NON-REMOVABLE MILLE LACS BAND OF OJIBWE INDIANS
COURT OF APPEALS

District of Nay-Ah-Shing

IN THE COURT OF APPEALS

No. 2013-AP-2

In Re the Matter of the Welfare of:

V.R.B.,
Minor Child.

MEMORANDUM DECISION

S.B. and B.B.,
Appellants.

vs.

Mille Lacs Band Family Services[1],
S.B. and C.B.,
Appellees.

S.B. and B.B., the maternal grandparents of V.R.B., appeal from a September 24, 2013 decision of the District Court, Honorable Chief Judge Richard Osburn presiding, appointing S.B. and C.B. - non-members of the Band and non-relatives of the child- the permanent legal and physical guardians of their minor granddaughter. Because this Court finds that the District Court erred when it decided to appoint permanent guardians without any request from the parties before

[1] The Band Family Services asked for permission from this Court to withdraw from this appeal, but that request was not granted. The Band's Solicitor, Todd Matha, thus appeared at hearing and argued in favor of reversal of the District Court decision, contending both that the District Court erred when it sua sponte decided to consider permanent guardianship with S.B. and C.B. without a party requesting such, and due to failure to abide by the customs and practices of the Band with regard to child-rearing as expressed in Band Law.

it and because the Court finds that insufficient grounds were proven to justify deviation from the Band's placement preferences we reverse the order appointing permanent guardians.

Oral argument was held before this Court on the 16th day of January 2014 with the Appellants appearing to represent themselves, the Band appearing through Todd Matha, Solicitor General, C.B. without legal counsel, and guardian ad litem, Shannon Porter, in person and through legal counsel, Christina Martenson. All parties were permitted to be heard at the hearing. The GAL also submitted a post-hearing letter to respond to a legal issue raised by the Court on whether any party had requested the District Court to grant a guardianship to S.B. and C.B.

The proceeding that ultimately resulted in the District Court granting S.B. and C.B. a permanent guardianship commenced on January 20, 2009, as a child protection matter filed by Band Family Services against the biological parents- R.B. and I.A-L.- and concerning V.R.B. and four of her siblings. The other four siblings are in placement with the maternal grandparents. V.R.B. was born on January 10, 2009, and removed three days later due to being born positive for drugs due to the mother's use during the pregnancy. Family Services initially placed her with another foster care provider, but on February 9, 2009, Family Services placed her with S.B. and C.B. C.B. is a White Earth Band member and S.B. a non-member. In August of 2009, Family Services located an adoptive home for V.R.B. with Band and extended family members, D.S. and J.S. That placement did not work however due to a domestic violence incident in the home, resulting in V.R.B. being returned to S.B. and C.B. on February 14, 2010, where she has resided since.

Up until June 2, 2011, the permanency plan offered by Family Services was reunification with the mother. Although Band Social Services had considered permanent placement with S.B. and C.B., they had not indicated assent to such as of December 9, 2010. On June 2, 2011, a review hearing was held at which time Band Family Services indicated that reunification with the

mother was no longer its permanency plan. Instead, at the next regular review hearing on September 8, 2011, Band Family Services offered two options to reunification- a permanent guardianship with a family member of either the mother or father or adoption by S.B. and C.B. Adoption by S.B. and C.B. was again expressed as a permanency plan on November 17, 2011. On January 25, 2012, [2] the Court found that adoption by S.B. and C.B. was not an option because the father would not consent to an adoption. Band law does not permit termination and thus adoptions must be premised upon consents by the biological parents.

Once again on January 25, 2012, S.B. and C.B. indicated that they did not want to consider a permanent guardianship over V.R.B. As a result, the Court ordered a transition into either the home of the maternal grandparents, who had been attending the review hearings on V.R.B. and her four brothers who are placed with the grandparents, or a paternal uncle. From January of 2012 until September of 2012, it is unclear from the record whether Family Services was making an attempt to transition the child into the Appellants' family or whether they supported keeping the child with S.B. and C.B. The GAL, who originally supported a transition plan to the Appellants, changed her mind at the hearing on July 18, 2012 and instead argued for long-term foster care with S.B. and C.B. Mille Lacs County Social Services, who was footing the bill for the foster care placements, argued for some long-term placement that would remove V.R.B. from the foster care system. On September 19, 2012, the Band Family Services changed its position with the Court on V.R.B. It contended that she should remain with S.B. and C.B. and that a transition plan was not in her best interest. The Court disagreed and ordered that the grandparents have visitation with V.R.B. so she could transition into their home. Two subsequent review hearings showed that the Appellants had visitations, but not enough according to

