SUPREME COURT OF WISCONSIN

No. 07-11A

In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal court.

FILED

JUL 1, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On July 31, 2008, this court created Wis. Stat. § 801.54 governing the discretionary transfer of cases to tribal court. See S. Ct. Order 07-11, 2008 WI 114 (issued Jul. 31, 2008, eff. Jan. 1, 2009) (Roggensack, J., dissenting).

On February 9, 2009, the Wisconsin Department of Children and Families ("the Department") submitted a letter to the court asking the court to create a narrow exception to the rule to facilitate transfer of post-judgment child support cases to tribes under certain circumstances. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), as amended by the Balanced Budget Act of 1997, authorized the direct funding of tribal child support enforcement programs by the federal government. The Department of Health and Human

Services ("DHSS") published rules[1] providing the mechanism for tribes to submit child support enforcement plans and, upon approval, to receive direct federal funding of tribally operated programs. As part of this program, federal regulations governing state IV-D plans were amended to require states to cooperate with tribal IV-D programs.[2] In Wisconsin, the Oneida Nation has received funding to establish such a program and assume the management of certain post-judgment child support cases from state circuit courts.[3]

Accordingly, the Department has been working on the transfer of approximately 4,000 post-judgment child support cases from state court to the Oneida Nation as part of this program. However, the Department has ascertained that complying with the affirmative notice requirements of Wis. Stat. § 801.54(2) will make these transfers cost-prohibitive to effectuate. The Department supports the adoption of a narrow exception that will facilitate these transfers while still affording the individual parties an opportunity to object to the transfer. The Department indicates that the Oneida Nation and

[1] The DHHS published its final rule on March 30, 2004. See 69 Fed. Reg. 16,638 (Mar. 30, 2005) codified at 45 C.F.R. Part 309.

[2] 69 Fed. Reg. 16,638 (Mar. 30, 2005).

[3] The Forest County Potawatomi Community, the Lac du Flambeau Band of Lake Superior Chippewa Indians, and the Menominee tribe of Wisconsin have already established such programs with the assistance of the Department of Children and Families. However, the transfer of cases in these matters occurred prior to the effective date of Wis. Stat. § 801.54.

the Brown County Circuit Court acknowledge the need for this request. The Department has also consulted with the Wisconsin Department of Justice regarding this proposal. The Department asks the court to expedite its consideration of this request because the Oneida Nation's participation in the federal program and its receipt of federal funds may be jeopardized as a result of the delay in transferring these cases. Expedited consideration by the court is permissible pursuant to Wis. S. Ct. IOP III-A.

The court discussed this matter at its open administrative conference on March 9, 2009. Justice Patience Drake Roggensack reiterated her objection to the court's adoption of the rule. A majority of the court voted to grant the request of the Department. Justice Roggensack sought additional feedback on the proposed amendment from the Wisconsin Department of Justice. The court also requested the Department prepare the forms that will be used to notify parties of a prospective case transfer. The Wisconsin Tribal Judge’s Association and the Wisconsin State-Tribal Justice Forum submitted written statements in support of the amendment. Mr. Rick Cornelius submitted a statement opposing the rule.

The court discussed this matter again at an open administrative conference on May 1, 2009. The court agreed to amend the proposal to reflect a suggestion from the Wisconsin Department of Justice requiring an explicit finding of concurrent jurisdiction as part of the amendment. The court discussed the proposed forms prepared by the Department and

voted to advise the records management committee, acting on behalf of the Judicial Conference, to develop standard forms to effectuate this amendment that are substantially similar to the forms attached to this order as exhibits A and B. A majority of the court then confirmed its decision to grant the request of the Department. Justice Patience Drake Roggensack stated she dissented from the adoption of the amendment and made a statement on the record explaining the basis for her dissent. She was joined by Justice Ziegler and Justice Gableman.

Accordingly, effective the date of this order:

SECTION 1. 801.54 (1) of the statutes is amended to read:

801.54 **(1)** SCOPE. In a civil action where a circuit court and a court or judicial system of a federally recognized American Indian tribe or band in Wisconsin ("tribal court") have concurrent jurisdiction, this rule authorizes the circuit court, in its discretion, to transfer the action to the tribal court under sub. (2m) or when transfer is warranted under the factors set forth in sub. (2). This rule does not apply to any action in which controlling law grants exclusive jurisdiction to either the circuit court or the tribal court.

