COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2936

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE INTEREST OF CODY S.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MILLE LACS BAND OF CHIPPEWA INDIANS,

RESPONDENT-PETITIONER-APPELLANT.

APPEAL from orders of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] The Mille Lacs Band of Chippewa Indians appeals a circuit court order denying its motion to transfer jurisdiction of a WIS. STAT. ch. 48 proceeding involving a fifteen-year-old band member to tribal court. The band also appeals the court's order denying its reconsideration motion. The band seeks transfer of jurisdiction pursuant to the Indian Child Welfare Act. *See* 25 U.S.C. § 1901 (1994). The band argues that (1) our standard of review is de novo, and (2) the circuit court erroneously determined that good cause precluded transfer of jurisdiction. This court affirms the orders.[2]

¶2 In 1992, at the age of seven, Cody S. was removed from his mother's custody because of allegations of neglect. The circuit court found Cody to be a child in need of protection and services (CHIPS). Since 1992, Cody has been in the legal custody of the Burnett County Department of Social Services and has been living with non-Indian foster families. The department filed its first permanency plan in 1994, and subsequently filed plans in September of 1994, 1995, 1996, and 1998. From February 25, 1997, to July 1, 1999, Cody resided in a treatment foster home in Eau Claire, Wisconsin.

¶3 The county has provided the band notices of CHIPS hearings since 1995.[3] According to the county, with one possible exception the tribe had a representative at all of Cody's hearings. In December 1996, a petition for the termination of parental rights was filed, and jurisdiction of that matter was

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] On December 21, 1999, this court granted the band's petition for leave to appeal a nonfinal order.

[3] Earlier notices had been mistakenly mailed to a different Indian band.

transferred to tribal court. The tribal court apparently dismissed the petition.[4] Due to social worker turnover, the band mistakenly believed the tribal court had also acquired jurisdiction of the WIS. STAT. ch. 48 CHIPS proceedings. In May 1999, after determining that it did not have jurisdiction over Cody's CHIPS proceedings, the band moved the circuit court to transfer Cody's case to tribal court.

¶4 In June 1999, the court held a hearing on the band's jurisdictional motion. The county objected to the band's motion and moved the court to transfer Cody's placement to a foster family closer to his relatives in Burnett County. Cody had expressed his desire to live closer to his relatives, and the department had located a foster family in the Turtle Lake area to accomplish this goal.

¶5 At the hearing, the court asked Cody where he wanted to live. Cody's response indicated that he wanted to live with his immediate biological family. When the court explained that that was not an alternative and that the tribe had located a potential foster home in Superior, Cody answered, "I'd probably rather move to Turtle Lake." Later in the hearing, Cody affirmed the social worker's statement that Cody expressed his desire to live with the foster family in Turtle Lake.

¶6 The circuit court determined that the Act governed, and that under the Act it must transfer jurisdiction to the tribal court unless the county met its burden to show good cause not to transfer. After hearing counsels' arguments, the circuit court concluded that the county had shown good cause not to transfer

[4] The termination proceedings involved Cody and two younger siblings. The younger children were placed in adoptive homes, but Cody was not. Due to the band's concerns with Cody's improper contact with a younger sibling, the tribal court arranged no post-adoption visitation with Cody and his siblings.

jurisdiction and denied the tribe's motion. The court found that Cody objected to the transfer as follows:

> I don't think that [Cody] understands jurisdiction and the difference that it makes. I asked that question using different language. I asked him where he wanted to go, what he wanted me to do, and in terms of where he's going to be living and with whom he's going to be living. And he told me that he wanted to be at Turtle Lake.
>
> ….
>
> That tells me that Cody's answer to whether he wants me to transfer jurisdiction is no. That's the way I understand his answer.
>
> I didn't ask him, Cody, do you want me to transfer jurisdiction, he never answered that question. But he did answer that question by telling me where he wanted to be.

