IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 14-0084

IN THE MATTER OF,

S.B.C., Jr.

Youth in Need of Care

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Edward P. Mclean, Presiding

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STATEMENT OF THE CASE

This is an appeal by S.B.C. Sr., Father to S.B.C., Jr., of the Fourth Judicial District Court's, Missoula County, denial of transfer of jurisdiction to the Blackfeet Tribal Court and the termination of his parental rights. On June 3, 2013, the district court denied the Blackfeet Tribe and the Father's request to transfer jurisdiction. Subsequently, in January 2014, the Father's parental rights were terminated.

This case is governed by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, et. seq. The Father alleges the district court erred in denying transfer to tribal court and erred in terminating his parental rights. The district court ignored key components of the ICWA when it denied the request to transfer jurisdiction to the Blackfeet Tribal Court. The district court improperly considered the tribes financial circumstances and applied a "best interest of the child" standard as its basis for denial. In addition, the district court erred in relying upon *Adoptive*

Couple v. Baby Girl, 133 S. Ct 2552, 186 L. Ed. 2d 729 (U.S. 2013), in determining that certain protections under the ICWA did not apply to the Father. Key facts distinguish this case from *Baby Girl*. Further, the absence of expert testimony, as required under the ICWA, requires reversal of the termination order.

STATEMENT OF THE FACTS

S.B.C., Sr. is the Father of S.B.C., Jr., now age three (3). Both the Father and S.B.C., Jr. are enrolled members of the Blackfeet Tribe. The Mother, whose rights were terminated, is also an enrolled member of the Blackfeet Tribe. The Father and the mother are not married. The Indian Child Welfare Act applies to this proceeding. (D.C. Doc. 1).

S.B.C., Jr., and his half-sister, who is not at issue in this appeal, were removed from their mother's care when S.B.C., Jr. was one month old. The State had received multiple calls over the course of weeks that the mother's older child and a cousin had been found playing unsupervised in the middle of a busy street. When the State and law enforcement arrived at the Mother's residence, the Mother was not present and there was no adult present who was suitable to care for the children. The Mother failed to return to the home and the State placed S.B.C., Jr. with a family member. (D.C. Doc. 1.)

On July 28, 2011, the State filed a petition for emergency protective services and temporary investigative authority. (D.C. Doc. 1.) Both parents stipulated to

the petition. (D.C. Doc. 12.) Based upon statements made by the mother and others in the community, the Father began to question paternity. (9/10/2013 Tr. at 575.) While the issue of paternity was pending, the Father declined to have visits with S.C.B., Jr. Paternity was ultimately established in March 2012.

The State petitioned for adjudication and temporary legal custody in November 2011. (D.C. Doc. 18.) After a contested hearing, the district court adjudicated S.B.C., Jr. a youth in need of care as to the Mother and granted temporary legal custody to the State February 2012. Adjudication as to the Father was granted in June 2012. (D.C. Doc. 50.) A treatment plan was ordered for the Father which required him to obtain a chemical dependency evaluation and enroll in parenting education. (D.C. Doc. 49.)

The Blackfeet Tribe intervened in this action in January 2012. (D.C. Doc. 23.)

On March 6, 2013, the State filed a petition to terminate the Father's parental rights. (D.C. Doc. 48.) A hearing was set for May 2, 2013. (D.C. Doc. 47.1.) On April 10, 2013, the Blackfeet Tribe filed its Motion to Transfer Jurisdiction. (D.C. Doc. 52.) The Father and Mother joined in the Motion; the State and the attorney for the child opposed the motion. (D.C. Doc. 54, 57, 58.)

A contested hearing regarding the transfer was held on May 14, 2013. At the hearing, the State conceded that the only contested issue was whether "the

proceeding [was] at an advanced stage when the petition to transfer was received." (5/14/2013 Tr. at 183.) The district court heard testimony from S.B.C., Jr.'s foster mother, Sarah Floyd ("Floyd"), child protection specialist Sheila Finley ("Finley"), and Blackfeet Tribe ICWA coordinator Anna Fisher ("Fisher"). Over the objections of the Father, Mother and Blackfeet Tribe, the district court heard testimony regarding S.B.C., Jr.'s best interest and the parents' compliance with treatment plans. (5/14/2013 Tr. at 167-8, 170, 204.)

