

No. 14-0084

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IN THE MATTER OF,

S.B.C., Jr.,

A Youth in Need of Care.

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**REPLY BRIEF OF APPELLANT**

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

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The Father maintains the arguments in his opening brief and respectfully replies to the Appellee's brief.

**I. THE DISTRICT COURT ERRED IN FAILING TO TRANSFER JURISDICTION TO THE BLACKFEET TRIBAL COURT.**

Tribal courts have presumptive jurisdiction over cases involving Indian children not domiciled on the reservation. This presumption may only be overcome by parental objection to the transfer or a showing of good cause not to transfer. 25 U.S.C. § 1911(b). Good cause, as identified by the *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584-95 (November 26, 1979), hereinafter "ICWA Guidelines" and as factually applicable here, is limited to subsection (b)(i) of Section 67591.

(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. (emphasis added.)

Applying the ICWA Guidelines, as this Court has directed district courts to do, the motion to transfer was timely. Subsection (b)(i) has two criteria for establishing timeliness as good cause to deny transfer: 1) the proceeding must be at an advanced stage and; 2) the moving party failed to promptly file a motion to transfer. Under the Indian Child Welfare Act ("ICWA"), a party may petition to transfer jurisdiction when foster care placement or the termination of parental rights are at issue. 25 U.S.C. § 1911(b). By their very nature, termination hearings

represent the culmination of the case. Nonetheless, the ICWA and Guidelines allow for transfers when the termination of parental rights is at issue. It is contrary to the spirit of the ICWA to broadly determine that the filing of the petition to terminate represents an advanced stage of the proceeding, thus barring a jurisdictional transfer.

Moreover, it is undisputed that the Blackfeet Tribe filed their motion to transfer thirty five days after the State filed its petition to terminate. The Blackfeet Tribe did not delay in filing the motion. The second requirement to establish timeliness as good cause to deny a transfer cannot be met.

In addition to the ICWA Guidelines, this Court has directed that a jurisdictional best interest test should also be applied. *In re T.S.*, 245 Mont. 242, 247, 801 P.2d 77,80 (1990). As the district court did, the State's response focused on the best interest of S.B.C., Jr., applying a standard more akin to the criteria used to determine abuse, neglect and dependency. (State's Br. at 29-30.) Relying upon and citing this Court's holding in *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 P.2d 1186, in support of a finding that transfer would not be in S.B.C., Jr.'s best interest is misplaced. *A.P.* involved a petition to transfer after a termination hearing had already been held. There was finality to the case as it related to the legal relationship between parent and child and a greater potential for a retrial and additional litigation than exists in the current case. In *A.P.*, a transfer would have

created a disruptive effect. Here, at the time the district court denied the transfer, there had been very little contested litigation. The risk of disruption to the child was minimal and tempered by the Blackfeet Tribe's interest in protecting their most precious resource.

As plainly revealed in the district court's comments and order denying transfer, the district court questioned the tribal court's ability and motivation to assume jurisdiction. Instead of deferring to the tribal court, and thus tribal members, to make decisions in the best interest of another one of their members, the district court substituted its judgment and ignored "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The district court was not tasked with determining placement issues. The sole question was which court should make custody determinations of S.B.C., Jr. Through ICWA, Congress determined that tribes have a vested interest in Indian children; as provided in *Holyfield*, 490 U.S. 30 (1989), the U.S. Supreme Court determined that tribes have presumptive jurisdiction over Indian children; and as stated by this Court, "tribal courts are uniquely and inherently more qualified...to determine custody in the best interest of an Indian child." *In the Marriage of Skillen*, 1998 MT 43, 287 Mont. 399, 956 P.2d 1.

The motion to transfer was timely. The State failed to prove, by clear and convincing evidence, that good cause existed to deny transfer. Instead of applying the Guidelines and deferring to the tribal court, the district court acted in contradiction to the spirit and purpose of the ICWA. The district court erred in denying the motion to transfer.

## **II. THE FAILURE TO PROVIDE EXPERT TESTIMONY SUPPORTING TERMINATION REQUIRES REVERSAL OF THE TERMINATION ORDER**

S.B.C. is an Indian father under the ICWA. More importantly, the State treated him as an Indian father upon the removal of S.B.C., Jr. until the termination hearing two years later. It was not until the termination hearing and the State's ICWA expert testified that she did not support termination, did the State argue that the ICWA did not apply to S.B.C.

From the time of S.B.C., Jr.'s birth until his removal, S.B.C. fulfilled the role of father: changing diapers, buying formula, giving bottles and visiting at the mother's home.<sup>1</sup> This window of time, although brief, is sufficient to differentiate the Father from the father in *In re Baby Girl*, 570 U.S. \_\_\_, 133 S. Ct. 2552 (2013), who in the months leading to and after the child's birth did not express an interest in his daughter.

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<sup>1</sup> The parents were separated at the time of S.B.C., Jr.'s birth and not co-habiting.

Because S.B.C. is an Indian father, the State was required to present the testimony of an ICWA expert to support the petition to terminate. *In re K.B. & T.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836, this Court held that the “failure to elicit expert testimony regarding whether continued custody will result in serious emotional or physical damage to the children requires reversal of the termination order.” *Id.*, ¶ 28. Although the district court may consider the record and testimony as a whole, *K.B.* leaves no doubt that the expert’s testimony must be specific in showing the emotional and physical damage that would result if the child is left in the parents’ care. “The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.” *ICWA Guidelines*, 44 Fed. Reg. at 67593, § D.3.c., *In re K.B.*, ¶ 30.

The State’s ICWA expert did not provide testimony that the Father’s continued custody of S.B.C., Jr. would result in serious emotional or physical damage. In fact, she did not support termination and opined that the Father be given additional time. Without expert testimony, the petition to terminate must fail and the order terminating the Father’s parental rights should be reversed.

### **CONCLUSION**

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



Respectfully submitted this \_\_\_\_ day of August, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that 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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DATED: \_\_\_\_\_

## **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 1,205, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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