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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STATEMENT OF THE ISSUES

1. Whether the district court erred when it held that good cause existed not to transfer jurisdiction to the Tribe.

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

STATEMENT OF THE CASE AND FACTS AND STANDARDS OF REVIEW

The State relies on its Statements of the Case and Facts and Standards of Review as set forth in its previously filed briefs in this matter.

SUMMARY OF THE ARGUMENT

The district court properly quashed its April 18, 2013 order granting transfer of the case because the Tribe's motion misstated the law as "requiring" transfer and failed to note the parties' position(s). It is undisputed that the parties were not properly served or given notice of the motion and, thus, had no opportunity to object. The court also failed to conduct a hearing as required under ICWA.

The district court's findings concerning good cause were supported by clear and convincing evidence that the Tribe's motion to transfer was not filed promptly, the proceedings were at an advanced stage, and it would not be in S.B.C.'s best interests to transfer the case at such a late juncture.

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 after paternity was confirmed. The district court did not misapprehend or misconstrue the effect of the undisputed record and correctly applied *Adoptive Couple v. Baby Girl*, 50 U.S. ___, 133 S. Ct. 2552 (2013), in concluding that U.S.C. § 1912(f) (§ 1912(f)) was not applicable to Father's termination proceeding. Even if this Court determines Father had a sufficient relationship with S.B.C. to distinguish *Baby Girl* and *In re J.S.*, 2014 MT 79, 374 Mont. 329, 321 P.3d 103, there was sufficient evidence presented in addition to the ICWA Expert to support termination of Father's rights.

ARGUMENT

I. THE DISTRICT COURT PROPERLY QUASHED ITS APRIL 18, 2013 ORDER GRANTING TRANSFER.

The Tribe asserts for the first time on appeal that the district court had no basis to quash its order transferring the case to the Tribe. (Tribe Br. at 16.) *See In re T.W.F.*, 2009 MT 207, ¶ 28, 351 Mont. 233, 210 P.3d 174 (citation omitted) (Court reluctant to "fault a district court for failing to address alleged deficiencies that were not brought to its attention at a time when any deficiencies could have been cured"). The Tribe also failed to provide legal authority or support for this argument on appeal. *See* Mont. R. App. P. 12(f) (requiring appellant's opening

brief to include contentions being made with respect to the issues presented and the reasons therefor, together with citations to the authorities, statutes and pages of the record relied on); and *In re G.S.*, 2002 MT 245, ¶ 48, 312 Mont. 108, 59 P.3d 1063. Given the Tribe's waiver and failure to assert proper authority, this Court does not have to consider this issue on appeal.

The Tribe's claim that the district court erred in quashing the initial transfer order may also be denied on the merits, as the April 18, 2013 order was premised on the Tribe's misstatement of the law (i.e., district court was "required" to transfer the case). (Doc. 56, attached as App. 1; Doc. 65, attached as App. 2.) The Tribe's motion to transfer was inaccurate and incomplete: the Tribe specifically used the term "required," despite that term not being found anywhere in U.S.C. § 1911(b) (§ 1911(b)) and omitted the applicable exceptions to transferring jurisdiction to a tribe (e.g., objection by either parent; showing of good cause; or declination of jurisdiction by the tribe). (Doc. 52)

The plain language of § 1911(b) does not include an absolute mandate to transfer a case to a tribal court. Rather, as clear from the language and context of § 1911(b), there are three distinct exceptions to transferring a case to tribal court. *See* § 1911(b). A judge's role in statutory interpretation is to "ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101.

The district court was misled by the Tribe's inaccurate statement in its motion and the erroneous belief that there was no objection. (*See* App. 1 at 17; 05/14/13 Tr. at 278.) The court correctly recognized it had prematurely granted the motion to transfer and rectified that error by quashing the order and setting a hearing to consider the motion on the merits. (Apps. 1, 2.)

In addition, there were procedural abnormalities that also supported quashing of the order. *See* Mont. R. Civ. P. 6(c), 12(a)(4); and Fourth Judicial District Court Rules, Rule 3(G) (Tribe failed to state parties' position on the motion).[1] By prematurely issuing the order, neither the child's attorney nor DPHHS could present their positions. *See In re J.W.C.,* 2011 MT 312, ¶ 30, 363 Mont. 85, 265 P.3d 1265 (trial court must conduct hearing before ruling on transfer petition); and Bureau of Indian Affairs (BIA) Guidelines for State Courts; Indian Child Custody Proceedings Guidelines, 44 Fed. Reg. 67,591 (Nov. 26, 1979) [hereinafter, Guidelines] ("all parties need an opportunity to present their views to the court" on the issue of transferring a case).