The following testimony was presented to the district court at the transfer hearing on May 14, 2013.

S.B.C., Jr. was placed with Floyd on October 11, 2011, and has remained in this placement. Prior to being placed with Floyd, S.B.C., Jr. was in five short term placements: two kinship placements, two placements at Watson's Children's Shelter and a failed placement with the Mother at Mountain Home. (5/14/2013 Tr. at 204-212.) Floyd is a blood descendent of the Salish & Kootenai Tribes but is not an enrolled member. She has adopted three children of Crow and Chippewa Cree descent. (5/14/2013 Tr. at 196-170.) Floyd acknowledged that she was not familiar with specific customs of the Blackfeet tribe, only general Native culture. (5/14/2013 Tr. at 193-4.)

When S.B.C., Jr. was removed from his Mother's care, the State initially sought out maternal family placements. Between removal in July 2011 and August

2012, the State made no efforts to contact paternal family placements. Even once paternity was conclusively established in March 2012, the State delayed six (6) months before searching out potential paternal placements. Eventually, Finley made one unanswered phone call to the paternal grandmother and one phone call and two emails to a paternal aunt. Finley did not follow up with the ICWA coordinator to determine if additional family or Blackfeet placement options were available. (5/14/2013 Tr. at 218-19, 222.)

Finley admitted that her opposition to the transfer was based upon her belief that the Blackfeet Tribal Court could not be objective regarding S.B.C., Jr.'s placement. (5/14/2013 Tr. at 264.) Floyd also expressed distrust with the judgment of the Blackfeet Tribal Court. (5/14/2013 Tr. at 187.)

Fisher was the ICWA coordinator for the Blackfeet Tribe between September and November 2012. When she assumed this position, she discovered many of the cases handled by the prior coordinator were mishandled. In fact, the previous coordinator had been asked to leave her position and cases were missing "family plans". (5/14/2013 Tr. at 282-289.) It was unclear what the prior coordinator had done to search out family placements or transfer jurisdiction to the tribal court. (5/14/2013 Tr. at 284.) Fisher testified that the tribe intended to place S.B.C., Jr. with his paternal grandmother with a slow transition plan in place. (5/14/2013 Tr. at 305-6.)

The district court denied the motion to transfer, finding that the Blackfeet Tribe had delayed in participating the district court proceedings and good cause existed to deny transfer. (D.C. Doc. 76.)

A hearing on the State's petition to terminate was held on September 10, 2013. Floyd, Finley, and the Father testified. Additionally, the State's ICWA expert, Susan Stevens ("Stevens") testified.

The Father testified he was at the hospital the day after S.B.C., Jr. was born and had him in his care for an evening in Browning, MT during Indian Days. The relationship between the parents was off and on shortly after the child was born. (9/10/2013 Tr. at 573.) Prior to removal, the Father would visit his son at the Mother's residence. He bought formula, would hold S.B.C.. Jr. and give him a bottle. The Father changed diapers and would bring his son what he needed. (9/10/2013 Tr. at 601, 607, 608, 613.)

The Father completed an alcohol assessment with Crystal Creek and followed their recommendations. He also began parenting classes with Blackfeet Head Start. (9/10/2013 Tr. at 584-587.)

To the surprise of the State, its own ICWA expert witness, Stevens, concluded that the Father's rights should not be terminated. She opined that the Father be given a short amount of additional time to complete very specific tasks. She concurred that the Father had deferred parenting and hopes of reunification

with the Mother and, upon it becoming clear that the Mother could not be successful, the Father began working for reunification. (9/10/2013 Tr. at 554, 546.)

