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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.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Did the alleged violations of the Indian Child Welfare Act (ICWA) during the temporary custody proceedings require invalidation of the guardianship proceeding which complied with the ICWA procedures?

2. Did the district court err in finding the Department complied with the ICWA requirements, including proper notice and providing active efforts, prior to granting guardianship?

3. Did the district court err in finding clear and convincing evidence supported that the "continued[?] custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child" prior to granting guardianship?

STATEMENT OF THE CASE

J.S. (born in 1998), an Indian child, was removed from his mother's care in 2001 and was adjudicated a youth in need of care in February 2002. (*See* D.C. Docs. 1, 28.) Once J.S.'s alleged putative father, S.F., was identified by the Department of Public Health and Human Services (Department), S.F. was personally served with notice of the proceedings in September 2002; S.F. did not appear for the hearing. (*See* D.C. Docs. 47, 48.) S.F. was eventually confirmed as J.S.'s biological father on September 8, 2004; S.F did not follow through with

setting up visits with J.S., and his first visit with J.S. was in March 2006. (*See* D.C. Doc. 108.) From 2006 to 2011, S.F. asserted he wanted to relinquish his parental rights and stated he would not work a treatment plan. (*See* D.C. Doc. 36 at 4-5, attached as App. 1.)

J.S. has been placed with his siblings in his current foster placement since May 2006. (App. 1 at 2-3.) The mother's tribe, Confederated Salish and Kootenai Tribe (CSKT), and the father's tribe, the Curyung Tribe, were given notice of these proceedings (in 2001 and 2008 respectively) and both Tribes intervened in this matter. (*See* App. 1 at 3.) The Curyung Tribe approved J.S.'s placement throughout these proceedings and concurred in the permanency plans for J.S. (adoption from 2008 to 2012; guardianship as of June 2012). (*See* App. 1 at 4-5, 7.)

Following a hearing on March 14, 2013, the district court granted the Department's petition for guardianship of J.S. with his foster family. (App. 1.) S.F. appeals the order, arguing that the guardianship proceeding should be invalidated based on alleged violations of the ICWA that occurred prior to the petition for guardianship.

STATEMENT OF THE FACTS

On September 5, 2001, the Department filed a petition for temporary investigative authority for J.S. and his siblings. (D.C. Doc. 1.) J.S.'s parents are A.S. (mother)[1] and S.F. (father). (App. 1.) Mother is member of the CSKT, and J.S. was deemed an Indian child pursuant to ICWA from the beginning of this case. (App. 1.) When J.S. was removed from his mother's care, his father was "unknown." (D.C. Doc. 12.) J.S. was found to be a youth in need of care on February 14, 2002, and temporary legal custody (TLC) was granted to the Department on February 28, 2002. (D.C. Docs. 28, 29.) A treatment plan was approved for A.S. on March 12, 2002. (D.C. Doc. 31.)

S.F. was first listed as J.S.'s alleged putative father in the Department's July 2002 petition to extend TLC; at that time, the Department was attempting to locate S.F. (D.C. Doc. 39.) S.F. was eventually located and notice of the petition to extend TLC was personally served on him on September 10, 2002. (D.C. Doc. 47.) S.F. did not appear at the hearing to extend TLC and his default was entered. (D.C. Doc. 48.)

A.S. was not working her treatment plan, so the Department filed to terminate her parental rights on October 30, 2002. (D.C. Doc. 50.) As of July 2003 the Department was still attempting to verify paternity for J.S.; however,

[1] A.S.'s parental rights were terminated on March 24, 2003. (D.C. Doc. 77.)

S.F. did not cooperate with the requests for paternity testing. (D.C. Docs. 79, 108.) Eventually, the ICWA representative from CSKT took S.F. to the paternity test at the end of August 2004, and in September 2004 it was confirmed that S.F. was J.S.'s father. (D.C. Doc. 86.)

As of December 2004, S.F. had made no attempts to establish a relationship with J.S. or made any attempts to contact the Department, despite the fact S.F. stated he was aware of J.S. even before J.S. was born. (D.C. Doc. 86; 08/30/12 Tr. at 9.) The Department was finally able to arrange the first contact between S.F. and J.S. on March 22, 2006. (D.C. Doc. 108.) At that time, S.F. indicated he would probably agree to keep J.S. in his current home with his siblings. (*Id.*) However S.F. had no further contact with the Department until August 2006. (*Id.*) In its reports to the court, the Department explained S.F.'s lack of relationship with J.S. and that it intended to seek termination of S.F.'s parental rights. (D.C. Docs. 99, 108.) J.S. and his siblings were moved to a new foster placement in May 2006. (D.C. Doc. 108.)

On August 21, 2006, the Department filed a petition for termination of S.F.'s parental rights based on his failure to establish any relationship with J.S. or show any intent in wanting to care for him. (D.C. Doc. 108.) S.F. was personally served notice of the hearing on August 23, 2006. (D.C. Doc. 114.) S.F. appeared at the August 31, 2006 hearing and an attorney was appointed to him. (D.C. Doc. 115.)

