Wis. Stat. § 801.54 should be maintained in its present form

Introduction

Wis. Stat. § 801.54 should be maintained in its present form. The rule has been an overwhelming success in meeting the goals intended by the proponents of the rule.[1] Furthermore, none of the negative effects feared by its opponents have come to pass. The rule has worked well in its current form for over four years and overall for six years. More than one thousand child support cases have been transferred from state courts to tribal courts without incident or appeal. Many other civil cases have been transferred successfully as well. *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, 265 Wis.2d 64, 665 N.W.2d 899, is still good law; revoking or substantially altering the rule would create chaos by removing an orderly process and upending the settled expectations of the thousands of people whose cases have been transferred.

The rule as it currently exists does not confuse or expand the scope of concurrent jurisdiction. Circuit court judges are able to fairly apply the statute in accordance with the definition provided by the Supreme Court of the United States. The rule is within the authority granted under Wis. Stat. § 751.12(1). The courts of other states have begun to utilize the protocols in *Teague* and legislatures of other states have already adopted or are considering adopting rules similar to Wis. Stat. § 801.54. Finally, all eleven Wisconsin tribes acknowledge it is a responsibility of a sovereign nation to make its laws known to those that may be subject to them, so all relevant tribal constitutions and judicial codes have been made easily accessible to the general public.

A. Wis. Stat. § 801.54 is not inadequate or misleading in addressing concurrent jurisdiction.

The U.S. Supreme Court and this Court have clearly defined the scope of concurrent jurisdiction and circuit courts are in the ideal position, having the best knowledge of the facts of a given

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1 The purpose of the rule is "to enable the circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate." S. Ct. Order 07-11, 2008 WI 114, 307 Wis. 2d xvii, xxii (issued July 31, 2008, eff. Jan. 1, 2009).

case and the tribal courts in their area, to make such determinations. Concurrent jurisdiction is, in short, the right of Indian tribes to retain inherent sovereign power to exercise some forms of civil jurisdiction over individuals on their reservations. *Montana v. U.S.*, 450 U.S. 544, 565 (1981). The scope of concurrent jurisdiction has been delineated since *Montana* was decided in 1981 but the analysis has not become so complex that circuit courts are not able to consistently apply it in a constitutionally sound manner. See *Plains Commerce Bank v. Long Family Land and Cattle Company*, Inc., 554 U.S. 316 (2008).

i. The scope of concurrent jurisdiction in civil cases has been defined by the United States Supreme Court.

The U.S. Supreme Court recognized that in most circumstances "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana* at 565. A tribe may however regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Id. Inasmuch, the ability to regulate the rights and conditions of tribal members on reservation land is plainly central to the tribe's power of self-government. *Plains Commerce* at 334.

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within reservation boundaries when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana* at 566. The Supreme Court further described the *Montana* consensual relationship exception as follows: "[Tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce* at 337. The reasoning behind this exception is that certain off reservation activities by non-members may intrude on the internal relations and sovereignty of the

tribe. Id. at 334-35. To the extent they do, such activities may be regulated. Id. at 335.

The Court did not require an additional showing that one specific relationship, in itself, "intrude[s] on the internal relations of the tribe or threaten[s] self-rule." Id. at 318. *Plains Commerce* does not suggest or require a strict focus on the specific nature of the initial relationship but rather the general impact on the tribe's internal relations and ability to self-govern.

Plains Commerce deals primarily with a discrimination suit against an off reservation bank stemming from the resale of fee land. Id. at 316. The decision in *Plains Commerce* was constructed on the highly determinative key fact that the land being sold was already in fee simple status and was being sold by a non-tribal, off reservation bank. Id. at 336. The Court ruled the real harm that may have been subject to concurrent jurisdiction was when the land initially left trust status and became fee simple. Id. This fact pattern focused on the status of land title and does not apply directly to the bulk of family law and employment cases that are clearly within the consensual relationship *Montana* exception contemplated by Wis. Stat. § 801.54. The difference between the sale of fee land by a non-tribal bank and a standard family law case involving tribal member parents or children is apparent. The US Constitution implicitly recognizes the inherent sovereignty of tribes to manage their own internal affairs through self-governance, this limited jurisdiction is reasonable to achieve those ends. The Supreme Court has not narrowed concurrent jurisdiction to the point that it is inherently overcome by a presupposition against tribal jurisdiction over non-members in every circumstance.