Given Stevens testimony that she did not believe the Father's rights should be terminated, the State attempted to have her testify that the ICWA did not apply to the Father in light of *Baby Girl*. Stevens conceded that she had not read the case in its entirety and was relying upon statements made by the State's counsel as to the holding in the case. (9/10/2013 Tr. at 557.)

At the end of the termination hearing, the district court permitted additional briefing on the applicability of the ICWA to the Father in light of *Baby Girl.* (D.C. Docs. 87, 88, 89.)

On January 15, 2014, the district court issued its order terminating the Father's parental rights. (D.C. Doc. 91.) The district court determined that the Father was not an "Indian Parent", and as such, "the rights ICWA confers to an 'Indian Parent' do not apply to Father." Finding the Father was not a parent under the ICWA, the district court concluded that the testimony of an "ICWA expert is not required as a prerequisite to terminate Father's parental rights." (D.C. Doc. 91.)

The Father filed this timely appeal.

SUMMARY OF THE ARGUMENT

ICWA establishes "concurrent but presumptively tribal jurisdiction" for removal and termination cases involving Indian children not domiciled on a reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). In the absence of a parental objection or "good cause to the contrary," 25 U.S.C. § 1911(b) mandates transfer to tribal court upon petition by a parent. The district court erred in finding "good cause to the contrary" and denying the transfer to tribal court.

The district court furthered erred in terminating the Father's parental rights and finding that the ICWA did not apply to the Father. The district court mistakenly applied *Baby Girl* when finding the Father was not an "Indian parent." Additionally, the State did not meet its statutory obligation of providing expert testimony in support of termination.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact to determine whether they are clearly erroneous. *In re M.P.M.*, 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988. Findings of fact are clearly erroneous if they are not supported by substantial evidence; or, if so supported, the district court misapprehended the effect of the evidence; or, if so supported and the district court did not misapprehend the effect of the evidence, this Court is left with the definite and firm

conviction that a mistake has been committed. *In re S.M.*, 1999 MT 36, ¶ 15, 293 Mont. 294, 975 P.2d 334. This Court reviews a district court's conclusions of law to determine whether its conclusions are correct. *In re M.P.M.,* ¶ 12.

"A district court's application of the law to the facts of a case is a legal conclusion which we review to determine whether the interpretation of the law is correct." *In re J.W.C.,* 2011 MT 312, ¶ 15, 363 Mont. 85, 265 P.3d 1265 (quoting *In re C.H.,* 2000 MT 64, ¶ 9, 299 Mont. 62, 997 P.2d 776).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE TRIBE'S MOTION TO TRANSFER JURISDICTION TO THE BLACKFEET TRIBAL COURT.

The ICWA was a direct response by the United States Congress to the threat posed to Indian cultures and families by state removal and termination proceedings. E.g., *Holyfield*, 490 U.S. at 32-35; *In re M.E.M.*, 195 Mont. 329, 333-34, 635 P.2d 1313, 1316 (1981). In passing the ICWA, Congress expressly found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions" and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the

essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4)-(5).

There is no dispute that S.B.C., Jr. is an Indian child as defined by 25 U.S.C. § 1903(4) or that the ICWA applies to these proceedings. It also appears undisputed that S.B.C., Jr. was residing off of a reservation at the initiation of these proceedings. (D.C. Doc. 1.)

As such, ICWA mandates that:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.
> 25 U.S.C. § 1911(b).

The United States Supreme Court has described 25 U.S.C. § 1911 as "the heart" of the ICWA. The statute creates "concurrent but presumptively tribal jurisdiction" in cases of Indian children not domiciled on a reservation. *Holyfield*, 490 U.S. at 36. In the absence of a parental objection or a showing of good cause not to transfer, 25 U.S.C. § 1911(b)'s "shall transfer" language mandates that state courts transfer cases to tribal court when requested to do so by a parent. As the United States Supreme Court noted in *Holyfield*, jurisdiction is "presumptively tribal." *Holyfield*, 490 U.S. at 36.