On October, 24, 2006, the Department filed a motion to dismiss its petition to terminate the parental rights of S.F. (D.C. Doc. 127.) Arrangements were made for S.F. to meet with the Department following the dismissal to create a treatment plan; however, S.F. failed to meet with the Department. (D.C. Doc. 131). The permanency plan of adoption was approved at a hearing on April 26, 2004. (D.C. Doc. 135.) S.F. made no contact with the Department for the next six months so the Department again sought to terminate his parental rights based on the following factors: S.F. failed to establish substantial relationship with J.S. or demonstrate interest in providing for J.S.; SF. failed to seek any further contact with J.S. after his one visit in March, 2006; J.S. demonstrated no interest in obtaining custody of J.S; and S.F. failed to contact the Department to work a treatment plan. (D.C. Docs. 143, 144.)

Notice of involuntary child custody proceedings was sent to S.F.'s affiliated tribe, the Curyung Tribe, on December 31, 2007. (D.C. Docs. 154, 155.) On February 7, 2008, the Curyung Tribe filed a motion to intervene, which was granted on February 14, 2008. (D.C. Docs. 162, 164.)

On March 31, 2008, S.F. filed a motion to dismiss the petition to terminate his parental rights and requested a treatment plan. (D.C. Doc. 174.) At a status conference on April 24, 2008, the Department stipulated to dismiss the request for termination and during the continued status conference on May 1, 2008, it was

agreed a treatment plan would be developed for S.F. (D.C. Docs. 183, 184; 04/24/08 Tr.) Treatment plans were developed for S.F., but S.F. did not demonstrate an interest in working on a treatment plan or seeing J.S.; in fact, S.F. expressed to his counsel that he wanted to relinquish his parental rights. (D.C. Docs. 231, 242.) On May 7, 2009, the permanency plan of adoption was approved following stipulation by S.F. and with the concurrence of the Curyung Tribe. (D.C. Docs. 235, 238.)

S.F. participated in only two counseling sessions with J.S. between October 2009 and January 2010. (03/14/13 Tr. at 19.) In May 2010, the Department's report to the court explained the efforts that had been made with S.F. and J.S. which included three informal treatment plans (the plans were not court ordered because S.F. consistently expressed the desire to relinquish his rights and was unwilling to work on any plans). (D.C. Doc. 242.) The Curyung Tribe continued to support adoption for J.S. with his current foster family and the Department sought to facilitate the relinquishment as requested by S.F. (*Id.*) During the June 24, 2010, permanency plan hearing, there was open discussion about S.F. executing a relinquishment and no objection was made to the proposed plan of adoption. (D.C. Docs. 251, 254.)

Despite attempts to facilitate S.F.'s relinquishment, he did not maintain contact with the Department and thus a motion to approve a treatment plan for S.F.

was filed in March 2011. (D.C. Doc. 256.) During the March 31, 2011 hearing to approve the treatment plan, S.F. stated he would not work on the components of the plan, explaining he could teach the classes the Department wanted him to attend. (D.C. Doc. 262.) The district court approved the treatment plan on April 6, 2011. (D.C. Doc. 263.)

On July 6, 2011, the Department's report to the court explained S.F. had done nothing on his court ordered treatment plan, failed to make contact with the Department, and had not made contact with J.S. or his foster parents for over a year. (D.C. Doc. 276.) The Curyung Tribe continued to support adoption for J.S. with his current foster family and siblings. (*Id.*) S.F. did not appear at the July 21, 2011 permanency plan hearing and there were no objections to the proposed plan which was approved by the court. (D.C. Docs. 270.5, 272.)

On November 16, 2011, the Department filed a petition to terminate S.F.'s parental rights based on his failed treatment plan. (D.C. Doc. 275.) S.F. was personally served with the petition. (D.C. Doc. 289.) At the April 12, 2012 hearing, the district court ruled the ICWA expert offered by the Department was insufficient and denied the petition to terminate parental rights at the time and continued the hearing. (*See* 04/12/12 Tr. at 53-54.) The court also expressed concern with the Department's explanation with contacting S.F. and whether it needed to be through counsel. (*Id.* at 55-56.) The court ordered S.F. to complete a

chemical dependency evaluation within 30 days. (*Id.*) On May 14, 2012, the court extended temporary legal custody another 90 days based on the parties' stipulations. (D.C. Doc. 298.) J.S. did not want to have visits with S.F. so the Department suggested S.F. write a letter to J.S.; however, J.S. refused to read the letter and the district court concluded it would not force J.S. to see S.F. (D.C. Doc. 303.) A Department report indicated the permanency plan for J.S. was now guardianship. (*Id.*; *see also* D.C. Doc. 309.)