The circuit court nevertheless acknowledged that "tribes ought to be the ones to determine what is best for their children, and I acknowledge the fact that unless there's a real good reason, the state should relinquish jurisdiction in favor of the tribe."

¶7 The court also stated:

> [H]e's 15 and he can make some choices, I think we ought to give him that opportunity. I think that what he calls family ought to be acknowledged. And if he is choosing to be near his family so that he can communicate with them and can see them, I think we ought to pay attention to that and I think we ought to make that possible for him.
>
> ….
>
> So I understand that the Mille Lacs Tribe probably would make a concerted effort to see that Cody was with his family, but Burnett County I think has guaranteed me that that's … what they are going to do.

The court further explained that Cody's placement in Turtle Lake "is not written in stone" and that if Cody thinks there is a better option with the band where he knows that he has extended family, the court's decision could be changed.

¶8 In a written decision, the circuit court denied the band's motion to reconsider, making the following findings and conclusions:

> At age 7, Cody was found by this Court to be in need of protection and services and has been placed out of home since then. More recently, this Court found Cody to be delinquent and with special needs in terms of treatment. The proceeding is at an advanced state and notice was given to the Mille Lacs band as early as October 19, 1995. … The Court has determined placement with the natural mother is not appropriate. The Court infers the mother and her family now seek intervention by the Tribe to facilitate placement with the mother or in the alternative, placement with the extended family, thus circumventing the treatment plan and the intense structured environment this 14 year old so desperately needs.
>
> This 14 year old wants to be placed on or near the St. Croix Reservation. Until the tribe is able to present a plan that will continue to provide for the child's needs and takes into account his wishes, the late intervention is disruptive and not in the child's best interests and contrary to the intent and purpose of the Indian Child Welfare Act.

THE INDIAN CHILD WELFARE ACT

¶9 We begin with an overview of the applicable provisions of the Act. There is no dispute that Cody's placement hearings fall within the ambit of the Act. "The ICWA of 1978 (92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (1978)), was enacted to prevent the results of separation of large numbers of Indian children from their families and tribes caused by adoption or foster care placement in non-Indian home by state child welfare entities." ***In re Arnell***, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990). Congressional findings incorporated into the Act reflect the

sentiment that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *See* ***id.*** Thus, the Act provides tribes jurisdiction to determine child custody and placement.

¶10 Because Cody does not live on the reservation, the following section applies:

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

25 U.S.C. § 1911(b) (1978).

¶11 Accordingly, whether the circuit court correctly determined that there was "good cause" not to transfer jurisdiction disposes of this appeal. The Act does not define "good cause," but the Department of the Interior, Bureau of Indian Affairs (BIA) has published guidelines for the implementation of the Act. *See* Guidelines for State Courts; Indian Child Custody Proceedings (1979), 44 Fed. Reg. 67,584 (1978); *see also* ***Arnell***, 550 N.E.2d at 1064-65. The BIA guidelines, while not controlling, are helpful and should be considered when applying the Act. *See* ***In re D.S.P.***, 166 Wis. 2d 464, 477, 480 N.W.2d 235 (1992).

¶12 The BIA guidelines provide that good cause not to transfer exists when the child's tribe does not have a tribal court or when any of the following circumstances exist:

> (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.

44 Fed. Reg., *supra,* at 67,591.

¶13 "Moreover, the BIA guidelines state that socio-economic conditions and the perceived adequacy of tribal or BIA social services may not be considered in determining whether good cause exists." *See* ***Arnell***, 550 N.E.2d at 1065. "Commentary to this section of the BIA Guidelines stresses that an Indian child's lack of present contacts with a tribe or reservation should not be used to justify denying transfer, since tribes have a transcendent interest in developing a relationship with their members." ***Id.*** (citing BIA Guidelines, § C.3. Commentary, 44 Fed. Reg., *supra,* at 67,591).

