IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF JAYDA L. ET AL.

IN RE INTEREST OF JAYDA L. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,
V.
ROBERT T. AND LYNDA L., APPELLEES, OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, SOUTH DAKOTA, INTERVENOR-APPELLEE, AND JOHN A. SELLERS, GUARDIAN AD LITEM, APPELLANT.

Filed July 31, 2012. No. A-11-1099.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

John A. Sellers, pro se.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee State of Nebraska.

Matthew C. Boyle, of Lauritsen, Brownell, Brostrom & Stehlik, for appellees Robert T. and Lynda L.

INBODY, Chief Judge, and MOORE, Judge, and CHEUVRONT, District Judge, Retired.

CHEUVRONT, District Judge, Retired.

INTRODUCTION

Following adjudication of their seven minor children, Robert T. and Lynda L. made a motion to transfer this matter to the Oglala Sioux Tribal Court in Pine Ridge, South Dakota, under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq. (2006), which motion was sustained. John A. Sellers, guardian ad litem for the children, now appeals this transfer of jurisdiction to the tribal court for the reason that the evidence necessary to proceed with the juvenile case will not be available to the tribal court without significant hardship to the witnesses. Because we find that Sellers did not object to the parents' motion to transfer in the county court, we affirm the decision of the county court to transfer jurisdiction to the tribal court.

BACKGROUND

Robert and Lynda are the biological parents of Lucille T., born in 2004; Jayda L., born in 2005; Damion T., born in 2007; Jaydon T., born in 2008; Daiza L., born in 2010; Alexzavier T. (also referred to as "Alexander" or "Alaxander"), born in 2011; and Alizae T., born in 2011. In August 2011, the deputy Hall County Attorney filed a petition in the county court for Hall County, Nebraska, alleging that all seven children were juveniles as defined under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The children were immediately placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

By the first hearing on September 15, 2011, the possible transfer of jurisdiction to tribal court had already been raised. A representative from the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, appeared before the county court and offered a motion for the tribe to intervene. Upon receiving approval from the court to intervene, the tribe filed a motion to transfer jurisdiction to the tribal court pursuant to ICWA.

Even though the parents did not object to a potential transfer and the tribal court itself accepted jurisdiction, the guardian ad litem for the children, Sellers, opposed the tribe's motion to transfer jurisdiction. Immediately following the September 15, 2011, hearing, Sellers wrote to the tribal court, asking it "to decline to accept jurisdiction of these children." And Sellers filed an objection in the county court on September 29.

Sellers adduced evidence in support of his objection to the tribe's motion during a hearing held on November 1, 2011. He offered affidavits of various witnesses, including two of the children's foster parents and their services coordinator, who would be unable to testify in tribal court because of the distance. He also offered a portion of the Oglala Sioux Tribe Juvenile Code in an effort to prove that such witness testimony would need to be presented as the case proceeded through tribal court. He finally offered nonbinding guidelines published by the Bureau of Indian Affairs, which advised that there is good cause not to transfer a case to tribal court when "evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (not codified). Based on this evidence, Sellers argued that the tribe's motion should be denied because "transfer of the case would limit the powers of the receiving [c]ourt to exercise its judicial authority because of a lack of subpoena power or to physically produce evidence and witnesses to make its required orders."

In response to Sellers' evidence, DHHS offered the testimony of the tribe's representative, who did not believe that witnesses would be required to travel to Pine Ridge to offer evidence. He explained that the tribal court did not follow the same rules of evidence as the county court and that consequently, it could hear testimony by telephone and receive "documentary evidence that may not be supported by foundation." Additionally, he testified that the tribal court could hold any necessary hearings in Hall County or at another location outside the reservation.

After hearing evidence, the county court listened to arguments of the parties. Despite calling the tribal representative to testify, DHHS maintained that it did not have a "strong stance one way or the other" on whether the motion to transfer should be approved. The State did not specifically oppose the motion, but expressed concern about possible inconvenience to the

witnesses. The parents had no objection to the potential transfer of jurisdiction to the tribal court. Sellers was the only party to object to the transfer. Following arguments, the court took the matter under advisement.

