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 APPELLEE

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

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BLACKFEET TRIBE

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2. Whether the district court abused its discretion when it terminated the birth father's parental rights.

STATEMENT OF THE CASE

This case involves S.B.C., Jr. (S.B.C.), whose birth parents are N.B. (Mother) and S.B.C., Sr. (Father). (Doc. 76, attached as App. 1; Doc. 91, attached as App. 3.)[1] Throughout this case, S.B.C. has been considered an "Indian child" within the meaning of the Indian Child Welfare Act (ICWA) (specifically, 25 U.S.C. § 1903(4)). (Apps. 1, 3.)

In July 2011, S.B.C. was placed into protective care when he was a month old. (Doc. 1.) S.B.C. was adjudicated a youth in need of care as to Mother in January 2012 and as to Father in June 2012; appropriate treatment plans were approved and ordered for each parent. (Docs. 34, 49, 50.) The Blackfeet Tribe (Tribe) received the required notices, and the Tribe's January 2012 motion to intervene was granted by the district court. (Docs. 23, 32.)

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[1] Birth mother filed her opening brief on 05/01/14 and reply brief on 07/07/014 following the State's response brief that was filed 06/02/14. This Court granted leave to the Tribe to file a cross-appeal brief which is due July 17, 2014. (*See* Supreme Court Docket for DA-14-0084.)

Thirty-five days after the petition to terminate the parents' rights was filed and less than a month before the termination hearing, the Tribe filed a motion to transfer the case to the Tribal Court. (Docs. 48, 52.) Following a hearing, the district court denied the motion to transfer, and Father petitioned this Court for a writ of supervisory control. (App. 1; and 05/14/13 Tr.) This Court denied Father's petition on August 20, 2013. (*See* Supreme Court Case No. OP 13-0465; Order attached as App. 2.) The district court held a hearing on the petition to terminate the parents' parental rights on September 10, 2013. (App. 3; 09/10/13 Tr.) On January 15, 2014, the court entered its findings, conclusions and order wherein both parents' rights were terminated. (App. 3.)

Father appeals the district court's order denying transfer and also challenges the district court's order terminating his parental rights on the sole basis that the court erred in concluding § 1912(f) did not apply to Father. (Father's Opening Br. (F. Br.).)

STATEMENT OF THE FACTS

The Department of Public Health and Human Services (DPHHS) filed its initial petition seeking emergency protective services and temporary investigative authority after removing S.B.C. from Mother. (Doc. 1.) At the time, Father's address was unknown and Mother's relative explained that Mother had been out drinking with Father (allegedly an alcoholic) and she was with Father when

DPHHS contacted her and advised her to return home to care for her children. (*Id*. at 3, 7-8; 01/24/12 Tr. at 103.) Mother did not return because she had a warrant out for her arrest and when DPHHS asked Father about taking custody of S.B.C., he declined. (01/24/12 at 105; 09/10/12 Tr. at 386-89, 574-76.)

Father never had physical custody of S.B.C. or a relationship with S.B.C. (09/10/13 Tr. at 387-88, 622.) Father knew Mother was pregnant and believed S.B.C. was his child until others suggested he may not be the father. (*Id*. at 423-24, 570, 573, 605.) Father did not know anything about caring for a baby and testified that the plan was for Mother to care for S.B.C. "until he gets big, and then, he can make that decision, if he's going to--if we're--you know--not together. Then . . . I could take care of him when he's able to tell me what's wrong with him, and all that." (05/14/13 at 217; 09/10/13 at 596:16-22.)

At the time of removal, the Tribe indicated it intended to assume jurisdiction over the case when the child's IV-E eligibility was confirmed. (Doc. 1 at 3.) The Tribe's ICWA Coordinator, Raquel Vaile (Vaile), advised DPHHS that the paternal grandparents planned to become licensed foster care providers but until that time and the IV-E approval, the Tribe requested DPHHS maintain S.B.C.'s placement. (*Id*.)

At the August 17, 2011 show cause hearing, Mother was in custody and Father stipulated to the requested relief as well as the forthcoming ICWA expert

testimony regarding active efforts and that the child should not be placed in either parent's care; the district court granted the requested relief. (Docs. 10, 12, 15, 22.1; 08/17/11 Tr. at 5-6.) On September 15, 2011, an Affidavit in support of DPHHS's intervention and S.B.C.'s placement was filed by the Tribe's ICWA Coordinator, Vaile. (Doc. 15.)

In September 2011, Mother and S.B.C. moved into a shelter for homeless mothers and babies; however, Mother voluntarily left within two weeks and soon thereafter was arrested for felony DUI. (Doc. 17; 10/19/11 Tr. at 11-12; Doc. 18, Aff. at 4; 01/24/12 Tr. at 40-45; 93-102.) Although Mother was incarcerated, Father again declined to take S.B.C. and he also contested paternity. (10/19/11 Tr. at 13, 16; 05/14/13 Tr. at 215-16; 09/10/13 at 424.) Father's counsel explained that since Father was not on the birth certificate and Mother had indicated more than once he was not the father, Father did not "want to change his lifestyle . . . unless he knows--one-hundred-percent sure--that he is the father to [S.B.C.]." (10/19/11 Tr. at 16.)

DPHHS social worker, Sheila Finley (Finley) consulted with Vaile, who explained she was assessing placement of S.B.C. with the paternal grandmother in Browning but also was aware paternity may be in question. (10/19/11 Tr. at 13; Doc. 18, Aff. at 3; 05/14/13 Tr. at 215-16.) Father made it clear to everyone that he did not want to visit S.B.C. or have his family involved with S.B.C. until

paternity was confirmed. (10/19/11 Tr. at 16; Doc. 18, Aff. at 2; 01/24/12 Tr. at 54; 05/14/13 Tr. at 216; 09/10/13 Tr. at 398-99, 423-25, 593.) Since neither parent would, or could, care for S.B.C., and a kinship placement had not been identified, DPHHS located an ICWA-compliant foster home (Native American foster parents and siblings) for S.B.C. in early October 2011; Vaile was notified and approved the foster home placement. (10/19/11 Tr. at 13; Doc. 18, Aff. at 3; 05/14/13 Tr. at 215-16.)