S.F.'s counsel submitted an "informational report" to the court on June 16, 2012, wherein she argued the court should "re-examine" the case under the ICWA and asserted, for the first time, that J.S. should be placed with his paternal grandmother. (D.C. Doc. 308.) J.S.'s letter to the district court concerning his permanency plan indicated he wanted to be adopted by his foster family. (D.C. Doc. 311.) At the July 19, 2012 permanency plan hearing, S.F. agreed to mediate the matter only if he could meet with J.S. alone. (07/19/12 Tr. at 11.) The court declined to order such a meeting and reminded the parties that J.S. was her primary concern. (*Id.* at 13, 17.) The court approved the permanency plan in the alternative (guardianship or uniting with S.F.) to ensure J.S. would not lose funding. (D.C. Doc. 314, 320.) Accompanied by their attorneys, S.F. and J.S. met on August 29, 2012, and had two individual visits in the fall of 2012. (D.C. Doc. 333 at 3-4.)

On November 14, 2012, the Department filed a petition for guardianship. (D.C. Doc. 328.) S.F. filed an objection wherein he admitted he had no intent to work a treatment plan but again argued the ICWA had not been followed with regards to placement and active efforts. (D.C. Doc. 333.) On November 30, 2012, S.F. filed a petition to transfer jurisdiction to the Curyung Tribe although the Tribe had not indicated it would accept the matter. (D.C. Doc. 336.) The district court denied the motion to transfer following a transfer hearing on December 21, 2012. (D.C. Doc. 343 and 12/21/12 Tr.) The Curyung Tribe participated in the hearing and stated it did not support transfer but did support granting guardianship to J.S.'s foster family. (*Id.*)

The Curyung Tribe also participated in the March 14, 2013 guardianship hearing and stated it supported guardianship with J.S.'s current foster home. (D.C. Doc. 356 and 03/14/13 Tr.) The court heard testimony from the Department as well as an ICWA Expert from the Curyung Tribe. (*Id.*) Following the parties' submission of proposed findings, conclusions and orders, the district court granted the petition for guardianship. (*See* App. 1.)

SUMMARY OF THE ARGUMENT

Alleged inadequacies with following the ICWA requirements during the temporary custody proceedings did not taint the subsequent proceedings or require invalidation of the guardianship order. The ICWA does not provide for invalidation of a separate action due to alleged violations during a prior action in a temporary custody proceeding. Any alleged deviations from the ICWA were squarely addressed by the court and the Department, thus curing any inadequacies. The ICWA was fully complied with as of the final custody proceeding (guardianship).

Notice was provided to S.F. even before paternity was established, which is above and beyond the notice requirements in the ICWA. S.F. was personally served with the petitions to terminate his parental rights and petition for guardianship. Moreover, S.F. was provided with counsel throughout the proceedings. While, delayed, notice to the Curyung Tribe was accomplished at least five years before the guardianship proceeding. From its intervention in 2008, the Tribe received proper notice and actively participated in the case, concurring in the permanency plans for J.S. throughout this matter.

As evidenced by the multiple attempts to engage S.F. in treatment and interaction with his child, clear and convincing evidence supports the court's conclusion that the Department employed active efforts in this case. Yet these

active efforts were met with apathy and unwillingness to participate by S.F. S.F.'s failure to accept or engage in services does not negate the Department's active efforts. Moreover, the Department implemented active efforts with J.S. and his mother and siblings as well which are relevant to the purpose behind ICWA.

The district court properly concluded that clear and convincing evidence supported that custody of J.S. by S.F. would likely result in serious emotional or physical damage to the child. The ICWA expert's testimony was not a vague reference to risk, but rather pointedly confirmed that placing J.S. with S.F. would result in "serious emotional harm." The court's finding was supported by the record and a qualified ICWA expert from S.F.'s tribe.

ARGUMENT

I. STANDARD OF REVIEW AND APPLICABLE LAW

A. Standard of Review

This Court reviews the factual findings of the district court to determine if they are clearly erroneous and reviews conclusions of law to determine if they are correct. *In re J.C.*, 2008 MT 127, ¶ 33, 343 Mont. 30, 183 P.3d 22. A factual finding is clearly erroneous if "it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed." *In re J.C.*, ¶ 34 (citation

omitted). An appellant bears the burden of establishing error by the district court; therefore, it is the appellant's burden on appeal to establish that the district court's factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825 (citing *In re M.J.W.*, 1998 MT 142, ¶ 18, 289 Mont. 232, 961 P.2d 105).

B. Applicable Law for Granting Guardianship of an Indian Child[2]

Pursuant to Mont. Code Ann. § 41-3-444, a court may grant a guardianship if the following exist:

> a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;
>
> b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection (9);
>
> c) the child has been adjudicated a youth in need of care;
>
> d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;
>
> e) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child; and
>
> f) it is in the best interests of the child to remain or be placed with the potential guardian.

[2] On appeal, birth father does not challenge the court's order with regard to the guardianship findings under Mont. Code Ann. § 41-3-444. S.F. limits his appeal issues to whether alleged violations of the ICWA tainted the entire proceeding.

Under the ICWA, placement of an Indian child in the home of a guardian constitutes a "foster care placement." 25 U.S.C. § 1903(1).[3] Pursuant to the ICWA, "[n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(e).