[1] The Tribe misstates the record when it alleged DPHHS was the only party that objected to the motion to transfer. (Tribe's Br. at 15.) The record shows the child's attorney filed a notice of position objecting to transferring the case pursuant to the district court order rescinding its transfer order. (*See* Docs. 56, 57.)

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

The State relies on the applicable law as set forth in its previous briefs.

Given the advanced stage of the case (i.e., substantial steps that had been made towards termination of parental rights (TPR)), as well as the delay in seeking transfer following notice, substantial evidence supports the district court's order denying transfer. (Doc. 76, attached as App. 3.) As the record demonstrates, the Tribe waited until an "advanced stage" of the proceeding to seek transfer, and failed to promptly seek a transfer following either receipt of notice (waited 610 days) or the order granting intervention (waited 455 days).

At the beginning of the case, the Tribe stated 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, the Tribe's ICWA Coordinator testified she was meeting with the Tribe's attorney about that issue. (01/24/12 Tr. at 33-36.) Nonetheless, the Tribe did not seek transfer until a month after termination proceedings were initiated in 2013. The Tribe also failed to seek transfer in the fall of 2012, when the new ICWA Coordinator, Anna Fisher (Fisher), had allegedly reviewed open cases with more scrutiny, including whether a case should be transferred. (05/14/13 Tr. at 282-84, 289-90, 301-02.) The district court did not

misapprehend the undisputed facts that the proceedings were at an advanced stage when the motion to transfer was presented.

Even when considering the lapse of time from which it was known DPHHS planned to seek TPR until its motion, the Tribe did not act promptly. By mid-February 2013, DPHHS had advised Father that a petition to terminate his rights was forthcoming. (09/10/13 Tr. at 583, 587, 623.) On February 27, 2013, the court set a hearing on the forthcoming petition for TPR, and DPHHS filed its petition a week later. (Docs. 47, 48.) Nonetheless, the Tribe chose to wait another month to request the Tribal Court accept jurisdiction or file its motion to transfer the case in district court. (*See* 05/14/13 Tr. at 313-14.)

Under these circumstances, and the fact all the parties were aware the parents were failing their treatment plans as early as the hearing to extend TLC in December 2012, the Tribe's request to transfer cannot be considered promptly filed and the proceedings were at an advanced stage when the motion to transfer was received by the court. The steps towards termination were well advanced; the hearing on the TPR petition was set for May 2, 2013, as of the end of February.

The case was at an even more advanced stage by the time DPHHS and the child's attorney became aware of the motion to transfer and subsequent order. As stated, it is undisputed that neither the child's attorney nor DPHHS were served with the motion to transfer; it was not until they were orally advised by the Tribe

on April 23, 2013, that the April 18, 2013, transfer order had been issued were they even aware of the Tribe's request.

The court's findings with respect to the dates the Tribe received notice and when the motion to transfer was filed are undisputed. Substantial evidence supports the district court's conclusions that this matter was at an advanced stage and the Tribe failed to promptly request the case be transferred.

The Tribe misstates the record when it claims that counsel for DPHHS agreed that "the district court could not take into consideration the entire amount of time that S.B.C., Jr. was in the custody of the State, as a basis to deny transfer." (Tribe's Br. at 28-29.) After describing other state courts' interpretations of the time period parameters when considering whether a motion to transfer was promptly filed (i.e., from the time a petition for TPR was filed), DPHHS counsel began to describe contrary positions from another jurisdiction. (05/14/03 Tr. at 332.) However, the district court interrupted counsel, expressing disagreement with not considering the total period of time from the case's inception, and DPHHS counsel agreed with the court. (*Id.*) Thus, DPHHS did not concede that the only time period to consider was from the date a TPR petition was filed. (*Id*.)