The Guidelines promulgated by the Bureau of Indian Affairs in 1979 are meant to help state courts interpret and apply ICWA. *In re M.B.*, 2009 MT 97, ¶ 16, 350 Mont. 76, 204 P.3d 1242; see Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584-95 (Nov. 26, 1979) [hereinafter Guidelines]. This Court has previously determined that these Guidelines are persuasive and will be applied when interpreting the ICWA. *In re J.W.C.,* 2011 MT 312, ¶ 21.

In regards to transfer, the BIA Guidelines provide:

> (b) Good cause not to transfer this proceeding may exist if any of the following circumstances exist:
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
> (ii) The Indian child is over twelve years of age and objects to the transfer.
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
> (c) Socio-economic conditions and the perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

44 Fed. Reg. 67591.

In addition, this Court has "determined that the 'best interest of the child' test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children." *In re T.S.*, 245 Mont. 242,

247, 801 P.2d 77, 80 (1990). "This 'best interests of the child' test should not be confused with the 'best interests of the child' test applied under Mont. Code Ann. Section 40-4-212. *It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent-child legal relationships under Title 41, Chapter 3, MCA.*" *Id.* (emphasis added).

Rather, the test is a "jurisdictional best interests of the child test." *Id.* As this Court has held, "the burden of showing good cause to the contrary must be carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer." *In re M.E.M.*, 195 Mont. at 336. *See also, In the Matter of T.S.*

Despite the fact that the State bears the burden of proving by clear and convincing evidence that a transfer is contrary to the child's jurisdictional best interest, the district court shifted the burden to the Blackfeet Tribe and required it prove that S.B.C., Jr.'s best interest would be served by transfer.

> But what I can't appreciate is how someone can come in and want to destroy the mother-son bond, that has been established in this case, as well as the other brothers and sisters, and father-and-child bond, after twenty months of showing no interest. And, I just – I want to tell you that, Mr. Goddard, because that's the burden I see on the tribe, when we start talking - what's the best interest of the child under the ICWA Act. There's no question that the priority for protecting the Indian heritage is very high. But, we, also, have the emotional wellbeing of the child, that probably has priority, and that's the burden I see on the Blackfeet Tribe, right now.

(5/14/2013 Tr. at 199-200.)

The district court cited Montana law and policy as its basis for refusing to transfer jurisdiction. The district court stated that: "Under Montana law delay in child abuse and neglect proceedings undermines the overarching policy that the child's health and safety are paramount (D.C. Doc. 76, ¶ 18); it is the policy of the state of Montana to provide for the protection of children (¶ 20); Montana policy recognizes . . . that all children have a right to a healthy and safe childhood in a permanent placement . . . and in implementing the policy of this section the child's health and safety are of paramount concern(¶ 21 & 22); The court's primary consideration is the physical, mental, and emotional condition and needs of the child, and therefore the best interests of the child are paramount and must take precedence over parental rights. (¶ 23)".

The district court's opinion and order then focused on the timing of the Tribe's motion and the opinion that the Tribe's delay was motivated by financial reasons.

> ¶ 24. While this State District Court appreciates the stated purposes of the ICWA to preserve tribal populations and cultural heritages by curbing mass migration of tribal children away from reservations based on Caucasian middle-class values, the Tribe in this matter chose to sit on its hands and delay seeking jurisdiction of S.B.C. Jr., for tribal financial reasons, and allowed him to remain in the care of a Salish and Kootenai foster mother domiciled off the reservation, with no attempts to initiate the Youth's contact with the Tribe or the birth Father's extended family, and now wants to take jurisdiction at the 11th hour to prevent the Youth's permanent adoption by a ICWA-qualified Native American family, even though the family qualifies as

