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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE DIVISION)

J.H., A Minor, by his next friend BELINDA KIRK, Mother of J.H., individually and as next friend,

Petitioner,

v.

YOLANDA BALDOVINOS, et al.,

Respondents.

Case No.: C 10-2507 LHK

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR REMAND

Date: September 16, 2010
Time: 1:30 PM
Courtroom: 4, 5th Floor
Address: 280 S. First Street
San Jose, CA 95113

Respondents Yolanda Baldovinos ("Baldovinos"), County of Alameda (sued erroneously herein as "Alameda County Social Services Agency/Children and Family Services") ("the Agency"), Tracey Fernandez ("Fernandez") and Shirley Lee-Andrade ("Lee-Andrade"), collectively the "County Respondents," submit the following reply to Petitioner's Opposition to Motion to Dismiss and/or Remand.

INTRODUCTION

Petitioner opposes the County Respondents' motion to dismiss and/or remand on four distinct grounds: (1) the *Younger* abstention doctrine does not apply; (2) Petitioner has plead facts sufficient to satisfy both prongs of the ineffective assistance of counsel test; (3) the applicable statute of limitations does not bar the instant action; and (4) the

individual respondents are not absolutely immune from liability. Each one of these arguments fails on at least one ground.

I.
THE COURT NEED NOT REACH THE ISSUES OF YOUNGER ABSTENTION, INEFFECTIVE ASSISTANCE OF COUNSEL OR IMMUNITY, AS ALL PETITIONER'S CLAIMS ARE TIME-BARRED

Petitioner asserts that the two-year statute of limitations of 42 U.S.C. §1983 is inapplicable to her claims under the Indian Child Welfare Act, as Petitioner is not asserting a §1983 claim. Even assuming that this is an accurate statement,[1] Petitioner's claims are still time-barred.

When Congress has not established a time limitation for a federal cause of action, the settled practice is to adopt a local time limitation as federal law if not inconsistent with federal law or policy to do so. *Wilson v. Garcia, 471 U.S. 261, 266-67, 105 S.Ct. 1938, 85 L.Ed. 254 (1985),* superseded by statute on other grounds as stated in *Jones v. R.R. Donnelly & Sons, Co., 541 U.S. 369, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004). See, also* DirecTV, Inc. v. Webb, 545 F.3d 837, 847 (9th Cir. 2008). Congress did not include a generally-applicable statute of limitations in ICWA.[2] *In re Adoption of Erin G, 140 P.3d 886, 891 (Alaska 2006)*. It specified a two-year statute for one class of ICWA claims, those brought under §1913(d) [vacating an adoption decree of an Indian child].

Petitioner does not identify what she believes to be the appropriate statute of limitations for her ICWA claims. Since the gravamen of Petitioner's claim is ineffective assistance of counsel, County Respondents suggest that the one-year statute of limitations for legal malpractice might be more appropriate than Section 1983's two-year

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[1] 42 U.S.C. §1983 establishes the right to bring a civil action for the "deprivation of any rights, privileges or immunities secured by the Constitution and its laws. . . ." Petitioner's instant action seeks to vindicate her rights under 25 U.S.C. §1901 *et seq.*, and thus can be considered a §1983 action.

[2] Although Congress passed a "catch-all" law in 1990 that established a four-year limitations period for all federal claims without limitation provisions, that statute only applies to civil actions "arising under an act of Congress enacted after the date of the enactment of this section." 28 U.S.C. Sec. 1658.

period. See, Cal. Code Civ. Proc. §340.6(a) [an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first]. Applying Section 240.6(a)'s limitations period, each and every allegation of ineffective assistance of counsel would be time-barred.

Lezly Crowell's representation of Petitioner ended on December 13, 2007. Opposition 7:14. Petitioner informed her successor attorney, Cheryl Smith, of Ms. Crowell's perceived shortcomings that same month. Opposition, 12:12-13. Thus, any cause of action based on Ms. Crowell's representation of Petitioner would have to be brought by no later than December 2008.

Similarly, Petitioner alleges that Ms. Smith's representation fell below the standard of care when, rather than herself filing a habeas corpus petition, she referred Petitioner to a civil rights attorney to inquire about this procedure. Opposition: 17:16-23. Ms. Smith made this referral on August 23, 2008. *Id.* at 17:23-24. Thus, any cause of action based on Ms. Smith's failure to file a habeas corpus petition would have to be brought by no later than August 22, 2009.

Petitioner further alleges that the Agency did not make active efforts to prevent the break-up of her Indian family as required by 25 U.S.C. §1912(d). Opposition, 9:23-25. On April 5, 2007 the Juvenile Court found that active efforts had been made by the Agency to prevent the break-up of the Indian home. Opposition, 7:1-9. The Agency continued to provide family reunification services until January 14, 2008. Opposition 7:26-27. Thus, any cause of action based on the Agency's failure to make active efforts to prevent the break-up of Petitioner's Indian home would have to be brought by no later than January 13, 2009.