¶14 Also, courts have interpreted the Act to provide that considerations involving the child's best interests are relevant not to determine jurisdiction, but to ascertain placement. *See* ***id.*** (citing ***Mississippi Band of Choctaw Indians v. Holyfield***, 490 U.S. 30 (1989); ***In re Appeal in Pima County Juvenile Action***, 635 P.2d 187 (Ariz. App. 1981); ***Catholic Soc. Servs. v. P.C.***, 455 U.S. 1007 (1982)). The United States Supreme Court observed: "We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be." ***Mississippi***

Band, 490 U.S. at 53. Also, the Utah Supreme Court held in ***In re Halloway***, 732 P.2d 962, 971-72 (Utah 1986), that issues of bonding and ultimate placement were not proper considerations when deciding the issue of jurisdiction. *See* ***Arnell***, 550 N.E.2d at 1065. The burden of establishing good cause not to transfer jurisdiction is on the party opposing the transfer. *See* ***Yavapai-Apache Tribe v. Mejia***, 906 S.W.2d 152, 163 (Tex. App. Ct. 1995).

STANDARD OF REVIEW

¶15 Our initial inquiry concerns the scope of our review of the court's "good cause" determination. "The ICWA does not, however, completely divest state courts of their jurisdiction over children of Indian descent." ***Id.*** at 162.[5] "Determining whether good cause exists to retain jurisdiction is within the trial court's discretion." ***Id.*** at 163 (citing ***In re J.L.P.***, 870 P.2d 1252, 1256 (Colo. App. Ct. 1994); ***In re A.L.***, 442 N.W.2d 233 (S.D. 1989); ***In re Wayne R.N.***, 757 P.2d 1333, 1335 (N.M. 1988)).

> A good cause determination is necessarily made on a case-by-case basis after consideration of all the circumstances involved. Thus, the determination is by its nature subjective, requiring a balancing process of the rights of the state, the child, and the tribe.

Id. (citations omitted).

¶16 The judgment of the circuit court in determining whether good cause exists will be upheld as long as the record discloses any reasonable basis. *See* ***In re J.J.***, 454 N.W.2d 317, 329 (S.D. 1995).

[5] "The ICWA does not preempt the Wisconsin children's code, and, therefore, the Wisconsin statutes can be read so as to harmonize them with the ICWA." ***In re D.S.P.***, 166 Wis. 2d 464, 473, 480 N.W.2d 234 (1992).

¶17 The band argues strenuously that the issue on appeal is solely one of law to be reviewed de novo. Some cases refer to the determination of good cause as a finding of fact. *See* ***In re Robert T.,*** 200 Cal. App. 3d 657 (1988). Yet other cases have held that when the historical facts are undisputed, a good cause determination is reviewed de novo. *See* ***In re F.E.W.***, 143 Wis. 2d 856, 858, 422 N.W.2d 893 (Ct. App. 1988).[6] In many cases and contexts, however, a good cause determination has been viewed as discretionary.[7] This apparent confusion notwithstanding, this court is satisfied that the "good cause" exception in 25 U.S.C. § 1911(b) by its nature demonstrates that the transfer is discretionary and not mandatory.

¶18 We are persuaded by the Department of the Interior's interpretation of the Act, expressed in its Guidelines for State Courts and the discussion in ***In re Robert T.***, 200 Cal. App. 3d at 662 (1988), stating:

> The introduction to the guidelines also notes that the legislative history of the Act "states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." S.Rep. No. 95-597, 1st Sess., p. 17 (1977).

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[6] *See also* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980) (conclusion that there is "good cause" is drawn from the underlying findings of fact and is a legal conclusion).