In addition, when the proceeding before the district court contemplates foster care placement of an Indian child, a court must be satisfied by "clear and convincing evidence" that active efforts pursuant to § 1912(d) were provided and proved unsuccessful. *In re G.S., Jr.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063.

> Clear and convincing proof requires:
>
> that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure--that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

G.S., ¶ 39 (citation omitted). The fact that evidence may conflict does not automatically preclude a determination that clear and convincing evidence supports

[3] For convenience, short citations to the ICWA will reference only the relevant subsection (*i.e.*, § 1903(1).)

a given position. *In re J.M.J.*, 1999 MT 277, ¶ 20, 296 Mont. 510, 989 P.2d 840 (citation omitted). "Moreover, notwithstanding, the clear and convincing evidence standard in the district court, we determine only whether that court's findings are clearly erroneous and, if not, the findings must be upheld." *Id.* (citation omitted).

Finally, a district court's determinations regarding an expert witness's qualifications and competency are within the discretion of that court and will not be overturned absent a showing of abuse of that discretion. *In re T.W.F.,* 2009 MT 207, ¶ 17, 351 Mont. 233, 210 P.3d 174 (citation omitted). A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason. *In re D.S.B.*, 2013 MT 112, ¶ 8, 370 Mont. 37, 300 P.3d 702 (citation omitted).

II. ALLEGED ICWA VIOLATIONS DURING TEMPORARY CUSTODY PROCEEDINGS DO NOT REQUIRE INVALIDATION OF SUBSEQUENT GUARDIANSHIP PROCEEDING.

The ICWA provides that "any parent or Indian custodian from whose custody such [Indian] child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912, and 1913 of this title." *See* § 1914. Relying on § 1914, S.F. argues that alleged inadequacies with following ICWA requirements tainted all of the proceedings and thus require

invalidation of the guardianship order. (*See* Appellant's Br. at 9-12.) However, this Court has specifically held that "alleged violations of [ICWA] in the temporary custody proceedings would not require invalidation of the permanent legal custody proceedings." *In re M.E.M.*, 209 Mont. 192, 195, 679 P.2d 1241, 1243 (1984).

In *M.E.M.*, the court did not reach the merits of the mother's alleged ICWA violation claims since it held invalidation of subsequent proceedings was not a proper remedy; this Court explained that § 1914 "does not provide for invalidation of a valid separate action because of an invalid prior one." *M.E.M.*, 209 Mont. at 196, 679 P.2d at 1243. This Court concluded that the prior hearings were not legal prerequisites to permanent legal custody which could be the initial filing in a youth in need of care action. *M.E.M.*, 209 Mont. at 196-97, 679 P.2d at 1243. This Court emphasized in *M.E.M.* that with regard to the final hearing, the ICWA was fully complied with (*i.e.*, individual counsel had been appointed to the child and each parent; notice was given to all concerned parties; jurisdiction had been offered, but declined by the tribe). *M.E.M.*, 209 Mont. 197-98, 679 P.2d at 1244. This Court also agreed that "[t]o further prolong this proceeding would not be in the child's best interest" and noted the parents had demonstrated little if any genuine interest in parenting M.E.M. *M.E.M.*, 209 Mont. at 198, 679 P.2d at 1244-45.

The circumstances presented here are similar to those in *M.E.M.* J.S.'s guardianship proceeding was separate and distinct from all the earlier proceedings and involved a new type of relief than previously sought. Like *M.E.M.*, the evidence presented at the guardianship hearing involved entirely different evidence than previously presented and was initiated by a separate petition, which can also be filed at the beginning of a case. *See* Mont. Code Ann. § 41-3-422(1)(a)(vi). Even if, assuming for the sake of argument, deviations from the ICWA did occur, they were certainly alleviated by November 2012 when guardianship proceedings were initiated: S.F. had been personally appearing and participating in the hearings with his appointed counsel since 2006; as of early 2008, the Curyung Tribe intervened and was fully participating; and since 2006, treatment plans, both informal and court approved, were offered along with visitation and counseling opportunities between S.F. and J.S. Just as in *M.E.M.*, where this Court emphasized the final proceedings fully complied with the ICWA, the requirements of the ICWA were fully complied with during J.S.'s guardianship proceedings.

The other case relied upon by S.F. to "invalidate" the guardianship order is distinguishable from this matter. (*See* Appellant's Br. at 10-11, citing *In re K.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836.) Like *M.E.M.*, the issue presented to this Court in *K.B.* was alleged violations of the ICWA with regard to the final order of permanent legal custody and termination of parental rights. *See K.B.*, ¶ 1.

However, unlike *M.E.M.* and the situation presented here, in *K.B.*, the mother agreed that the ICWA was followed in the beginning of the case and alleged *only* violations associated with the final termination of parental rights proceeding. *K.B.*, ¶ 23. Here, S.F. argues alleged deficiencies with the ICWA compliance (notice and active efforts) *prior* to the guardianship proceedings. Notably, in *K.B.* after this Court concluded proper notice was not provided for the *final* hearing and the expert testimony was insufficient, the remedy fashioned by this Court was to remand the matter "for the purpose of *curing* statutory deficiencies and hold a new termination hearing." *K.B.*, ¶ 2 (emphasis added). This holding is in line with *M.E.M.*, which did not negate subsequent actions once deficiencies were corrected.