The Court has made its analysis relatively explicit through its decisions in *Montana* and *Plains Commerce.* Given the current understanding of concurrent jurisdiction, the vast majority of cases dealt with under Wis. Stat. § 801.54 are presumptively subject to both tribal and state jurisdiction. As such, concurrent jurisdiction primarily serves to ensure that only the proper litigants are transferred to tribal courts and the transfer process does not violate state and federal constitutional protections. Given the six year history of success Wis. Stat. § 801.54 has in building comity between the state and tribal

judicial systems, the statute should be maintained in its current form.

A strong example of the successful implementation of Wis. Stat. § 801.54 is the transfer of Title IV-D child support cases to the corresponding tribal authority. This rule was specifically amended to facilitate the transfer of child support cases delegated to tribal courts through Title IV of the Social Security Act. 42 U.S.C. §§ 601-619 (2006). James Botsford & Paul Stenzel, *The Wisconsin Way Forward With Comity: A Legal Term for Respect,* 47 Tulsa L. Rev. 659, 680 (2012). The Social Security Act provides eligible, federally recognized Indian tribes with the IV-D funding and authority necessary to establish their own functioning child support agencies. Id. The Lac du Flambeau, Menominee, Forest County Potawatomi, Red Cliff Band, Lac Courte Oreilles, Ho-Chunk, and Oneida Tribes have all successfully established tribal IV-D child support agencies under these amendments. As such, Wis. Stat. § 801.54 is within the constitutional authority granted by the federal government regarding the concurrent jurisdiction necessary to operate a functioning child support office within a sovereign nation.

In Wisconsin, a high percentage of all cases in state court are family law cases. Family law cases which, if there is that involve a tribal member parent or child, would fall within the first *Montana* exception regarding consensual relationships. Employment matters are the other principle type of case that would fall under the consensual relationship *Montana* exception. Id. at 678. These types of cases represent a significant caseload in the state court system that may be more properly adjudicated in tribal courts. By transferring these cases, additional judicial resources are available in the state courts to handle other cases. Wis. Stat. § 801.54 serves two practical purposes: it helps provide better access to legal resources in state courts and enables tribal judicial systems to do the work they were created to do by sending cases to each respective court system.

Wis. Stat. § 801.54 is not inadequate or misleading in addressing concurrent jurisdiction as the scope of such jurisdiction has been clearly defined in civil cases by the United States Supreme Court.

In fact, the fundamental concurrent jurisdiction requirement of Wis. Stat. § 801.54 was specifically included so as to provide consideration to the constitutional rights of those potentially subject to it. Inversely, discretionary transfers under the rule are restrained by deference to the circuit court judge's ability to correctly interpret and apply the Supreme Court's jurisprudence within the context of their specific community.

ii. Threshold determination of concurrent jurisdiction is most properly made by circuit court.

Local state court judges are in the ideal position to make an informed opinion on the existence of concurrent jurisdiction. When the circuit court transfers a case to tribal court under Wis. Stat. § 801.54, the transfer is in the pursuit of justice for all parties involved. This rule was made with respect to the history of U.S. jurisprudence over tribal lands and works to develop tribal systems of justice as parallel, yet dependent, to the U.S. system of adjudication.