On January 10, 2012, the Tribe, through Vaile, filed a notice of intervention, preserving its right to file a motion to transfer to the Blackfeet Tribal Court. (Docs. 23, 31.) The district court granted the Tribe's motion to intervene. (Docs. 27, 32.)

At the January 24, 2012 hearing for adjudication and temporary legal custody (TLC), Vaile testified that DPHHS was complying with ICWA and had engaged in active efforts with the family and agreed with DPHHS intervention and continued to approve S.B.C.'s placement with the Native American foster family. (01/24/12 Tr. at 23-29.) When asked if the Tribe would accept jurisdiction should either parent petition the district court, Vaile stated she was meeting with the Tribe's attorney about that issue. (01/24/12 Tr. at 33-36.)

Father was not present at the hearing and Mother was in custody having violated the conditions of release on her felony DUI. (Docs. 30, 50; 01/24/12 Tr.

at 64.) At the time of the hearing, Father's counsel was unsure where Father was and both Finley and his counsel described difficulty in getting Father to return their calls. (01/24/12 Tr. at 55-62.) Finley explained that Father was not a suitable placement for S.B.C. given Father's substance abuse history and that until Father's paternity was confirmed, he did not want S.B.C. placed with him. (01/24/12 Tr. at 53-54.)

Father had failed to attend a November 14, 2011 paternity test in Missoula and also failed to attend a second test set up in Cut Bank for his convenience. (Doc. 18, Aff. at 2; 01/24/12 Tr. at 55; 09/10/13 Tr. at 392, 433-34.) As of January 24, 2012, Father had not been in touch with Finley to reschedule testing and the district court entered an order requiring Father to promptly schedule and complete paternity testing. (01/24/12 Tr. at 55-56; Doc. 21.) Father eventually participated in paternity testing with Finley's assistance. (05/14/13 Tr. at 216; 09/10/13 Tr. at 433-34, 577.)

The district court granted the petition for adjudication and set a dispositional hearing for February 29, 2012, where it granted TLC. (Docs. 33, 50; 01/24/12 Tr. at 136-37; 02/29/12 Tr.) As of the March 14, 2012 status conference, paternity testing had confirmed Father as the biological father to S.B.C. (Doc. 35; 09/10/13 Tr. at 277.) Finley immediately contacted Father to report the result and advised him he needed to begin building a relationship with S.B.C. and he should set up

visits right away. (*Id*. at 393.) Notably, Father did not seek to add his name to S.B.C.'s birth certificate until February 2013--after he had been advised DPHHS planned to seek termination of parental rights (TPR) and permanent legal custody (PLC). (*Id*. at 577.) It was also not until this time that Father sought to enroll S.B.C. in the Tribe. (*Id*. at 578.)

As April 4, 2012, DPHHS advised the court it had been unable to locate Father to work on preparing a treatment plan, and the court set another status conference for May 9, 2012. (Doc. 36.) At the May 9 hearing the court learned that Father and his counsel had not had contact with him for "a number of months." (05/09/12 Tr. at 147, 151.) A treatment plan had been developed for Father and submitted to his counsel, but given lack of contact with Father, she had not been able to review it with him. (*Id*. at 151.)

A hearing as to Father for adjudication and TLC was held on June 27, 2012; Father was not present, and his counsel stipulated to the relief sought. (Docs. 43, 50.) Father had to be served by publication with notice of the hearing given his lack of contact with DPHHS and his counsel. (Docs. 38-40, 42.) Prior to the hearing, DPHHS submitted a proposed treatment plan for Father which, following adjudication and TLC, the district court approved. (Docs. 41, 49, and 50 at 3.)

In September 2012, the court was advised that upon completion of WATCh, Mother hoped to reside at the Carol Graham Home (CGH) where she could have

S.B.C. with her. (Doc. 44.) DPHHS was assessing placement options for S.B.C. with a paternal aunt who needed to complete the application process. (*Id*.)

On December 5, 2012, without objection, the permanency plan(s) of reunification with Mother and a concurrent plan of adoption were approved and TLC was extended. (Docs. 46, 50; 12/05/12 Tr.) Father was not present at the hearing and his counsel stated he had been "infrequently" in touch with DPHHS and when asked why it is so difficult for DPHHS and the CASA volunteer to make contact with him, his counsel reiterated Father's position that if Mother was going to be reunited with her children, he had no intention of being a placement option. (12/05/12 Tr. at 157-59.)

Finley told the court she spoke to Father the day before and upon learning he was in Missoula, invited him to attend the visit set up between Mother and S.B.C. and advised him about court the next day. (12/05/12 Tr. at 159-60.) During their discussion, Father told Finley that he was too busy to do his treatment plan. (*Id*. at 160.) Despite the fact paternity had been established as of March 2012, and Finley had encouraged him to engage with his son, Father did not visit S.B.C. until Finley's December invitation. (09/10/13 Tr. at 392-93, 602-603.) Since S.B.C. was placed with Foster Mother in October 2011, Father had no contact with S.B.C.--14 months--and in fact, had cancelled a visit set up in mid-October 2011

because he wanted paternity established before he had a visit. (*Id*. at 355-56, 367, 388, 398.)

Finley secured a spot for Mother and her two children at CGH for December 2012. (09/10/13 Tr. at 427.) However, before S.B.C. could be placed with her there, Mother was asked to leave CGH because she could not follow the rules. (*Id*. 09/10/13 Tr. at 396-97, 429, 471-72.) Both parents were present with counsel at the February 27, 2013 status conference when the court set a hearing on DPHHS's forthcoming petition to terminate parental rights for March 6, 2013, and later reset it for May 2, 2013. (D.C. Docs. 47, 47.1.)[2] On March 6, 2013, DPHHS filed a petition to terminate the parents' parental rights based on failed treatment plans. (Doc. 48.)

