with their current foster family on May 29, 2009.

On November 4, 2010, Zylena's permanency objective was changed from reunification to adoption. A hearing was also held on November 4, at which time the court found no exception

existed to eliminate the requirements for the filing of a motion for termination of parental rights as set forth in Neb. Rev. Stat. § 43-292.02 (Reissue 2008) with respect to Zylena.

On February 7, 2011, the State filed a motion to terminate the parental rights of Elise and Francisco to Zylena and Adrionna. The grounds for termination listed in the motion are Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2010) with respect to both parents. The motion additionally alleges that termination is proper with respect to Elise pursuant to § 43-292(4). The motion asserts that termination is in the best interests of the children.

The Tribe filed a notice of intervention on February 14, 2011. The notice alleges that Zylena and Adrionna are children as defined by the ICWA in that they are eligible for membership with the Tribe. The Tribe filed an intent to transfer on February 22, and neither Elise nor Francisco objected to such. An acceptance of transfer was filed by the Tribe on March 1.

A hearing was held on March 16, 2011, in which Emerime Sheridan, the aid to tribal government/enrollment director for the Tribe, was the sole witness to testify. The State requested the court to take judicial notice of her testimony at the hearings on May 3 and June 16, and the court agreed to do so. Sheridan's duties include investigating and determining eligibility of persons for enrollment in the Tribe. Sheridan testified that she investigated the eligibility of Zylena and Adrionna for enrollment in February 2011 and that her investigation determined that their degree of Omaha blood is 38/128. Sheridan testified that one-fourth degree Omaha blood is required for enrollment with the Tribe, and thus, Zylena and Adrionna are both eligible.

Sheridan testified that the reason Zylena was previously determined to be ineligible for enrollment was because there was an error in the determination of Elise's degree of Omaha blood. Specifically, she testified that Elise's father's blood quantum was not incorporated into the calculation, and thus, Elise's degree of Omaha blood was lower than it should have been. In evidence is an acknowledgment of paternity dated December 22, 1988, which provides that Elise's father's race is "American Indian." Testimony at a later hearing revealed that he is part Winnebago and part Omaha. Sheridan testified that incorporating Elise's father's blood increased Elise's degree of Omaha blood "considerably"--from 15/32 to 19/32, which would increase Zylena's degree of Omaha blood to 38/128, as would also be true for Adrionna. Sheridan testified that documentation regarding the Omaha blood of Elise's father was available when Elise's blood quantum was initially calculated and that the failure to take his ancestry into account was an "oversight" by her office.

The State filed an amended motion for termination of parental rights on April 28, 2011, with the additional allegations that (1) continued custody of Zylena and Adrionna by their parents is likely to result in serious emotional or physical damage to said children and (2) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful.

Formal hearing on the Tribe's motion for transfer was held on May 3 and June 16, 2011. A DHHS children and families outcome monitor, Katie Rawhouser, testified that she began working with Zylena and Adrionna in February 2010 and that she sent documentation inquiring into Adrionna's enrollment in the Tribe on October 27, but that she did not receive a response. Rawhouser did not inquire into Zylena's eligibility because, as stated above, the Tribe had determined in July 2008 that Zylena was ineligible for enrollment. The next action by the Tribe

concerning these children was the filing of the notice of intervention 1 week after the motion to terminate Elise's and Francisco's parental rights was filed.

All of the testimony was that it is in Zylena's and Adrionna's best interests to remain in their current foster placement, where they had been living for approximately 2 years (since May 29, 2009) at the time of the hearing. Elise testified that, in the event the court granted the Tribe's motion to transfer, she would like the children to stay in that foster home until she is ready to parent. At the time of the hearing, Elise was not living in a permanent home and she was unemployed. She testified that Zylena had recently expressed concern over where she would be living in the future. There was no evidence that Francisco was capable of parenting or in a position to parent the children.

Elise testified that she has participated in drug treatment three times, twice inpatient and once outpatient. Her testimony was that her most recent recommendation through DHHS was that she needs to address her drug and alcohol problems through long-term inpatient treatment. Rawhouser testified that Elise has struggled with sobriety and that "she has not been able to get [her sobriety] under control, has not completed court ordered services." Marla Spears, a member of the Tribe and director of Child Protective Services for wards of the Tribe, testified that if the case were transferred to the Tribal Court, Elise would be required to complete inpatient drug and alcohol treatment, which could take up to 6 months, at a facility 8 hours' driving distance one way from where the children are now living.

Francisco also testified. His testimony was that he feels the children's current foster home is providing good care. He testified that although he wants the children to stay in their present foster home, he does not want his parental rights to be terminated. The evidence was that Francisco has been unsuccessful in completing court-ordered services and that his visitation with the children has been sporadic at best.

