SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 07-11B

In the matter of review of Wis. Stat. § 801.54, discretionary transfer of cases to tribal court.

FILED

JUL 1, 2011

A. John Voelker
Acting Clerk of Supreme Court
Madison, WI

On Monday, October 18, 2010, the court conducted a public hearing to review the operation of 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), as amended by S. Ct. Order 07-11A, 2009 WI 63 (issued Jul. 1, 2009, eff. Jul. 1, 2009) (Roggensack, J., dissenting). A number of individuals submitted written statements and provided testimony at the public hearing. At the ensuing open administrative conference the majority of the court concurred that the rule was operating as expected and that no action was required. The majority of the court voted to conduct another review of the rule in five years. Justice Patience Drake Roggensack stated her continuing concerns about the constitutionality of the rule as set forth in her dissent to this order. Therefore,

IT IS ORDERED that the circuit courts, tribal courts, litigants, and attorneys affected by this rule shall advise the court, in writing, regarding their experience of this rule on or before January 1, 2016.

IT IS FURTHER ORDERED that notice of this order on the review of the operation of Wis. Stat. § 801.54 governing the discretionary transfer of cases to tribal court 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, 2011.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

¶1 PATIENCE DRAKE ROGGENSACK, J. *(dissenting).* A majority of this court chooses to close the courts of Wisconsin to those lawfully entitled to their use in order to accommodate the desires of Native American Tribes, who seek to expand the subject matter jurisdiction of their tribal courts. In accommodating the wishes of Native American Tribes, a majority of this court disregards the effect that its decision has on the fundamental constitutional rights of Wisconsin citizens who have chosen Wisconsin circuit courts as their forum. In accommodating the wishes of Native American Tribes, a majority of this court has abandoned citizens to tribal courts that are not obliged to follow either the United States Constitution or the Wisconsin Constitution. In accommodating the wishes of Native American Tribes, a majority of this court contravenes the oath of office that each justice took to protect the Constitution of the United States and the Constitution of the State of Wisconsin. In accommodating the wishes of Native American Tribes, a majority of this court has engineered legislation that changes the substantive rights of the litigants; and therefore, is in excess of this court's rule-making authority granted by the legislature in Wis. Stat. § 751.12.

¶2 I have great respect for Native American Tribes and the very valuable contributions that tribal courts make to the administration of justice. However, that respect cannot overcome my constitutional obligations to citizens or expand the

authority granted by Wis. Stat. § 751.12. Accordingly, I respectfully dissent.

I. BACKGROUND

¶3 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 to transfer of tribal members and nonmembers. S. Ct. Order 07-11, 307 Wis. 2d xvii, xxi (eff. July 31, 2008). I dissented from that order. Id. at xxiii. I did so because: (1) tribal court concurrent subject matter jurisdiction rarely exists when nonmembers are parties; (2) § 801.54 gives no guidance on the standards to be applied in evaluating whether tribal courts have concurrent subject matter jurisdiction; and (3) § 801.54 contravenes Wis. Stat. § 751.12(1) by altering substantive rights of the parties to civil litigation. Id.

¶4 On July 1, 2009, a majority of this court extended tribal court jurisdiction over tribal members and nonmembers further 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." S. Ct. Order 07-11A, 316 Wis. 2d xiii (eff. July 1, 2009 as Wis. Stat. § 801.54(2m)). These transfers are done without the requirement of a hearing in the circuit court to determine whether there is concurrent subject matter jurisdiction in tribal courts. Id. Once again, I dissented, id. at xx, and was ignored by a majority of this

court who elevated the wishes of Native American Tribes over the constitutional rights of the citizens who have chosen Wisconsin courts as their forum.

¶5 Today a majority of this court affirms the expanded potential for infringement of the constitutional rights of tribal members and nonmembers by continuing the nonconsensual transfers into tribal courts for those who have chosen the circuit courts of Wisconsin. S. Ct. Order 07-11B (eff. July 1, 2011). Again, I dissent.

¶6 Who looks out for the unrepresented litigant whose constitutional rights are not represented in tribal court? Who looks out for the unrepresented litigant when the tribal court that will judge a nonmember's case combines law and tribal religion and it is not the nonmember's religion? Apparently no Wisconsin court, including this one.

II. DISCUSSION

¶7 Today's order is an affirmation of the deprivation of the rights of litigants in cases involving child custody, child placement and child support, as these litigants are transferred into tribal courts without their consent and without a hearing in circuit court prior to the transfer. This court is fond of saying that no right is more fundamental than the rights of a parent to the care and custody of his or her child. Dane Cnty. Dep't of Human Servs. v. Ponn P., 2005 WI 32, ¶22 n.5, 279 Wis. 2d 169, 694 N.W.2d 344. Apparently, a majority of this court forgets its own jurisprudence when it suits its purposes to do so. This majority does not make even an attempt to

address the fundamental rights it assigns to tribal courts, over which courts this court has no jurisdiction.

A. Constitutional Concerns

¶8 Child custody and child 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.

¶9 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, 316 U.S. 535, 541 (1942). However, these amendments to Wis. Stat. § 801.54 are contrary to our obligation to uphold the Constitutions of the United States and the State of Wisconsin.

¶10 As the United States Supreme Court repeatedly 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. See Dep't of Admin. v. WERC, 90 Wis. 2d 426, 434-35, 280 N.W.2d 150 (1979). The Constitutions provide the framework in which the courts of the State of Wisconsin are obligated to operate. See State v. Cockrell, 2007 WI App 217, ¶34 n.10, 306 Wis. 2d 52, 741 N.W.2d 267. That constitutional framework includes the United States

Constitution's Bill of Rights and the Wisconsin Constitution's Declaration of Rights. Helgeland v. Wis. Municipalities, 2008 WI 9, ¶13, 307 Wis. 2d 1, 745 N.W.2d 1. 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).