On April 10, 2013, the Tribe filed a Motion to Transfer Jurisdiction and Dismiss Case.[3] (D.C. Doc. 52.) In its motion to the district court, the Tribe erroneously stated that the district court was "required" to transfer the matter to the Tribal Court. (*Id*.) Relying on this inaccurate statement, and its belief the matter was uncontested, the district court signed the Tribe's proposed order on April 18, 2013. (D.C. Doc. 53; *see also* 05/14/13 Tr. at 278; and App. 1 at 17.)

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[2] The Tribe received the Minute Entry from the February 27, 2013 hearing, and was, therefore, on notice DPHHS intended to seek termination of the parents' rights. (Doc. 47.)

[3] The Tribe did not initiate its petition to the Tribal Court requesting it accept jurisdiction until April 8, 2013. (*See* 05/14/13 Tr. at 313-14.)

DPHHS did not learn of either the motion to transfer or the district court's order until April 23, 2013. (D.C. Doc. 54 at 3.) The Tribe sent DPHHS a copy of its transfer motion by facsimile on April 23, 2013. (D.C. Doc. 55 at 1-2.) DPHHS did not receive the district court's order granting transfer until April 25, 2013. (D.C. Doc. 55 at 1-2.) On April 24, 2013, DPHHS filed an objection to the motion to transfer and on April 25, filed a motion to reconsider the court's transfer order. (Docs. 54-55.) Counsel for S.B.C. concurred with DPHHS's objection to the transfer motion and premature order and noted it had not received the Tribe's April 10 transfer motion until April 26 (8 days after the court granted the motion). (Doc. 57.)

On April 25, 2013, the district court issued an order rescinding the April 18, 2013 transfer order, and set a hearing on the motion to transfer for May 2. (Doc. 56.) On April 29, 2013, the Tribe, joined by Mother, moved to continue the May 2 transfer hearing, and on May 1, 2013, sought continuation of the termination hearing that was set for May 2 as well. (Docs. 58-59, 62, 64.) Over objection from DPHHS and the child's attorney, the court granted the continuance and reset the transfer hearing to May 14, 2013. (Docs. 60, 65.)

At the transfer hearing, both Finley and S.B.C.'s foster mother (Foster Mother) described S.B.C.'s placement history. From the beginning of DPHHS involvement (July 2011) to October 11, 2011, S.B.C. was placed and moved from

several placements through no fault of DPHHS. (App. 1 at 5-6, 12; 05/14/13 Tr. at 230-31, 237.) After Mother was arrested for felony DUI in early October 2011, S.B.C. was placed with a concurrent, ICWA-qualified Native American foster home, where he still resided. (*Id*. and 05/14/13 Tr. at 173-74.) Vaile, an ICWA Expert and the Tribe's ICWA Coordinator in 2011, made active efforts to place the child in a kinship home prior to October 2011 (including consideration of the paternal family for placement), but could not secure a kinship placement that was ICWA compliant. (App. 1 at 11; 05/14/13 Tr. at 212-13, 218, 221-22.) The Tribe consistently supported the placement until the spring of 2013 (Vaile was replaced by Anna Fisher (Fisher), (the Tribe's ICWA Coordinator from September to November 2012)). (App. 1 at 9-10; 05/14/13 Tr. at 218, 221-22, 282.)

Foster Mother descends[4] from an enrolled member of the Salish and Kootenai Tribe in Lake County, Montana, is familiar with Indian culture, has adopted three Native American children, and recognizes the importance of S.B.C. learning about his own culture, heritage, and customs. (App. 1 at 10-11; 05/14/13 Tr. at 169-70, 173-74, 185, 189, 193-96.) Foster Mother explained that Vaile met with her in June 2012, and since that time, neither the Tribe nor any family members had contacted her to discuss S.B.C. (05/14/13 Tr. at 190, 197, 306-07.)

[4] In its June 2, 2014 Response Brief to Mother's Opening Brief, the State mistakenly stated Foster Mother was an enrolled member of the Salish Kootenai Tribe, rather than a first descendant of an enrolled member.

Foster Mother explained she was under the impression that if the case were transferred, S.B.C. would be removed from their care and she described the negative impact several moves had had on her three adopted kids. (App. 1 at 11-12; 05/14/13 Tr. at 176-82; 190-97.)

DPHHS actively pursued all kinship placements. (App. 1 at 9-11.) Finley explained that S.B.C. was placed with his sibling with various maternal family members and friends since neither parent came to get him. (05/14/13 Tr. at 203-209, 268-69.) Finley explained that the maternal grandmother was not an appropriate placement option given her history with DPHHS. (*Id*. at 213.) The children were placed with Mother in mid-September, but she was arrested in October 2011, and Finley consulted Vaile about placement options after Father failed to assume care of S.B.C. (*Id*. at 209-10, 214-15.) Vaile approved placing S.B.C. with Foster Mother and told Finley she would explore other family placements. (*Id*. at 209-10, 212-14, 222.)

Prior to paternity being confirmed in the spring of 2012, Finley did not have ability to place S.B.C. with the paternal extended family because Father had made it clear he did not want his family involved, in case he was not the biological father. (05/14/13 Tr. at 216, 234-35.) A month after paternity was confirmed, a family group decision-making meeting was held on April 10, 2012; the only parent

that attended was Mother and no one from the Tribe or paternal family participated. (*Id*. at 269-72.)

In August 2012, Finley tried to contact Father's mother but there was no answer, so she then contacted Father's sister (Dorothy). (05/14/13 at 217-18.) Dorothy asked Finley not to contact the paternal grandmother because she was too old to care for an infant and Finley accepted her representations; Dorothy expressed to Finley she wanted to be considered for placement. (App. 1 at 9; 05/14/13 Tr. at 218-21, 228-29.) Finley invited Dorothy to visit the foster family and S.B.C. and offered gas cards and a hotel room to Dorothy; however, Dorothy did not follow through. (*Id*., 09/10/13 Tr. at 512.) Finley sent an e-mail to confirm Dorothy's interest and two weeks later sent another message with instructions on how to pursue licensing with the Tribe, but Finley did not hear back from Dorothy. (*Id*., 09/10/13 Tr. at 522.) Finley explained there was no other paternal family identified for possible placement and there was no reason to move S.B.C. from an ICWA compliant foster home. (05/14/13 Tr.) The Tribe concurred that it had been assessing other placement options, but had found none. (09/10/13 Tr. at 500.)