The children's foster mother testified at the hearing that she and her husband have always encouraged Elise's reunification with the children and that thus, it was never their intention to adopt. However, she testified that they would be willing to adopt Zylena and Adrionna and that if they did, they would continue to maintain a relationship with Elise and the extended family, and provide cultural enrichment for the children. In evidence is a "NATIVE AMERICAN CULTURAL PLAN Foster Care/Adoptive Placement" form. It provides the foster parents' plan for integrating Zylena's and Adrionna's cultural traditions into their lives. One question on the form is, "How will cultural traditions be a part of your way of life (rather than a one-time event)?" The foster parents answered:

We have participated in many social activities and traditions in the nearly two years the children have been a part of our family, including two pow-wows and a family wedding. The children have had regular contact with their extended family members to celebrate holidays and birthdays. We have also shared Native American foods and stories with all of the children in our family. All of these traditions have been a part of our way of life and will continue.

Spears testified that if the case were transferred, she would recommend that the children stay in their current placement. However, she testified that there is no guarantee the Tribal Court would take her recommendation. Spears testified that termination of parental rights goes against

the Tribe's core beliefs and that thus, Elise's parental rights would not be terminated if the case were transferred. Rather, the children would be placed in a guardianship indefinitely until and unless Elise is able to parent. Spears was asked on cross-examination whether the Tribe would have intervened sooner if not for the error in calculating Elise's blood quantum and she testified, "I believe so."

Rawhouser testified that DHHS is objecting to the Tribe's motion to transfer because the Tribal Court will not terminate Elise's parental rights and because termination is in Zylena's and Adrionna's best interests. She testified that the children are bonded to their foster home and have ties to their Lincoln community through school and medical services. She testified that adoption should be pursued at their current foster home because the children need permanency. The children's guardian ad litem objected to the transfer for the same reasons.

After the hearing, written arguments were submitted to the court. The court entered its order denying transfer to the Tribal Court on June 29, 2011. The court found, "Given the proceeding is at an advanced stage and given the . . . Tribe did not promptly file its Notice to Transfer, good cause has been shown to deny the transfer." Elise now timely appeals, and the Tribe cross-appeals.

#### ASSIGNMENTS OF ERROR

Elise alleges that the juvenile court erred by finding that good cause was shown to deny the motion to transfer to the Tribal Court.

On cross-appeal, the Tribe assigns that the juvenile court erred by (1) not requiring the objections to the Tribe's request for transfer be put in writing and made available to the Tribe prior to the hearing and (2) failing to require clear and convincing evidence to support a finding that good cause existed to deny the motion to transfer.

#### STANDARD OF REVIEW

A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009). 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. *Id.*

#### ANALYSIS

Elise asserts that the juvenile court was incorrect in determining that good cause not to transfer this case to the Tribal Court existed because the proceeding was at an advanced stage. Pursuant to § 43-1504(2):

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.

(Emphasis supplied.) “[G]ood cause to the contrary” is not defined in the ICWA statutes, but nonbinding guidelines published by the Bureau of Indian Affairs provide that good cause not to transfer a proceeding may exist if 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. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified). At a hearing on a petition to transfer a termination of parental rights proceeding to tribal court under the ICWA, the party opposing the transfer has the burden of establishing that good cause not to transfer the matter exists. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds*, *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

In this case, the State and the guardian ad litem both opposed transfer, and thus it was their burden to prove that there was good cause not to transfer the case to the Tribal Court. The evidence offered at the hearings was that Zylena and Adrionna have been living in their current foster home since May 29, 2009, following their joint adjudication under § 43-247(3)(a). During that period of time, Elise and Francisco have been unable to regain physical custody of the children because neither parent has been successful at completing court-ordered services. Francisco has had limited contact with the children, and Elise continues to struggle with maintaining her sobriety and achieving stability in her life. She is currently without a permanent home or employment, and she is undisputedly in need of inpatient drug and alcohol treatment.

The evidence presented was generally that neither parent has done what they were ordered by the court to do so as to avoid this case progressing in the system to a termination of parental rights. Considering how long these children have been out of the family home, and thus without permanency, it can be said that it is in the normal course of events in juvenile proceedings for adjudicated children that a motion to transfer would be denied, particularly given the lack of parental progress in correcting the conditions that gave rise to the adjudications. Spears testified that if the case had started in the Tribal Court, the children would already be in a guardianship by now. Clearly, that assertion carries a significant degree of speculation that the Tribe would have acted, and when it would have done so. Moreover, the fact that the Tribe entered these proceedings late is directly a result of the Tribe’s failure to properly determine the children’s eligibility for enrollment in the Tribe. Accordingly, given the overall course of this case, as well as the length of the children’s out-of-home placement, without resolution (or substantial improvement) of the parents’ issues, we cannot say that the trial court abused its discretion in finding that good cause was shown to deny the transfer because the case was clearly at an advanced stage when the Tribe motioned to transfer.

