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.

REPLY OF CROSS-APPELLANT

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The Tribe maintains the arguments in its opening brief and respectfully replies to the Appellee's brief.

I. THE DISTRICT COURT ERRED WHEN IT DENIED TRANSFER OF JURISDICTION TO THE BLACKFEET TRIBAL COURT.

The Tribe relies on the applicable law as set forth in its opening brief.

It is undisputed that S.B.C., Mother and Father are all members of the Blackfeet Tribe. The Blackfeet Tribal Court is "uniquely and inherently more qualified" to determine what is in the best interests of S.B.C. The Blackfeet Tribal court is the proper forum to determine custody of S.B.C. The district court focused on the Tribe's socioeconomic standards and the perceived inadequacies of the Blackfeet Tribe and Blackfeet Tribal Court, as its basis to deny transfer of jurisdiction. The district court's findings concerning good cause not to transfer were not supported by clear and convincing evidence. Under the Indian Child Welfare Act (ICWA), this matter should be transferred to the Blackfeet Tribal Court.

Good cause may exist to deny transfer if, "[t]he 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." *Bureau of Indian Affairs (BIA) Guidelines for State Courts; Indian Child Custody Proceedings Guidelines,* 44 Fed. Reg. 67591 (November 26, 1979) [hereafter, Guidelines].

Contrary to the State's argument, the proceeding was not at an advanced stage, and good cause did not exist to deny transfer. The Tribe's Motion to Transfer Jurisdiction (MTJ) was promptly filed within weeks of the State filing its Motion to Terminate Parental Rights (TPR). (D.C. Doc. 48, 52.) The parents' rights had not been terminated.

Under a "jurisdictional best interest" analysis as required by this Court, good cause shown by clear and convincing evidence that the best interests of S.B.C. would be injured by transferring the matter to the Blackfeet Tribal Court, did not exist. *In re T.S.,* 245 Mont. 242, 247, 801 P.2d 77, 80 (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 State argues that like in *T.S.*, transferring the case at such an advanced stage would not be in S.B.C.'s best interests. (State's Br. at 8.) This case is distinguishable from *T.S.* There, the mother and child were not members of the tribe, and neither resided on the reservation during the lifetime of the child. *In re T.S.*, 245 Mont. at 244, 801 P.2d at 78. In that case, the tribe was located in Alaska, and the mother and child resided in Fergus County, Montana. *Id.* at 244, 79. The court found that tribe and mother showed little interest in *T.S.* prior to the action being filed, and that it would not be in the best interest of *T.S.* to be removed from Montana and transferred to an isolated community in Alaska. *Id.* at 249, 81. The court concluded that it would be an undue hardship to the parties and witnesses to

commute to Alaska, should the matter be transferred. *Id.* Additionally, the court did not detect anything in the proceedings to "indicate animosity or lack of respect for the Tribe." *Id.* Whereas the opposite is true in this case.

In this case, the Mother, Father and S.B.C. are all members of the Blackfeet Tribe. The Father and Mother have lived or are currently living on the reservation. S.B.C. has visited and stayed on the reservation with his parents. S.B.C.'s foster mom admitted that if the matter was transferred, it would not be a hardship for her to attend any court proceedings in the tribal court. (Tr. at 182.) Thousands of miles differentiate *T.S.* from this case. The Guidelines encourage transfer of jurisdiction in "cases involving Indian children who do not live very far from the reservation." *Guidelines* at 67591. Geographical distance in this case, is not an issue. The Blackfeet Reservation is hours away from S.B.C.'s current placement. Since S.B.C. was removed, the Tribe and parents have been involved in the matter. The State has not provided any evidence that transfer of this case would injure S.B.C., nor has the State shown that the matter, if transferred, would be retried in tribal court. *Id.* at 67590. Unlike in *T.S.*, during the MTJ and TPR, the district court and State openly displayed animosity and a lack of respect towards the Tribe. By denying transfer to the Blackfeet Tribal Court, the district court failed to follow the ICWA and its Guidelines. Good cause does not exist, and this matter should be transferred to the Blackfeet Tribal Court.

The district court's basis for denying transfer of jurisdiction was fueled by socioeconomic conditions and perceived inadequacies of the Tribe. Throughout the transfer hearing, the district court questioned the Tribe about its motives for transferring jurisdiction of S.B.C. to the Blackfeet Tribal Court. The court failed to follow ICWA's "clear preference for...deferring to tribal judgment on matters concerning the custody of tribal children..." *Id.* at 67591. The State emphasizes that even if the district court considered the Tribe's financial positon, the proceedings were at an advanced stage; the transfer was not promptly filed; and granting the motion would have a disruptive effect. (State's Br. at 9.) The State however, provides no evidence that transferring the matter to the Blackfeet Tribal Court would have a disruptive effect on S.B.C. The district court and State have failed to accept this Court's finding that, "the ICWA demonstrates confidence in the tribal forum, not only for the substantive expertise of its perspective, but also for its ability to make fair and appropriate determination and to serve the interests of all parties, including the state." *In the Marriage of Skillen*, 1998 MT 43, 287 Mont. 399, 956 P.2d 1.

The State argues that this Court should not entertain the Tribe's argument concerning financial issues related to J.B., because that the information was not properly before the court, and was only offered in the form of an affidavit attached to a motion to reconsider. (State's Br. at 9, n. 2.) The Tribe's argument regarding

J.B. is relevant. The Tribe raises the issue of J.B., because the district court made it a point to discuss J.B. in its opinion and order, and found that the Tribe did not request transfer of J.B. based on financial reasons. (D.C. Doc. 79.) The affidavit does support the Tribe's argument that finances did not play a role in declining to transfer J.B.; however, that is not why the issue was raised. The Tribe raises the issue concerning J.B., due to the fact that half-a-dozen times throughout the district court's opinion and order that the court brought up the Tribe's socioeconomic conditions.