Finley testified that on April 18, 2013 (same day the district court issued the initial order transferring the case), the Tribe called her two hours before a placement hearing in Tribal Court and she did not have sufficient time to make it to the hearing or participate. (05/14/13 Tr. at 227-28.) Finley was given no

explanation for why she had not been given notice of the hearing. (*Id*. at 252-53, 256-57.)

On April 29, 2013, the Tribe's new ICWA Coordinator sent Finley a letter advising her that S.B.C.'s placement was no longer acceptable. (05/14/13 Tr. at 224-26.)[5] The letter informed Finley that the Tribe--acting on the premature order transferring the case to Tribal Court that had since been rescinded--was placing S.B.C. with his paternal grandmother who became a licensed foster parent on April 29, 2013; the Tribe had made no contact with DPHHS about this new placement. (*Id*., App. 1 at 13.) The paternal grandmother began the licensing process the day Finley told Father she was seeking termination of his parental rights. (05/14/13 Tr. at 237.)

Finley explained that the new ICWA coordinator later indicated that if she had known about the paternal family's apathy toward seeking placement, she would not have pushed so hard to transfer the case. (05/14/13 Tr. at 231.) When asked if the Tribe followed ICWA in general, Fisher explained, "The only thing that [the Tribe is] not doing is the transfer of jurisdiction right away." (*Id*. at 301:20-24.) Fisher agreed that it was unusual for a Tribe to wait until a petition for PLC and TPR was filed to move to transfer and added that the Tribe does not

[5] This letter was written and sent four days after the district court's April 25, 2013 order rescinding its initial order transferring the case and three days before the May 2 termination of parental rights hearing. (Doc. 56.)

believe in termination. (*Id*. at 297-98.) Upon inquiry from Father's counsel, Fisher admitted the Tribe chose not to seek jurisdiction until the petition for termination was filed and acknowledged the Tribe's delay in seeking transfer was driven by financial reasons. (*Id*. at 298-99; App. 1 at 15-16.)

On June 3, 2013, the district court issued an order denying the joint request to transfer jurisdiction. (App. 1.) ("[T]he State has shown good cause to deny the Tribe's untimely motion seeking transfer of jurisdiction to the Blackfeet Tribal Court at this advanced stage of these proceedings.") On July 17, 2013, Father filed a Petition for Supervisory Control to vacate the June 3, 2013 order denying the request to transfer jurisdiction. (*See* Supreme Court Case No. OP 13-0465). On August 20, 2013, this Court denied Father's Petition for Writ of Supervisory Control. (App. 2.)

Once Finley learned the paternal grandmother was interested in being a placement option, she worked to establish contact with her by phone, e-mail, and certified mail. (09/10/13 Tr. at 400-02.) Finley extended gas cards and hotel vouchers for the paternal grandmother to visit S.B.C. twice in June 2013 along with Father. (*Id*. at 400-02, 519.)

Father had a total of 12 visits with S.B.C. during this case: zero between October 2011 and December 2012; 10 between December 2012 to May 2013 (approximately two visits per month); and 2 from May to September 2013 (both in

June and with paternal grandmother). (09/10/13 Tr. at 359-60, 371-72, 399, 488.) Following the transfer hearing, Father failed to make contact with Finley, so she contacted his mother who advised Father had been in Missoula for two weeks. (*Id*. at 400.) Within 24 hours of talking to Father's mother, Father contacted Finley and set up the June visit. (*Id*.) Father requested a July 4 visit which Finley could not accommodate, but she told Father he could have a visit the following week. (*Id*. at 402, 481-82.) Finley did not hear from Father so she called him and learned his mother had passed away the first week of August. (*Id*. at 402-403, 482, 486, 520.)

At the September 10, 2013 TPR and PLC hearing, Foster Mother described what S.B.C. was like when he first came into their care in October 2011, at age two and a half months: displayed symptoms of reactive attachment (though not diagnosed); was extremely fussy; did not like being held like most infants (could not hold him facing themselves and had to hold away from their bodies; did not like skin-to-skin contact; had to be constantly bounced or would scream; screamed whenever he was put down. (09/10/13 Tr. at 353-55.) The foster family worked with S.B.C. for two months with constant physical and face-to-face contact to address those basic issues. (*Id*.) When S.B.C. had visits with his parents, he was extremely fussy and very agitated (kicking and hitting with fists) so the decision was made that Foster Mother should stay in the room during visits as a "safety net." (*Id*. at 357-58.) Once S.B.C. became verbal, when Foster Mother brought

him to visits, the closer they got to the visit location, S.B.C. cried and said, "No, no, mommy, no," and then clung to her. (*Id*.)

Neither parent successfully completed a treatment plan nor demonstrated a vested interest in developing a relationship with S.B.C. (09/10/13 Tr.) By his own admission, Father did not even begin to work on his treatment plan until after Finley told him she planned to file for PLC and TPR. (*Id*. at 583, 587, 623.) Father did not successfully complete this treatment plan as follows: failed to establish a relationship with his son, did not participate in offered parenting classes or complete the classes, did not demonstrate parenting skills he learned during visits, did not attend regular visits with his child, did not complete with chemical dependency treatment, and did not sign necessary releases. (*Id*. at 416-17, 457, 503, 588.)

Father agreed that Finley made significant and active efforts to get him engaged with developing a relationship with his child and work on his treatment plan (multiple calls, texts, e-mails; sought his attorney's assistance; explained the importance of having visits; etc.). (09/10/13 Tr. at 459-60, 524, 619.) Finley provided gas cards and hotel accommodations for Father to visit S.B.C. (*Id*. at 461, 510-11.) Finley explained that Father told her he did not know how to parent and that caring for an infant scared him; thus, the parenting classes and spending time with S.B.C. were critical to Father developing a relationship. (*Id*. at 508.)

