IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-17-0402

IN THE MATTER OF:

A.L.D.,

A Youth in Need of Care

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Russell Fagg, Presiding.

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STATEMENT OF THE CASE

Father appeals the termination of his parental rights and the placement of A.L.D. in a non-ICWA-compliant home. The district court terminated Father's parental rights at a hearing on April 4, 2017. On June 23, 2017, Father's Attorney filed a Notice of Substitution of Counsel, informing the district court that the Appellate Office of the Public Defender ("AOPD") will further represent Father on appeal. On July 10, 2017, AOPD requested production of transcripts in this matter. The same day, AOPD filed Father's Notice of Appeal. On August 30, 2017, undersigned counsel was asked to be appellate counsel for Father in his appeal.

On September 15, 2018, undersigned counsel requested an extension to file her opening brief. On September 18, 2018, this Court granted undersigned counsel's motion for an extension until October 23, 2017, to file her Opening Brief. On October 23, 2017, undersigned counsel filed an *Anders* Brief and Motion to Withdraw. On October 24, 2017, this Court ordered Father to file a response within 30 days to the *Anders* Brief. Father did not file a response. On December 19, 2017, this Court rejected counsel's *Anders* Brief because not all of the transcripts in this matter were provided to the Court. On December 21, 2018, AOPD requested all additional transcripts in this matter. On December 28, 2017, this Court ordered

Father's Opening Brief due 30 days from December 27, 2017. Father now presents this Opening Brief for the Court's review.

ISSUES PRESENTED

I. Did Father's attorney provide ineffective assistance of counsel?

II. Did CFs provide active efforts to prevent the breakup of the Indian family in compliance with 25 U.S.C. § 1912(d)?

III. Was A.L.D. placed in a foster home in violation of 25 U.S.C. § 1914(b)'s placement preferences?

STATEMENT OF FACTS

D.B. ("Mother") and M.D. ("Father") are the natural parents of A.L.D. who is presently two years old. (Dkt. 1). A.L.D. is an "Indian Child" under ICWA as she is a member of the federally recognized Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana. (Dkt. 63; *see* Indian Entities Recognized and Eligible to Receive Services from the B.I.A., 81 Fed. Reg. 5019, 5019-20 (Jan. 28, 2016)). Thus, the proceedings in this matter were subject to the standards of ICWA. 25 U.S.C. § 1903(4), (8), and 1912 (d).

On July 31, 2015, the State petitioned for emergency protective services ("EPS"), adjudication as a youth in need of care ("YINC"), and temporary legal custody ("TLC") of A.L.D. (Dkt. 1). When A.L.D. was born, she tested positive for methamphetamine, amphetamine, and marijuana. (Dkt. 2 at

3). The State's Petition alleged A.L.D. was physically neglected because of birth parents' inability to meet her basic needs and provide her a safe environment. (Dkt. 1 at 2-3).

On July 27, 2015, Father informed Child Protection Specialist ("CPS") Harvey that his mother, T.S., would be willing to care for A.L.D. in Utah. (Dkt. 2 at 3). Two of Father's other children are placed with T.S. (Dkt 2 at 3; 4/4/17 Trans. 12:13-15). Mother agreed. (Dkt. 2 at 5). CPS Harvey reported in her Affidavit to the Court on July 31, 2015, that she contacted T.S. in an effort to place the child in accordance with ICWA requirements. *Id.* at 3. T.S. agreed to cooperate with Child and Family Services ("CFS") to complete appropriate background checks and initiate an Interstate Compact Agreement. (Dkt. 2 at 3). Nevertheless, CFS failed to initiate background checks on T.S. or initiate an Interstate Compact Agreement with her. In fact, there is no evidence of CFS *ever* looking into placing A.L.D. with her Paternal Grandmother, T.S., despite ICWA's clear placement preference with an Indian child's extended family. 25 U.S.C. § 1915(b)(i)

On August 6, 2015, the court granted EPS. (Dkt. 5). The same day, the State filed a Notice of Involuntary Child Custody Proceedings in compliance with ICWA, which was served upon the Bureau of Indian Affairs by certified

mail, as required by statute. (Dkt. 8). This Notice informed the Turtle Mountain Band of Chippewa Cree Indians and the Fort Peck, Assiniboine, and Sioux Tribes that if A.L.D. is an Indian Child, the tribes have the right to intervene in the proceedings and transfer the proceeding to tribal court. *Id.*

On August 24, 2015, the court held a Show Cause Hearing, at which Father's attorney was present. (Dkt. 9; 10/19/15 Trans. at 1:19). The State informed the court that neither parent had been served with notice of the hearing and requested the court continue to October 19, 2015. *Id.* at 1:9-17. None of the parties objected, and the court continued the hearing. *Id.* at 1:24-26.