This Court's holding from *M.E.M.* is supported by other courts. The Alaska Supreme Court concluded that "[e]ven if procedural defects existed in an earlier temporary custody hearing, they can be cured by a subsequent procedurally correct final dispositional hearing. . . ." *D.E.D. v. State*, 704 P.2d 774, 782 (Alaska 1985) (final hearing occurred five months after parent was appointed counsel and three months after her counsel stipulated to adjudication). *See also In the Interest of J.D.B.*, 584 N.W.2d 577, 582 (Iowa Ct. App. 1998) (ICWA violations in temporary custody proceedings do not invalidate a subsequent permanent custody proceeding; they are separate proceedings, arising from separate petitions); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 152 (Minn. Ct. App. 2007)

(alleged ICWA violations that occurred during the temporary foster care placements do not, as a matter of law, require that the district court invalidate the subsequent termination of parental rights proceedings); and *In re H.A.M.*, 961 P.2d 716 (Kan. App. 1998) (trial court's failure to give notice to the tribe until termination of parental rights hearing did not invalidate later proceedings.)

Similar to the situation here, in *H.A.M.*, the parents argued the trial court erred by failing to follow the notice provisions of the ICWA; however, unlike the situation here, in *H.A.M.*, the tribe was not notified until *after the filing* for termination of parental rights and upon the parents' request to transfer jurisdiction to the tribe. *H.A.M.*, 961 P.2d at 719-20. Yet, despite this delayed notice to the tribe, the Kansas Court of Appeals concluded reversal of the case was not warranted due to subsequent actions to comply with ICWA and because the tribe ultimately participated in the proceedings. *H.A.M.*, 961 P.2d at 719-20.

On appeal, the court found that the trial court erred by not giving notice to the tribe during the first two years of the proceedings and noted the lapse in notifying the tribe reduced that time to work with the Chickasaw Nation in an attempt to preserve the family. *H.A.M.*, 961 P.2d at 720. However, the court also found that the tribal representative had participated in the case, approved the treatment plan, and "intervened in the direction of the case." *H.A.M.*, 961 P.2d at 720. The court concluded that, although the Chickasaw Nation's involvement in

the case was belated, "there was substantial compliance with the ICWA purpose of involving the tribe in the child care proceedings." *H.A.M.*, 961 P.2d at 720.

This Court's holding from *M.E.M.*, as supported by several jurisdictions, does not sustain S.F.'s arguments on appeal that the alleged ICWA violations during proceedings leading up to the guardianship hearing are sufficient to invalidate the guardianship proceeding. Although notification to the Curyung Tribe was delayed, the Tribe's intervention and participation in the proceedings for over five years certainly constitutes "substantial" compliance and does not justify invalidation of the final guardianship proceedings.

III. THE GUARDIANSHIP PROCEEDING COMPLIED WITH STATUTORY REQUIREMENTS OF THE ICWA AND THE DISTRICT COURT PROPERLY GRANTED GUARDIANSHIP.

A. Notice

Pursuant to the ICWA:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary.
>
> . . . .

25 U.S.C. § 1912(a). *See also In re K.B.*, ¶ 22.

1. Notice to S.F.

The ICWA defines a "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

Even though he was not considered a "parent" under § 1903(9), as paternity had not been established, S.F. was provided personal notice of the proceeding in 2002. (*See* D.C. Doc.) From the time he was identified as J.S.'s biological father in September 2004, only two permanency plan hearings took place without S.F. being notified. (*See* D.C. Docs. 90, 102.) S.F. was personally served with notice of the petitions to terminate his rights and guardianship and was appointed counsel. Notably, S.F. did not attend the final guardianship hearing despite being notified of the matter.

Prior to establishing paternity, pursuant to the ICWA, S.F. had no right to notice of the proceedings. As argued above, any deficiencies in providing notice to S.F. during the temporary custody proceedings were later cured by subsequent notifications. Finally, S.F. and his counsel received proper notice of the proceedings from August 2006 forward, including the final dispositional

proceeding granting guardianship. Accordingly, the notice requirements for S.F. were sufficient to comply with the ICWA.

2. Notice to the Curyung Tribe

S.F.'s assertion that "the State did not provide notice in any manner to the Father's tribe," is not accurate. (*See* Appellant's Br. at 13.) The ICWA expert and representative of the Curyung Tribe, Mr. Itumulria, believed that notices of the proceedings were first sent to the Bristol Bay Native Association in 2004 and the case was transferred to the Curyung office in 2008. (03/14/13 Tr. at 48-49.) The district court record indicates legal notice was sent to the Curyung Tribe on December 31, 2007, and the tribe formally intervened in February 2008. (*See* D.C. Docs. 154, 164.) This was nearly five years before the Department filed for guardianship on November 14, 2012. (*See* D.C. Docs. 328, 340.) As discussed above, any delay in notifying the Curyung Tribe prior to the final dispositional petition is not justification for invalidating the final guardianship hearing. The record clearly indicates the Tribe was properly served for all proceedings from 2008 onward.