Susan Stevens (Stevens) testified in her capacity as an ICWA expert. (09/10/13 Tr. at 526-68.) Based on her observations of a visit between Father and S.B.C., Stevens noted Father lacked "knowledge of parenting and what to do." (*Id*. at 541:3-5.) Stevens also noted that Father's reluctance to engage in services indicated it would be inappropriate to continue to services. (*Id*. at 541.) When asked pointedly whether allowing Father to have custody of S.B.C. would result in serious emotional or physical damage, Stevens replied, "I think there needs to be a lot of work done, before--you know--if and before he would ever--you know--have him or parent him on his own, but--and he may never get to that point." (*Id*. at 545:2-10.) However, Stevens then softened her opinion about Father and suggested that Father should perhaps be given one last very short period of time to comply with his treatment plan. (*Id*. at 546-48, 554.) Stevens agreed that S.B.C. was not removed from the physical care and custody of Father. (*Id*. at 555.)

Given Steven's change of opinion about giving Father more time and in light of Father's oral argument that the district court could not terminate his parental rights since the ICWA expert did not concur, DPHHS asserted that ICWA did not apply to Father given he never had custody of S.B.C. and cited the recent United States Supreme Court decision in *Adoptive Couple v. Baby Girl*, 570 U.S. ___, 133 S. Ct. 2552 (2013). (09/10/13 Tr. at 555-56.) The court asked the parties to brief the issue; only DPHHS and Father submitted briefs. (*Id*. at 627;

Docs. 87 90.) On January 15, 2014, the district court entered its order terminating the rights of both the parents and granting PLC to the Department. (App. 3.)

STANDARDS OF REVIEW

This Court reviews a district court's findings of fact to determine if they are clearly erroneous. *In re J.S.*, 2014 MT 79, ¶ 14, 374 Mont. 329, 321 P.3d 103 (citing *In re J.W.C.*, 2011 MT 312, ¶ 15, 363 Mont. 85, 265 P.3d 1265). Findings of fact are clearly erroneous if they are not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if this Court is left with the definite and firm conviction that a mistake has been committed. *J.S.,* ¶ 14 (citing *In re G.S., Jr.*, 2002 MT 245, ¶ 24, 312 Mont. 108, 59 P.3d 1063). A district court's conclusions of law are reviewed for correctness. *J.S.*, ¶ 14 (citing *In re M.P.M.*, 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988). "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." *J.S.*, ¶ 14 (citing *In re J.W.C.*, ¶ 15). 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).

A district court's order terminating parental rights is reviewed for abuse of discretion. *In re R.M.T.*, 2011 MT 164, ¶ 26, 361 Mont. 159, 256 P.3d 935 (citing *In re J.M.*, 2009 MT 332, ¶ 12, 353 Mont. 64, 218 P.3d 1213). This Court reviews a district court's decision to take judicial notice of facts and law for an abuse of discretion. *In re Marriage of Steab*, 2013 MT 124, ¶ 11, 370 Mont. 125, 300 P.3d 1168 (citation omitted).

A district court abuses its discretion when it "acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *R.M.T.*, ¶ 26. A district court's decision is presumed correct and will not be disturbed on appeal "unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *In re M.N.*, 2011 MT 245, ¶ 14, 362 Mont. 186, 261 P.3d 1047 (citing *In re E.K.*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690).

SUMMARY OF THE ARGUMENT

The district court's findings concerning good cause to deny the motion to transfer were supported by substantial evidence and the court did not act arbitrarily or abuse its discretion in denying the motion. The record established by clear and convincing evidence that the Tribe's motion to transfer was filed at an advanced stage of the proceedings (*i.e.*, significant amount of delay in seeking transfer and the fact substantial steps toward TPR had been made) and it would not be in

S.B.C.'s best interests to transfer the case at such a late juncture. The court correctly applied the applicable law to the facts and properly denied the motion to transfer.

The district court did not abuse its discretion in terminating Father's parental rights. Substantial evidence supported beyond a reasonable doubt that Father never had custody of S.B.C., nor did he have a relationship with his son or even attempt to develop one even after paternity was confirmed. The district court did not misapprehend or misconstrue the effect of the undisputed and correctly applied the holding from *Baby Girl* in concluding that § 1912(f) was not applicable to Father's termination proceeding.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED THE MOTION TO TRANSFER.

A. Applicable Law

In relevant part, § 1911(b) of ICWA provides,

> 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. . . .

The burden of establishing good cause by clear and convincing evidence is on the party opposing the transfer. *In re T.S.*, 245 Mont. 242, 245, 801 P.2d 77, 79 (1990) *writ of certiorari denied King Island Native Community v. Montana Dep't of Family Servs.*, 500 U.S. 917 (1991) (citing *In re M.E.M.*, 195 Mont. 329, 333, 635 P.2d 1313, 1317 (1981)). This Court has stated that the district court must find clear and convincing evidence "that the best interests of the child would be injured" if the matter was transferred. *T.S.*, 245 Mont. at 245, 801 P.2d at 79 (held, district court "properly applied the jurisdictional 'best interests of the child' test and considered the BIA Guidelines").

The Bureau of Indian Affairs (BIA) promulgated guidelines to help state courts interpret and apply ICWA. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584-95 (Nov. 26, 1979) [hereinafter, Guidelines]. This Court has previously considered the Guidelines as persuasive and will apply them when interpreting ICWA. *In re C.H.*, 2000 MT 64, ¶ 12, 299 Mont. 62, 997 P.2d 776.

B. Good Cause Existed to Deny the Tribe's Untimely Motion to Transfer Jurisdiction.

The procedural Guidelines for § 1911(b) state:

> Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer *unless* either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that *good cause to the contrary exists for denying the transfer*.

Guidelines at 67590-91, C.2 (emphasis added). Section 1911(b) "specifies that requests [to transfer] are to be made promptly after receiving notice of the proceeding." Guidelines, at 67590, C.1 Commentary. Notably, the ICWA provides that a motion to transfer may be made orally "[s]o that transfers can occur as *quickly and simply as possible*." *Id*. (emphasis added).

Under the Guidelines, "good cause" to deny a request to transfer the proceedings is present under any of these circumstances:

> (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; or
>
> (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.

Guidelines at 67591, C.3.

