FILED
January 6 2014
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0539

IN THE MATTER OF:

J.S.,

A Youth in Need of Care.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah Kim Christopher, Presiding

APPEARANCES:

ELIZABETH THOMAS
PO Box 8946
Missoula, MT 59807-8956
Phone: 406-728-5936
elizthomas@bresnan.net

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
KATIE F. SHULTZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Phone: 406-444-2026
Fax: 406-444-2026
kschulz@mt.gov
Helena, MT 59620-1401

MITCH YOUNG
Lake County Attorney
106 Fourth Avenue East
Polson, MT 59860

EMILY VON JENTZEN
Assistant Attorney General
121 Financial Dr., Ste. C
Kalispell, MT 59901

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

The Father maintains the arguments in his opening brief and respectfully replies to the Appellee's brief.

I. INVALIDATION IS THE APPROPRIATE REMEDY GIVEN THE SUBSTANTIAL AND LONG STANDING VIOLATIONS OF THE INDIAN CHILD WELFARE ACT.

In response to the historical failure of social services and the courts to protect and promote the stability and structure of Indian tribes, the Indian Child Welfare Act was established. Setting forth minimum standards and statutory requirements, Congress intended to provide greater protections for Indian families. One protection provided to a child, parent or tribe is the right to petition a court to invalidate the proceedings upon a showing that the ICWA was violated. Here, invalidation is the appropriate remedy given the pervasive nature of the violations of the ICWA.

The State argues that the violations of the ICWA were inconsequential to the award of guardianship, alleging that the statutory requirements for guardianship were sufficiently complied with. This view is narrow and turns a blind eye to the nearly decade long violations of the ICWA. Each failure to provide the appropriate notice to the Father and/or his tribe and make active efforts compounded the strained relationship between the Father and J.S. and, with each additional violation, the ability of the Father and J.S. to establish themselves as a

family was further compromised. The ultimate disposition of this case, guardianship, cannot be viewed in a vacuum, factually or legally.

Both Appellant and Appellee cite *In re M.E.M.*, 209 Mont. 192, 679 P.2d 1241 (1984), in support of their argument. The Father maintains that the current matter is distinguishable from *M.E.M.* and disagrees with the State's assertion that the guardianship proceeding was separate and distinct and "involved entirely difference evidence than previously presented." (*See* Appellee's Br. at 16.) Legal and factual issues of notice, active efforts and expert testimony were raised in response to prior petitions and the petition for guardianship. These issues were pervasive over the course of this case and unresolved with the filing of the petition for guardianship.

A. <u>Notice</u>

Notice requirements to the tribe of an Indian child under the ICWA were established for the purpose of directly informing the tribe of State intervention. "A tribe's right to intervene is meaningless without notice of the proceedings." *In re H.A.M.*, 961 P.2d 716 (Kan. App. 1998).

There is nothing in the record to indicate that the Curyung Tribe was notified of these proceedings between the time the State was aware that J.S. was an Indian child, July 2002, through December 2007. The State asserts that the Curyung tribe "believed that notices of the proceedings were first sent…in 2004." (*See*

Appellee's Br. at 21.) However, the tribe representative, Mr. Utumulria , later testified that he probably was mistaken as to the 2004 date. (3/14/2013 Tr. at 52.) Further, there is nothing in the district court file reflecting service was completed until December 2007.

The significant period of time in which the Curyung Tribe was excluded from these proceedings is an undisputable violation of the notice provision of the ICWA. Five years were lost where the Curyung Tribe, which had a vested and personal interest in the preservation of this family, was unable to assist, offer resources or advocate for its members. The impact of the absence of the tribe's participation was not cured or remedied when statutory notice was ultimately provided. The effects of the failure to timely provide notice carried through to the guardianship proceedings. Noting that the child had already been in the system for eleven (11) years, the Curyung Tribe declined to accept jurisdiction and conceded to the guardianship.

B. Active Efforts

Although undefined, various commentary on the requirement of active efforts indicates that efforts made by the State must be timely and must do more than just leave a parent to their own devices to complete a treatment plan. Here, more than five (5) years passed between the establishment of paternity and the time that the State moved the district court to adopt a treatment plan for the Father.

Once the treatment plan was ordered, active efforts by the State should have become more focused. However, the district court noted that the State failed to make efforts to assist the Father even once a treatment plan was ordered.

> And I've already ordered that treatment plan, and he has already failed to complete any of those things on that treatment plan. *But the child protective specialist also failed to do any of the actions on the treatment plan*. So I can take judicial notice of testimony that has been given in this hearing, but at this point I can't find that it's appropriate to terminate his parental rights based on the treatment plan when basically no one did anything.

(4/12/2012 Tr. at 62, *emphasis added.*)

The State's failure to make active efforts to assist the Father, along with the failure of the State to provide adequate expert testimony, resulted in the denial of the State's November 2011 petition to terminate. (D.C. Docs 275.) (See Appellant's Br. at 16.) The failure of the State to make active efforts to assist the Father and J.S. is evidenced by the decade long absence of a treatment plan for the Father and finding of the district court that the child protection specialist "failed to do any of the actions on the treatment plan," once it was ordered.

As with notice, the lack of active efforts impacted the course of this case from beginning to end. Looking only at the efforts made from the filing of the petition for guardianship through the final hearing, ignores the underlying purpose of the ICWA, preservation of Indian families.

C. Expert Testimony

The expert testimony presented by the State at the guardianship hearing falls short of the requirement set forth by the ICWA in 25 U.S.C. § 1912(e) and the standard recently issued by this Court. *In re K.B. & T.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836, this Court held that the "failure to elicit expert testimony regarding whether continued custody will result in serious emotional or physical damage to the children requires reversal of the termination order." *Id.*, ¶ 28.

Although the district court may consider the record and testimony as a whole, *K.B.* leaves no doubt that the expert's testimony must be specific in showing the emotional and physical damage that would result if the child is left in the parents' care. "The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result." *ICWA Guidelines,* 44 Fed. Reg. 67584, 67593, § D.3.c. (Nov.26, 1979), *In re K.B.*, ¶ 30. Here, Mr. Utumulria's testimony referenced only the length of time that J.S. had been in the system in response to inquiry of potential emotional or physical harm. There was no testimony that identified any conduct or condition of the Father likely to cause emotional or physical harm.

CONCLUSION

With each passing year, the effect of the lack of active efforts on behalf of the State and the failure to involve the Curyung Tribe was compounding. The long

standing nature of the violations cannot be overlooked by simply arguing that the statutory violations of the ICWA were complied with upon the filing of a separate guardianship proceeding. Given the nature, scope and length of the violations, invalidation of the entire proceeding is warranted and in concert with the spirit of the ICWA. The guardianship should be vacated and this matter remanded to the district court.

Respectfully submitted this 6th day of January, 2014.

Elizabeth Thomas
PO Box 8946
Missoula, MT 59807-8956

By: _____
ELIZABETH THOMAS
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed and/or hand delivered to:

TIMOTHY C. FOX
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MITCH YOUNG
Lake County Attorney
106 Fourth Avenue East
Polson, MT 59860
(by email delivery)

EMILY VON JENTZEN
Assistant Attorney General
121 Financial Dr., Ste. C
Kalispell, MT 59901
(by email delivery)

CHARLES D. WALL, JR.
PO Box 460
Polson, MT 59860
(by email delivery)

Copy Sent to S.F., (Father/Appellant)

DATED: _____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,243, excluding Table of Contents, Table of Authorities, Signature Block, Certificate of Service, Certificate of Compliance, and Appendices.

_____

ELIZABETH THOMAS