[2] There appears to be a typographical error at page 2 of Judge Osburn's order and the date is indicated as January 25, 2011.

the GAL and Band Family Services to warrant a change in placement. After review hearing on May 8, 2013, the District Court Judge decided that the transition plan was not progressing as he hoped so he decided to schedule a contested permanency hearing instead of continuing with the transition plan.

The permanency trial was held over a period of two days- August 14-15, 2013 and resulted in a thirty-six-page order on September 24, 2013, appointing S.B. and C.B. the "permanent guardians" of V.R.B., although the Judge opted not to transfer "physical custody" to them because they were not family members. The upshot of the order, however, was both a permanent transfer of physical and legal custody to S.B. and C.B. because the Court left visitation with extended family members in the discretion of S.B. and C.B. and also noted, and did not preclude the possibility of, a move of S.B. and C.B. with V.R.B. to Florida, a move that could potentially impair the child's relationship with her siblings and other extended family members.

This Court greatly appreciates the thorough nature of the order propounded by Judge Osburn along with its timeline on V.R.B. and her placements. Some of his legal conclusions that led him to rule the way he did include the following:

1. S.B. and C.B. are the only persons who were there for V.R.B. for four years;
2. The Appellants had four years to transition the child into their home and they consistently failed to do what was required;
3. It would cause V.R.B. great psychological harm to be removed from S.B. and C.B. and placed elsewhere;
4. That V.R.B. has extraordinary emotional or physical needs that justify deviating from the placement preferences that Band law imposes;
5. That it is in the best interest of V.R.B. to remain in S.B. and C.B.'s home.

Although Judge Osburn did not differentiate between his findings of fact and conclusions of law in his order, it appears to this Court that these are the critical findings in his order that support his appointment of S.B. and C.B. as permanent guardians of V.R.B. Although they appear to assimilate findings of fact into conclusions of law, this Court concludes that they are essentially legal determinations that must be reviewed under a "clear error of law" standard by this Court with no deference granted to the District Court.

LEGAL ANALYSIS

It is undisputed from the record, as well as the positions taken by the Parties to this appeal, that the District Court granted S.B. and C.B. a permanent guardianship over V.R.B. even though no party expressly petitioned the District Court for it. The Band Solicitor General at hearing noted that the Mille Lacs Band Code is a bit ambiguous on how a child welfare proceeding advances from the Band having legal custody of a child to the Band being displaced as legal guardian. Certainly, in situations where a child is returned to the parents or guardian from whom the child is removed, the law is clear that Family Services' legal custody would terminate in that situation and full custody restored to the parent or guardian. However, the Band's Code is not clear with regard to how other forms of permanency, such as permanent guardianships, permanent transfer of legal custody, or other alternatives available to the District Court are effectuated when the Court finds one of those alternatives to be the form of permanency best suited for the child. Certainly just because the District Court concludes at a permanency hearing that adoption, guardianship or some other permanent transfer of legal custody from the Band's Family Services to a non-parent is in the child's best interests

does not, pro tanto, mean the child is adopted or placed permanently with another family. Usually, some party follows up on that permanency order with an appropriate petition to carry out what is recommended at the permanency hearing.

Following appropriate procedure is particularly critical in guardianship proceedings because they involve substantial interference in the rights of parents and extended family members to rear children. This Court recognizes that a permanent guardianship with a nonfamily member may be a potential long-term disposition for a child in the legal custody of Family Services under Band law. It is not the optimal disposition, however, as Courts have recognized that permanent guardianships, premised upon allegations of parental unfitness, are very invasive of the constitutional rights of parents and extended family members to raise their children. See Matter of Guardianship of T.H.M. and M.M.M., 640 N.W.2d 68 (SD 2002); see also In re Guardianship of D.T.N., 914 P.2d 579 (Mont. 1996) (award of permanent guardianship to grandparents reversed because the practical result was the termination of the parents' rights which could not be done in a guardianship action). In T.H.M, the South Dakota Supreme Court rejected an attempt by grandparents to obtain guardianship over a minor child based upon allegations of abuse or neglect without following the same procedures that the State would have been required to follow in an abuse and neglect matter. As the Minnesota Court of Appeals held in In re Guardianship of D.M.S., 379 N.W.2d 605, 608 Minn. App. 1985) awarding guardianship to a non-parent over the objection of the parent is tantamount to termination of parental rights because the parent may lose the ultimate right to raise the child. [3]