However, in her brief, Elise argues that we should treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether a juvenile case is at an advanced stage. In support of this position, she points to § 43-1503 on the basis that such statute, in her view, provides distinct definitions for each:

(1) Child custody proceeding shall mean and include:

(a) Foster care placement which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian

cannot have the child returned upon demand, but where parental rights have not been terminated;

(b) Termination of parental rights which shall mean any action resulting in the termination of the parent-child relationship.

Thus, she submits, in deciding whether the case was at an advanced stage when the Tribe filed its motion to transfer, we should not look back to when Zylena and Adrionna were placed in foster care, but, rather, when the motion for termination was filed--which occurred in this case 1 week before the Tribe petitioned to transfer. She contends that this view is consistent with the Tribe's cultural norm disfavoring termination of parental rights and favoring guardianships.

Elise argues that this is an issue of first impression in Nebraska and directs us in her brief to a North Dakota case, *In re A.B.*, 663 N.W.2d 625 (N.D. 2003), which followed the path she now urges we take--which is that a motion to terminate starts the clock over for the purpose of deciding the timeliness of a motion to transfer under the ICWA. However, our review of Nebraska case law indicates that it is the policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage. See, *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds*, *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Consequently, we adhere to established Nebraska precedent and determine how "advanced" the case is based on its complete history from inception to the time of the Tribe's request to transfer.

Furthermore, the ICWA does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus. *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983). The testimony at the hearing on the Tribe's motion to transfer was undisputed that it is in the children's best interests to remain in their current foster home. Rawhouser testified that termination of parental rights was in the children's best interests in part because they need permanency. The evidence was that, if the case were transferred, the children could remain in limbo indefinitely while they waited for Elise to complete drug and alcohol treatment--something she has not been able to do in past attempts. And it was altogether uncertain where the children would live, and the conditions there, if the case were to be transferred to the Tribal Court. The State asserts that from a child's perspective, there is no distinction at all between the foster care placement proceeding and the termination of parental rights. While from a legal standpoint, we would not fully embrace that claim, it is true that central undeniable facts are that the children have been out of their parents' home for more than 2 years, that they are now being well cared for, and that they are in a home that appears to be committed to fostering their Native American heritage. Thus, the present situation is clearly in the children's best interests.

For these reasons, the trial court did not abuse its discretion when it found that good cause existed to deny the motion to transfer for the reason that the juvenile proceeding was at an advanced stage. The Tribe filed its motion to transfer 1 week after the State filed a motion to terminate parental rights and nearly 2 years after Zylena and Adrionna were placed with their current foster family, where they are safe, secure, and loved. This assignment of error is without merit.

On cross-appeal, the Tribe first contends that the State failed to follow the Bureau of Indian Affairs guideline that “[i]f the court believes or any party asserts that good cause to the contrary exists, the reason for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer.” Brief for cross-appellant at 26, quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,590 (1979) (not codified). The Tribe asserts that such failure by the State “should be resolved in favor of a result that is consistent with the ICWA’s preference of transfer.” Brief for cross-appellant at 26. However, the Tribe failed to object or otherwise raise this issue at trial and thus waived its right to assert such as error on appeal. See *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011). And, due to the fact that the Bureau of Indian Affairs guidelines are “nonbinding,” see *In re Interest of C.W. et al.*, 239 Neb. 817, 826, 479 N.W.2d 105, 113 (1992), *overruled on other grounds*, *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), and the fact that the Tribe has not explained precisely how this failure compromised their “opportunity to respond and to present alternatives that would negate the objections,” brief for cross-appellant at 26, we decline to consider this as plain error.

Next, the Tribe argues that the burden of proof for a party objecting to a transfer request to the Tribal Court should be clear and convincing evidence and that the State did not prove good cause to that standard. However, the Tribe concedes that the ICWA does not specify a burden of proof in this context and neither do Nebraska statutes. Rather, Nebraska case law is clear that our review of the trial court’s denial of a motion to transfer an ICWA case is for an abuse of discretion, which requires us to decide whether a decision is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition. As we already determined above, the trial court did not abuse its discretion in denying the transfer. The errors assigned by the Tribe in its cross-appeal are without merit.

#### CONCLUSION

For the aforementioned reasons, we find that the juvenile court did not abuse its discretion in finding good cause existed to deny the Tribe’s motion to transfer to the Tribal Court, and thus, we affirm.

AFFIRMED.