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MPT-2: *In re Guardianship of Will Fox*

EXCERPTS FROM THE INDIAN CHILD WELFARE ACT OF 1978 (TITLE 25 U.S.C.)

§ 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903 Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "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;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

. . .

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe . . . ;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

. . .

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

. . .

§ 1911 Indian tribe jurisdiction over Indian child custody proceedings

. . .

(b) Transfer of proceedings; declination by tribal court

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.

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS

* * * *

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 [25 U.S.C. §§ 1901 *et seq*. (Indian Child Welfare Act)] to which the case can be transferred.

(b) Good cause not to transfer this 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 12 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.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

In re Custody of R.M.

Franklin Supreme Court (2009)

Joan Albers filed in the Franklin district court a Petition for the Sole Physical and Legal Custody of R.M. (DOB 4/20/2005). The Petition did not seek to terminate the parental rights of R.M.'s parents. Albers, the maternal aunt of R.M., has shared responsibility for raising R.M. since the child was two months old. Albers, R.M., and R.M.'s parents are members of the Falling Rock Tribe. The district court granted the motion by R.M.'s parents to transfer this matter to the Falling Rock Tribal Court, relying on the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(b). The Court of Appeal affirmed. Albers appeals.

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq*., was the product of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. U.S. Senate oversight hearings yielded numerous examples documenting "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 3 (1974) (statement of William Byler). The Association on American Indian Affairs reported that 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. It also identified serious adjustment problems encountered by these children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Additional witnesses at the Senate hearings testified to the impact on the Indian tribes of this history. One witness testified:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. . . . Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptuous of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

In enacting the Act, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and that "the States, exercising their recognized

jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

Albers argues in her appeal of the transfer of the matter to tribal court that ICWA does not apply. She contends that this is not a child custody matter because she does not seek to terminate the parental rights of R.M.'s parents. She simply wants to be able to make decisions for R.M. The parents, however, argue that what Albers seeks is a foster care placement that is governed by § 1911(b) of ICWA.

Under § 1911(b), upon receipt of a petition to transfer by a parent, an Indian custodian, or the Indian child's tribe, the state court child custody proceedings are to be transferred to the tribal court, except in cases of "good cause," objection by a parent, or declination of jurisdiction by the tribal court.

The critical issue in determining whether ICWA applies is not how a party captions the petition, but rather what the petition seeks. ICWA defines foster care placement as encompassing four requirements: (1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. 25 U.S.C. § 1903(1).

ICWA does not define these terms. Franklin state law, however, defines the guardian of a minor as one with "the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." FR. REV. STAT. § 72.04. For example, a guardian is empowered to facilitate the minor's education and social and other activities and to authorize medical care. Under Franklin law, a "conservator for a minor" has the power to provide for the needs of the child and has the duty to pay the reasonable charges for the support, maintenance, and education of the child. *Id.* § 72.08.

Here, by seeking to have sole legal custody of R.M., Albers in effect seeks the ability to decide her care, including the ability to remove R.M. from her parents and place her temporarily in Albers's home. The parents would not be able to have the child returned upon demand.

The terms "conservator" and "guardian" describe the very powers Albers seeks. Albers cannot avoid the effect of ICWA by calling her petition one for "sole physical and legal custody." Thus, her petition falls within the definition of "foster care placement" to which ICWA applies.

Albers also claims that she can object to the transfer to tribal court because she is an Indian custodian. In doing so, Albers relies on the legislative history of ICWA. "[B]ecause of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interest of the parents." H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

We assume that Albers would be an Indian custodian under ICWA. Nevertheless, while Indian custodians such as Albers are eligible to *petition* to transfer, they do not have the right to *object* to the transfer. 25 U.S.C. § 1911(b). Being an Indian custodian does not give Albers the right to object to the transfer in this case.

Finally, Albers argues that good cause exists not to transfer the matter under § 1911(b) but to keep it in state court because 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. The Bureau of Indian Affairs has issued Guidelines to help state courts in determining good cause not to transfer. BUREAU OF INDIAN AFFAIRS, *Guidelines for State Courts; Indian Child Custody Proceedings ("Guidelines")*. Although the Guidelines have not been promulgated as administrative regulations, they clarify the congressional intent behind this legislation. We therefore follow them.

The Guidelines recognize that undue hardship is one of the circumstances that would warrant a finding of good cause not to transfer. However, Albers has failed to meet her burden. *See Guideline (d)*. The tribal court is located just over an hour's travel time from Albers's home and less than two hours' travel time from the home of R.M.'s parents. It is within one to two hours' driving time of school and medical personnel and any other witnesses likely to be called to testify. In fact, Albers admits to often taking R.M. to the reservation to visit with family and friends, a trip that was not inconvenient to her. It has been our experience that tribal courts have the power to subpoena witnesses needed to prove parties' allegations. We have no reason to question that power here, and our state courts will issue subpoenas upon request of tribal courts. Accordingly, good cause not to transfer does not exist here.

The district court correctly applied the law in this case by ordering the transfer to the Tribal Court.

Affirmed.