Part and parcel to the disruptive effect noted by this Court and the Guidelines, is consideration of the child's [jurisdictional] best interests. *See*, *e.g*., *In re T.S.* , 245 Mont. 242, 801 P.2d 77 (1990); *In re M.E.M.*, 195 Mont. 329,

635 P.2d 1313 (1981); *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 1186. The best interests 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 a 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).

Similar to this Court's analysis in *T.S.*, 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 and require the matter to be retried) (*see* Guidelines at 67590, C.1 Commentary). (App. 1 at 25.) *See T.S.*, 245 Mont. at 247, 801 P.2d at 80. The Tribe offers no argument to distinguish this case from *A.P., T.S.,* or *M.E.M.*, where this Court recognized that transfer at a late stage in the proceedings could injure a child.

The district court's comments concerning the Tribe's motivation to wait were not driven by its belief the Tribe was not "more fiscally responsible."

(Tribe's Br. at 29.) Rather, taken in total context of the hearing, the court's comments regarding any fiscal factors were simply the court's attempt to understand why the Tribe waited; the court did not make its ruling based on perceived inadequacies of the Tribe's financial position. The court's findings as to the Tribe's motives cannot change the undisputed findings that the motion to transfer was not filed promptly, the case was at an advanced stage when the motion was received, and granting the motion would have a disruptive effect.

The court's observations noted the apparent inconsistency with the Tribe's conscious choice not to seek transfer and the opinions put forth by Fisher and counsel for the Tribe (i.e., that the Tribe's children are sacred and belong not just to parents, but to all members of the Tribe). The court explained that "I don't challenge your strategy [to avoid expending money], but what I challenge is for you to come in, then, and act like you have an interest, when we have a loving relationship established" between Foster Parents and S.B.C. (05/14/13 Tr. at 317:18-23.) Considered in context, the court's inquiry and comments do not demonstrate a decision based on the Tribe's socio-economic position but rather, on the purposeful decision of the Tribe to seek change at the final stages of the case.[2]

[2] The Tribe's argument concerning financial issues related to J.B. (S.B.C.'s half-sister) were not properly before the district court or this Court because that information was offered only in the form of an affidavit attached to a motion to reconsider. (Tribe's Br. at 7; citing Doc. 79.)

To the extent the Tribe argues on appeal that S.B.C.'s placement was not in accord with ICWA, that sufficient efforts were not made, or that the district court erred in approving the placement, those issues are not properly before this Court. (*See* Tribe's Br. at 25.) None of the parties raised those issues with the district court; the record supports that the Tribe (and parents) chose to use the transfer proceeding as the means to alter S.B.C.'s placement, and even at that juncture, no party filed a motion to change placement in the event the case was not transferred. Accordingly, this issue was waived and not properly before this Court.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY TERMINATING FATHER'S PARENTAL RIGHTS.[3]

The State relies on its previous briefs for applicable law.

The district court correctly applied *Baby Girl* when it concluded Father lacked sufficient custodial interest to require findings under § 1912. (Doc. 91 attached as App. 4) Father's lack of intent to *ever* assume custody of S.B.C. was clear throughout these proceedings. When DPHHS asked Father to care for S.B.C., he declined. (09/10/13 Tr. at 387, 575-76.) Father repeatedly confirmed he "never had [S.B.C.] in my care." (*Id*. at 601, 607-08, 622:8-9, 626.) When

[3] The Tribe limited its appeal of termination of Father's parental rights to the sole issue of whether the court erred in not requiring findings under § 1912(f). (Tribe's Br. at 20-23.)

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 six hours. (*Id*. 570, 573, 609.)

Father's name was not on S.B.C.'s birth certificate; Father insisted paternity be confirmed and went so far as to direct his family not to get involved since paternity was at issue and because he believed Mother should have custody. (09/10/13 Tr. at 424, 577, 593:15-16, 619.)

Termination of parental rights is a non-jury matter, and it is the responsibility of the district court to weigh the evidence and assess the credibility of the witnesses. *T.W.F.*, ¶ 31 (citation omitted). The district court did not misapprehend the substantial evidence; Father never had physical or legal custody of S.B.C., nor did he take affirmative steps to establish a relationship. (09/10/13 Tr. at 387-88, 575:11-13, 596:16-22, 601:14-17, 606, 622.)