The BIA recognized that:

> [t]imeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

See Guidelines at 67591, C.3 Commentary. The Guidelines further recognize the impact of a delinquent transfer as evidenced by the distinction between the limited disruptions of granting intervener-status versus the more significant disruption from a motion to transfer. *Id*.

The following Guideline further address timeliness of a transfer motion:

> This section specifies that requests are to be made promptly after receiving notice of the proceeding. . . . While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. . . . Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Guidelines at 67590, C.1 Commentary (emphasis added).[6] See also, *People in Interest of J.J. and S.J.*, 454 N.W.2d 317 (S.D. 1990) (tribal motion to intervene granted; but untimely § 1911(b) motion to transfer was denied because, under the BIA guidelines, intervention is far different than transfer and would subject children to potentially dangerous situations and not be in their best interest).

There is no question that the Tribe (and parents to the extent they joined the Tribe's motion) waited until an "advanced stage" of the proceeding to seek

[6] See also this Court's Order denying Father's application for writ of supervisory control. (App. 2 at 2 (citing *J.W.C.*, ¶ 22).)

transfer. The Tribe's motion to transfer was filed: 610 days after receiving notice (08/09/11 to 04/10/13); 455 days after the Tribe intervened (01/10/12 to 04/10/13); 42 days after the district court set a hearing date for a forthcoming petition to terminate (02/27/13 to 04/10/13); 35 days after DPHHS filed its petition for termination (03/06/13 to 04/10/13); and 22 days before the termination hearing (04/10/13 to 05/02/13). With such a delay in seeking transfer as well as the substantial steps that had been made towards TPR and PLC, this matter was at an advanced stage.

The Tribe had advised DPHHS at the inception of the case that it was interested in seeking transfer of jurisdiction once the child was declared IV-E eligible. (Doc. 1 at 3.) When asked in January 2012 if the Tribe would accept jurisdiction should either parent petition the district court, Vaile stated she was meeting with the Tribe's attorney about that issue. (01/24/12 Tr. at 33-36.) Nonetheless, the Tribe did not seek such a transfer until termination proceedings were initiated in 2013. Nor did it seek transfer when it moved to intervene in January 2012, when the problems identified with the parents' inability to parent were readily apparent to all parties.

The Tribe was consistently apprised of the status of the case, which included the parents' lack of progress or success with their treatment plans. The record reflects that the Tribe's reason for seeking transfer was to effect a change in the

child's placement; however, it chose to wait until DPHHS filed for termination of parental rights to seek transfer. This is notable given the Tribe's own ICWA Coordinator and Expert consistently approved S.B.C.'s placement and the Tribe's motion to transfer came six months after Vaile was replaced. It was proper for DPHHS to rely on Vaile's opinion and consistent approval of S.B.C.'s placement throughout these proceedings.

The legislative history of ICWA "states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Guidelines, at 67584 (citing S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977)); and *T.S.*, 245 Mont. at 246, 801 P.2d at 80. "In exercising this flexibility, this Court has determined that the 'best interests of the child' test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b)." *T.S.*, 245 Mont. at 247, 801 P.2d at 80 (citing *M.E.M.,* 195 Mont. at 336, 635 P.2d at 1317). The court's findings with respect to the dates the Tribe received notice and when the motions to transfer were filed are undisputed. The district court did not abuse its discretion in applying the evidence

to § 1911(b) and the Guidelines when it concluded the transfer request(s) were at an advanced stage of the proceeding.[7]

In *T.S.*, when affirming the trial court's order denying a motion to transfer the matter to a tribal court, this Court explained:

> The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. *The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test*. She resides in a home where the mother is Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

T.S., 245 Mont. at 247-48, 801 P.2d at 80 (emphasis added). *See also In re M.E.M.*, 195 Mont. at 336, 635 P.2d at 1317 ("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.").

The facts of this case are comparable to those presented in *T.S.* The only stable, loving home S.B.C. had known was with his foster family and he had no relationship with any paternal family member or the Tribe. S.B.C.'s Native American foster mother is not only well informed on Indian Culture, but also dedicated to ensuring S.B.C. is taught his Blackfeet Culture.

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[7] In fact, this Court has already recognized that "the proceedings in the District Court [were] well along" and this case was "on the eve of a termination hearing."

This Court has recognized that a transfer at a late stage in the proceedings would create a "manifest disruptive effect" by exposing the child to "an entirely new court system for more litigation and possible retrial" and would "hardly be in the best interest of the parents or child." See *In re A.P.*, 1998 MT 176, ¶ 27, 289 Mont. 521, 962 P.2d 1186. The best interest of the child is properly considered when considering an untimely transfer motion that clearly would disrupt a child's life and permanency. *See* Guidelines at 67591 (Guidelines grant state courts discretion to deny motion for transfer when they are untimely *despite* the underlying purpose of the ICWA that provides a tribe should determine the best interests of its own members). "Long periods of uncertainty concerning the future are generally regarded as *harmful to the well-being of children*. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings." Guidelines at 67591-92. (Emphasis added.)

Thus, like the court in *T.S.*, the district court properly considered the "jurisdictional" best interest of S.B.C. when evaluating "good cause" to deny the motion to transfer and by relying on the Guidelines. *See T.S.*, 245 Mont. at 247, 801 P.2d at 80. The district court properly noted that transferring the case at such an advanced stage ("just before termination and adoptive proceedings were eminent [sic]") would not be in the child's best interests (would delay proceedings

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(App. 2 at 2.)

and require the matter to be retried) (*see* Guidelines at 67590, C.1 Commentary). (App. 1 at 25.)

Like Mother, Father's argument that the district court shifted the burden is unpersuasive. (Fr. Br. at 12.) The district court's statements, taken in context and considered in the totality of the circumstances, emulate the court's description of the Tribe's delinquency in seeking transfer of jurisdiction. The district court properly considered the timeliness of the Tribe's motion to seek transfer as clearly contemplated by § 1911(b) and the Guidelines, *supra*. The district court's inquiry into the Tribe's interest and action in the proceeding was focused on determining if there was a good reason for the Tribe's delay in seeking transfer until after a petition to terminate was filed. The court's comments relate to its perception of the reasons for delay in seeking transfer and are perfectly acceptable to consider under the Guidelines. *See* Guidelines at 67591, C.3 Commentary (ICWA "was not intended to authorize [delay] tactics and the 'good cause' provision is ample authority for the court to prevent them.") When the entire record is read and all the comments are considered in context, the State asserts the district court properly weighed the timeliness of the motion, which included the purposeful delay in filing the motion, and the child's best interests.