On October 19, 2015, the court held the Show Cause Hearing. (Dkt. 19). Father was not present, but his attorney was. (10/19/15 Trans. at 1:12-13; 2:7). Father's attorney stated that she had not had any contact with Father and has no evidence to offer. *Id.* at 2:7-12. The State informed the court that the parents' attorneys will not be contesting the Show Cause Hearing and will stipulate to the relief requested. *Id.* at 14-17. Because neither party requested testimony from ICWA expert, Edith Adams, the State made an offer of proof of her testimony. *Id.* at 2:17-22. The State claimed she would testify that the children are in danger of physical or emotional abuse if they were returned home to their parents. *Id.* at 2:21-23.

The court held that the parties stipulated clear and convincing evidence existed to find A.L.D. a YINC based upon the CPS's affidavit and granted TLC. (Dkt. 20 at 2). The court further held the parties stipulated to the testimony of ICWA Expert Edith Adams and her opinion that continued custody of A.L.D. by her parents is likely to result in serious emotional or physical damage to A.L.D. *Id.* Based upon the parties' alleged stipulation and the Affidavit, the court adjudicated A.L.D. a YINC and transferred legal custody to CFS for a period not to exceed six months. (Dkt. 20).

On January 22, 2016, CFS and Father entered into a Treatment Plan. (Dkt. 25). On May 24, 2016, the State petitioned for Extension of TLC to allow the parents additional time to successfully complete their treatment plans. (Dkt. 27; Dkt. 28). On June 27, 2016, the court held a hearing on the State's Petition for Extension of TLC. (6/27/16 Trans. at 1:9-12; Dkt. 36). Father's attorney did not object to extending TLC. (6/27/16 Trans. at 1:13-15). The court granted the State's Petition. (*Id.* at 1:24-25; Dkt. 36).

On August 12, 2016, CPS McNamara filed an affidavit with the court requesting a Permanency Plan Hearing. (Dkt. 37). CPS McNamara stated CFS will continue its goal of reunification between Father and A.L.D., but if they are unable to successfully reunite, CFS will pursue termination of parental rights and place the child for adoption. *Id.*

On November 7, 2016, the court held a Permanency Plan Hearing. (11/7/16 Trans. at 1:10-12). Father was not present and neither was his attorney. *Id*. at 2:7-8. The State claimed that it had been in contact with Father's attorney who could not be there, and "she said that she's had no contact with the father, and so she's fine with what I've represented today." *Id*. at 11-12. However, in the court's Order following the Permanency Hearing, the court states that Father's attorney was present and that the parties stipulated to the permanency plan. (Dkt. 40). In addition, the court's Order stated that: the July 18, 2016, Affidavit of CPS McNamara's, provided in advance of the permanency hearing, addressed the options for the child's permanent placement, examined the reasons for the exclusion of any higher priority placement options, and set forth the proposed plan to carry out the placement decision. *Id*. However, CPS McNamara's July 18, 2016 Affidavit did not address the options for A.L.D.'s placement, and did not examine the reasons for exclusion of any higher priority placement options. (*See* Dkt. 37). Rather, her Affidavit stated: "The Department will continue to focus on its goal of reunification and offer support when needed to assist the parents in successfully completing their treatment plan tasks. If the parents are unable to successfully reunify with their child, the Department will pursue termination of parental rights and place the child adoptively." *Id*.

Regardless, the court ordered the permanency plan approved and directed CFS to make active efforts to place A.L.D. in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize her permanent placement. (Dkt. 40).

On November 22, 2016, the State filed a Petition for Permanent Legal Custody and Termination of Parental Rights with Right to Consent to Adoption or Guardianship. (Dkt. 42). The State alleged evidence exists beyond a reasonable doubt, showing Father failed to comply with the Treatment Plan. *Id*. The State further alleged this failure rendered Father unfit to parent and that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that Father's conduct renders him unfit to give A.L.D. adequate parental care. *Id*. CPS McNamara filed an Affidavit in support of the State's Petition. (Dkt 41).