The record clearly reflects that upon intervention in this matter, the Curyung Tribe actively participated, was consulted by the Department, and concurred in the placement for J.S. as well as the permanency plans (even when the plan was adoption). Notably, the birth mother's tribe, CSKT, was an active

participant in J.S.'s case and his siblings' cases. S.F. has not carried the burden of establishing error by the district court. The district court did not misapprehend the evidence when it correctly concluded the notice provisions were satisfied in this matter.

B. <u>Active Efforts</u>

Under the ICWA,

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

§ 1912(d).

This Court has noted that "[c]ommon sense construction of the meaning of 'active efforts' requires only that 'timely affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services [designed] to remedy problems which might lead to severance of the parent-child relationship.'" *G.S.*, ¶ 36 (citation omitted). In meeting this "heightened responsibility," the State "cannot simply wait for a parent to complete a treatment plan." *T.W.F.*, ¶ 27.

However, this Court has consistently explained that while active efforts imply a heightened responsibility to the Department, "in determining whether the state had made active efforts . . . a court may consider a parent's demonstrated

apathy and indifference to participating in treatment." *In re A.N.*, 2005 MT 19, ¶ 22, 325 Mont. 379, 106 P.3d 556 (citing *E. A. v. State of Alaska, Div. of Family and Youth Services*, 46 P.3d 986, 991 (Alaska 2002)). *See also*, *In re I.B.*, 2011 MT 82, ¶ 41, 360 Mont. 132, 255 P.3d 56 (citing *T.W.F.*, ¶ 27) ("The success of the remedial services and rehabilitative programs concomitantly depends on the parents' ability and willingness to develop the necessary skills to provide their child with a safe living environment.")

Moreover, this Court has noted that § 1912(d) provides no detailed procedure or criteria for determining the sufficiency of active efforts; but the Bureau of Indian Affairs Guidelines for the ICWA (Guidelines), commentary states that "establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments." *G.S.*, ¶ 29, (citing 44 Fed. Reg. 67,592 (November 26, 1979)).

In *G.S.,* the Court concluded that the Department's active efforts in placing an Indian child in an out of home placement or foster care from the beginning of the case were supported by clear and convincing evidence. *G.S.*, ¶¶ 29, 33-34 (Department investigated places for mother and children to stay; properly attempted to locate Native American homes or extended family; offered remedial

and rehabilitative programs for counseling, parenting education, and employment, and assistance with shelter in attempts to reunite).

In *A.N.,* the Department held two family group decision making meetings, paid for the father's sex-offender evaluation, and arranged a visit between father and children that the father did not attend. *A.N.*, ¶ 24. Other than one attempt to arrange a visit, the father "disappeared" for nearly one year, and the Department's attempts to set up telephone contact between the children and father were stifled because of his failure to maintain contact with the social worker. *Id*., ¶¶ 6, 24. The father's treatment plans included services provided by the Department such as chemical dependency evaluations and treatment, random drug screens, counseling sessions, and parenting classes. *Id*., at ¶ 7. Despite the efforts of the Department, the father failed to achieve any of those tasks, mainly due to his failure to maintain contact with his social worker. *Id*., at ¶¶ 8-11.

The Court explained how the Department could not have been more active given the father's complete unavailability:

> It was Father's apparent apathy and indifference that prevented him from completing his treatment plans. . . . Father prevented the Department from making active efforts at providing more intensive services.

Id., ¶ 25. *See also T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174 (court may consider parent's failure to participate in completing her treatment plan); *In re R.H.*, 250 Mont. 164, 170, 819 P.2d 152, 156 (1991) (while the Department's

role may be to assist parents "in completing the treatment program, the parents retain the ultimate responsibility for complying with the plan.") (citing *In re L.W.K.,* 236 Mont. 14, 19, 767 P.2d 1338, 1342 (1989)).

Moreover, this Court has agreed it is appropriate to consider efforts specific to the other parent when determining whether the Department has actively attempted to keep the family together since consideration of all the efforts employed by the Department promotes the purpose of § 1912(d) (prevent the breakup of the Indian family). *In re D.S.B.*, ¶ 17. In *D.S.B.* the father failed to avail himself of services (*i.e.*, two treatment plans, social worker assistance, visitation, drug testing, chemical dependency treatment, counseling, referrals to treatment providers, parenting coaching) prior to his incarceration. *D.S.B., supra*. This Court concluded the father's unwillingness to participate did not negate the Department's active efforts. *D.S.B.*, ¶¶ 15-17.

Just as in *D.S.B*, the Department in the current case provided significant active efforts in attempts to prevent the breakup of this family through the services provided for A.S., J.S., and his siblings. The Department made active efforts with the mother (provided treatment plan, visits, consulted with the CSKT, *etc*.) and placed the children with approval of the children's tribes throughout these proceedings.

