

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF BIANCA H. & ETERNITY H.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF BIANCA H. AND ETERNITY H., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

VICTORIA A., APPELLANT.

Filed November 25, 2008. Nos. A-08-651, A-08-652.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge.
Affirmed.

Lisa F. Lozano for appellant.

Alicia B. Henderson, Deputy Lancaster County Attorney, and Richard Grabow, Senior
Certified Law Student, for appellee.

Susan P. Buettner, Special Assistant Attorney General, and Sarah E. Preisinger, Senior
Certified Law Student, for Nebraska Department of Health and Human Services.

IRWIN, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Victoria A. appeals from an order of the juvenile court for Lancaster County, denying her
motion to transfer the juvenile court matters involving her children to the Rosebud Sioux Tribal
Court. For the reasons set forth below, we affirm the decision of the juvenile court.

BACKGROUND

The record shows that Victoria and Antonio H. are the parents of two children, Bianca
H., born on February 20, 2003, and Eternity H., born on December 6, 2004. In 2006, the juvenile
court adjudicated Bianca and Eternity under the juvenile code, stating that the children were in a

situation dangerous to life or limb or injurious to their health or morals under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). Subsequently, the State filed motions to terminate Victoria's and Antonio's parental rights to both children. Prior to the hearing on the State's motion to terminate, the Rosebud Sioux Tribe made a motion to intervene in the children's case.

On January 11, 2008, Antonio filed a motion to transfer the case to the Rosebud Sioux Tribal Court. The record shows that Antonio is a member of the Rosebud Sioux Tribe. On January 14, 2008, the court held an initial hearing on Antonio's motion to transfer and found that the hearing on the State's motion to terminate should be postponed. After this hearing, Victoria filed her own motion to transfer in February 2008. The hearing on the parties' motion to transfer was then continued to April 17, 2008.

At the April hearing, the State called Shirley Big Eagle to testify. Big Eagle is employed as the Indian Child Welfare Act specialist for the Rosebud Sioux Tribe. Big Eagle testified that typically motions to transfer are made on behalf of the tribe, and the tribe had not made a motion to transfer in the instant case. Big Eagle testified that the tribe did not make a motion to transfer when the children were adjudicated because at that time, the children were not eligible for enrollment. Under the tribe's criteria, a person must have at least a 25-percent Rosebud Sioux bloodline to be eligible for membership.

Big Eagle testified that since the children's adjudication, the tribe had decided to amend its criteria. Big Eagle stated that under the proposed criteria, the children would be eligible for enrollment in the tribe. Big Eagle testified that at the time of trial, the tribe had yet to pass an ordinance establishing the new criteria.

Big Eagle stated that although the new criteria had yet to be enacted, the tribe still decided to intervene in the children's case. As part of that process, Big Eagle reviewed the children's case in order to determine whether the case should be transferred. Big Eagle testified that she consulted with Sicangu Child and Family Services Agency, the agency that provides services for children on the Rosebud Sioux reservation. Big Eagle testified that the agency stated it would not accept the children's case because of the lack of services and foster homes available to the children through the agency. Because the agency would not accept the children in its family services program, Big Eagle determined that she would not seek to transfer the children's case to the tribal court.

In an order filed June 11, 2008, the trial court found that the Rosebud Sioux Tribal Court had declined transfer of the children's case and that good cause had been shown by the State to deny transfer of the case to the Rosebud Sioux Tribal Court. Victoria appeals.

ASSIGNMENTS OF ERROR

On appeal, Victoria argues that the trial court erred in failing to transfer the juvenile court matters to the jurisdiction of the Rosebud Sioux Tribal Court.

STANDARD OF REVIEW

A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007). 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

On appeal, Victoria argues that the trial court erred in failing to transfer the children's case to the jurisdiction of the Rosebud Sioux Tribal Court. Neb. Rev. Stat. § 43-1504(2) (Reissue 2004) provides:

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

In proceedings to terminate parental rights to an Indian child, the child's tribe shall have the right to intervene at any point in the proceeding. See § 43-1504(3). Under the Indian Child Welfare Act, if the tribe or either parent of the Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation without first determining whether jurisdiction of the matter should be transferred to the tribe. *In re Interest of Lawrence H.*, *supra*, citing *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

In the instant case, both Antonio and Victoria made motions to transfer the children's case to the tribal court. Big Eagle testified that the tribe did not make a motion to transfer when the children were adjudicated because at that time, the children were not eligible for enrollment.

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Big Eagle stated that although the new criteria had yet to be enacted, the tribe still decided to intervene in the children's case. As part of that process, Big Eagle reviewed the children's case in order to determine whether the case should be transferred. Big Eagle testified that she consulted with Sicangu Child and Family Services Agency and that the agency stated it would not accept the children's case because of the lack of services and foster homes available to the children through the agency. Because the agency would not accept the children in its family services program on the reservation, Big Eagle determined that she would not seek to transfer the children's case to the tribal court.

In an order filed June 11, 2008, the trial court found that the Rosebud Sioux Tribal Court declined transfer of the children's case and that good cause had been shown by the State to deny transfer of the case to the Rosebud Sioux Tribal Court. We agree. Neb. Rev. Stat. § 43-1503(4) (Reissue 2004) defines an Indian child as "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." In the instant case, it is clear that at the time of the hearing, Bianca and Eternity did not qualify as Indian children, and therefore, we cannot

say that the trial court abused its discretion in denying transfer of Bianca and Eternity's case to tribal court.

Alternatively, even if Bianca and Eternity do qualify as Indian children, the record clearly shows that the Rosebud Sioux Tribe cannot provide the children the services they require, and therefore, good cause has been shown not to transfer the children's case to tribal court.

CONCLUSION

After reviewing the record, we conclude that the trial court did not err in failing to transfer the juvenile court matters to the jurisdiction of the Rosebud Sioux Tribal Court. Therefore, the juvenile court's order is affirmed.

AFFIRMED.