

IN RE INTEREST OF MELAYA F. & MELYSSE F.
Cite as 19 Neb. App. 235

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was that her employment at the time required her to travel frequently, her travel dates coincided with dates she was to have physical custody, Ryan refused to switch dates with her to accommodate her travel, and she had ceased that employment to secure new employment which did not require her to travel. We find no merit to Ryan's assertion that this temporary period of increased physical custody was a material change of circumstances warranting permanent modification of child support.

V. CONCLUSION

The record presented in this case does not demonstrate a material change of circumstances occurring since the entry of the previous child support order. Ryan asked the court to impute income to him that was identical to his earnings at the time of the prior order, and the brief period of time during which Ryan had increased physical custody of the children was a temporary issue that had resolved itself and was not likely to recur. As such, we reverse the district court's order of modification and remand the matter.

REVERSED AND REMANDED.

IN RE INTEREST OF MELAYA F. AND MELYSSE F.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, v. MINDY F., APPELLANT,
AND YANKTON SIOUX TRIBE, INTERVENOR-APPELLEE.
810 N.W.2d 429

Filed September 27, 2011. No. A-11-200.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** 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.
3. **Indian Child Welfare Act: Jurisdiction: Good Cause.** 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.

4. **Indian Child Welfare Act: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act 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.
5. **Indian Child Welfare Act.** The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.

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

Nancy R. Wynner, of DeMars, Gordon, Olson, Zalewski, Wynner & Tollefson, for appellant.

Joe Kelly, Lancaster County Attorney, and Shellie D. Sabata for appellee.

IRWIN, CASSEL, and PIRTLER, Judges.

PIRTLER, Judge.

INTRODUCTION

Mindy F. appeals from a decision of the separate juvenile court of Lancaster County which denied her motions to transfer this juvenile case to the Yankton Sioux Tribal Court. Because the juvenile court did not abuse its discretion in denying Mindy's motions, we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

BACKGROUND

Mindy is the mother of Melaya F. and Melysse F. Mindy and Melaya are both enrolled as members of the Yankton Sioux Tribe (the Tribe). Melysse is eligible to be enrolled, although at 1 year of age at the time of the hearing, her enrollment had not yet occurred.

On December 15, 2010, the State filed a petition in the juvenile court alleging that the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) in that they lacked proper parental care by reason of the faults and habits of Mindy or that they were in a situation dangerous to life or limb or injurious to their health or morals. The petition stated that

on December 12, law enforcement officers were dispatched to Mindy's home, where they discovered that the home was in an unsanitary and unsafe condition; Mindy was unresponsive and believed to be under the influence of drugs or alcohol; and the children were dirty, crying, and in distress. The petition further alleged that Mindy had a history of involvement in domestic violence, assaultive behavior, and alcohol or drug abuse that had led to the removal of the children in 2006.

On January 18, 2011, Mindy filed a motion to transfer the case to the Tribe's jurisdiction, and the Tribe was subsequently permitted to intervene in the matter. The Tribe also filed a motion to transfer jurisdiction pursuant to the Indian Child Welfare Act (the ICWA).

At a hearing on February 9, 2011, there was testimony from a Lincoln police officer who was involved in the removal of the children from Mindy's home in December 2010 and testimony from Kathy Hohbein, a family permanency specialist who has worked with Mindy almost daily since the children's removal. Both of these witnesses testified that driving from Lincoln to the Yankton Sioux Tribal Court in South Dakota, a round trip taking approximately 10 hours, would pose an undue hardship, both personally and professionally. However, they each stated that they could testify telephonically and could make their written reports in the case available to the tribal court.

The ICWA director for the Tribe testified that the Tribe was not initially seeking to transfer jurisdiction of the case, but that the persistence and adamancy of Mindy's family members resulted in his decision to act on behalf of the family to transfer jurisdiction to the Tribe. The ICWA director stated that the tribal court has, in the past, adjudicated cases based on telephonic testimony as well as written reports and photographs. However, he was unsure whether the Tribe had the power to subpoena Nebraska witnesses to appear in South Dakota.

Mindy testified that she had lived on the reservation in Yankton, South Dakota, when she was a young child. Neither of her children has ever lived on the reservation, although Melya has visited relatives there and attended "powwows," "sun dances," funerals, and other ceremonies. Mindy has a

large number of extended family members living on the reservation that she described as a “good family support system.” She testified that if the Tribe took jurisdiction of her children, she would move to the reservation to be near them, if necessary.

Following the hearing, the juvenile court denied the motions to transfer the case to the Tribe on the basis that *forum non conveniens* is a recognized reason to deny transfer. The court cited “those practical factors identified” in *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), and stated that it was clear that those factors that make trial of the case easy, expeditious, and inexpensive require that the matter be heard in Lancaster County. Mindy timely appealed from this order.