Contrary to the Tribe's argument, *Baby Girl* is not materially different than this situation. The procedural posture of *J.S.* and *Baby Girl* are not materially distinguishable. *See J.S.*, and *Baby Girl, supra*. The fact *Baby Girl* began as a voluntary proceeding is not significant; once the matter became a contested adoption concerning an involuntary termination proceeding, the father invoked the ICWA in challenging the adoption. Accordingly, application of §§ 1912(d) and (f) were considered. *Baby Girl*, 133 S. Ct. at 2560.

The Tribe, citing to Mont. Code Ann. § 40-6-103, argues that unlike the unwed father in *Baby Girl*, Father is a parent under Montana Law. (Tribe's Br. at 32.) However, the Supreme Court did not reach the issue of whether the father was a "parent" under ICWA since application of §§ 1912(d) or (f) was dispositive. *Baby Girl*, 133 S. Ct. at 2560, n.4. Moreover, the father in *Baby Girl* did not contest paternity as Father did.

Prior to the Department's involvement and, in fact, up until Father finally participated in paternity testing, Father had no grounds to seek legal custody since no presumption of a parent-child relationship applied. *See* Montana's Uniform Parenting Act, Title 40, Part 6, MCA. *See also In re Parenting of K.P.*, 2005 MT 297, ¶ 20, 329 Mont. 337, 124 P.3d 1091 ("mere biology does not automatically warrant the legal rights and responsibilities accompanying a determination of paternity"). Even after Father's paternity was established, he failed to even see S.B.C. for 14 months, let alone develop a relationship.

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. This Court 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. This

Court cited, with approval, the following: "The District Court accurately described the relationship between S.F. and J.S. as 'non-existen[t],' and recognized that the Department 'cannot force the creation of a personal relationship between a Youth and his estranged father where none has previously existed." *J.S.*, ¶ 30. Accordingly, just as is the case here, § 1912, did not apply to J.S.'s father because there was "no custody to continue." *J.S.*, ¶ 37.

Finally, even if ICWA expert testimony was required under § 1912(f), sufficient evidence was presented for this Court to affirm. This Court "may still affirm a district court where it reaches the right result for the wrong reason." *In re J.A.L.*, 2014 MT 196, ¶ 16, ___ Mont. ___, 329 P.3d 1273 (citation omitted).

The plain language and wording of § 1912(f) indicates that the expert's testimony is only a part of the evidence supporting the determination. *See A.N.*, 2005 MT 19, ¶¶ 27-28, 325 Mont. 379, 106 P.3d 556 (§ 1912 does not require specific form of evidence or limit the evidence to only the qualified expert witness testimony); *In re D.S.B.*, 2013 MT 112, ¶ 18, 370 Mont. 37, 300 P.3d 702 (a court's findings as to § 1912(f) do not have to be based on expert testimony alone); and *T.W.F.*, ¶¶ 25-26 (trial court not required to "conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found, beyond a reasonable doubt, that the continued custody of

the child by the parent . . . is likely to result in serious emotional or physical damage to the child").

Here, when asked if continued custody of S.B.C. with his biological parents would likely result in serious emotional or physical damage to S.B.C., the ICWA expert Susan Stevens (Stevens), replied, "I feel that due to the lack of relationships between the biological parents and the child, that--that that would lead to, I guess, lack of parenting ability, maybe, to deal with issues that could come up with [S.B.C.]." (09/10/13 Tr. at 539:9-15.) Stevens noted Father's lack of parenting skills and stated that given Father's reluctance to engage, it was her "fear" that S.B.C. will be grown by the time Father would be ready to parent. (*Id*. at 541, 545.)

Stevens testified that S.B.C. should not be placed with Father unless he was willing and able to work hard; she did not testify that placing S.B.C. with Father would not likely create serious emotional or physical harm. 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. Stevens did not retract her testimony concerning the risk to S.B.C. if he was placed in the care of Father, who had no appreciable parenting skills or relationship with S.B.C. Moreover, neither Father nor the Tribe challenged the district court's finding that the conduct or condition rendering Father unfit to parent was unlikely

to change. Considering the facts and circumstances presented to the district court, sufficient facts were present to terminate Father's parental rights even if this Court determines § 1912(f) applies.

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 the parents' parental rights.

Respectfully submitted this 4th day of September, 2014.

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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 3,501 words, excluding certificate of service and certificate of compliance.

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APPENDIX