To assume that circuit court judges would be misled by the language of Wis. Stat. § 801.54 implies a lack of faith in the ability of the circuit courts to interpret statutes and well established case law. The language of Wis. Stat. § 801.54 is straightforward and unambiguous:

> "When a civil action is brought in the circuit court of any county of this state, and when, under the laws of the United States, a tribal court has concurrent jurisdiction of the matter in controversy, the circuit court may, on its own motion or the motion of any party and after notice and hearing on the record on the issue of the transfer, cause such action to be transferred to the tribal court. The circuit court must first make a threshold determination that concurrent jurisdiction exists. If concurrent jurisdiction is found to exist, unless all parties stipulate to the transfer, in the exercise of its discretion the circuit court shall consider [the following] relevant factors." *Wis. Stat. § 801.54(2).*

The rule is clear that only *after* a threshold determination of concurrent jurisdiction that a circuit court judge *shall* consider the following relevant factors. It is therefore unlikely that a circuit court judge would conflate the listed relevant factors with the analysis to find concurrent jurisdiction. Wis. Stat. § 801.54 provides a clear framework for circuit court judges to make the discretionary transfer of civil cases to tribal courts and it is abundantly clear that the Supreme Court's standard for concurrent

jurisdiction must first be established before any of the subsequent relevant factors are considered.

Wis. Stat. § 801.54 also statutorily requires notice and hearing on the record regarding the issue of transfer which the circuit courts have approached in a variety of ways. Some circuit courts have utilized negative notice to fulfill this requirement in child support cases under the (2m) rules. Others have used actual threshold determination meetings to satisfy the rule even in child support cases. Id. at 681. It is worth noting that at these hearings few parties have challenged the transfer to tribal jurisdictions and the vast majority do not even appear.

Circuit court judges have already been applying this relatively straightforward statutory analysis for over four years according to the needs of their specific community and it would be unfair to question their ability to interpret and apply Wis. Stat. § 801.54 now. Their work in applying this rule has been highly successful in providing better access to justice across Wisconsin while building a relationship of reciprocity and comity with the tribal justice system. This was the intent of the statute and it is fulfilling what it was intended to do.

B. In accordance with Wis. Stat. § 751.12, Wis. Stat. § 801.54 does not impermissibly abridge, enlarge, or modify substantive rights.

Wis. Stat. § 751.12(1) restricts the Supreme Court's rule making authority by not allowing a rule to "abridge, enlarge, or modify the substantive rights of any litigant" and Wis. Stat. § 801.54 does not violate this prohibition on the Supreme Court's rule making authority.

i. Wis. Stat. § 801.54 is the codification and streamlining of the judicially created *Teague Protocol.*

The genesis of Wis. Stat. § 801.54 was the decision in *Teague*. In *Teague,* the court created a mechanism for the discretionary transfer of cases from circuit courts to the applicable tribal court. This mechanism is time consuming and expensive for both the courts and litigants. The protocol required parallel actions to be commenced in state and tribal courts to only then have a subsequent hearing on the transfer. *Teague* at 102. The discretion of the circuit court judge is a key deciding factor in the

Teague protocol, as in Wis. Stat. §801.54. As the *Teague* protocol was found to square with constitutional principles and within the authority of the Wisconsin Supreme Court to create rules, the analogous mechanism set up in Wis. Stat. § 801.54 should similarly be found to not exceed the Court's ability to administer the execution of the laws. With the *Teague* protocol already in place, no substantive rights were modified by Wis. Stat. § 801.54; as it was simply the codification of existing case law. If anything, Wis. Stat. § 801.54 is a clear improvement over simply relying on the *Teague* protocol.

ii. Access to Wisconsin State Courts is not closed to litigants subject to Wis. Stat. § 801.54.

Access to the state courts is not closed through the application of Wis. Stat. § 801.54 and litigants are not denied the rights and protections inherent to our federalist system. Three essential elements of Wis. Stat. § 801.54 safeguard this access. These elements include: the fact these transfers can be appealed before the case ever proceeds to tribal court; jurisdiction is retained by the state court for five years after the transfer; and, the final safeguard of the circuit court judge's knowledge and discretion in weighing the statutory factors listed in Wis. Stat. § 801.54(2).

Wis. Stat. § 801.54(4) states "[t]he decision of a circuit court to transfer an action to tribal court may be appealed as a matter of right under s. 808.03(1)." Wis. Stat. § 808.03(1) refers to the standard appeals process available to all litigants in Wisconsin's courts. This initial ability to challenge transfers to tribal courts demonstrates that is illustrative of the courts of Wisconsin courts are being open and available to those that feel their constitutional rights may be infringed upon by having their case transferred to a tribal court.

