Case No. A23-1762

State of Minnesota
In Court of Appeals

In Re the Matter of the Children of:
L.K., Parent.

BRIEF OF RESPONDENT GUARDIAN AD LITEM

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STATEMENT OF LEGAL ISSUES

I. **Whether the district court properly exercised its discretion when it denied Appellants' motion for permissive intervention and whether this issue is properly before this Court on appeal.**

District Court's Ruling: The district court held that intervention was not in the children's best interests and denied Appellants' motion.

II. **Whether the district erred in its interpretation that Minn. Stat. § 257C.01, subd. 3 excludes Appellants as "interested third parties" and whether the district court properly exercised its discretion in finding that placement with Appellants is not in the children's best interests.**

District Court's Ruling: The district court found that under Minn. Stats. § 257C.01, an interested third party does not include an individual who has a child placed in the individual's care through a court order or voluntary placement under chapter 260C.

III. **Whether the district court abused its discretion in determining that good cause does not exist to deviate from ICWA and MIFPA's placement preferences.**

District Court's Ruling: The district court determined that good cause did not exist to deviate from ICWA and MIFPA's placement preferences and found that it was in the children's best interests to be placed with an extended family member.

IV. **Whether Appellants' constitutional challenges are properly before the Court.**

District Court's Ruling: The district court did not hear arguments or make any decisions on Appellants' request for relief.

STATEMENT OF THE CASE AND FACTS

This is a juvenile court child in need of protection or services ("CHIPS") proceeding venued in Martin County before the Honorable Michael D. Trushenski, Judge of District Court.

This matter involves two children - Ki.K. and Kh.K., twin siblings who are eligible for membership or enrolled members of the Miskwaagamiiwi-zaag'igan (hereinafter "Red Lake Nation" or "the Tribe"), a federally recognized Indian Tribe. (Doc. ID #24.) Red Lake Nation's reservation lands are located in northern Minnesota. The children's mother, L.K., was not married when the children were born. (Doc. ID #10.) The children's father is unknown.

Ki.K. and Kh.K. were born at 37 weeks on April [redacted], 2022 at a hospital in Mankato. (Doc. ID #1.) Human Services of Faribault & Martin Counties ("HSFMC", "the County" or "Humans Services") received a report that the children's mother, L.K. tested positive for amphetamines, methamphetamines and opiates and had not received prenatal care during her pregnancy. (*Id.*) Ki.K. experienced significant difficulties at birth and was transported to Rochester Mayo NICU. (*Id.*)

HSFMC filed a CHIPS Petition on April 12, 2022. (*Id.*) An EPC hearing was held April 14, 2023 following which the Court determined that out-of-home

placement was necessary to prevent imminent physical damage or harm to the children. (Doc. ID #10.)

Kh.K. remained in the hospital in Mankato for a week and a half then discharged into foster care in Appellants' home on April 20, 2022. (Doc. ID #20.) Ki.K. remained in the hospital NICU for slightly longer than a month then discharged into foster care in Appellants' home on May 16, 2022. (Doc. ID #21.) Appellants and non-Indian persons.

The Qualified Expert Witness agreed that the children should be placed in a culturally appropriate foster home until the children could be placed with a relative or in a foster home specified by children's Tribe. (App. Add. 006.)

The children were going to be placed with R.J.F., a relative and Indian person who is also the legal custodian of the children's sibling, but were placed with Appellants due to their vulnerable medical needs at that time. (Doc. ID #46.) The children were subsequently placed with their relative, R.J.F., on September 13, 2023. (Doc. ID #112.)

Appellants' assertion that the children's Guardians ad Litem ("GALs") "repeatedly represented" to them that they were preferred long-term placement options given the children's "extraordinary needs" is not supported by the record. (App. Brief at 4.) The first written GAL Report in this matter was filed August 23, 2022. That report is clear that the children had initially been placed outside of ICWA's placement preferences due to their medically

fragile condition. At the time of the August 23, 2022 report, however, the children were thriving and the GAL believed that good cause no longer existed to maintain the children in a non-ICWA compliant placement. (Doc. ID. #47.) Approximately three weeks later in September, 2022 the children's GAL again recommended that, "the twins be moved to an ICWA compliant placement when a family member can be located who is able to take care of them." (Doc. ID #53.) The GAL further recommended that visits between the twins and their older sibling (G.G.G. with whom the twins now live) be arranged. (*Id.*) These visits were never arranged. (App. Add. 007.)