On December 19, 2016, the court held a hearing on the State's Petition for Termination of Parental Rights and Permanent Legal Custody. (12/19/16 Transcript at 1:9-11). The State informed the Court that the parents had not been served with notice ten days prior to the hearing as required by statute. *Id*. at 1:14-21. Thus, the court continued the hearing to January 30, 2017. *Id*. at 2:10-13.

On January 30, 2017, the court again held a hearing on the State's Petition for Termination of Parental Rights and Permanent Legal Custody. (1/30/17 Trans. at 1:11-13). Father was not present, but his attorney showed this time. *Id.* at 1:27. The State informed the court the hearing will be contested and requested the court reset it for April. *Id.* at 1:21-2:2. The court reset the hearing for April 4, 2017. *Id.* at 2:11-12.

On April 4, 2017, the court held a hearing on the State's Petition for Permanent Legal Custody and Termination of Parental Rights with Right to Consent for Adoption or Guardianship. (Dkt. 60). Father, again, was not present, but his attorney was. (4/4/17 Trans. at 1:15-16). The State called ICWA expert, Edie Adams, and CPS McNamara to testify. (*Id.* at 6:20; 16:1). The State asked Ms. Adams if the Department has provided "active efforts in the current case to reunite *the mother* and child," and Ms. Adams responded "[w]ith my work with the social worker, yes I do." *Id.* at 8:1-3 (emphasis added). The State never asked Ms. Adams if the Department provided active efforts to reunite the Father and child as required by ICWA. In fact, Ms. Adams never testified to whether or not the Department provided active efforts to reunite Father and A.L.D. as required by ICWA. (*See* 4/4/17 Trans. 7:1-15:24)

In addition, at this hearing, Ms. Adams learned CFS never informed her that that Father's Mother, T.S., has two of Father's other children, "I didn't even know that was – that information was available to us," even though Mother and Father both provided this information to CFS at the beginning of the investigation. (Trans. 9:14-18). Ms. Adams testified that A.L.D. is currently placed with foster parents who are not tribal members. *Id*. at 10:2-3. On cross-examination, Ms. Adams testified that the State should follow ICWA, which states that children should be placed with their extended family. *Id*. at 11:9-12. Ms. Adams then testified that "I'm saying that [the current placement] it's not following ICWA — the current placement is not following ICWA." *Id*. at 11:14-16. Father's attorney asked Ms. Adams, "Okay. So as an expert you're not saying that this placement's okay?" (Id. at 11:16-17). The State objected to this question, stating:

> First off, it's placement preferences — I would prefer a steak dinner tonight, but I would be fine with a hamburger instead . . . Nonetheless it is preferences, and the State does its best to follow the preferences . . . .

Trans. 11:18-21. This statement about ICWA's placement requirements represents the State's and CFS's attitude toward placing A.L.D. in an ICWA compliant home even when they were expressly informed of a placement opportunity with Father's mother, T.S., a tribal member. (*See* Dkt. 1). Ms.

Adams again confirmed A.L.D.'s placement in foster care is not ICWA compliant:

> Q: . . . So, the question is placement with non-Indian people in compliance with the Indian Child Welfare Act?
>
> A: No, it is not.
>
> Q: Okay. So the placement we currently have is non-compliant?
>
> A: That's correct.

(Trans. 12:18-22).

The State also called CPS McNamara who testified that CFS has made efforts to provide services to Mother. *Id.* at 19:4-20. When the State asked CPS McNamara what efforts CFS made with Father, she testified that he has been incarcerated for the majority of the case, she had sent him letters, visited him in jail, and talked to him about chemical dependency treatment and drug testing, but he did not show up, despite being incarcerated. *Id.* at 20:12-20. She then testified she agrees with Ms. Adams that CFS has provided active efforts regarding these parents, even though Ms. Adams never testified about CFS providing active efforts with Father. *Id.* at 21:8-9. On cross-examination, however, CPS McNamara admitted she did not offer Father any programs because he was incarcerated. *Id.* at 22:11-13. She testified "I don't know what I would have had him do in the community when he's locked up behind bars." When asked again what active efforts CFS

provided Father, CPS McNamara stated, "I have not contacted the jail to see if there was a class for him." *Id.* at 23:8-10.

The court terminated the parental rights of both parents. *Id.* at 31:10-11. It stated CFS has made "best efforts and the parents have not even come close to completing their treatment plan." *Id.* at 31:12-14. In the court's Findings of Fact, Conclusions of Law, and Order Terminating Parental Rights, it found CFS used active efforts to prevent the breakup of the Indian Family. (Dkt. 60 at 11).