> one of the preferential placements under the ICWA and BIA guidelines.
>
> ¶25. While 44 Fed.Reg. 67,591 does provide non-binding guideline that socio-economic conditions and the perceived inadequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists to deny transfer, this Court does not believe this guideline was intended to support the Blackfeet Tribe intervening by motion and then sitting on its hand for months…
>
> ¶26. This is not a case of the State making value judgments based on Caucasian middle-class values, but a Tribe who claims their children are sacred and yet are willing to sit on its hands for financial reasons…

The reasoning and analysis applied by the district court was in direct contradiction to the underlying purpose of the ICWA and the Guidelines promulgated by the BIA. Here, in determining whether the jurisdictional best interests of the child could prevent transfer of jurisdiction, the District Court improperly relied solely on the State policy and law regarding best interest citing only provisions of MCA Title 41, Chapter 3 as its best interest guide; the court failed to take into account considerations of "best interest" defined by Congress in the ICWA in making a jurisdictional best interest determination.

Instead of finding the Guidelines persuasive and applying them when interpreting the ICWA, as directed by this Court, the district court acknowledged their existence but dismissed them out of hand as inapplicable. Then, in stark opposition to the Guidelines, the district court accused the Blackfeet Tribe of sitting on their hands for financial reasons, ignoring the directive that a tribe's

socio-economic reasons should not be a basis for denying transfer. The district court mischaracterizes the testimony of the Blackfeet ICWA expert when finding that Fisher testified that the "Tribe admittedly chose to let State and County taxpayers expense significant financial" resources and "twice acknowledged…that the Tribe's decision to not get involved…was driven by the Tribe's financial decisions…" (D.C. Doc. 76.)

Fisher's testimony in response to questions about funding was that the Blackfeet Tribe did not have the same financial resources as the State and, generally, if parents were working with the State, finances could be a reason to delay intervention or transfer. (5/14/2013 Tr. at 298-9.) Nowhere does Fisher admit, acknowledge or suggest that that the Tribe delayed transfer so that the State could foot the bill. Assuming, *arguendo*, that the district court properly characterized Fisher's testimony, the Guidelines expressly prohibit consideration of financial resources as a reason for denying transfer.

In addition to prohibiting a court to rely upon the socio-economic situation of a tribe in denying transfer, the Guidelines also prohibit consideration of perceived inadequacies of the tribal system. The district court's dismissal of the Guidelines is evidenced by its finding that "the Tribe intends to remove the Youth from the only loving, secure home he has ever known, place him with his paternal grandmother…and in essence, begin the whole custodial process anew…or allow

the Youth to be passed from family tribal member after another under the guise of the position that it is the Tribe's responsibility to raise its children for the rest of his childhood…" (D.C. Doc. 76.)

The district court's sentiment was echoed by the child protection specialist, who did not believe the tribal court could be objective regarding placement, and the foster mother, who did not trust that tribal court could make the best decision. (5/14/2013 Tr. at 264, 187.) Such ethnocentric substitution of judgment is precisely what Congress expected to avoid by passage of the ICWA. As Congress found, "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

The dissent in *In re M.E.M.*, encapsulates the current situation.

> The District Court in this case refused to transfer the proceedings to the Tribal Court upon the perceived impression that the child's custody would be given to persons on the reservation with whom the District Court, and the Department of Public Welfare, were not satisfied. This is not the function, however, of a good-cause determination under section 1911(b) of the Indian Child Welfare Act. Those are matters for decision by the Tribal Court and under section 1911(d) of that Act, the United States, every state, and every Indian tribe shall give full faith and credit to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records and judicial proceedings of any other judicial entity.

> It cannot, in my view, be "good cause" to refuse transfer of the proceedings to a tribal court on the perception that the tribal court may not act with respect to the child in the way we would wish it to act. The purpose of the Indian Child Welfare Act is to remove as far as possible the white man's perceptions in these matters where Indian values may conflict."

In re M.E.M., at 338-9 (dissent).

This logic and common sense approach to the ICWA and jurisdiction should be applied here. The question before the district court was which court should make custody determinations over S.B.C., Jr., not what the outcome of that determination should be. The ICWA gives clear preference to have tribal courts make those custody determinations.