It was not until a December 12, 2011, hearing that the court orally overruled the tribe's motion to transfer jurisdiction, explaining that "[t]he basis for that ruling is it's my understanding that an agreement has been reached with respect to adjudication in this case." Pursuant to this agreement, Lynda then entered a plea of no contest on behalf of herself and Robert to the charge that the children "lack proper parental care by reason of the fault or habits of their parents." The court accepted the parents' plea as "knowingly, voluntarily and intelligently" made and adjudicated the children under § 43-247(3)(a).

Immediately following adjudication, within the same hearing, the parents made an oral motion to transfer jurisdiction to the tribal court. They stated that they "essentially restate all the allegations previously brought by the [t]ribe in their motion to transfer." When the court asked whether the parents' motion was "by agreement," the State responded that "[i]t is." Per that agreement, the motion was submitted on "all of the evidence" and "all of the record that was presented in this case previously with respect to the motion to transfer that was considered by this [c]ourt pre-adjudication."

The county court gave each of the parties a chance to respond to the motion with any objections. The State and DHHS each stated that they had no objections. When the court turned to Sellers, he did not respond with an objection, but stated as follows: "The agreement between the parties was that it would be submitted on the evidence that was previously offered, with the additional fact that adjudication has been completed in the [c]ourt."

Later, the court allowed each of the parties to make statements on the parents' motion. When it was Sellers' turn, he simply replied, "Nothing further, Your Honor."

Following these statements, the court orally ruled that "the motion of the parents to transfer this case to the [t]ribal [c]ourt for jurisdiction in connection with the dispositional efforts in this case should be and the same is hereby sustained."

Sellers timely appeals.

ASSIGNMENT OF ERROR

Sellers alleges that the county court abused its discretion by granting a motion to transfer to tribal court where good cause was shown not to transfer.

STANDARD OF REVIEW

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

We do not reach the merits of Sellers' assignment of error because we find that he did not object to the parents' motion to transfer in the county court and therefore cannot now make his objection on appeal.

Our review of the December 12, 2011, hearing revealed that Sellers did not raise an objection at any time between the parents' oral motion to transfer and the county court's ruling on that motion. He was given two explicit opportunities to state his views on the motion during the hearing. The first time, he responded by expounding on the agreement under which the motion was being made. He talked of evidence generally, but did not make any arguments regarding what that evidence showed about the merits of the motion. The second time the court gave Sellers leave to speak, he responded by simply stating, "Nothing further, Your Honor." Considering that he was given not one but two chances to object to the parents' motion to transfer jurisdiction, we find his failure to raise any objection during the county court hearing to be fatal to his appeal.

We acknowledge that Sellers did adamantly object to the first motion to transfer filed by the tribe. However, the order from which he now appeals sustained *the parents'* motion to transfer, not the tribe's motion. The tribe's motion was denied prior to the filing of the parents' motion to transfer and is distinct. We refuse to find that Sellers' previous objections also applied to the parents' motion when he took no action to restate or preserve his objections at the time the parents' motion was being considered.

The case law is clear that "appellate courts do not consider arguments and theories raised for the first time on appeal." *Tolbert v. Jamison*, 281 Neb. 206, 215, 794 N.W.2d 877, 884 (2011). Accordingly, because we find that Sellers did not object to the parents' motion to transfer in the county court, he cannot now object on appeal to the granting of that motion.

Even if we had not found that Sellers failed to object to the parents' motion to transfer in the county court, his assignment of error has no merit. He argues that the court abused its discretion by ordering a transfer to the tribal court when good cause was shown not to transfer the case. But the burden to prove good cause was on Sellers. See *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 832, 770 N.W.2d 678, 682 (2009) ("party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists"). And per our standard of review, we review the county court's decision for abuse of discretion. There was testimony that the tribal court could convene for any necessary hearings in Hall County. Indeed, commentary to the Bureau of Indian Affairs' guidelines specifically referred to the ability of tribal courts to alleviate hardship on the parties and witnesses "by having the court come to the witnesses" or by appointing members of the tribe who live outside of the reservation as tribal judges. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (not codified). Furthermore, the tribal representative testified that the tribal court could always receive testimony from witnesses in Hall County via telephone or documentary evidence. Given this evidence, the county court did not abuse its discretion in finding that Sellers failed to prove that there was good cause to deny the transfer based on hardship to potential witnesses.

CONCLUSION

Having found that Sellers did not object to the parents' motion to transfer jurisdiction to the tribal court during the county court proceedings, we do not reach his sole assignment of error on appeal. The order of the county court is affirmed.

AFFIRMED.