ASSIGNMENT OF ERROR

Mindy asserts that the juvenile court abused its discretion when it found good cause to deny her motion to transfer jurisdiction to the Tribe.

STANDARD OF REVIEW

[1,2] 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

Mindy argues that the juvenile court erred in denying the motions to transfer the proceedings to the tribal court. Both motions to transfer were filed a few weeks after the State filed its petition to adjudicate the children.

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.

[3,4] 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 Interest of Brittany C. et al., supra*. 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 Interest of Leslie S. et al., supra*.

The ICWA does not define "good cause," but the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. 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.

The juvenile court found good cause to deny the motions to transfer, citing *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), in which the juvenile court's decision not to transfer a case to a tribal court was affirmed. In that case, the factors cited included *forum non conveniens* and the facts that the mother and the children were not living on the reservation when the petitions were filed and that the children had lived in Nebraska for most of their lives. The court in *In re Interest of Brittany C. et al.* also found that the transfer would not be in the children's best interests.

Upon our de novo review, we are unable to say that the juvenile court abused its discretion in denying the motions to transfer. One of the stated circumstances set forth in the non-binding guidelines noted above is clearly present in this case, i.e., the evidence necessary to decide the case cannot be adequately presented without undue hardship to the parties or the witnesses. In determining whether the doctrine of *forum non conveniens* should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). In the instant case, although the police officer and Hohbein testified that they could present evidence telephonically, the record does not show that the Tribe has subpoena power over them or other Nebraska witnesses. Without such assurances, this court cannot say that the juvenile court abused its discretion in denying the motions to transfer the matter to the tribal court.

[5] In addition, the Nebraska Supreme Court has recognized that 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, 750, 331 N.W.2d 785, 791 (1983). See, also, *In re Interest of C.W. et*

al., supra. The record in this case reveals that Melaya and Melysse have lived in Lincoln throughout their lives, although Melaya has visited the reservation a few times. Lincoln police officers received a report of possible neglect of the children, and when the officers arrived at Mindy's home, an apartment, they heard the children crying and screaming inside. When no one would answer the door, the officers obtained a key from the landlord and entered into the apartment. They found Mindy unconscious on a couch. Mindy was unresponsive even to painful stimuli and woke up only after medical help was summoned. She appeared to the officers to be under the influence of alcohol or drugs. The officers found "old food" on the floor throughout the apartment, "feces in the open toilet," beer cans and trash throughout the apartment, and the door to the electric oven open for heating the apartment despite the obvious danger to the children, who were ages 11 months and 4 years at the time.

Hohbein testified to Mindy's extreme hostility to her as she worked to provide services to the family. Hohbein stated that most telephone conversations ended with her informing Mindy that she would not tolerate being sworn at, to which Mindy responded at one point, "'Go ahead and hang up, you stupid fucking bitch.'" Hohbein stated that Mindy was being adversely affected by her relationship with a worker for the Indian Center, who told Mindy that she need not follow Hohbein's recommendations, referred to the Department of Health and Human Services as "baby snatchers," and believed that the soil and filth depicted in photographs of Mindy's apartment had been planted there by police officers.

Hohbein described a number of Mindy's accusations made against foster families housing the children, including an allegation of sexual abuse, all of which have proved unfounded. She stated that Mindy has been uncooperative with the alcohol and drug services being provided, because Mindy believes that once the Tribe takes jurisdiction, the children will be placed with her mother, and that "all can return to normal." However, the ICWA director for the Tribe testified that Mindy's mother has not been able to be approved for placement of the children because of her criminal history, as well as her inclusion on

a child abuse registry in Nebraska for abuse and neglect. He acknowledged that Melaya had been the subject of a neglect proceeding in 2007 which was transferred to the Tribe and which resulted in placement of Melaya with Mindy's mother and closure of the case. He admitted to being surprised when he later learned that Mindy's mother had immediately returned the child to Mindy.

The record in this case shows that Mindy had not lived on the reservation since she was a young child, that her children had never lived there, and that there was no evidence that the Tribe had the ability to subpoena Nebraska witnesses to appear in its proceedings. In addition to these factors, the record also shows it is in the children's best interests that jurisdiction of this case remain with the juvenile court.

CONCLUSION

The ICWA does not change the cardinal rule that the best interests of the child are paramount. Based on the factors set forth in *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), and our finding that it is in the children's best interests for jurisdiction to remain with the juvenile court, we find that the court did not abuse its discretion in denying the motions to transfer jurisdiction to the tribal court. Accordingly, we affirm the juvenile court's decision.

AFFIRMED.