The district court also held "[t]he proposed out-of-home placement of the above-named child is not in compliance with the requirements of 25 U.S.C. § 1915. Despite active efforts to do so, neither CFS nor the Assiniboine and Sioux Tribes have been able to locate appropriate family members for placement. The youth is placed with siblings in a placement approved by the Assiniboine and Sioux Tribes for the siblings." *Id.* at 12. It is from this decision Father appeals.

STANDARDS OF REVIEW

This Court reviews the district court's decision to terminate parental rights for abuse of discretion. *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836. Before terminating parental rights, the district court must make specific fact findings in accordance with statutory requirements. *In re*

C.H., 2000 MT 308, ¶ 8, 318 Mont. 208, 79 P.3d 822. On review, this Court reviews findings of fact to determine whether they are clearly erroneous and conclusions of law to determine if they are correct. *In re T.W.F.*, 2009 MT 207, ¶ 17, 351 Mont. 233, 210 P.3d 174. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if this Court is convinced that the district court made a mistake. *Id.*

In addition, a proceeding governed by ICWA is subject to heightened standards of proof. Under ICWA, a district court may not terminate parental rights unless a reasonable fact finder could conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *Id.*, ¶ 11; *In re K.B.*, ¶ 18. In addition, a district court must determine that the "Department made active efforts if a reasonable fact-finder could conclude beyond a reasonable doubt that the Department's efforts were active." 25 U.S.C. § 1912(d); *In re A.N.*, 2005 MT 19, ¶ 19, 325 Mont. 379, 106 P.3d 556.

ARGUMENT

A.L.D. is younger than 18 years of age and is a member of the federally-recognized Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana. (Dkt. 63; 81 Fed. Reg. 5019, 5019-20 (Jan. 28, 2016)).

Accordingly, ICWA covers any proceedings that involve the termination of parental rights to A.L.D. 25 U.S.C. § 1903(4), (8), and 1912 (d).

The express policy of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *In re Baby Girl Doe*, 262 Mont. 280, 387, 865 P.2d 1090, 1094 (1993). Congress enacted ICWA to keep Indian tribes and families together by establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902; *In re S.B.C.*, 2014 MT 345, ¶ 22, 377 Mont. 400, 240 P.3d 534. ICWA is clear, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

I. FATHER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO QUESTION THE ICWA EXPERT REGARDING ACTIVE EFFORTS AND FOR FAILING TO OBJECT TO A.L.D.'S PLACEMENT AT THE PERMANENCY PLAN HEARING.

Parents are entitled to a constitutional right to effective assistance of counsel in termination proceedings. *In re J.J.L.*, 2010 MT 4, ¶ 16, 355 Mont. 23, 223 P.3d 921. The Due Process Clause of the Montana Constitution provides a parent in a termination of parental rights proceeding with the right to the effective assistance of counsel. Mont. Const. Art II, § 17; *In re A.D.B.*, 2013 MT 167, ¶ 64, 370 Mont. 422.

In 2005, the Montana Legislature granted indigent parents a statutory right to appointed counsel in all abuse and neglect proceedings involving any petition filed pursuant to Mont. Code Ann. § 41-3-422. Further, a parent is entitled to effective assistance of counsel not just at termination hearing but pre-termination hearings as well. *In re A.D.B.*, ¶ 17. If there is no requirement that a parent's counsel is effective, then the mere act of appointing counsel is meaningless. *Id.*, ¶ 18 (quoting *In re A.S.*, 2004 MT 62, ¶ 20, 320, Mont. 268, 87 P.3d 408).

This Court holds that the *Strickland* test for criminal proceedings is not appropriate. *In re A.S.*, ¶ 26. Rather, this Court holds that the effectiveness of counsel in cases involving the termination of parental rights should be evaluated by first looking at counsel's training and advocacy and then, if the Court finds that counsel was ineffective, by looking to whether or not the parent was prejudiced. *Id.*, ¶¶ 26, 31.

This Court first evaluates whether counsel was ineffective by looking to the following non-exclusive factors: (1) Training and Experience. Whether counsel has experience and training in representing parents in matters and proceedings under Title 41 of Mont. Code Ann., whether counsel is competent in understanding statutory and case law involving Title 41 of Mont. Code Ann. and whether counsel is competent in understanding

termination proceedings under Title 41 of Mont. Code Ann.; (2) Advocacy. Whether counsel has adequately investigated the case, whether counsel has timely and sufficiently met with the parent and researched the applicable law, whether counsel prepared for the termination hearing by interviewing witnesses and reviewing discovery, whether counsel has demonstrated that she possessed trial skills including making objections, producing evidence, and calling and cross-examining witnesses and experts. *Id.*, ¶ 26.