While contact with S.F.'s tribe was delayed, once the Curyung Tribe was identified, the Department sought input and guidance from the Tribe on J.S.'s placement and permanency. Mr. Itumulria explained that he sent enrollment paperwork for J.S. after the Tribe intervened and that he also reviewed S.F.'s treatment plan that was approved by the court in April 2011. (D.C. Doc. 263; 03/14/13 Tr. at 49.) Mr. Itumulria also kept in contact with S.F. about working with his attorney and on the tasks of his treatment plan in order to have J.S. placed with him; notably, Mr. Itumulria agreed S.F. had not completed his treatment plan. (*Id*. at 49.)

The Department provided services specific to S.F., but just like D.S.B.'s father, S.F. failed to avail himself of those services and showed little or no interest in parenting J.S. S.F. acknowledged he knew of J.S. before he was born, yet he failed to attend the September 19, 2002 hearing and would not cooperate in determining paternity for several years. Three informal treatment plans were developed for S.F. from 2006 to 2012. Although S.F. repeatedly expressed his intent to relinquish his rights during that period, he failed to follow through and the Department sought formal approval of a treatment plan. Throughout this case the Department sought to facilitate relationship building between J.S. and S.F., including setting up family counseling, encouraging letter writing, and connecting the foster family with S.F. to further open up communication opportunities.

S.F. failed to take advantage of the multiple efforts made for him (made no attempt to engage in services; made clear he did not intend to work on a treatment plan; repeatedly advised the court he intended to relinquish his parental rights but never followed through; failed to maintain consistent contact with the Department; and most significantly, made minimal efforts towards visiting his child). S.F. made it clear to the court that he did not intend to participate in parenting education despite the fact he had no constructive relationship with J.S. Just as in *D.S.B.*, the record is replete with substantial evidence of S.F.'s failure to engage the Department or make any positive steps toward seeking custody of J.S.

S.F.'s description of the district court's April 12, 2012 denial of the petition to terminate is incomplete. (*See* Appellant's Br. at 16.) While the district court did express concern with the social worker's limited explanations of attempts to contact S.F. and/or his counsel as well as the length of time that had passed (*see* 04/12/12 Tr.), it is inaccurate to allege the court "denied the petition due to these concerns." (*See* Appellant's Br. at 16.) Rather, the main thrust of the district court's ruling involved concern with the qualifications of the proposed ICWA expert.

During the guardianship hearing, the district court clarified that "[the petition to terminate] "was denied, just so everybody's clear, because the ICWA expert that came to testify wasn't from the Tribe, the father's Tribe. We had an ICWA expert from the mother's Tribe, but the Court wasn't satisfied that that

would actually reflect the cultural significance of the father's Tribe." (03/14/13 Tr. at 16.) *See* also D.C. Doc. 342 at 5 ("The Court denied the Petition as the State did not call an ICWA expert who was familiar with the father's tribal culture with [sic] the Curyung Tribe."). Moreover, S.F.'s reliance on the court's impression about active efforts in 2012 ignores the subsequent efforts made by the Department prior to the final disposition in 2013.

The record clearly establishes by clear and convincing evidence--and the district court did not misapprehend that evidence--that the Department employed active efforts in providing remedial and rehabilitative services to prevent the breakup of this family (or to unite J.S. and his father), yet those efforts were unsuccessful. S.K.'s refusal to take advantage of the offered services does not negate the Department's active efforts or diminish the fact the efforts were unsuccessful.[4]

[4] Citing a recent United States Supreme Court decision, the district court also noted that the ICWA was designed to "counteract [sic] the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." (App. 1 at 11, citing *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552, 2562-65, 2013 U.S. LEXIS 4916 (June 25, 2013) (emphasis in district court order). The United States Supreme Court held that §1912(d) is inapplicable when, as here, the parent never had custody of the Indian child. *Baby Girl,* 133 S. Ct. at 2562-64. While *Baby Girl* was decided after guardianship was ordered, the holding is instructive and an argument could be made that the active efforts designed to "prevent the breakup" of a family would not apply here since S.F. (1) failed to acknowledge paternity despite knowing J.S. may be his child and was reluctant to even take a paternity test and (2) J.S. never lived with S.F.

C. **<u>[Continued] Custody of the Child With Father Would Likely Result in Serious Emotional or Physical Harm</u>.**

Under the ICWA, a district court's granting of guardianship will be affirmed if a reasonable factfinder could conclude by clear and convincing evidence that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. § 1912(e). Determination of this factor must include testimony of qualified expert witnesses. § 1912(e).

The plain language of the statute clearly indicates the expert witness testimony is only a part of the evidence that may be considered in establishing that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In *D.S.B.*, this Court noted that while "expert testimony is required on the issue, a court's finding that a child will likely suffer serious emotional or physical harm if the parent continues custody does not have to be based on that testimony alone." *D.S.B.*, ¶ 18 (citing *A.N.*, ¶ 32 ("a district court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony. . . ."). This Court noted that in addition to the ICWA expert's testimony that the children would suffer serious emotional or physical harm, the evidence also showed that the children's emotional needs would not be met if they were placed in the parent's care and the parent had failed to successfully complete the treatment plan in over two years. *D.S.B.*, ¶ 19 ("Based on all the evidence presented at the hearings," the district court did

not err in determining the children would suffer serious emotional or physical harm if the parent retained custody).