In December, 2022, the children's GAL again reported that the children were no longer medically fragile and that the county should make active efforts to locate a placement within ICWA's placement preferences. (Doc. ID #60.)

On March 2, 2023, a new GAL appointed for the children reported that the children were making good progress developmentally and displayed appropriate attachment to caregivers and others. (Doc. ID #72.) That GAL also recommended that the children's placement with Appellants last only minimally until an appropriate relative placement could be made. (*Id.*) The GAL made the same recommendation in his next Report filed April 25, 2023. (Doc. ID #84.)

A third successor GAL for the minor children submitted a Report to the district court on July 19, 2023. That GAL also recommended that the children

remain in Appellants' care only minimally until an appropriate relative placement was found. The children's GAL recommended that the county work with Red Lake Nation's new tribal representative to identity an appropriate relative placement. (Doc. ID #91.)

Throughout the course of this case, the District Court was similarly consistent that a relative placement search continue. (Tr. 9/13/23 at 39.)

On July 20, 2023, HSFMC advised the District Court that Human Services has attempted to contact Mother L.K. for location and whereabouts and has not heard from her since the last court appearance. (Doc. ID 93.) She had not engaged in supervised visits with the children for four months, and despite the case being open for 14 months, had not made progress on her court-ordered case plan. (*Id.*) Human Services reported that the twins were not placed with their relative R.J.F. at that point in time due to uncertainty from R.J.F. (*Id.*) The uncertainty was resolved and HSFMC moved forward with a plan to place the children with their sibling and extended family member.

On September 12, 2023, Appellants filed an emergency motion with the district Court caking six separate requests: 1) Granting them permissive intervention under the Juvenile Protection Rules. 2) Granting them party status for the purpose of filing an alternate transfer of legal custody petition. 3) Staying the change in placement from a non-Indian, non-relative placement to an Indian relative placement who is also the custodian of the minor

children's sibling. 4) Finding good cause under ICWA, 25 U.S.C. § 1913(b) to deviate from ICWA's placement preferences. 5) Issuing a declaratory judgment that the Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751 to 260.835, is unconstitutional under the 14th Amendment's Equal Protection clause. 6) Issuing a declaratory judgment that the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963, is unconstitutional under the 5th Amendment's incorporated Equal Protection guarantees, except as to certain provisions which may be deemed severable. (Doc. ID #100.)

August 17, 2023 Medical Appointment. In support of their motion and affidavit, Appellants attached medical records from the Mayo Clinic regarding Ki.K. following an August 17, 2023 visit. (Doc. ID #102.) The records identify Ki.K. multiple times as "Natalie" and Kh.K as "Nolan" – anglicized names Appellants gave the children to replace their birth names.

Below is a general summary of relevant information contained within the medical records:

- Appellants wanted to adopt the children and view the children's upcoming change in placement as traumatic because they have "loved these children as [their] own."

- Overall, Ki.K. is making developmental gains. She is very social and makes good eye contact. She has no sleep concerns. Appetite and energy are stable. Concentration is good. No behavior concerns. She did not pass her hearing test. Overall, Ki.K. is a happy toddler.

- She has not had any definite seizures and has done well off seizure medication. She has been having frequent episodes of eye rolling which is suspected to be behavioral.

- She was active and alert. All joints had full range of motion with no deformity or tenderness. Her strength, tone and gait were normal.

- She is at high risk of speech and motor delays and seizure recurrence as she gets older and will require ongoing monitoring and evaluation. She is at significant risk for developmental stagnation if she does not continue to receive ongoing therapies and close monitoring.

- Currently, she is receiving occupational therapy once every three months and physical therapy once a month.

- Medical recommendations include a six-month follow-up with the NICU Clinic; a Bayley assessment; an EEG to rule out seizures; a high calorie, protein rich diet; an ENT appointment in August 2024; an ophthalmology appointment in April 2024; possible speech language therapy at age two if indicated.

An emergency hearing was held September 13, 2023. (App. Add. 001.) Appellants' motion to stay the children's change in placement was the only issue addressed. (*Id.*, Tr. 9/13/23 at 17.) As Appellants' motion to intervene was not heard at the September 13, 2023 hearing, Appellants were not parties to the CHIPS proceeding when their motion to stay change in placement was filed or argued.