Once this Court has determined under these factors that a parent was ineffectively represented by counsel at his termination proceeding, the Court then assessed whether the parent suffered prejudice as a result of counsel's ineffectiveness. *Id.* ¶ 31.

Here, the chronology of events shows that Father's counsel was not prepared to advocate for Father at the November 7, 2016, Permanency Plan Hearing. In fact, Father's counsel did not show up to the hearing and informed the court through the State that she agreed with the proposed Permanency Plan. (11/7/16 Trans. at 2:6-12). The Permanency Plan resulted in A.L.D.'s placement in a non-ICWA-compliant home. Father's counsel did not effectively represent Father at that hearing by not showing up and failed to place an objection to A.L.D.'s placement in the record following the hearing, despite clear standing and duty to do so. This ineffectiveness

prejudiced Father because A.L.D. was then placed in a non-ICWA-compliant home when she should have been placed with her Paternal Grandmother, which is an ICWA compliant home.

In addition, Father's counsel did not effectively cross-examine ICWA expert, Edith Adams, at the Termination Hearing. Father's counsel failed to ask if CFS has provided active efforts in the case to reunite Father and child as required by ICWA. This was ineffective because if Father's counsel had asked Ms. Adams this question, she likely would have said that CFS had not provided active efforts for Father because CFS did nothing for Father while he was incarcerated. This ineffectiveness also prejudiced Father because CFS did not comply with ICWA in terminating Father's parental rights, and the court should have been made aware of this at the Termination Hearing.

Therefore, this Court should reverse and remand for proceedings that afford Father effective assistance of counsel. Alternatively, this Court should reverse because the district court abused its discretion in holding that the parties stipulated to the permanency plan. As stated above, Father's attorney was not present at the Permanency Plan Hearing and did not stipulate to the permanency plan, despite the court's finding to the contrary. (*See* 11/7/17 Trans. at 1:11-12). The court's holding that Father's attorney was present and the parties stipulated to the permanency plan was an abuse of discretion

because the transcript shows that Father's attorney was not present and supports the conclusion that no meaningful stipulation could have been achieved without Father or his attorney. (*See* 11/7/16 Trans. at 2:11-12; Dkt 40.)

II. CFS DID NOT PROVIDE ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY IN COMPLIANCE WITH 25 U.S.C. § 1912(D).

When ICWA applies and the State is seeking termination of parental rights, the State has to prove beyond a reasonable doubt that it made "active efforts" to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful. 25 U.S.C. § 1912(d); *In re M.S.*, 2014 MT 265, ¶ 24, 376 Mont. 394, 336 P.3d 930.

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d) (emphasis added).

The term "active efforts," by definition, requires a heightened responsibility compared to passive efforts, which is what the State did here. *In re A.N.*, ¶ 23; *In re D.S.B.*, 2014 MT 112, ¶ 15, 270 Mont. 37, 300 P.3d 702. "Active efforts" require that "timely affirmative steps be taken to accomplish

the goal that Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship." *In re K.B.*, 2013 MT 133, ¶ 31, 370 Mont. 254, 301 P.3d 836 (quoting *In re G.S.*, 2002 MT 245, ¶ 36, 312 Mont. 108, 59 P.3d 1063). This Court has held that providing a parent a treatment plan and waiting for him to complete it does not equate to "active efforts." *Id.*

This Court has also held that while "a parent's incarceration may limit the remedial and rehabilitative services that the State can make available to the parent to prevent the breakup of the Indian family, this Court does not excuse the state's obligation to continue to make active efforts." *In re D.S.B.*, ¶ 15; *In re M.S.*, ¶ 25. That did not happen here.

