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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0522**

In the Matter of the Welfare of the Child of: F. J. V., Parent.

**Filed October 25, 2021
Affirmed
Kirk, Judge***

Hennepin County District Court
File Nos. 27-JV-19-1960; 27-JV-21-131

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

Considered and decided by Slieter, Presiding Judge; Cochran, Judge; and Kirk, Judge.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellants challenge the district court's transfer of jurisdiction of this child-protection matter to tribal court, arguing that good cause existed to deny the motion to transfer. Appellants also challenge the district court's dismissal of their petition for third-party custody of a child. We affirm.

FACTS

L.J.H. (the child) was born in March 2017. The child's biological mother's (mother)¹ race was American Indian, and her affiliation was with respondent Red Lake Band of Chippewa Indians (the Band).

Mother had six other children. Legal and physical custody of three of mother's children was involuntarily transferred to the children's biological father. Mother's parental rights to her other three children were involuntarily terminated. These three children were adopted by appellants H.H. and D.H. (foster parents). H.H., foster father, is an enrolled member of the Bois Forte Chippewa Tribe. D.H., foster mother, is a descendant of the White Earth Chippewa Tribe; her mother and siblings are enrolled members. Foster parents are licensed foster parents in Minnesota and their home is considered an Indian Child Welfare Act (ICWA) placement home.

¹ Mother is deceased.

Mother's parental rights to the child were involuntarily terminated in June 2017. The child's biological father is respondent F.J.V. (father) whose race is Hispanic. Father was awarded sole legal and sole physical custody of the child.

On May 8, 2019, father was arrested on child-pornography charges, and soon after apprehended by Immigration and Customs Enforcement and deported to Mexico. On May 13, 2019, respondent Hennepin County Human Services (the department) filed a juvenile protection petition seeking to have the child adjudicated a child in need of protection or services (CHIPS). The petition alleged that the child was CHIPS because she was in a dangerous environment and without a parent who was able to provide necessary care. The same day, the district court filed an order for protective care and out-of-home placement. The child has been in out-of-home placement since May 13, 2019.

On June 18, 2019, the child was placed with foster parents and three of her half-siblings. The foster parents' home was a permanency option. The child became very connected to her half-siblings and foster parents.

On November 15, 2019, the Band requested that the department facilitate visits between the child and her maternal grandmother, respondent W.M. The Band indicated that it wanted the child to be placed with W.M. On November 19, 2019, the district court filed an order finding the child "to be within the statutory definition on an Indian child" and that the ICWA applies. In April 2020, the department, although realizing that it would be "a significant transition" for the child, sought placement of the child with W.M. On May 6, 2020, the district court approved the child's placement with W.M.

On May 11, 2020, foster parents moved to intervene and stay the change of placement. Foster parents asserted that they had been the child's foster parents since June 18, 2019, and that it was in her best interests to remain in their home with three of her half-siblings. The district court granted foster parents' motion to intervene but denied their motion to stay the change of placement. On June 5, 2020, the child was removed from foster parents and placed with W.M.

On January 19, 2021, foster parents initiated a new case and petitioned to establish third-party custody. The same day, W.M. and the Band moved to transfer jurisdiction to tribal court. The district court held a hearing on February 22, 2021. Father did not object to transferring jurisdiction to tribal court and the department supported the transfer of jurisdiction.

On April 2, 2021, the district court filed an order granting the motion to transfer jurisdiction to tribal court and dismissing foster parents' petition to establish third-party custody. The district court found that all other parties objected to foster parents' petition for three main reasons: (1) a third-party custody motion is a family-court proceeding and at the time the juvenile court had exclusive jurisdiction; (2) the ICWA takes precedence and foster parents' placement request is contrary to the ICWA; and (3) the matter is not currently at permanency, thus, the statute upon which foster parents relied did not apply. The district court agreed with the other parties and dismissed foster parents' petition as a family-court action, not properly addressed in juvenile court. The district court ruled, however, that foster parents were not prevented from filing the petition when juvenile-court jurisdiction has been terminated.

The district court also concluded that foster parents' alternative basis supporting their petition was not appropriate because there was no pending permanency petition. In this matter there was no permanency petition following the CHIPS petition; two termination-of-parental-rights (TPR) petitions regarding father were filed and dismissed.