Indeed, as this Court has explained, "tribal courts are uniquely and inherently more qualified than state courts to determine custody in the best interests of an Indian child." *In the Marriage of Skillen*, 1998 MT 43, ¶ 39, 287 Mont. 399, 956 P.2d 1 (1998). "The ICWA demonstrates confidence in the tribal forum, not only for the substantive expertise of its perspective, but also for its ability to make a fair and appropriate determination and to serve the interests of all the parties, including the state." *Id.*, at ¶ 40.

The district court fails to take into account that it is in both an Indian child's and Tribe's best interest for tribal children to remain with their tribes and for decisions about their futures to be made by the tribes themselves. Congress recognized, "there is no resource that is more vital to the continued existence and

integrity of Indian tribes than their children . . . ." 25 U.S.C. § 1901(3). Similarly, this Court has acknowledged that the ICWA "represents Congressional recognition of the concomitant cultural interests of Indian tribes and Indian children; interests fundamental to the perpetuation and preservation of their mutual and valuable heritage." *In the Matter of M.E.M.*, at 329. This Court has further identified the risk to Montana tribes: "preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. . . . In applying our state law and the Indian Child Welfare Act we are cognizant of our responsibility to promote and protect the unique Indian cultures of our state. *Id.*

The idea that the Blackfeet Tribe's culture and traditions are unique and important was undervalued by the district court and the State. Although S.B.C., Jr.'s placement with Floyd was compliant with the ICWA, higher priorities existed which honor S.B.C., Jr.'s specific heritage. The ICWA was meant to protect, preserve and perpetuate the unique characteristics, traditions, and history of each individual tribe, not just general Indian culture. "The cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated or adequately protected in our society. Our constitution recognizes 'the distinct and unique cultural heritage of the American Indians and is committed in its

educational goals to the preservation of their cultural integrity'. 1972 Mont.Const., Art. X, § 1(2)." *In re M.E.M.* at 333.

Floyd's Salish and Kootenai descent is a piece of preserving Indian culture. It does not, however, adequately address the need to preserve the cultural integrity of the Blackfeet Tribe and S.B.C., Jr.'s specific heritage. The district court erred in finding that S.B.C., Jr.'s placement in an ICWA compliant home supported good cause to deny the transfer.

The district court incorrectly relied upon *In re A.P.* in determining the petition to transfer was untimely, *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 P.2d 1186. This case is distinguishable from *A.P.* In *A.P.*, the tribal court sought to transfer jurisdiction after parental rights had been terminated and long term custody was granted to the State. The proceedings had been "completed and closed for a month when the Tribes' transfer motion was filed." *In re A.P.*, at ¶ 27. Here, the tribe filed its petition to transfer thirty-five (35) days after receiving notice of the petition to terminate. Under the Guidelines, good cause to deny exists when the proceeding is at an advanced stage *and* the petitioner did not file promptly after receiving notice of the petition. The tribe promptly filed for transfer.

While the district court acknowledged the presumption in favor of tribal jurisdiction, it did not implement that presumption. Rather than starting with the

premise that the tribal court is the correct forum for the resolution of the issues here, the district court only expressed its fear and judgment that the Blackfeet Tribe would do the wrong thing and for the wrong reasons. In both its findings of fact and conclusions of law, the district court characterized and criticized the Tribe's motives and interest in exercising its jurisdiction and decision-making authority and, with great judgment, rejects these perceived motives.

The district court erred in denying transfer to the Blackfeet Tribal Court. The State did not successfully prove, by clear and convincing evidence, that good cause existed for the district court to retain jurisdiction. The State and the district court focused on perceived inadequacies of the tribal court, mistrust of the Blackfeet Tribe's motivation and ability to act in S.B.C., Jr.'s best interest. The district court ignored the well-established mandate that the Blackfeet Tribal Court had presumptive jurisdiction and is inherently more qualified to make determinations regarding their most precious resource. More than lip service must be given to honor the intent of the ICWA and to preserve and foster the importance of tribal culture to the State of Montana.