[3] Although this Court notes that the parents have not appealed the District Court's decision granting S.B. and C.B. permanent guardianship, the grandparents' rights to raise

This Court finds that the Indian Civil Rights Act guarantee of due process of law requires that any party seeking to be appointed the permanent guardian over a minor child, against the wishes of a parent, must make a compelling demonstration of the need for such an appointment. This is because the granting of a guardianship petition inalterably impacts the liberty rights of parents and their extended family members to raise their children. In this case, for example, S.B. and C.B. have been granted the authority to remove the child from the State of Minnesota and to move with the child to another state. This will obviously impair not only the ability of the grandparents to maintain a relationship with V.R.B. but will also impact her siblings' ability to maintain a relationship.

This substantial interference with the right of the grandparents and siblings to maintain a relationship with V.R.B. was accomplished without S.B. and C.B., the GAL or the Band even filing a petition seeking a permanent guardianship. Indeed, the record reflects that on at least two occasions- December 10, 2009 and January 25, 2012- S.B. and C.B. rejected any suggestion that they should be appointed permanent guardians over V.R.B. This may be due to their desire to adopt V.R.B. but does not change the official position they took at these hearings.

The GAL argues to this Court that the fact that no petition for appointment of a legal guardian was filed is not an appropriate issue on appeal because the grandparents have not raised this issue and even if they had, granting such relief is well within the District Court's discretion under 8 MLBSA §3111(a). The letter submitted by the GAL after the hearing making this argument also points out, however, that under Band law, 8

---

their grandchild are derivative of the parents' rights and thus they also have some due process protections that require that the District Court follow the appropriate procedures when granting permanent guardianships to non-relatives.

MLBSA §§ 3154d, 3201, 3204, and 3206 the District Court is granted the discretion to "direct persons interested in permanent guardianship over a child **to file a petition for such guardianship**." That was not done below; instead, the Court opted to appoint S.B. and C.B. permanent guardians as part of a permanency hearing without an appropriate petition being filed. Merely because 8 MLBSA §3111(a) grants the District Court great discretion to issue appropriate orders in child welfare cases does not relieve a party of its obligation to file an appropriate petition under the law that notifies all parties, including the parents, of the remedy being sought.

This Court also finds that this issue goes to the jurisdiction of the lower court and can thus be raised on appeal. It should be noted that the grandparents have no legal counsel in this appeal because their trial counsel withdrew. Appellate courts can raise issues pertaining to the jurisdiction of the lower court to grant relief sua sponte.

The GAL also points out that even if the Court were to fault the District Court for granting a permanent guardianship to S.B. and C.B. such does not benefit the Appellants because the Court was still justified in denying placement with them of their granddaughter. This appears to be a harmless error argument. This Court disagrees with this argument. Even were the District Court correct in ruling that it was not in V.R.B.'s best interest to be placed with her grandparents and siblings, that finding does not bar the Appellants from arguing that a permanent guardianship with S.B. and C.B. was nonetheless not warranted under the law. By granting S.B. and C.B. a permanent guardianship the District Court has essentially barred the Appellants from forever obtaining custody of

their grandchild, absent some substantial and material change in circumstances impacting the ability of S.B. and C.B. to provide for V.R.B. Had the District Court merely ruled that placement with the Appellants was not appropriate at this time, and avoided the permanent appointment of S.B. and C.B. as guardians, the Appellants could have still argued that an ultimate placement with them would be appropriate in the future. The District Court order foreclosed this possibility and this is sufficient harm to the Appellants to confer standing upon them to raise this issue in this appeal.

We thus conclude that the District Court erred when it granted a permanent guardianship without the benefit of a petition being filed for such relief and also that the Appellants have authority to argue this issue even if the Court did not, for the sake of argument, err in ruling that placement with them was in V.R.B.'s best interests.