SECTION 2. 801.54 (2m) of the statutes is created to read:

801.54 **(2m)** TRIBAL CHILD SUPPORT PROGRAMS. The circuit court may, on its own motion or the motion of any party, after notice to the parties of their right to object, transfer a post-judgment child support, custody or placement provision of an action in which the state is a real party in interest pursuant to s. 767.205(2) to a tribal court located in Wisconsin that is

receiving funding from the federal government to operate a child support program under Title IV-D of the federal Social Security Act (42 U.S.C. 654 et al.). The circuit court must first make a threshold determination that concurrent jurisdiction exists. If concurrent jurisdiction is found to exist, the transfer will occur unless a party objects in a timely manner. Upon the filing of a timely objection to the transfer the circuit court shall conduct a hearing on the record considering all the relevant factors set forth in sub. (2).

IT IS ORDERED that the court directs the records management committee, acting on behalf of the Judicial Conference, to develop standard forms to effectuate this amendment that are substantially similar to the forms attached to this order as Exhibits A and B.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stat. § 801.54 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 1st day of July, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

Exhibit A

STATE OF WISCONSIN CIRCUIT COURT BRANCH____ _____COUNTY

In re

_____
Petitioner

v. Case No. _____

_____
Respondent

REQUEST FOR HEARING ON CASE TRANSFER TO [Name of tribe] TRIBE

TO THE CIRCUIT COURT JUDGE OF _____ COUNTY:

I request a hearing to contest the transfer of my case regarding the issues of legal custody, physical placement and child support to the [Name of Tribe] Tribe of Indians.

_____
Signature

_____
Name (please print)

_____
Date

----------FOR AGENCY USE ONLY----------

The above requested hearing is scheduled for :

Date: _____

Time: _____

Room:_____

Presiding Official:_____

Address:_____

Exhibit B

_____ COUNTY
CHILD SUPPORT AGENCY

123 _____ Lane
___ Floor
_____, WI

TEL: (000) 000-0000
FAX: (000) 000-0000
TDD: (000) 000-0000

Mailing Address: P.O. Box 00000, _____, WI 54000-0000
http://www.co.____.wi.us/child_support/

Party Name
Address

Date
Case No.:

Dear <NAME>

The [Name of Tribe] has received federal approval to operate a tribal child support agency. The Tribe has enacted laws authorizing the establishment of paternity and enforcement of child support.

You or the other parent in your case is a member of the [Name of Tribe] Tribe. Therefore, your child support case may be transferred to the [Tribal] Child Support Agency. If the case is transferred in part, the issues of (1) legal custody, (2) physical placement and (3) child support will be under the jurisdiction of [Name of Tribal Court]. Other aspects of your family law case, such as maintenance, will remain with the [Insert County] family court.

<u>This is your formal notice of [Name of County]____ County's intent to transfer your child support case to the [Tribal] Child Support Agency. You have a right to object to this transfer.</u>

If you want to object to this transfer, you *must* complete the enclosed *Request for Hearing*. Then, within ten (10) business days of the date of this letter, you *must* send the completed *Request for Hearing* to the _____ County Child Support Agency, P.O. Box 00000, _____, WI 54000-0000. If you return the request within the appropriate time period, a hearing will be scheduled in _____ County Court, and all parties will be sent a notice of the hearing date, time and location.

If you do not complete and return the *Request for Hearing* form on a timely basis, we will ask _____ County Court to sign an order transferring your case to the [Tribal] Child Support Agency.

This agency is an equal opportunity employer and service provider. If you have a disability and need information in an alternative format, or if you need it translated to another language, please contact us at the phone number or address listed at the top of this letter.

Sincerely,

Agency Attorney, Child Support Agency

¶1 PATIENCE DRAKE ROGGENSACK, J. *(dissenting).* The majority of this court chooses to disregard the effect that its decision has on the fundamental constitutional rights of parents, gives no direction to circuit courts in regard to the standards under which concurrent subject matter jurisdiction could exist in tribal court and abrogates the rights of litigants who have chosen Wisconsin circuit courts as their forums. Once again, this court has exceeded the authority that the legislature granted in Wis. Stat. § 751.12. Accordingly, I respectfully dissent.