Finally, the district court rejected foster parents' argument that good cause existed—the matter was at an advanced stage—to deny the transfer of jurisdiction to tribal court. The district court concluded that the Band has authority to take jurisdiction and good cause did not exist to deny the transfer of jurisdiction. This appeal followed.

DECISION

Jurisdiction

Foster parents argue that the district court erred by transferring jurisdiction to tribal court because good cause existed to deny the transfer, namely, the proceeding was at an advanced stage.

“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 [ICWA].” *In re Welfare of Child of T.T.B.*, 724 N.W.2d 300, 304 (Minn. 2006). The aim of the 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. “[T]ransfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by the ICWA whenever possible.” *In re Welfare of B.W.*, 454 N.W.2d 437, 446 (Minn. App. 1990). Applying the ICWA to undisputed facts presents a question of law that we review de novo. *T.T.B.*, 724 N.W.2d at 307.

Under the ICWA,

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[.]

25 U.S.C. § 1911(b). Thus, regarding a child who neither resides nor is domiciled on a reservation, federal and state law recognize that Minnesota and tribal courts can have “concurrent but *presumptively* tribal jurisdiction.” *T.T.B.*, 724 N.W.2d at 305 (emphasis added). Therefore, the district court must transfer jurisdiction to tribal court following petition by the Band unless a parent objects or good cause exists to deny the transfer.

Here, father did not object to the transfer. And the district court determined that good cause did not exist to deny the transfer. Foster parents claim that the district court erred because good cause to deny the transfer existed, that is, the relevant proceeding—the “foster-care proceeding”—was at an advanced stage.

Neither the ICWA nor Minnesota law defines “good cause” to deny a petition to transfer jurisdiction. *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. App. 2007), *rev. denied* (Minn. Sept. 26, 2007). Minnesota courts have looked to the Bureau of Indian Affairs Guidelines for state courts in Indian child-custody proceedings (BIA Guidelines) which describe the circumstances under which good cause may exist. *T.T.B.*, 724 N.W.2d at 305.

The BIA Guidelines provide that a “good cause” finding is determined on a case-by-case basis. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-01, 38821 (June 14, 2016) (codified at 25 C.F.R. pt. 23). The BIA Guidelines provide that the discretion to finding that good cause exists to deny a transfer of jurisdiction “should be limited” and used to “protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court.” *Id.* at 38820.

The BIA Guidelines do not mandate how the good-cause analysis must be conducted. *Id.* at 38821. But, among other things, a district court may not find good cause to deny a transfer of jurisdiction “based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child’s Tribe did not receive notice of the proceeding until an advanced stage.” *Id.* at 38822. The district court is also prohibited from finding good cause to deny a transfer of jurisdiction if “there have been prior proceedings involving the child for which no petition to transfer was filed. ICWA clearly distinguishes between foster-care and termination-of-parental-rights proceedings, and these proceedings have significantly different implications for the Indian child’s parents and Tribe.” *Id.* Thus, the BIA guidelines describe factors that a district court *must not* use as a basis to find good cause to deny a transfer of jurisdiction. The guidelines, however, do not describe factors that a district court can or must take into consideration. Therefore, in determining whether good cause exists to deny transfer of jurisdiction to tribal court, a district court is free to consider relevant factors, but it is not required to consider any particular factor(s).

Foster parents assert that good cause existed to deny transfer of jurisdiction because the proceeding was at an advanced stage. But contrary to foster parents' assertion, the district court determined that the proceeding was not at an advanced stage.

Foster parents contend that “the issue of permanency” of the child was continuously litigated. *See* Minn. Stat. §§ 260C.503, subd. 1 (2020) (stating that when child is in foster care, the court shall commence permanency proceedings no “later than 12 months after the child is placed in foster care”); .515 (2020) (listing permanency dispositions as TPR, guardianship to commissioner of human services, custody to relative, and custody to social services agency). But the issue of permanency was not litigated because both TPR petitions were dismissed prior to litigation.

Foster parents concede that “the issue of permanency was just continually delayed,” and claim that they filed their third-party custody petition in order to “provide a permanency determination” for the child. If that is the case, and the third-party petition filed on January 19, 2021, commenced the permanency proceeding, then the matter was not at an advanced stage when the Band filed the motion to transfer jurisdiction on the same day. The district court did not err in determining that foster parents failed to show that good cause existed to deny the transfer of jurisdiction to tribal court.²

² The district court had the discretion on the facts of this case to determine that good cause existed to deny the transfer of jurisdiction because of the length of these proceedings in the district court, and the nearly one-year placement of the child with her three half-siblings. *See* Minn. Stat. § 260.771, subd. 3a(a) (2020). However, the district court also had the discretion to do what it chose to do in this case.