The district court's findings with regard to the Tribe's failure to seek transfer based on financial reasons merely restated what the Tribe's ICWA Coordinator

testified to at the hearing *in response to Father's counsel's inquiry*. The court's comments were not a criticism of the Tribal *system*; rather, it described the Tribe's failure to timely assert an interest in transferring the case. Notably, the district court was cognizant of the Guidelines' mandate that a tribe's socio-economic status cannot be considered; the court specifically cited to the provision and explained it was the tardiness of the Tribe's request to transfer that was at the core of the court's ruling, not its socio-economic position. (*See* App. 1 at 27.)

Contrary to Father's allegations, the district court's order did not rest on comments concerning the Tribe's motivation to wait being tied to financial resources. The district court's Conclusion No. 13 describes what is in the child's best interests, explaining that taking a child from the only caregiver he has known would disrupt his well-being. (App. 1.) The court's comments set forth potential explanation for why the Tribe waited; the court's findings as to the Tribe's motives cannot change the undisputed findings that the motion to transfer was at an advanced stage of the proceedings and would disrupt S.B.C. and adversely impact his best interests.

Father's argument that district court erroneously "relied" on *A.P.* misinterprets the district court order. (Fr. Br. at 19.) The district court's citations to *A.P.* were only references to the applicable code (§ 1911(b)) and Guidelines. (App. 1 at 20, 23.) The district court did not draw a parallel between the cases or

imply it relied on the rationale of *A.P.* and did not improperly "rely" on *A.P.'s* holding.

Just as in *T.S.*, Father's reliance on *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) is misplaced. As this Court noted in *T.S.*, *Holyfield* was a § 1911(a) case that dealt with the definition of "domiciled" and since T.S., like S.B.C., had not been domiciled on the tribal reservation, *Holyfield* does not control. *T.S.*, 245 Mont. at 250, 801 P.2d at 82 ("There is a valid distinction between a § 1911(b) case such as we have here and a § 1911(a) case such as *Holyfield*.")

Based on the record, specifically the significant period of time the Tribe refrained from requesting transfer to the Tribal Court, the district court's determination of good cause is supported by clear and convincing evidence. The Tribe's overt, non-action precisely fits the Guidelines' definition of "good cause" as well as the purpose for § 1911(b) (prevent a party from waiting to see how a case is going and seek a transfer if the outcome does not look to be in their favor in State Court).

The district court did not misapprehend the substantial evidence establishing good cause to deny the motion to transfer; Father has failed to establish that the district court's findings were clearly erroneous. *See J.S.*, ¶ 14. Nor does the record create a "definite and firm conviction that a mistake has been committed." *J.S.*,

¶ 14. The district court's application of the law to the facts presented in this matter was correct and should be affirmed. *J.S.*, ¶ 14.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY TERMINATING FATHER'S PARENTAL RIGHTS.[8]

A. Applicable Law for Terminating Parental Rights

1. Termination of Parental Rights

Relevant to this matter and pursuant to Mont. Code Ann. § 41-3-609(1)(f), a court may terminate parental rights if the following exist:

> the child is an adjudicated youth in need of care and both of the following exist:
>
> (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and
>
> (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

When the ICWA provisions apply, the Court will uphold a district court's order terminating a parent's rights in an ICWA case "if a reasonable fact finder could conclude beyond a reasonable doubt" that active efforts were made and that

[8] Regarding Father's challenge to the order terminating his rights, Father limits his appeal to one issue: whether the court erred in not requiring findings under § 1912(f) (continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child). (Fr. Br. at 20-23.) Father does not challenge any of the required conclusions under Mont. Code Ann. § 41-3-609(1)(f). Nor does he raise any argument concerning active efforts pursuant to § 1912(d). Accordingly, the State deems those issues waived and will not address them.

continued custody by the parent is likely to result in serious emotional or physical damage to the child. *G.S., Jr.*, ¶ 33. *See also In re T.W.F.*, 2009 MT 207, ¶ 18, 351 Mont. 233, 210 P.3d 174.

"The best interests of the children are of paramount concern in a termination of parental rights termination proceeding and take precedence over the parental rights." *E.K.*, ¶ 33 (citation omitted).

2. Applicability of ICWA For a Non-Custodial Parent

Neither §§ 1912(d) nor (f) apply to a parent who never had physical custody of the child and has no relationship with the child. *J.S.*, ¶¶ 28-38 (citing *Baby Girl*, 133 S. Ct. 2552). In *J.S.*, this Court applied *Baby Girl* to a guardianship proceeding initiated by DPHHS. *J.S., supra* (holding that § 1912(d) did not apply to father given the non-existent relationship between father and child and the limited contact between the two during the proceedings and that § 1912(e) did not apply to father given that father never had custody of the child). This Court noted that *Baby Girl* applied the same to a guardianship proceeding as an involuntary termination proceeding. *J.S.*, ¶ 31 (finding no material difference between application of §§ 1912(e) and (f)).

Specific to this appeal and the applicability of § 1912(f), this Court relied on *Baby Girl* which explained that ICWA "conditions the involuntary termination of parental rights on a showing regarding the merits of '*continued* custody of the child

by the parent.'" *J.S.*, ¶ 36 (citing *Baby Girl*, 133 S. Ct. at 2560 (emphasis in original). The Supreme Court explained that since the "adjective 'continued' plainly refers to a pre-existing state . . . [t]he phrase 'continued custody' [] refers to custody that a parent already has (or at least had at some point in the past)." *J.S.*, ¶ 36 (citing *Baby Girl*, 133 S. Ct. at 2560). Therefore, the Supreme Court held that "§ 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child." *J.S.,* ¶ 36 (citing *Baby Girl*, 133 S. Ct. at 2560) (emphasis in original). *See also Baby Girl*, 133 S. Ct. at 2561 (citing Guidelines at 67593 ("Indeed, the Guidelines recognized that § 1912(f) applies only when there is pre-existing custody to evaluate.")).