I. BACKGROUND

¶2 On July 1, 2008, a majority of this court legislated to create Wis. Stat. § 801.54, which permits the transfer of civil cases pending in Wisconsin circuit courts to tribal courts, over the objections of litigants and when all of the litigants are not tribal members. S. Ct. Order 07-11, 2008 WI 114, 307 Wis. 2d xxi (eff. Jan. 1, 2009). I dissented from that order. Id. at xxiii. I did so because: (1) tribal court concurrent subject matter jurisdiction rarely exists when non-tribal members are parties; (2) § 801.54 gave no guidance on the standards to be applied in evaluating whether tribal courts have concurrent subject matter jurisdiction; (3) § 801.54 contravenes Wis. Stat. § 751.12(1) by altering substantive rights of the parties to civil litigation; and (4) no information was provided about the substantive and

procedural rights that are available in the various tribal courts to which we authorized transfers. Id.

¶3 Today, a majority of this court expands the potential for infringement of the constitutional rights of non-tribal and tribal members by permitting the transfer of "post-judgment child support, custody or placement provision of an action in which the state is a real party in interest pursuant to s. 767.205(2) to a tribal court located in Wisconsin," without a hearing. S. Ct. Order 07-11A, supra at 4.

II. DISCUSSION

¶4 Today's change is a further deprivation of the rights of litigants in cases involving custody, placement and child support because Wis. Stat. § 801.54, as originally enacted, required the circuit court to provide notice and to hold a hearing in each case before a transfer could be made. § 801.54(2). During that hearing the circuit court was required to first determine whether concurrent subject matter jurisdiction existed in the tribal court, and then to examine 11 listed factors, as well as any other factors that the court deemed relevant, in order to determine whether to order the transfer to tribal court. Id.

A. Constitutional Concerns

¶5 The majority now eliminates the obligation to hold a hearing in each individual custody, placement and child support matter. However, custody and placement

decisions involve the most fundamental of constitutional rights: the right to the care and custody of one's children. Stanley v. Illinois, 405 U.S. 645, 651 (1972); State v. Shirley E., 2006 WI 129, ¶¶23-24, 298 Wis. 2d 1, 724 N.W.2d 623.

¶6 The fundamental rights of parents are protected by the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). However, this latest amendment to Wis. Stat. § 801.54 is contrary to our obligation to uphold the Constitutions of the United States and the State of Wisconsin.

¶7 As the United States Supreme Court has explained, the United States Constitution is not binding on tribal courts. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2724 (2008) (citing Talton v. Mayes, 163 U.S. 376, 382-85 (1896)). However, litigants in Wisconsin courts are protected by the United States Constitution and the Wisconsin Constitution. Helgeland v. Wis. Municipalities, 2008 WI 9, ¶13, 307 Wis. 2d 1, 745 N.W.2d 1. The Constitutions provide the framework in which the courts of the State of Wisconsin are obligated to operate. Id. That constitutional framework includes the United States Constitution's Bill of Rights and the Wisconsin Constitution's Declaration of Rights. Id. However, as separate sovereigns antedating the

Constitutions, Indian tribes have "historically been regarded as unconstrained by those [federal] constitutional provisions framed specifically as limitations on federal or state authority." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

¶8 In considering transfers of child custody and placement issues to tribal courts, it is also important to note that both the United States Constitution and the Wisconsin Constitution require the separation of church and state. U.S. Const. amend. I; Wis. Const. art. I, § 18. Separation of church and state is one of the basic tenets of our democracy. However, tribal courts do not separate church and state; instead, tribal courts impose their religious values as custom and tradition that informs the tribal courts' view of the law.[4]

¶9 Wisconsin courts have no power to review decisions on child support or custody and placement that may be made after transfer to tribal court because those decisions will be made by an independent sovereign. Even federal courts cannot review tribal court decisions in the normal course of a federal court review. Duro v. Reina, 495 U.S. 676, 709 (1990). Instead, federal review of tribal court decisions is provided by a separate action for

[4] Tribal Law and Order Act of 2008: Hearing Before the S. Comm. on Indian Affairs, 1-2 (July 24, 2008) (statement of Roman J. Duran, Vice President, National American Indian Court Judges Association).

habeas corpus. Id. This lack of direct review of tribal court decisions is a significant deprivation of guaranteed procedural rights. As Justice Kennedy recognized, "[t]he political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights." United States v. Lara, 541 U.S. 193, 214 (2004) (Kennedy, J., concurring).

¶10 I recognize that holding a hearing in each case is more expensive, uses more court time and is generally more difficult than giving a notice to unrepresented parents and presuming both that the parents know how their interests will be addressed in tribal court and that they will ask for a hearing if they object to the transfer. However, neither presumption has merit.