All of the ICWA provisions at issue in this case were enacted in their current form in 1978, well before the

Petitioner filed her Petition for Writ of Habeas Corpus on June 7, 2010. Thus, whether the court applies the limitations period of Cal. Code Civ. Proc. §340.6(a) or the more generous §1983 limitations period, all of Petitioner's instant claims are time-barred. Because all possible claims Petitioner could assert under the Indian Child Welfare Act are untimely, this Court need not reach the remaining grounds for dismissal.

II.
AS PLAINTIFF HAS NOT MET HER BURDEN OF PLEADING THAT SHE IS BARRED FROM PURSUING HER FEDERAL CLAIMS IN STATE COURT, *YOUNGER* APPLIES

Even if Petitioner's claims were not time-barred, this Court should abstain from exercising its jurisdiction.

County Respondents do not dispute that this Court has original subject matter jurisdiction of Petitioner's claim to ineffective assistance of counsel pursuant to 28 USC §1331 and 25 USC §1914. Nor, as Petitioner asserts, do County Respondents argue that *Younger* divests this Court of such jurisdiction. Rather, County Respondents maintain that this Court must decline to exercise its jurisdiction because the legal standards for abstention have been met.

District courts applying *Younger* "must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when these standards are met; there is no discretion vested in the district courts to do otherwise." *Canatella v. California, 404 F.3d 1106, 1113 (9th Cir. 2005),* citing *Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001)*. Exceptions to *Younger* abstention requirements are permitted only where there is evidence of bad faith, harassment, or some other extraordinary circumstances which will tend to make abstention inappropriate. *Dubinka v. Judges of the Superior Court of the State of California for the County of Los Angeles, 23 F.3d 218, 223 (9th Cir. 1994).*

1990 enactment of the federal catch-all statute of limitations.

Petitioner must show that she is barred from raising her federal claims in state court to avoid *Younger*. *Lebbos v. Judges of Superior Court, 883 F.2d 810, 815 (9th Cir. 1989*). The burden is on Petitioner, seeking to avoid abstention, to show that state procedural law bars presentation of the petitioner's federal claims in the state proceeding. *Pennzoil v. Texas, Inc., 481 U.S. 1, 14, 107 S.Ct. 519 (1987).*

Petitioner attempts to meet her burden by claiming that she is "locked out of State court and has been precluded from exercising her rights as an Indian provided by Congress under the Indian Child Welfare Act." Opposition, 13:1-3. Petitioner's own Opposition belies this assertion. Petitioner "has appeared at each substantive hearing beginning with the Detention hearing on December 22, 2006." Opposition, 12:5-6. She has been represented by Court-appointed counsel at each and every step of the proceedings. Attorney Lezly Crowell was appointed to represent her at the detention hearing on December 22, 2006. *Id.* at 12:5-6. Ms. Crowell represented Petitioner continuously for the following year, until Attorney Cheryl Smith was appointed on December 13, 2007. Ms. Smith represented Petitioner for close to two and one-half years, until she withdrew as counsel on May 27, 2010. *Id.* at 7:14-15; 12:11-12. The Court immediately appointed attorney Dennis Reid, whose motion to withdraw was denied by the Court on June 8, 2010. Mr. Reid represents Petitioner in the juvenile court proceedings to this day. *Id*. at 12:17-25.

Petitioner's sole allegation supporting her claim that she has been "locked out" of State court is her assertion that she was precluded from filing a Motion to Dismiss by order of the Court Commissioner. Opposition, 12:26-28. This allegation is insufficient to meet Petitioner's burden to show that "state procedural law bars presentation of her federal claims in the state proceeding."

The June 1, 2010 "Go Back" letter[3] does not constitute a state procedural law as

[3] The June 1, 2020 "Go Back Letter" is attached as Exhibit A to Petitioner's June 28, 2010 Amended Emergency Application for Temporary Restraining Order/Preliminary Injunction, Docket No. 14.

required to defeat abstention. *Pennzoil*, 481 U.S. at 14. Even a cursory review of the Go Back Letter reveals that it is merely a form cover letter created by the Clerk of the Alameda County Juvenile Court to advise litigants of the various reasons why a document may be returned unfiled; for example: the court number is missing or incorrect, the document is not signed, the document is not on the correct Judicial Council form, the required three copies are missing. Petitioner focuses on the "Other" category, which in her case reads:

> "Pro per has no standing to file documents. Please go through with their counsel per Commissioner directive."

It is clear from the face of this document that Petitioner has not been precluded from filing anything with the Juvenile Court, whether by state procedural law or local Commissioner directive. Rather, she has been informed that since she is represented by counsel, only her counsel can file documents with the Court. Certainly this local housekeeping rule does not bar presentation of Petitioner's federal claims in the state juvenile court proceedings.

Because Petitioner is not barred from raising federal claims in the state court proceedings, all prongs of *Younger* has been met, and this Court may not exercise its jurisdiction.