[7] *See, e.g.,* ***Kisten v. Kisten***, 229 Wis. 479, 485, 282 N.W. 629 (1938) (whether "good cause" exists is a matter within the trial court's discretion); ***In re Smith Family Trust***, 167 Wis. 2d 196, 202, 482 N.W.2d 118 (Ct. App. 1992) (court exercised discretion by determining whether there was good cause to refuse to appoint individual as successor trustee); ***In re Sorensen,***180 Wis. 2d 496, 501, 509 N.W.2d 285 (1994) (per curium) (Board of Bar Examiners did not erroneously exercise its discretion by determining that applicant did not have good cause); ***State v. Wild***, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988) (trial court improperly exercised discretion when it failed to consider whether State's noncompliance with discovery was for good cause); ***Hartman v. Buerger***, 71 Wis. 2d 393, 397, 238 N.W.2d 505 (1976) (permitting delayed filing of summary judgment motion was not erroneous exercise of discretion where trial court specifically found good cause for the delay).

44 Fed. Reg., *supra,* at 67,584. This court will therefore determine whether the circuit court's denial of the transfer motion constituted a proper exercise of discretion.[8]

¶19 Discretionary decisions are sustained if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson,*** 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Underlying discretionary determinations are questions of fact and issues of law. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993). A mistake of fact or incorrect view of the applicable law amounts to an erroneous exercise of discretion. We apply the clearly erroneous standard to factual findings and review issues of law de novo. *See* ***id.*** at 148.

EXERCISE OF DISCRETION

¶20 The band makes several challenges to the circuit court's refusal to transfer jurisdiction. It asserts that the circuit court refused to transfer jurisdiction because the county guaranteed placement in Turtle Lake, while the band could not.[9] The band argues that the child's potential placement is "conceptually

[8] The circuit court made various findings of fact that this court reviews under the clearly erroneous standard. *See* WIS. STAT. § 805.17(2) (1997-98). The band takes issue with some of these findings and supplants them with speculative assertions. For example, it states that "there is reason to believe … Cody would be eager to have his case transferred," and, "[p]lacement with a Native family may be precisely what Cody needs to change some of his negative behaviors." The band does not, however, specifically challenge the circuit court's findings under the proper standard of review.

[9] The band asserts that, as of the motion hearing date, it had not been aware of the proposed placement and therefore had no opportunity to determine whether it would meet Cody's needs for an appropriate placement.

impermissible under the Act" and, therefore, is an inappropriate consideration when deciding which court should exercise jurisdiction.

¶21 The band also contends that the circuit court erred by construing Cody's placement preference as an objection to transferring jurisdiction to the band. It acknowledges that whether a child over the age of twelve objects to a transfer is one of five "good cause" criteria under the BIA guidelines. The band asserts, however, that Cody did not in fact object to the proposed jurisdictional transfer. It also contends that a child's objection is only relevant where the objection relates to the jurisdiction issue and not placement.[10] This court is unpersuaded.

¶22 The record reflects that the court placed much importance on Cody's age and his wish to live with the Turtle Lake foster family. The court did not express a placement preference or weigh the potential benefits of one placement over another. Instead, it considered that Cody, at age fifteen, desired to be placed in a foster home near his family and that Cody's choice was a rational one. This court concludes that the court's consideration of a child's wishes is not equivalent to a comparison of potential placements.

¶23 This court is also satisfied that the circuit court did not err by referring to placement outcomes when describing jurisdiction to Cody. The abstract notion of a court's jurisdiction would have little meaning to a child absent an explanation of potential outcome. The court did not express to Cody a

[10] To illustrate its point, the band hypothesizes that a child might object to a transfer that would result in a substantial upheaval in his environment, such as a transfer of jurisdiction over a child raised in Wisconsin to a court in a distant state.

preference for one potential outcome over another, but merely attempted to impart meaning to notions of jurisdiction.

¶24 The court inferred from Cody's satisfaction with his present placement in Turtle Lake that he objected to a transfer. Cody was present at the June 9, 1999, hearing on the motion and heard those present discuss the transfer issue in clear terms. At one point, the band's attorney indicated that a preliminary investigation indicated a possible placement in the Superior area. Cody shortly thereafter indicated that he did not "even know where Superior is" and that he was satisfied with the placement the county had arranged. Under these circumstances, the court's inference is reasonable. Because a rational basis supports the circuit court's ruling, this court does not overturn it on appeal.