Foster parents also argue that good cause to deny transfer of jurisdiction exists because the tribal court has no inherent jurisdiction over nonmembers such as themselves. Foster parents claim that, as nonconsenting nonmembers, they were “improperly subjected to the personal and subject matter jurisdiction of a state foreign to them” and as such, the transfer of jurisdiction “violates their due process rights to fundamental fairness and equal protection—to have the right to be heard as parties in state court on the same terms and conditions as other parties in this case.”

But under the ICWA, tribal jurisdiction is presumed, and the BIA Guidelines provide that a good-cause analysis is aimed to “protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court.” *See* 81 Fed. Reg. 38778-01, at 38820. And as previously stated, while the district court *could have* considered the personal-jurisdiction issue in determining whether good cause existed to deny the transfer of jurisdiction, it was not required to weigh this into its analysis. The district court did not abuse its discretion by declining to consider whether the tribal court has jurisdiction over foster parents in its good-cause analysis. And as the district court determined, foster parents are not prohibited from filing their custody petition in tribal court.

Third-party custody petition

Foster parents argue that the district court erred by dismissing their third-party petition, filed pursuant to Minn. Stat. §§ 257C.01, subd. 3, 260C.515, subd. 4(6) (2020). The district court dismissed foster parents’ third-party petition, concluding that it was a family-court petition not properly filed in juvenile court, and was prematurely filed because

no permanency petition existed. The district court's determinations were based on its interpretation of relevant statutes. "Issues of statutory interpretation are reviewed de novo." *Lewis-Miller v. Ross*, 699 N.W.2d 9, 12 (Minn. App. 2005), *aff'd*, 710 N.W.2d 565 (Minn. 2006).

Foster parents concede that the petition was filed in juvenile court. They claim that the plain language of section 257C does not require that a third-party custody action be decided in family court, only that it be brought in a court with jurisdiction to decide child custody matters.

Foster parents are correct. It was permissible to file the petition in juvenile court. The statutory language provides: "In a court of this state with jurisdiction to decide child custody matters, a . . . third-party child custody proceeding may be brought by an individual other than a parent by filing a petition seeking custody" Minn. Stat. § 257C.03, subd. 1(a) (2020). It is undisputed that the juvenile court has jurisdiction to decide matters of child custody. And in *Stern v. Stern*, this court upheld a dismissal of a petition brought pursuant to Minn. Stat. § 257C.03 in family court because the juvenile court exercised original and exclusive jurisdiction over an existing petition for permanent legal and physical custody. 839 N.W.2d 96, 97 (Minn. App. 2013). Therefore, the third-party custody petition was not a petition that was required to be filed in family court and was appropriately filed in juvenile court.

Foster parents also claim that the district court erred by concluding that the case was not a "'permanency proceeding' under [section] 260C.515, subd. 4(6)." Foster parents assert that it is illogical to classify the matter as not being a permanency proceeding after

two TPR petitions had been filed. They argue that it makes no sense to deem the matter a permanency proceeding when a TPR petition was pending between June and November 2020, but then to deem it a non-permanency proceeding two months later in January 2021, when they filed their third-party custody petition.

Foster parents assert that the existence of a permanency proceeding is not based on when a TPR petition exists, but rather on how long the child has been in foster care, and a permanency proceeding is required to commence no later than 12 months after the child is placed in foster care. *See* Minn. Stat. § 260C.503. And they claim that if the district court failed to commence the permanency proceeding, they “converted the matter into a permanency proceeding by filing their [p]etition.”

Foster parents’ argument is logical. The length of time that the child has been in out-of-home placement should be taken into consideration when deciding whether a permanency proceeding exists. However, while foster parents’ argument has some merit, we have determined that jurisdiction was properly transferred to tribal court. Because jurisdiction was properly transferred, we affirm the district court’s dismissal of the third-party custody petition. Foster parents are not foreclosed from filing their petition in the tribal court with jurisdiction.

Affirmed.