¶11 First, how are litigants to know what procedures and substantive rights will be accorded in tribal court? I do not have the answers to those questions, nor does the majority of this court, although I repeatedly requested that the majority get this information before Wis. Stat. § 801.54 was enacted on July 1, 2008. Second, if litigants do not know how matters proceed in tribal court, how can they make an informed decision about whether to object to the transfer and how can they know what concerns to bring to the circuit court if they do file an affirmative objection to the transfer?

¶12 The process the majority has established runs roughshod over the constitutional rights of parents. Stanley, 405 U.S. at 656-57 (instructing that efficient procedures cannot trump the constitutional rights of parents). Furthermore, the genesis of the tribes' petition for this amendment to Wis. Stat. § 801.54 was asserted to be the tribes' desire to collect federal funds that would be forthcoming if the tribes established mechanisms for the collection of delinquent child support. It was not necessary to that purpose to connect child custody and placement decisions to the collection of child support, and doing so impacts the most fundamental of constitutional rights, the right to the care and custody of one's child.

B. Concurrent Jurisdiction

¶13 I continue to have concerns that, as circuit courts attempt to comply with Wis. Stat. § 801.54's requirement to determine whether tribal court concurrent subject matter jurisdiction exists, they will not recognize that tribal court concurrent subject matter jurisdiction is almost nonexistent when a non-tribal member is a party to the lawsuit. Plains Commerce Bank, 128 S. Ct. at 2722. The law the majority enacts has given them no direction.

¶14 As an initial matter, tribal court subject matter jurisdiction is established by federal laws and United States Supreme Court precedent. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851-52 (1985). Stated otherwise, "whether a tribal court has adjudicative

authority over nonmembers is a federal question"; it is not decided under state law or tribal law. Plains Commerce Bank, 128 S. Ct. at 2716 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987)).

¶15 The United States Supreme Court has explained that tribal court concurrent subject matter jurisdiction is extremely limited when non-tribal members are among the parties to an action. Montana v. United States, 450 U.S. 544, 565-66 (1981). The United States Supreme Court recently has affirmed that tribal court jurisdiction over nonmembers for conduct that occurs off tribal land is almost nonexistent, having been upheld on only one occasion. Plains Commerce Bank, 128 S. Ct. at 2722. The Court has also said, "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" Id. at 2718-19 (quoting Montana, 450 U.S. at 565).

¶16 Even when nonmember conduct occurs on tribal land, the general rule is that tribes lack subject matter jurisdiction over nonmembers. Montana, 450 U.S. at 565. Tribes "may" have concurrent subject matter jurisdiction over nonmembers: (1) to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) to

regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565-66. But as the Court's recent discussion of Montana in Plains Commerce Bank shows, the two exceptions to the lack of subject matter jurisdiction in tribal courts are not to be broadly interpreted; rather, they are extremely limited. Plains Commerce Bank, 128 S. Ct. at 2720.

¶17 In Plains Commerce Bank, tribal members (the Longs) sued a nonmember (Plains Commerce Bank) in tribal court, alleging that the bank discriminated against them when it sold property. Id. at 2715. The Longs further alleged that the property sales had arisen directly from their preexisting commercial relationship with the bank, and accordingly, the sales fell within the first Montana exception to the general rule that tribes lack jurisdiction over nonmembers. Id. at 2715-16. The tribal jury awarded $750,000 in damages. Id. at 2716. The bank then brought a declaratory judgment action in federal court asserting that the tribal court lacked subject matter jurisdiction to adjudicate the claims, and therefore, the judgment was void. Id.

¶18 The Supreme Court agreed with the bank. The Court began by explaining that the sovereign powers of tribes are limited by virtue of the tribes' "incorporation

into the American republic."[5] Id. at 2719. In so incorporating, the tribes generally lost the right to govern persons coming within tribal territory except for tribal members.[6] Id.

¶19 In any attempt to exert jurisdiction over nonmembers, "[t]he burden rests on the tribe to establish one of the exceptions to Montana's general rule" that precludes jurisdiction over nonmembers. Id. at 2720. The burden of proof rests with the tribe to establish that concurrent jurisdiction exists in tribal courts because of the general rule that tribal courts do not have subject matter jurisdiction to adjudicate claims involving nonmembers. Wisconsin Stat. § 801.54 is in conflict with

[5] The court in Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2721 (2008), cited two limited types of exceptions that involved the regulation of nonmember activities on reservation land "that had a discernable effect on the tribe or its members": Williams v. Lee, 358 U.S. 217 (1959) (concluding the tribe had jurisdiction over a contract dispute about "the sale of merchandise by a non-Indian to an Indian on the reservation") and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (upholding tribal determination of the taxing authority of the tribe for activities by non-Indians on reservation land). The Court cited other cases that also upheld tribal determinations involving taxes for activities within tribal land.