The State has the burden to prove to the district court that CFS has made active efforts to prevent the breakup of the Indian family and that those efforts were unsuccessful. *In re K.B.*, ¶ 34. Then, the district court's termination order must discuss which, if any, "active efforts" CFS made. *Id.* Because ICWA sets minimum federal standards for proceedings involving Indian Children, this Court must ensure that ICWA's requirements are followed. *Id.*

Here, the State did not prove that CFS provided active efforts to provide remedial and rehabilitative programs for Father to prevent the breakup of the Indian family. The State's ICWA Expert, Ms. Adams, never testified to the active efforts provided for Father. The State's other witness, CFS McNamara, testified that CFS did not provide Father any programs because he was incarcerated. (*Id.* at 23:8-10). "No, I have not contacted the jail to see if there was a class for him." *Id.* CPS McNamara testified "he did sign his treatment plan with a prior worker, so he knows what was required of him to complete [it]." This does not equate to active efforts. *In re K.B.*, ¶ 31.

The State has clearly not proven beyond a reasonable doubt CFS provided active efforts to prevent the breakup of the Indian family. In addition, the district court's termination order did not discuss which, if any, "active efforts" were made. (*See* Dkt. 60). Rather, the court just made a conclusory statement that "the Department used active efforts to prevent the breakup of the Indian Family." (Dkt. 60 at 11). This does not meet the requirement that the district court's termination order discusses which, if any, active efforts were made. *In re K.B.*, ¶ 34. Because the State did not prove beyond a reasonable doubt that active efforts were made for Father and because the district court did not discuss which, if any, active efforts

were made, this Court must remand this case for proceedings that comply with ICWA.

III. THE DISTRICT COURT ERRED BY NOT FOLLOWING ICWA'S PLACEMENT PREFERENCES.

In 1978, Congress enacted ICWA in response to concerns of abusive welfare practices due to the "alarmingly high percentage of Indian families [who] are broken up by the removal, often unwarranted . . . and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(5); *Miss. Band of Choctaw Indians v. Holyfield et al.*, 490 U.S. 30, 35, 109 S. Ct. 1597, 1601. (1989). ICWA is clear, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). The two goals of ICWA are: (1) "protect the best interests of Indian children," and (2) "promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

ICWA established "*minimum* Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes[,] which will reflect the unique value of Indian culture." 25 U.S.C. § 1902 (emphasis added); *In re S.B.C.*, ¶ 22. ICWA is "based on the fundamental assumption that it is in an Indian child's best interest that its relationship to the tribe be protected." *Miss. Band of*

Choctaw Indians, at 49-50, 109 S. Ct. at 1609. The Montana and U.S. Constitutions require strict compliance with the statutory requirements governing parental right termination proceedings. *In re J.C. and A.D.*, 2008 MT 127, ¶ 53, 343 Mont. 30, 183 P.3d 22. The failure to strictly comply with the statutory requirements should result in the reversal of the termination in the "overwhelming majority of cases." *Id.* Further, "the doctrine of harmless error should be applied in parental termination only on the rarest occasions and with great caution." *Id.*

A. A.L.D. was placed in a non-ICWA-compliant foster home.

ICWA was enacted in 1978 for the principal purpose of protecting the integrity of Indian tribes by preventing, where possible, the removal of Indian children and placement in non-Indian homes. 25 U.S.C. § 1901. It is apparent from the plain language of ICWA that its principal purpose is to promote the stability and security of Indian tribes and families. *See* 25 U.S.C. § 1901; 25 U.S.C. § 1902; 25 U.S.C. § 1911(c); 25 U.S.C. § 1912(c).

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i. When placing a child in any foster care or preadoptive placement, preference must first be given to a placement with a member of the Indian child's extended family.

ICWA provides a preferred order for the adoptive and preadoptive placement of Indian children.

> When placing an Indian child in a preadoptive or foster placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) An institution approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

25 U.S.C. § 1915(b). The district court is required to order a preadoptive or foster placement of an Indian child in accordance with these preferences unless it finds that good cause exists to deviate from them. *In re C.H.,* ¶ 12.

Congress's intent in placing Indian children is clarified in 25 U.S.C. § 1915, which requires that placement be first given to a member of the child's extended family. *In re Baby Girl Doe*, at 385, 865 P.2d at 1093. In *Doe*, the mother waived all parental rights and relinquished custody of her child to CFS, consenting to her adoption without further notice or consent. *Id.* at 383, 865 P.2d at 1091.

The Tribe was formally notified of the proceedings and moved to intervene in the matter to assure compliance with ICWA, which was granted by the district court. *Id.* At a hearing to consider CFS's petition for permanent custody, the Tribe requested information about the identity of the child's natural mother and family, so it could determine whether the child could be placed with her extended family pursuant to 25 U.S.C. §§ 1915(a) and (b). *Id.* at 383; 865 P.2d at 1091-92. The district court denied the tribe's request concluding ICWA could be satisfied without revealing the identity of the child's mother. *Id.* On appeal, this Court reversed, finding that the district court's holding possibly defeated application of the clear preference provided by 25 U.S.C. § 1915(a) and (b) for placement of Baby Girl Doe with a member of her extended family. *Id.* at 389; 865 P.2d at 1095.