Under Wis. Stat. § 801.54(3), the state court retains jurisdiction for five years after the initial discretionary transfer to tribal court so as to redress any issues or controversies that may infringe on an individual's constitutional rights. During that time, the state court can alter the stay or take any other action as the interests of justice so require. So it is safe to reason that the circuit court is not completely

transferring the case until it is certain that the constitutional rights of those whose cases have been transferred to tribal courts have not been violated. In only one case that we are aware of has a state court judge exercised jurisdiction after transfer at the request of a litigant. See *Harris v. Lake of the Torches Resort and Casino*, 2015 WI App 37, 363 Wis.2d 656, 862 N.W.2d 903. Our view is that this shows the rule is working properly.

The final safeguard that ensures Wisconsin's state courts are not denied to those that have a right to be heard in that venue is the circuit court judge's intimate knowledge of the specific facts of the case before them and the practices and procedures of the corresponding tribal court. Their experience in upholding the constitutional protections guaranteed to all U.S. and Wisconsin citizens should be given significant deference because as even after the analysis of concurrent jurisdiction, the relevant factors enumerated in Wis. Stat. § 801.54(2)(a)-(k) will also be considered. Given the judge's knowledge of the standards and practices within the relevant tribal court, these factors will all be weighed together as a final protection of litigants' constitutionally protected rights.

iii. Wis. Stat. § 801.54 should be given the same deference given foreign jurisdictions under Wis. Stat. § 801.63 because they are closely analogous statues.

Wis. Stat. § 801.63 permits state courts to defer jurisdiction to any other court outside the state of Wisconsin, including courts of other countries. Wis. Stat. § 801.63 goes further than § 801.54 by permitting state courts to subject litigants to courts outside the United States which are entirely beyond the control of the U.S. Congress or the U.S. Supreme Court. Unlike transfers invoking Wis. Stat. § 801.54, no jurisdiction is retained by Wisconsin courts when cases are transferred under Wis. Stat. § 801.63.

Wis. Stat. § 801.63 is significantly similar to § 801.54 but reaches much further by permitting state courts to subject litigants to jurisdictions completely outside the control of the United States. The Wisconsin Supreme Court enacted Wis. Stat. § 801.63 in 1975 and in the forty years since, no

constitutional challenges or considerations of whether the Court exceeded its authority in creating Wis. Stat. § 801.63 have been mentioned.

As such, Wis. Stat. § 801.54 should be granted the same deference given Wis. Stat. § 801.63.

C. The jurisprudence of Wis. Stat. § 801.54 is being adopted in other jurisdictions.

The courts of other states have begun to utilize the protocols in *Teague* and legislatures of other states have already adopted or are considering adopting rules similar to Wis. Stat. § 801.54.

The Western District of New York has begun to transfer divorce proceedings between a tribal member and a non-member by applying the principles of *Teague*. *Aernam v. Nenno*, No. 06-CV00053C(F), WL 1644691 (W.D.N.Y., 2006). In *Parry v. Haendiges*, the court applied *Teague* and ruled against enjoining the state court as the timing and circumstances were such that the application of the *Teague* factors led the court to conclude the balancing of equities favored state court jurisdiction. *Parry v. Haendiges,* 458 F. Supp. 2d 90 (W.D.N.Y., 2006).

Other states have also enacted statutes allowing for discretionary transfer of cases to tribal courts. One such statute has been in effect in Washington since 1995 without any major constitutional challenges. See Wash. Rev. Code Ann. § 82.5(b). This statute is almost identical to Wis. Stat. § 801.54 as it requires a finding of concurrent jurisdiction and a subsequent consideration of factors that are parallel to those in Wis. Stat. § 801.54(2). Given the success of discretionary transfers to tribal courts in Wisconsin and the existence for over twenty years of an almost identical rule in Washington, Wis. Stat. § 801.54 can be presumed to be constitutionally sound and in the best interests of those transferred to tribal courts.