The State also argues against the Tribe's position that S.B.C.'s placement was not in accordance with the ICWA, was not properly before this Court, and should not be heard. (State's Br. at 10.) The State argues that the Tribe didn't raise such issues with the district court. *Id.* The State is incorrect. The Tribe did raise the issues with the district court. The Tribe questioned the child protection specialist, Shelia Finley (Finley), at the transfer hearing, about her efforts to actively place S.B.C. in accordance with the ICWA. (Tr. at 233-234, 236, 264.) The Tribe's issues regarding S.B.C.'s placement, and J.B., relate to the issues presented in the Tribe's opening brief (Tribe's Br. at 1), and are properly before this Court.

Although tribes have jurisdictional preference in cases involving Indian children, the district court failed to follow the ICWA. As the ICWA states at 25 U.S.C. § 1901 (3):"[T]here is no resource that is more vital to the continued

existence and integrity of Indian tribes than their children." S.B.C., Mother and Father, are all members of the Tribe. The Tribe's interest in one of its own members increases when there is a termination of parental rights. The correct application of ICWA results in the Tribe determining what is in the best interest of S.B.C. The district court erred when it did not transfer jurisdiction of this matter to the Blackfeet Tribal Court.

II. THE DISTRICT COURT ERRED BY TERMINATING FATHER'S PARENTAL RIGHTS.

The Tribe relies on its previous opening brief for applicable law.

The district court incorrectly applied *Baby Girl* when it determined that the Father was not an Indian parent under the ICWA. For the majority of this proceeding, the State treated Father as an Indian parent under the ICWA. Only after the State's ICWA expert shocked the State, and testified that Father's parental rights should not be terminated, did the State immediately change course, and argue that Father was not an Indian parent under the ICWA. The issue of whether or not Father was an Indian parent under the ICWA was strategically beneficial for the State: if the ICWA expert testified that Father's parental rights should be terminated, then Father was an Indian parent; if the expert testified otherwise, then Father was not an Indian parent. In other words, the State was able to have its proverbial cake and eat it too.

Father in this case can be distinguished from the father in *Baby Girl*. In *Baby Girl*, the father attempted to relinquish his parental rights, and was not physically in the child's life until after the child had been voluntarily given up for adoption by the mother. *Adoptive Couple v. Baby Girl*, 50 U.S.___, 133 S. Ct. 2552 (2013). In this case, however, Father held S.B.C. in his arms the day after S.B.C. was born. During the 27 days prior to S.B.C.'s removal, Father visited, fed and changed S.B.C.'s diapers. There was a physical relationship between Father and S.B.C.

The State attempts to draw a comparison between *J.S.*, and this case. (State's Br. at 12.) *J.S.*, like *Baby Girl,* can be distinguished from this case. Similar to the father in *Baby Girl*, the father in *J.S.*, was not around during the pregnancy, or after the child was born. *In re J.S.*, 2014 MT 79, 374 Mont. 329, 321 P.3d 103. Like the father in *Baby girl*, the father in *J.S.* wanted to relinquish his parental rights. *J.S.*, ¶¶ 10, 27. The tribe in *J.S.* also declined to accept jurisdiction, and supported placement with the foster family. *J.S.*, ¶ 12. Additionally, the ICWA expert in that case, supported placement with the foster parents, and testified that removing the child from foster care would result in serious emotional harm. *Id.* In addition to not being involved with his child for a significant period of time, father in *J.S.* was unwilling to work on his treatment plan. *J.S.*, ¶¶ 5-10. Furthermore, *J.S.* was a teenager by the time his father petitioned to transfer jurisdiction. *Id.*

In this case, Father has never indicated that he ever wanted to relinquish his parental rights. Father testified that he wanted to have a relationship with S.B.C. (Tr. at 596-597, 601.) Prior to removal, as an effort to establish a relationship, Father would visit S.B.C. at the Mother's residence. (Tr. at 606-608, 611, 614.) The State's ICWA expert concluded that the Father's rights should not be terminated; that Father having custody of S.B.C. would not result in serious emotional or physical damage; and that it was in the best interests of S.B.C. to be with his Father. (Tr. at 543-546.) Father has also made significant strides to follow his parenting plan. Father has completed an alcohol assessment, followed the recommendations of the assessment, and began parenting classes. (Tr. at 584-587.)

Under the ICWA, Father is an Indian Parent. In the short time prior to S.B.C. being removed, Father attempted to establish a relationship with his child. Although Father was limited in his involvement with S.B.C. after removal, he still made an effort on several occasions, to visit S.B.C. and comply with his parenting plan. The State and district court criticize Father for not being more of a parent to S.B.C. However, the ICWA does not require that an Indian parent be a model, or superb parent to avoid having his/her parental rights terminated. Moreover, the ICWA expert found that Father was capable of being a loving father to S.B.C. Father is an Indian parent under the ICWA, and the district court erred when it terminated his parental rights.

CONCLUSION

Based upon the foregoing, and the arguments raised in the Tribe's opening brief, this Court should reverse the order terminating the parental rights of the Father, and reverse the order denying the Tribe's motion to transfer jurisdiction to the Blackfeet Tribal Court.

Respectfully submitted 19th day of September, 2014.

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By: 
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I caused a true and accurate copy of the foregoing Reply Brief of Appellant to be emailed, mailed and/or hand delivered to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2105, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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