[6] In Plains Commerce Bank, the Court pointed out that tribal courts lack jurisdiction over: a "tort suit involving an accident on non-tribal land"; the regulation of "hunting and fishing on non-Indian fee land"; and taxation of nonmember activities on non-Indian fee land. Id. at 2722.

that requirement of federal law because under § 801.54(2), a circuit court can transfer a case to tribal court on its own motion. Therefore, the tribe would not be a moving party who carries the burden of proof explained by the United States Supreme Court in Plains Commerce Bank. The circuit courts of Wisconsin cannot make a discretionary transfer to tribal courts, sua sponte, and still comply with this aspect of federal law because meeting that tribal burden is one prerequisite for the exercise of concurrent subject matter jurisdiction by tribal courts.

¶20 The United States Supreme Court also has explained that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Id. at 2720 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 440 (1997)). This is an important principle because if a tribe could not pass a law that bound the conduct and the parties whose claims and defenses a tribal court attempts to adjudicate, then the tribal court lacks concurrent subject matter jurisdiction over those claims and defenses.[7] Id. Tribes do not have the legislative jurisdiction to enact a law that will establish a non-tribal member's custody and placement rights to his or her child. See Jacobs v.

[7] In Plains Commerce Bank, the tribe lacked "the civil authority to regulate the Bank's sale of its fee land," and therefore, the tribal court could not adjudicate the circumstances under which the land sales were made. Id. at 2720-21 (citations omitted).

Jacobs, 138 Wis. 2d 19, 26-28, 405 N.W.2d 668 (Ct. App. 1987).

¶21 It is not a simple matter for a circuit court to determine whether a case fits within one of the two very narrow Montana exceptions to the tribal courts' lack of subject matter jurisdiction over nonmembers. Wisconsin Stat. § 801.54 is completely inadequate in addressing this major obstacle to the exercise of tribal court jurisdiction over nonmembers; yet, it is a critical decision that must be made before any transfer can occur. This is so because the contention that a court lacks subject matter jurisdiction may be raised at any time, even after judgment. See Arbaugh v. Y&H Corp., 546 U.S. 500, 506-07 (2006); see also Fed. R. Civ. P. 12(h)(3). Furthermore, "subject matter jurisdiction cannot be created by waiver or consent." United States v. Hazlewood, 526 F.3d 862, 864 (5th Cir. 2008) (quoting Howery v. Allstate Ins. Co., 243 F.3d 912, 919 (5th Cir. 2001)). The majority continues to give the circuit courts no legal guidelines to assist with this weighty legal task.

C. Wisconsin Stat. § 751.12(1)

¶22 This court's power to legislate, which we speak of as "rule-making," is derived from Wis. Stat. § 751.12(1), which provides in relevant part:

> The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of

> simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.

(Emphasis added.)

¶23 Prior to the creation of Wis. Stat. § 801.54, all litigants who satisfied the statutory provisions for jurisdiction in Wisconsin courts had a statutory right to avail themselves of the Wisconsin court system. See Wis. Stat. § 801.04. Wisconsin's open courthouse doors provide a significant, substantive right for tribal as well as non-tribal litigants. However, since § 801.54 has become effective, the courthouse doors of Wisconsin can be closed to some litigants, both tribal members and nonmembers. This limitation of the substantive rights of litigants is contrary to the express provisions of Wis. Stat. § 751.12(1), which provides that any statute that this court creates "shall not abridge, enlarge, or modify the substantive rights of any litigant."

¶24 The latest amendment to Wis. Stat. § 801.54 permits a court to eliminate the right to litigate in state courts without holding a hearing before transferring the matter to tribal courts. In so doing, the majority eliminates not only the substantive right to litigate in state courts, but it eliminates the right to a hearing unless a party affirmatively requests one. This new law abridges the rights of litigants contrary to the express directive of Wis. Stat. § 751.12(1).

III. CONCLUSION

¶25 In conclusion, the majority of this court chooses to disregard the effect that its decision has on the fundamental constitutional rights of parents, gives no direction to circuit courts in regard to the standards under which concurrent subject matter jurisdiction could exist in tribal court and abrogates the rights of litigants who have chosen Wisconsin circuit courts as their forums. Once again, the majority has exceeded the authority that the legislature granted in Wis. Stat. § 751.12. Accordingly, I respectfully dissent.

¶26 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and MICHAEL J. GABLEMAN join in this dissent.