B. Since the Prerequisite Custodial Relationship Between Father and S.B.C Was Not Present, §1912(f) Does Not Apply to Father.

The district court's findings that evidence beyond a reasonable doubt established that Father never had physical or legal custody of S.B.C., nor a relationship with S.B.C., are supported by substantial, credible evidence. (App. 3; 09/10/13 Tr. at 387-88, 606, 622.) Father's only contact with S.B.C. was more akin to a babysitter than custodian (feeding, diaper changing). Father did not attend any of S.B.C.'s checkups and repeatedly confirmed he "never had [S.B.C.] in my care." (*Id*. at 607-608, 601, 622:8-9, 626.) When asked if he and Mother ever argued in front of S.B.C. or his sibling, Father replied, "No, I was never

around them enough." (*Id*. at 611:7-9, 615.) The longest period of time S.B.C. spent with Father was when Mother dropped him off at the paternal grandmother's home in Browning where Father was with him for six hours. (*Id*. 570, 573, 609.)

Father's lack of intent to ever assume custody of S.B.C. was clear throughout these proceedings. Father's name was not on S.B.C.'s birth certificate and he insisted paternity be confirmed; he went so far as to direct his family not to get involved since paternity was at issue and because "[S.B.C.] was going back to his mother [which is] what I wanted." (*Id*. at 424, 577, 593:15-16, 619.)

When DPHHS asked Father to care for S.B.C., he declined. (09/10/13 Tr. at 387, 575-76.) Father cancelled a visit with S.B.C. in October 2011 because he had challenged paternity. At the termination hearing, Father claimed he did not take S.B.C. into his care because he had nowhere to live and in fact moved back to Browning; what Father failed to acknowledge was that he moved in with his mother who could have assisted him with S.B.C. (*Id*. at 576, 579.)

Father testified that the plan was for Mother to care for S.B.C. "until he gets big, and then, he can make that decision, if he's going to--if we're--you know--not together. Then . . . I could take care of him when he's able to tell me what's wrong with him, and all that." (09/10/13 Tr. at 596:16-22.) "The whole plan was for [Mother] to raise [S.B.C.]." (*Id*. at 575:11-13.) Father added that he figured Mother would have custody of S.B.C. with Father "be[ing] able to see him,

whenever, and get around to--you know--being--being a dad for him, basically." (*Id*. at 601:14-17.)

The facts presented here are similar to those in *J.S.* where paternity testing was necessary, the putative father failed to make an effort to see his child over a significant time period, and the putative father was unwilling to work his treatment plan. *J.S.*, ¶¶ 5-10. The father appealed the court's grant of guardianship claiming, among other things, that DPHHS failed to provide active efforts or ICWA expert testimony that continued custody would result in emotional or physical harm to the child. *J.S., supra*.

In affirming the district court, this Court followed *Baby Girl* and explained that the father, like the father in *Baby Girl*, "never obtained legal or physical custody of [the child] and did not initiate a relationship with [the child] until many years after his birth." *J.S.*, ¶¶ 30, 37 (Father "never had custody of J.S." and "was not involved in the child's life for the significant part of 15 years and only became interested in the action 10 years after significant State involvement refocused his attention to the matter."). While the number of years in *J.S.* is greater than here, the crux of the holding with regard to application of § 1912(f) was that the father never had custody of the child, just as in *Baby Girl*.

Father's argument that *Baby Girl* does not apply because it involved an "attempted voluntary" adoption is mistaken. *Baby Girl* was a contested adoption

and thus involved an involuntary termination of parental rights proceeding; the father invoked the ICWA in challenging the adoption. Accordingly, the courts in *Baby Girl* properly applied §§ 1912(d) and (f) which are required for involuntary severing an Indian Parent's rights. *Baby Girl*, 133 S. Ct. at 2560. The ICWA applies equally to either "adoptive placements" and "termination of parental rights" since both are considered a "child custody proceeding." §§ 1903(1)(iv) and (ii).

The fact that Baby Girl's father at one point indicated a desire to relinquish his rights is immaterial since he later withdrew that alleged relinquishment and thus the proceedings became involuntary. *See also* § 1913 which specifically applies to *voluntary* foster placements or terminations of parental rights. Moreover, this Court applied the *Baby Girl* holding in *J.S.*, an involuntary guardianship proceeding initiated by DPHHS which, as this Court explained, applied equally to either guardianship or termination proceedings. *J.S.*, ¶ 31. Therefore, the procedural posture of *J.S.* and *Baby Girl* are not materially distinguishable.

The holdings from *Baby Girl* and *J.S.* are dispositive. Just like the fathers in *Baby Girl* and *J.S.*, it is undisputed that Father never had custody of S.B.C. Thus, since § 1912(f) applies to evidence regarding the "continued custody" of a child, it is inapplicable here. *Baby Girl*, 133 S. Ct. at 2560 (Section 1912(f) refers to

"continued custody" which means "custody that a parent already has (or at least had at some point in the past.")

Finally, even if ICWA expert testimony was required, there was sufficient evidence provided for this Court to affirm. "Though 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." *In re D.S.B.*, 2013 MT 112, ¶ 18, 370 Mont. 37, 300 P.3d 702 (citing *In re A.N.*, 2005 MT 19, ¶ 32, 325 Mont. 379, 106 P.3d 556 ("a district court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony . . . .") (emphasis added). Stevens did not testify that placing S.B.C. with Father would not likely create serious emotional or physical harm. Rather, while explaining how she does not generally believe in terminating parental rights, Stevens merely advocated for Father to have one last short period of time to prove himself.

CONCLUSION

This Court should affirm the district court's order denying the motion to transfer and the district court's findings of fact, conclusions of law, and order terminating Father's parental rights.

Respectfully submitted this 21st day of July, 2014.

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CERTIFICATE OF SERVICE

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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 9,487 words, excluding certificate of service and certificate of compliance.

_____

KATIE F. SCHULZ

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.

APPENDIX