

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 14-0084

IN THE MATTER OF:

S.B.C., Jr.,

A Youth in Need of Care.

REPLY BRIEF OF APPELLANT

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

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N.B. respectfully replies to the Brief of Appellee as follows:

I. The District Court erred in denying N.B. and the Blackfeet Nation's Motion to Transfer Jurisdiction.

The district court's denial of the Motion to Transfer Jurisdiction ("Motion to Transfer") in this case should be reversed. The district court order and the Department of Public Health and Human Services' ("the Department") conduct clearly indicate a failure to acknowledge that the tribal court is "uniquely and inherently more qualified" to determine the best interest of S.B.C., Jr. No matter the timing of the transfer request, a district court should not be upheld when its focus, and that of the State, was on inadequacies in the tribal court system, mistrust of the tribe's motivation and the Court's perception that S.B.C., Jr. would "be passed from family member after another [sic]," (D.C. Doc. 76) rather than on the legal standards.

The State argues in its Brief of Appellee that the district court correctly denied the Motion to Transfer and quotes the B.I.A. Guidelines which state that "timeliness is a proven weapon of the courts against disruption caused by the negligence or obstructionist tactics on the part of counsel." *See* Guidelines, C.3 Commentary, 44 Fed. Reg. at 67591. The State asserts that the court properly weighed the timeliness of the motion to transfer, "which included the purposeful delay in filing the motion." (Brief of Appellee.)

There was no testimony at the Transfer Hearing that the delay in filing the Motion to Transfer was purposeful. The only witness from the Blackfeet Nation to testify was Anna Fisher and her testimony was that she didn't "exactly know how come it didn't transfer a long time ago." (Tr. 5/14/13 Hearing, 287:12-13.) Fisher also testified that the files for the ICWA cases at the Blackfeet Nation were unorganized and that it took her two months to straighten out the records. (Tr. 5/14/13 Hearing, 290:1-2.) These facts do not amount to a "purposeful delay" in filing the Motion to Transfer nor do they implicate the Guidelines comment regarding obstructionist tactics on the part of counsel.

In fact, the opposite argument can be made in this case: that the Court and the State relied on the timeliness argument in order to thwart the basic purpose of ICWA. In addition to the district court's negative comments noted above and in the Brief of Appellant, the district court also stated, "[t]his is not a case of the State making value judgments based on Caucasian middle-class values," but that "[i]t is the sound judgment of this Court that the Blackfeet Tribe wants to exercise its sovereign rights as a Nation, but only when it is in its best financial interests to do so." (D.C. Doc. 76.) The district court clearly does not recognize its own privileged position and does, in fact, make value judgments based on its Caucasian middle-class values.

The State next argues that the district court correctly denied the Motion to Transfer by relying on the best interest of the child test. However, the best interest of the child test should not be confused with the ‘best interests of the child’ test applied under Mont. Code Ann. § 40-4-212 or with the criteria used to determine child abuse, neglect and dependency and to terminate parent-child legal relationships under Title 41, Chapter 3, MCA. *In re: T.S.*, 245 Mont. 242, 247, 801 P.2d 77, 80 (1990). The test is a “jurisdictional best interests of the child test.” The State must show by clear and convincing evidence that the best interest of the child would be injured by such a transfer. *In re: M.E.M.*, 195 Mont. 329, 336, 635 P.2d 1313 (1981).

Here, the testimony entered by the State on how the transfer would affect S.B.C., Jr. was by the foster mother, who had no qualifications other than having two other foster children, whose experience was very different than S.B.C., Jr.’s and who were members of a different tribe. (Tr. 5/14/13 177:21-22.) In fact, the foster mother testified that S.B.C., Jr. had already advanced developmentally beyond the older foster children. (Tr. 5/14/13 177-23-25, 178-1-2.) Her comparison testimony should not carry any weight as she is clearly not qualified as an expert on the effects of transfer on children simply by having two other foster children.

The social worker in the case testified that she opposed the transfer because it came on the heels of the motion for termination. In fact, she stated, "If they're so committed to having this child back in their care, they would already have done what they needed to do." (Tr. 5/14/13 232:2-4.) The social worker's testimony indicates that her objection was not based on an injury to S.B.C., Jr., but rather a frustration with the Blackfeet Nation.

In contrast, Fisher testified that it was in S.B.C., Jr.'s best interest to be with his own relatives. (Tr. 5/14/13 286:12-14.) It is worth noting that Fisher is a qualified expert witness on ICWA for the State of Montana and has been since 2006. (Tr. 5/14/13 282:10-13.)

The State did not meet its burden of proving by clear and convincing evidence that S.B.C., Jr. would be injured by transfer of the case to the Blackfeet Nation.

N.B. respectfully requests that this Court reverse the district court's denial of the motion to transfer and/or reverse the termination of her parental rights to S.B.C., Jr. because the district court abused its discretion by acting without employment of conscientious judgment and exceeded the bounds of reason when it found evidence beyond a reasonable doubt that N.B. abandoned S.B.C., Jr. and that N.B. had not successfully completed or complied with her treatment plan.

DATED this 2nd day of July, 2014.

*Kristina Neal for
Carolyn M. Fagan*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Reply

Brief to be mailed and/or hand delivered to:

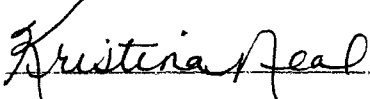
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Dated this 8th day of July, 2014.



CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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