"It is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture." *Miss. Band of Choctaw Indians v. Holyfield*, at 49-50, 109 S. Ct. at 1602. In its decision to reverse the Mississippi court, the U.S. Supreme Court discussed at length the legislative history of ICWA, concluding that:

> The most important substantive requirement imposed on state courts is that of § 1915(at), which absent "good cause" to the contrary, mandates that adoptive placements be made

> preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

Id. at 36-37; 1602. Thus, ICWA seeks to protect the rights of the Indian Child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. ICWA established a "[f]ederal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian Child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Miss. Band of Choctaw Indians*, at 36-37, 109 S. Ct. at 1602.

Here, the district court failed to comply with ICWA's minimum standards because it did not place A.L.D. with a member of her extended family, despite Paternal Grandmother having other siblings of A.L.D. and being ICWA-compliant. Father and Mother both informed CFS that Paternal Grandmother, T.S., had two of Father's other children and that she was willing to care for A.L.D. before the State even filed the Petition for EPS. CPS Harvey reported to the court that she contacted T.S. in an effort to comply with ICWA and that T.S. agreed to cooperate with CFS to complete background checks and to initiate an Interstate Compact Agreement. Nevertheless, CFS neither initiated background checks on T.S., nor did CFS initiate an Interstate Compact Agreement with her. Despite T.S. being the

preferred placement for A.L.D., CFS placed her in a non-kinship and non-Indian foster home in violation of ICWA. (Trans. 10:2-3).

In addition, the ICWA expert testified at the Termination Hearing that she was never informed by CFS that T.S. was even a placement option. (Trans. 9:14-18). She also admitted that the current placement is not in compliance with ICWA. *Id.* at 11:14-16. Indeed, the district court's findings of fact and conclusions of law, held A.L.D.'s placement does not comply with ICWA. (Dkt. 60 at 11).

This Court must reverse this case for proceedings that comply with ICWA because the district court failed to order A.L.D's placement in accordance with ICWA's preference. Akin to *In re C.H.*, where this Court reversed because the district court's holding likely defeated application of the clear preferences required by ICWA, this Court must reverse this case because the district court did not require that the proceedings comply with ICWA's placement preferences. A.L.D. was not placed in accordance with § 1915 of ICWA. As noted above, the first placement preference is with the Indian child's extended family. 25 U.S.C. § 1915(b)(i). Instead, A.L.D. was placed with a foster family who was neither family nor Indian. Thus, placing A.L.D. with this foster family does not qualify as the first or second

preferences for placement as required under ICWA, and this case must be reversed for proceedings that comply with ICWA.

ii. Only Absent "Good Cause" may an Indian Child's foster care placement not comply with 25 U.S.C. § 1915(b).

Absent good cause, preference must be given first to placing an Indian Child with a member of the Indian Child's extended family. 25 U.S.C. § 1915(b). In enacting ICWA Congress did not define "good cause" as used in 25 U.S.C. § 1915. However, BIA promulgated Guidelines for State Courts to assist them in interpreting and applying ICWA. *In re C.H.,* ¶ 12; *see* Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979) ("Guidelines"). This Court has previously determined that while the Guidelines are not binding, they are persuasive, and it applies them when interpreting ICWA. *In re C.H.,* 2000 MT 64, ¶ 12, 299 Mont. 62, 997 P.2d 776.

Under the Guidelines, "good cause" to avoid ICWA's order of preference only includes: (1) the request of the biological parents of the child when the child is of sufficient age; (2) the request of a child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) the presence of a sibling attachment that can be maintained only through a particular placement; (4) the extraordinary physical or emotional needs of

the child; (5) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria, but none has been located. 25 C.F.R. § 23.132(c); *In re C.H.*, ¶ 19. If CFS seeks a departure from these preferences, it must provide clear and convincing evidence that it has completed a "diligent search" for a compliant placement. 25 C.F.R. § 23.132(c)(5).