III.
PETITIONER HAS NOT STATED A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL

A. THE COURT NEED NOT REACH THE QUESTION OF HER ATTORNEYS' EFFECTIVENESS, BECAUSE PETITIONER HAS NOT DEMONSTRATED A REASONABLE PROBABILITY OF A MORE FAVORABLE RESULT

The Court need proceed no further in its inquiry into the effectiveness of Petitioner's counsel if Petitioner does not establish a reasonable probability that she would have achieved a more favorable result in the Juvenile Court had counsel

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For the Court's convenience, a true and correct copy of the "Go Back Letter" is attached as Exhibit A to the accompanying Declaration of Mary Ellyn Gormley.

performed in accordance with prevailing professional norms. *People v. Hayes (1990) 52 Cal.3d 577, 612; Strickland v. Washington, 466 U.S. 668, 687 (1984)*. Petitioner alleges variously that "full investigation by counsel on behalf of Ms. Kirk and a cross-examination of witnesses and presentation of evidence *could result* in a finding by the court that the Agency had not met its burden of proof" (Opposition 16:24-27); "[i]t is also *possible* that the filing of a motion akin to a demurrer . . . would have been successful:" (Opposition 17:6-7); "investigating the allegations including working with experts *could have* lead to a dismissal" (Opposition 18:9-10) [emphasis added].

Such speculative and conclusory allegations are not sufficient to meet Petitioner's burden of pleading a reasonable probability that the Court would *not* have declared Jack a dependent child in the face of the serious allegations in this case. County Respondents in their moving papers cited several cases where the Juvenile Court found jurisdiction even in the face of the parents' denial of sexual abuse and the minor's recantation of the disclosures. Even under the "beyond a reasonable doubt" standard of a criminal prosecution, Courts have found that sexual abuse occurred in the face of a complete recantation by the minor victim. *See, e.g., People v. Housley (1992) 6 Cal.App.4th 947*.

Petitioner has cited no case, and County Respondents are aware of no case, where under similar circumstances a Juvenile Court has not declared the minor a dependent of the court.

B. CROWELL'S REPRESENTATION DOES NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS.

Even if Petitioner were to adequately plead a reasonable probability of a more favorable result, Petitioner's ineffective assistance of counsel claim would still fail. To state an ineffective assistance of counsel claim, Petitioner must allege that her counsel's representation "fell below an objective standard of reasonableness under prevailing professional norms." *In re Emilye A. (1992) 9 Cal.App.4th 1695, 1711.*

Petitioner alleges that "[c]ompetent counsel in a juvenile dependency case representing a parent should perform an investigation of the facts of the case based upon information provided to her by her counsel and that provided in the reports of the Social Services Agency." Opposition, 14:20-23. Petitioner seems to allege that because Attorney Crowell advised her to submit to the allegations of the Petition before conducting her own independent investigation of the facts, her representation must have fallen below an objective standard of reasonableness. This assertion cannot withstand examination. California law itself contemplates that a parent may forego investigation, and admit or plead no contest to the allegations of the Petition. *See, e.g.*, Cal. Rules of Court, Rule 5.682(c), (d), (e). The California Judicial Counsel has adopted a form which embodies this option. See, Waiver of Rights-Juvenile Dependency, Judicial Council Form JV-190, Exhibit 5 to County Respondents' Request for Judicial Notice. Against this background, Petitioner cannot allege that Crowell's representation fell below the standard of reasonableness.

IV.

THE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED

As a preliminary matter, ICWA does not provide a private right of action against participants in the underlying court proceeding. *Parkell v. South Carolina, 687 F.Supp.2d 576 (D.S.C. 2009); Doe v. Mann, 285 F.Supp.2d 1229, 1240 (N.D. Cal. 2003), aff'd Doe v. Mann, 415 F.2d 1038 (9th Cir. 2005)*.

Even if ICWA did allow suit against individual defendants, the individual defendants named here are absolutely immune from liability. Social workers have absolute immunity when they make discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody of a child away from his parents. *Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008)*. This is distinct from the qualified immunity afforded for social workers' investigatory conduct. *Id.* Child welfare worker Fernandez first appeared in this matter on August 11, 2008, over a year

and a half after jurisdiction was taken. See, RJN No. 17. There are no allegations plead against child welfare worker Shirley Lee-Andrade. Yolanda Baldovinos is the current Director of the Alameda County Social Services Agency, but she did not fill this position in December 2006-January 2007, when this matter was being investigated. See, e.g., RJN No. 1 at p. 11 [Chet Hewitt, Director, Alameda County Social Services]. As none of the named individuals were involved in the investigation of this child dependency matter, they are entitled to absolute immunity.

CONCLUSION

For all the foregoing reasons, County Respondents respectfully request that their Motion to Dismiss be granted.

DATED: September 2, 1010

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

By /s/ Mary Ellyn Gormley
MARY ELLYN GORMLEY
Assistant County Counsel

Attorneys for Respondents County of Alameda, Yolanda Baldovinos, Tracey Fernandez and Shirley Lee Andrade