II. THE FATHER IS AN INDIAN PARENT, UNDER THE ICWA.

In terminating the Father's parental rights, the district court relied upon *Baby Girl* and determined that the ICWA did not govern the Father's parental rights to S.B.C., Jr. In *Baby Girl* a non-Indian mother, with sole custodial rights under

Oklahoma law, voluntarily and legally initiated the adoption of the child to a non-Indian couple, while she was pregnant. There was no State or protective services involvement. During the pregnancy, the mother and father's relationship deteriorated and the father indicated he was willing to relinquish his parental rights. As he understood at the time, he would be relinquishing those rights to the mother. When he learned that he was relinquishing his daughter to a couple who planned to adopt, the father sought to maintain his parental rights. The state supreme court held that the father was entitled to the protections of the ICWA. On appeal, the United States Supreme Court determined that the father was not entitled to the protections of the ICWA, as he had never had legal custody of the child under Oklahoma state law.

Baby Girl can be distinguished from the current case in many key respects. In *Baby Girl* involved the attempted **voluntary** adoption of a child. The proceeding here was completely involuntary and precipitated by the State. In *Baby Girl*, the father indicated his intent to relinquish his parental rights prior to the birth of the child and was uninvolved with the mother during the pregnancy. Here, the Father never indicated a desire to relinquish and was involved with S.B.C., Jr. prior to his removal (gave bottles, bought formula, visited at the Mother's home). Under Oklahoma state law, the father in *Baby Girl* had no legal or custodial rights as an

unwed father. There is no Montana law which restricts or otherwise limits the legal or custodial rights of an unwed father.

The ICWA, specifically 25 U.S.C. § 1912(f), was established to protect native families from involuntary removals and adoptions. As pointed out in the United States Supreme Court opinion, "when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing unwarranted removal of Indian children and the dissolution of Indian families is not implicated." *Baby Girl,* at 2561. The opinion does not specifically extend to involuntary removals. In fact, in his concurrence, which was necessary for the majority's opinion, Justice Breyer indicated a concern that the majority's definition of "parent" could exclude too many and urged that "we should decide no more there than is necessary," suggesting a narrow application of the Court's holding. *Id.*, at 2571.

Baby Girl is distinguishable from the current matter and is not controlling. The district court erred in relying upon *Baby Girl* in holding that the ICWA did not apply to the Father.

III. THE DISTRICT COURT ERRED IN TERMINATING THE FATHER'S PARENTAL RIGHTS IN THE ABSENCE EXPERT TESTIMONY.

The ICWA requires the evidence for terminating parental custody to "include 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." 25 U.S.C.S. §1912(f). This requirement is further codified in Mont. Code Ann. § 41-3-609(5). The burden is on the State to prove this requirement beyond a reasonable doubt. "Accordingly, 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." *In re K.B. & T.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836.

To the State's surprise, their own ICWA expert testified that the Father's parental rights should not be terminated and he should be given additional time to perform specific tasks under his treatment plan. No expert testified that the Father's continued custody would result in serious emotional or physical damage to the child. The State's failure to meet this statutory requirement mandates reversal of the order terminating the Father's parental rights.

CONCLUSION

Ignoring the ICWA and BIA Guidelines, the district court mistakenly denied transfer to the Blackfeet Tribal Court. This matter should be transferred to the tribal court, a court best suited to protect the an Indian child and his unique cultural heritage.

All protections provided under the ICWA applied to Father and each statutory requirement must be met before termination of his parental rights. The

district court erred in determining the Father was not an Indian parent and terminating his parental rights in the absence of expert testimony.

Respectfully submitted this ____ day of June, 2014.

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CERTIFICATE OF SERVICE

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

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Copy sent to S.B.C. Sr. (birth father and Appellant)

DATED: _____ _____

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 5,725, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

_____

ELIZABETH THOMAS

APPENDIX