When the ICWA expert merely stated the children would be "at risk" if returned to the parent's custody and that termination was "in the best interest of the children," this Court concluded the district court lacked the evidence to meet the requirements of § 1912(f). *K.B.*, ¶¶ 16, 27-29. *K.B.* is distinguishable from the circumstances presented here both procedurally and factually. Here, the burden of proof required under § 1912(e) was clear and convincing; because the issue before the Court in K.B. involved termination of parental rights, the burden of proof pursuant to § 1912(f) was beyond a reasonable doubt.

The evidence the district court relied upon here is also distinguishable from *K.B*. Unlike the ICWA expert in *K.B*., Mr. Itumulria's testimony was not a vague reference to "risk." Rather, Mr. Itumulria specifically averred that "[J.S] has been noted in the system for 11 years, and I do believe changing at this time would do some serious emotional harm since he can make his own choices at the age of 14." (*Id*. at 45-46.) Mr. Itumulria's opinion that it was in J.S.'s best interests for the court to grant guardianship with his current foster family aligned with one of the findings required under Mont. Code Ann. § 41-3-444(2)(f) and was not improper. (*Id*. at 45.)

In this case, Mr. Itumulria was qualified as an ICWA expert based on his personal knowledge of the Tribe, its customs and cultural standards, and 20 years experience as an ICWA worker with the Tribe, as well as the fact he is a member of the Tribe. (*See* 03/14/13 Tr. at 41-43.) Mr. Itumulria and the Tribe consistently participated in the case and supported J.S.'s placement with his foster family--either through adoption or guardianship. (*Id*. at 44-45.) Mr. Itumulria noted his opinions considered the cultural norms of the Curyung Tribe and explained consideration of a 14-year old child's opinion was something the Tribe believed was appropriate. (*Id*.) Mr. Itumulria was certainly familiar with the case and had reviewed the file and record. In affirming the trial court's conclusion pursuant to § 1912, this Court has explained it "will not substitute its judgment for that of the District Court's regarding the credibility, persuasiveness, and weight to be given a witness's testimony." *D.S.B.*, ¶ 36 (citing *In re K.J.B.*, 2007 MT 216, ¶ 23, 339 Mont. 28, 168 P.3d 629).

As this Court has held, when issuing its decision to terminate a parent's rights under the ICWA, a district court does not have to:

> conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found, beyond a reasonable doubt, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

A.N., ¶ 32 (citation omitted). In *A.N.*, the Court clarified that § 1912 does not require a specific form of evidence or limit the evidence to only the qualified expert witness testimony when determining if continued custody of the children with the parent would likely to result in serious emotional or physical damage to the children. *Id.*, ¶¶ 27-28. As the Court further noted, the ICWA expert reviewed the record and applied the Indian Cultural norms prior to giving her opinion. *Id.*, ¶¶ 30, 32. Significantly, this Court referenced *the record* as a whole in affirming the district court's conclusion and holding a reasonable person could have found beyond a reasonable doubt that the continued custody with the parent would likely result in serious emotional damage to the child. *Id.*, ¶ 32 (emphasis added). *See also T.W.F.*, ¶ 25-26 (ICWA expert can testify based on review of the file and district court's decision does not have to conform to narrow piece of evidence from expert); and *Thomas H. v. Alaska Dept. of Health and Soc. Servs.*, 184 P.3d 9, 17 (Alaska 2008) ("ICWA does not require that the experts' testimony provide the sole basis for the court's conclusion" that continued custody would likely result in serious emotional or physical harm to a child).

The district court properly considered all factors associated with J.S.'s emotional well-being as evidenced by the detailed findings entered by the court. (*See* App. 1.) The court also properly considered S.F.'s lack of interest over the majority of the case and the fact he did not appear to appreciate his child's needs

and wishes. The district court properly considered Mr. Itumulria's testimony, as well as testimony of others, and the case record, in finding that permitting S.F. to have custody of J.S. would likely result in serious emotional or physical injury to the child.[5]

CONCLUSION

The district court's findings of fact, conclusions of law and decree of guardianship should be affirmed.

Respectfully submitted this 20th day of December, 2013.

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[5] With regard to § 1912(f), the district court again referenced *Baby Girl's* holding that demonstration of serious harm to the Indian child was likely to result from the parent's *continued custody* of the child did not apply when the parent at issue never had custody of the child. (*See* App. 1 at 15-16, citing *Baby Girl*, 133 S. Ct. at 2560-63). Just as with active efforts, this holding is instructive and it could likewise be argued that the Department was not required to establish the likelihood of serious harm to J.S. since he had never been in S.F.'s custody.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 7,885 words, excluding certificate of service and certificate of compliance.

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