¶25 The band nonetheless argues that the circuit court erred as a matter of law by concluding in its memorandum opinion that the band's intervention at a point where the proceeding was at an advanced stage would be disruptive. The band suggests that the memorandum's conclusion that its intervention was late is inconsistent with the court's conclusion at the hearing on the band's original motion that the motion was timely and that it was not basing its denial on the band's failure to act promptly. This court disagrees.

¶26 There is no inconsistency in the court's rulings. The band had been involved in Cody's case since 1995. In 1996, it caused to be transferred a termination of parental rights case involving Cody. The band had not, however, taken any steps to exercise its misperceived jurisdiction in the CHIPS proceedings or sought a transfer of jurisdiction until its June 1999 motion. Consequently, the court was entitled to conclude that although the band had acted timely with respect

to the 1999 proceedings, it had not sought to exercise its jurisdiction until four years from the time it first had notice.

¶27 In addition, Cody had been receiving services from the time he was seven years old. The band had been attending CHIPS proceedings since 1995 and believed it had tribal court jurisdiction since 1996. While the circuit court would not hold that the band failed to act promptly before it received notices in 1995, it could rationally conclude that to transfer jurisdiction when Cody was fifteen and placed according to his expressed preference would be disruptive.

¶28 The band argues that Cody's life has not been stable and therefore the court's rationale is disingenuous. This argument is unpersuasive. The court recognized the disadvantages Cody faced. It found, however, that given Cody's age and the length of time that he has been in the juvenile system, he had reached a point where he could make some choices and be given that opportunity. This court concludes that the record supports the court's reasoning.

¶29 The band further asserts that a circuit court improperly denies a transfer unless the stage of the proceedings has advanced to a point where, for example, the case was considered "closed." *See* ***In re A.P.***, 962 P.2d 1186, 1188-90 (Mont. 1998) (denying transfer where state court proceedings were completely finished and child was living and thriving in a secure and loving preadoptive Indian home). Aside from alluding to the Act's "clear jurisdictional preferences," the band does not rely upon language either in the Act or the BIA guidelines to

support its interpretation.[11] Moreover, the rule that the band asks this court to establish does not necessarily or even logically flow from the Act's initial jurisdictional presumption.

¶30 The band also asserts that the court's errors are reflected in its remark that "I don't care who has jurisdiction." This court disagrees. In context, the court's remarks indicated that it was approaching the jurisdiction issue impartially and had no vested interest in maintaining jurisdiction in state court. The remarks reflect no error.

CONCLUSION

¶31 This court's role is to review the record for reasons to sustain the circuit court's discretionary decision. *See* ***Looman's v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). Here, the record reflects that the circuit court based its decision on a correct interpretation of the law and an accurate view of the facts. It represented a rational decision that a reasonable judge could reach. That another court could have reasonably reached a contrary determination is not grounds for reversal. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

[11] The band also asserts that other "[c]ourts that have ruled on the exception have taken this approach," thus implying that these courts have interpreted the advanced stage exception to prevent the transfer of a case when the proceedings are almost complete and a transfer would disrupt an imminent final disposition. The cases relied upon, ***In re J.J.***, 454 N.W.2d 317 (S.D. 1990), and ***In re Robert T.***, 200 Cal. App. 3d 657 (1988), do not support the band's contention. Neither court attempted to define when a proceeding was at an advanced stage, but merely applied the "good cause" exception to the transfer presumption to the facts before it. Indeed, the ***Robert T.*** court observed that whether a request to transfer is timely must be made on a case-by-case basis, but that such request "should at least precede permanency planning in a dependency proceeding." ***Id.*** at 665.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.