Even if the District Court had the authority to grant a permanent guardianship at a permanency hearing without the benefit of a petition being filed seeking such, this Court finds that the District Court committed clear error on some of its findings in support of its conclusion that a permanent guardianship is in V.R.B.'s best interests. The District Court seemed to insinuate that there were two options available to it: placement of V.R.B. with her grandparents or a permanent guardianship with S.B. and C.B. This certainly was not true under Band law because nothing in Band law, unlike the Adoption and Safe Families Act incorporated into Minnesota law, commanded the District Court to make a permanency choice that involved removing the child from Family Service's legal custody and County obligation to pay foster care under the IV-E agreement between the State and the

Band. Obviously the District Court felt that the Appellants were given more than sufficient opportunity to transition the child into their home and they did not perform. The District Court found that the Appellants had four years to transition V.R.B. into their home and had failed to do so. This finding is clearly erroneous. It was not until June of 2011 that the Band Family Services indicated that reunification with the mother was not the permanency plan for V.R.B. The Appellants may very well have been holding out hopes that their daughter would overcome her drug problems and reach the point where she could provide for

V.R.B. It was not until September 19, 2012 that the District Court first ordered a transition plan for V.R.B. to be placed with her grandparents. The unsuccessful transition plan was thus over a period of approximately one year and not four years as indicated by the District Court.

It must also be remembered that the Appellants were not twiddling their thumbs while the Court laid down conditions for them to complete to gain placement of their granddaughter. They had four of her siblings- all of whom are special needs children like V.R.B. Nowhere in the District Court's order is there any meaningful discussion on the fact that the Appellants were involved with providing care for V.R.B.'s siblings who are in a similar situation as she and how that obviously impacted their ability to comply with all requests of Family Services for visits and other transition efforts.

The District Court also found that it is in V.R.B.'s best interests for S.B. and C.B. to be awarded a permanent guardianship. The legal ramifications of such a finding are profound. This order would permit S.B. and C.B. to move away from the area with

V.R.B. preventing all contact between her and her grandparents and most extreme under the law, would also interfere with V.R.B. and her siblings' efforts to bond and maintain affiliation throughout their lives. Nor is there is any indication that the District Court considered the cultural deprivations that would befall V.R.B. if removed from the area as S.B. and C.B. plan on doing. Although C.B. at hearing expressed general knowledge of the traditional ways of the Anishinaabeg, it was S.B. who clearly expressed knowledge of the traditional ways of the Band and the intent to raise V.R.B. knowing these values. This loss of cultural knowledge is just as important to V.R.B. as the psychological bonding between S.B. and C.B. and V.R.B., testified to by the expert witnesses. In determining the best interest of the child the Court must take a longitudinal approach- looking at what is best for the child her entire minority- and not just analyze what is best in the short-term. The District Court had other options available to it to preserve V.R.B.'s cultural best interest other than granting a permanent guardianship to S.B. and C.B.

The Appellants raise issues regarding an alleged bias by the presiding Judge against them that this Court declines to address. If a party feels that a Judge cannot be fair to that party it is incumbent upon that party to raise the issue first with the presiding Judge. It is not fair to the District Court Judge for this Court to merely accept allegations of bias made by the Appellants in this appeal as true without first giving the District Court Judge the chance to address them. The Appellants may raise those issues on remand, but this Court declines to find that the presiding Judge acted out of any bias towards the Appellants.

This Court finds that the District Court erred in granting S.B. and C.B. a permanent guardianship and remands this case to the District Court with instructions to vacate the permanent guardianship. The District Court should also give the Appellants sufficient opportunity on remand to work towards assimilating V.R.B. into their home. This Court will leave the particulars of that effort up to the District Court.

Wherefore based upon the foregoing analysis it is hereby

ORDERED, ADJUDGED, AND DECREED that the District Court's order granting a permanent guardianship to S.B. and C.B. is hereby REVERSED and this case remanded to the District Court with instructions to continue efforts to assimilate into the home of her grandparents and siblings based upon a schedule to be set by the District Court.

So ordered this 27th day of January 2014

B. J. Jones

BJ Jones
Special Magistrate as Substitute Justice for
Chief Justice Churchill

Clarence Boyd

Clarence Boyd
Associate Justice

Brenda Moose

Brenda Moose
Associate Judge

ATTEST: Clair L. Boyd
Clerk of Courts