Wis. Stat. § 801.54 demonstrates Wisconsin's role as a leading voice in how to manage the interaction between state courts and the courts of federally recognized Indian tribes. This respect for the capacity and capability of tribal courts in conjunction with the creation of a cooperative legal regime between these sovereign judiciaries make Wisconsin a model for other states. As such, Wis.

Stat. § 801.54 should be maintained as an example for others to follow in fulfilling the federal and state commitment to effective tribal justice systems.

D. Tribal judicial codes and constitutions are widely available to the public.

All eleven of Wisconsin's federally recognized tribes acknowledge that it is a responsibility of a sovereign nation to make its laws known to those that may be subject to them. Therefore, all relevant tribal constitutions and judicial codes have been made easily accessible to the general public. Wisconsin's tribal courts realize that public awareness of the law is an integral precept in the due process necessary to grant authority to this parallel system of sovereign justice within the larger framework of U.S. constitutional jurisprudence.

The constitution and judicial code of the Bad River Band of Lake Superior Chippewa,[2] [3] Forest County Potawatomi,[4] [5] Ho-Chunk Nation,[6] [7] Lac du Flambeau Band of Lake Superior Chippewa,[8] [9] Menominee Indian Tribe,[10] [11] Oneida Tribe,[12] [13] Red Cliff Band of Lake Superior Chippewa,[14] [15] and Stockbridge Munsee Community[16] [17] are all available to the public online and are easily accessed through a Google search. The constitution of the St. Croix Chippewa is also accessible online.[18]

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2 http://www.badriver-nsn.gov/legislative/bad-river-constitution-a-bylaws
3 http://www.badriver-nsn.gov/legislative/tribal-court-code
4 http://www.loc.gov/law/help/american-indian-consts/PDF/37026470.pdf
5 https://www.fcpotawatomi.com/wp-content/uploads/2014/12/FCPC-Code-Title-2.pdf
6 http://www.ho-chunknation.com/government/the-constitution-of-the-ho-chunk-nation.aspx
7 http://www.ho-chunknation.com/government/judiciary/judicial-rules.aspx
8 http://thorpe.ou.edu/IRA/lacduflamcons.html
9 http://www.ldftribe.com/Courts/CHAP80%20Tribal%20Court%20Code.pdf
10 https://www.menominee-nsn.gov/mitw/pdf/constitutionAndBylaws.pdf
11 http://ecode360.com/11986859
12 https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws,_Policies,_Resolutions/Oneida_Register/Constitution%20-%20clean.pdf
13 http://www.oneidanation.org/government/page.aspx?id=4780
14 http://redcliff-nsn.gov/government/chapters_table_contents.htm
15 http://www.narf.org/nill/Codes/redcliffcode/ch4.pdf
16 http://www.mohican-nsn.gov/Departments/Legal_Information/Ordinances/CONSTITUTION%20AND%20BYLAWS.pdf
17 http://www.mohican-nsn.gov/Departments/Legal/Ordinances/Ch%201,%20Court,%209-17-09_adopted.pdf
18 http://thorpe.ou.edu/IRA/croixcons.html

The judicial codes of the Sokaogon Mole Lake Community and St. Croix Chippewa are readily available through a request to their respective clerk of courts.

Therefore, all tribal laws and tribal court procedures are easily accessible to the public and particularly to those that would avail themselves to tribal jurisdiction through consensual relations.

Conclusion

Wis. Stat. § 801.54 should be maintained in its present form. The rule is not misleading or unworkable in regards to concurrent jurisdiction as circuit court judges will be able to apply the definition provided by the Supreme Court of the United States. The rule is within the authority granted under Wis. Stat. § 751.12(1). The rule and the underlying *Teague* Protocols which created it are a model that other jurisdictions are using to decide disputes regarding concurrent jurisdiction and as such have been found to be constitutionally sound. Finally all eleven of Wisconsin's tribes acknowledge it is a responsibility of a sovereign nation to make its laws known to those that may be subject to them, so all relevant tribal constitutions and judicial codes have been made easily accessible to the general public.

Submitted this 30th day of September 2015 by:

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