¶11 In considering the nonconsensual transfers of child custody and child 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.[1]

¶12 Wisconsin courts have no power to review decisions on child custody, child support or child placement made after transfer to tribal court because those decisions will be made by an independent sovereign not accountable to Wisconsin courts. Even federal courts cannot review tribal court decisions in the

[1] 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).

normal course of a federal court review. Duro v. Reina, 495 U.S. 676, 709 (1990) (Brennan, J., dissenting). Instead, federal review of tribal court decisions is provided by a separate action for habeas corpus. Id.

¶13 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).

¶14 Notice of transfer to a tribal court to unrepresented parents presumes both that the parents know how their interests will be addressed in tribal court and that they will ask for a hearing if they want one. Neither presumption has merit.

¶15 First, how will the unrepresented parent know what procedures and substantive rights will be accorded in tribal court? I do not have the answers to those questions, nor does a majority of this court, although I repeatedly requested that the court get this information before Wis. Stat. § 801.54 was enacted on July 1, 2008.

¶16 Second, if litigants do not know how matters proceed in tribal court, how can they make an informed decision about whether to request a hearing before the transfer and how can they know what concerns to bring to the circuit court if they do request a hearing?

¶17 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 the second amendment to Wis. Stat. § 801.54, which a majority affirms today, was asserted to be the tribes' desire to collect federal funds that will be forthcoming if the tribes established mechanisms for the collection of delinquent child support.

¶18 If that were the reason for Native American Tribes' request for this legislation, it was not necessary to that purpose to connect child custody and child placement decisions to the collection of child support. Furthermore, making that connection impacts the most fundamental of constitutional rights, the right to the care and custody of one's child.

B. Concurrent Jurisdiction

¶19 Tribal court concurrent subject matter jurisdiction is almost non-existent when a nonmember is a party to the lawsuit. The United States Supreme Court carefully explained that in its 2008 decision in Plains Commerce Bank. Plains Commerce Bank, 128 S. Ct. at 2722. A majority of this court ignores Plains Commerce Bank because it is contrary to the wishes of Native American Tribes.

¶20 Furthermore, it is beyond dispute that 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)).

¶21 The United States Supreme Court has explained that tribal court concurrent subject matter jurisdiction is extremely limited when nonmembers 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).

¶22 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 preclusion 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.

¶23 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 2715-16. 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. 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.

¶24 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."[2] Id. at 2719. In so incorporating, the tribes generally lost the right to govern persons coming within tribal territory except for tribal members.[3] Id.

¶25 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 court because of the general rule that a tribal court does not have subject matter jurisdiction to adjudicate claims involving nonmembers.

¶26 Wisconsin Stat. § 801.54 is in conflict with 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, a tribe would not be the moving party who carries the

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[2] 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 discernible effect on the tribe or its members": Williams v. Lee, 358 U.S. 217 (1959) (concluding the tribe had jurisdiction over a contract dispute between a non-Indian and an Indian on the reservation) and Washington v. Confederated Tribes of the 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.

[3] 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.

burden to prove that there is concurrent subject matter jurisdiction, as is required 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. Stated otherwise, requiring the tribe to prove that there is concurrent subject matter jurisdiction over a litigant who is not a member of the tribe is a prerequisite for the exercise of concurrent subject matter jurisdiction by tribal courts. Section § 801.54 is contrary to federal law when it relieves the tribes of this burden.

¶27 The United States Supreme Court also has explained that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Id. at 2720 (internal quotation omitted). 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.[4] Id. Tribes do not have the legislative jurisdiction to enact a law that will establish a nonmember's child custody and child placement rights to his or her child. See Jacobs v. Jacobs, 138 Wis. 2d 19, 26-28, 405 N.W.2d 668 (Ct. App. 1987).

[4] 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.

¶28 Furthermore, 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). In addition, subject matter jurisdiction cannot be created by waiver or consent. See United States v. Hazlewood, 526 F.3d 862, 864 (5th Cir. 2008).

C. Wisconsin Stat. § 751.12(1)

¶29 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.)

¶30 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 members as well as nonmembers. However, since § 801.54 has become effective, the courthouse doors of Wisconsin have been 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."

III. CONCLUSION

¶31 In conclusion, a majority of this court chooses to close the courts of Wisconsin to those lawfully entitled to their use in order to accommodate the desires of Native American Tribes, who seek to expand the subject matter jurisdiction of their tribal courts. In accommodating the wishes of Native American Tribes, a majority of this court disregards the effect that its decision has on the fundamental constitutional rights of Wisconsin citizens who have chosen Wisconsin circuit courts as their forums. In accommodating the wishes of Native American Tribes, a majority of this court has abandoned citizens to tribal courts that are not obliged to follow either the United States Constitution or the Wisconsin Constitution. In accommodating the wishes of Native American Tribes, a majority of this court contravenes the oath of office that each justice took to protect the Constitution of the United States and the Constitution of the State of Wisconsin. In accommodating the wishes of Native American Tribes, a majority of this court has engineered legislation that changes the substantive rights of the litigants; and therefore, is in excess of this court's rule-making authority granted by the legislature in Wis. Stat. § 751.12.

¶32 I have great respect for Native American Tribes and the very valuable contributions that tribal courts make to the

administration of justice. However, that respect cannot overcome my constitutional obligations to citizens or expand the authority granted by Wis. Stat. § 751.12. Accordingly, I respectfully dissent.

¶33 I am authorized to state that Justice Annette Kingsland Ziegler and Justice Michael J. Gableman join in this dissent.