The Guidelines provide additional guidance on the "diligent search requirements." 80 Fed. Reg. at 10157 (Feb. 25, 2015). The Guidelines clearly require a placement hearing where the agency must "identify placement options that would satisfy the placement preferences . . . and explain why the preferences could not be met." Guidelines, 81 Fed. Reg at 38777 (June 14, 2016). The child's parents, extended family members, and tribe, as well as any foster homes approved by the child's tribe, and Indian foster homes located in the child's State, should all be notified about the placement hearing. *Id.*

If a party asserts that good cause exists to not follow ICWA's placement preferences, the party must state on the record or provide why good cause exists in writing to the parties in the proceeding. 25 C.F.R. § 23.132(a). The burden of establishing good cause must be proven by the party seeking departure from the placement preferences by clear and convincing evidence,

in this case the State. 25 C.F.R. § 23.132(b). A court's determination of good cause to depart from the placement preferences must be made on the record or in writing. 25 C.F.R. § 23.132(c). Finally, a placement may not depart from the preferences based solely on ordinary bonding or attachment due to a non-preferred placement that was made in violation of ICWA. 25 C.F.R. § 23.132(e)

While A.L.D.'s placement with the foster family was approved by the Tribe, there is no evidence in the record that CFS had "good cause" to deviate from the first placement preference and skip to the second placement preference. The burden is on CFS to demonstrate that the placement was ICWA compliant. Speculation that there was not an extended family member for A.L.D., specifically Father's Mother, is not allowable and inappropriately shifts the burden to Father to show that CFS did not comply with ICWA. The State's own expert testified that the placement was non-compliant. (4/4/17 Trans at 11:14-16.)

Despite Father and Mother informing CFS that they both wanted A.L.D. to be cared for by Father's Mother, T.S., who cares for Father's two other children, CPS McNamara testified, ". . . I have not had contact with her." CPS McNamara also stated that "[Father] did not have anyone that he felt was appropriate [to parent A.L.D.]" in complete contradiction of CPS's

Report and Affidavit to the Court on July 31, 2015. (Trans. 25:2). Then CPS McNamara made conclusory statements that ". . . all efforts to place with ICWA-compliant homes were tried and failed," and "there was no appropriate family member." (Trans. 25:10-11; Trans 28:20-22).

Here, there is no evidence that CFS conducted the required diligent search for an ICWA compliant placement, and a review of the record shows that it is clear that CFS never held a placement hearing. CFS failed to prove by clear and convincing evidence that there was good cause to depart from the preferences.

Further, the district court made no finding that the placement met ICWA's placement preferences. In fact, the district court explicitly said the placement was not ICWA-compliant. (Dkt. 60 at 10). Yet, it failed to determine that a diligent search was conducted and failed to determine that there was good cause to depart from the placement preferences as required by ICWA. CFS's, the State's, and district court's efforts to place A.L.D. in an ICWA-compliant home can be summed up in the State's cavalier attitude regarding compliance with ICWA's preference: "First off, it's placement preferences — I would prefer a steak dinner tonight, but I would be fine with a hamburger instead." (Trans. 11:18-21).

i. This Court should remand this case for placement proceedings that comply with ICWA.

A.L.D. was placed in a non-IWCA-compliant foster home. The State failed to follow ICWA's policy in giving preference to placing a child within the Indian child's family, and the district court failed to order A.L.D.s placement in accordance with ICWA preferences. Further, the Court did not determine there was good cause to depart from placement preferences as required by ICWA. Thus, this Court must remand this case to district court for placement proceedings that comply with ICWA's placement preferences.

Because Father now appeals the termination of his parental rights and the placement of A.L.D., he retains standing for this Court to address both issues. *In re C.B.D.*, 2017 MT 108, 387 Mont. 327, 395 P.3d 202. Father seeks a reversal of the termination of his parental rights, thus, this Court must consider on appeal the merits of his argument that A.L.D. was placed in a non-ICWA-compliant home. To the extent that *In re C.B.D.* held otherwise, it should be overruled.

CONCLUSION

Father's counsel was ineffective, the district court failed to comply with ICWA because CFS did not make active efforts to prevent the breakup of the Indian family, and CFS placed A.L.D. in a non-ICWA-compliant placement.

Therefore, Father respectfully requests this Court reverse the order terminating his parental rights to A.L.D. and remand his case to the district court for further proceedings where Father has effective counsel and that comply with ICWA.

RESPECTFULLY submitted this 26th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Georgia typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

Dated this 26th day of January, 2018.

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CERTIFICATE OF SERVICE

I, Briana E. Kottke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-26-2018:

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