The District Court issued an oral order from the Bench denying Appellants' motion and permitting placement of the children with their sibling and extended family member R.J.F on that date. (App. Add 002.)

A written Order dated September 15, 2023 was subsequently issued with additional legal findings. (App. Add. 001-004.)

On October 4, 2023, Appellants filed an amended motion requesting the Court join them as necessary parties or, in the alternative, grant their motion for permissive intervention. (Doc. ID #125.) On the same date, Appellants filed a family court third party custody petition into the underlying juvenile court CHIPS file. (Doc. ID #126.)

A hearing was held October 5, 2023 on all issues except the declaratory relief of Appellants challenging various constitutional provisions. (App. Add. 006. As Appellants' amended motion was not timely filed or served, the district court kept the record open and allowed parties to submit written responses. (Tr. 10-5-23 at 35.)

On October 13, 2023, the children's GAL filed a motion seeking dismissal of Appellant's third party custody petition and denial of Appellants' motion for joinder and permissive intervention. (Doc. ID #135.)

On October 13, 2023, Red Lake Nation filed a motion requesting the district court to deny Appellants' motion in its entirety and find that Appellants and their counsel engaged in frivolous litigation. (Doc. ID #139.)

On October 31. 2023, the district court issued an order dismissing Appellants' third party custody petition for lack of jurisdiction, denying

Appellant's motion for permissive intervention, and denying Red Lake's frivolous litigant request. (App. Add. 008.)

This appeal follows.

STANDARD OF REVIEW

Denials of permissive intervention are subject to an abuse of discretion standard. *Norman v. Refsland*, 383 N.W.2d 673, 676 (Minn. 1986). A district court abuses its discretion by "making findings unsupported by the evidence or by improperly applying the law." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). An appellate court will reverse the denial of a request to permissively intervene only when a clear abuse of discretion is shown. *State v. Deal,* 740 N.W.2d 755, 760 (Minn. 2007).

Whether good cause exists to deviate from ICWA's placement preferences is subject to an abuse of discretion standard. *Matter of Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct.1993), rev'd on other grounds, 521 N.W.2d 357 (Minn. 1994). The application of ICWA to undisputed facts presents a question of law reviewed de novo. *In Re Welfare of Child of T.T.B. & G.*W., 724 N.W.2d 300, 307 (Minn. 2006). Statutory interpretation is a question of law reviewed de novo. *In re Welfare of Children of J.B.*, 782 N.W.2d 535, 539 (Minn. 2010).

A person "who invokes the power of the court to declare a statute unconstitutional must be able to show not only that the statute is invalid but that the person has sustained or is in immediate danger of sustaining some direct injury resulting from its enforcement." *Paulson v. Lapa*, Inc., 450 N.W.2d 374, 380 (Minn. App. 1990).

ARGUMENT

I. Appeal of the district court's denial of permissive intervention is not properly before this Court. Notwithstanding that, the district court properly found that intervention was not in the children's best interests.

A. Denial of permissive intervention is generally not appealable.

As an initial matter, denial of permissive intervention in a civil proceeding is generally not appealable and this issue is not properly before this Court. *Deal v. Deal (In re State)*, 740 N.W.2d 755, 760 (Minn. 2007); *Norman v. Refsland*, 383 N.W.2d 673, 675 (Minn. 1986).

Appellants improperly rely upon the Court's decision in *In re Welfare of the Children of M.L.S.,* to argue that denial of their motion for permissive intervention is appealable. *M.L.S.,* however, is an exception to the rule, and is substantively and procedurally distinguishable from this present proceeding. *See Matter of Welfare of Child of M.L.S.,* 956 N.W.2d 257, 259 (Minn. Ct. App. 2021).

In *M.L.S.,* the petitioner was a relative to the child who sought to intervene in an adoption proceeding. The reviewing Court essentially carved out an exception to the general rule and held that denying the relative permissive intervention would effectively bar her from being considered as an adoptive placement for the child. *M.L.S.*, 964 N.W.2d at 451 (citing *Matter of Welfare of Child of M.L.S.*, 956 N.W.2d 257, 260 (Minn. App. 2021). On that basis, the denial of her permissive intervention motion was appealable.

Unlike *M.L.S.,* this is a CHIPS proceeding, not an adoption proceeding. Further, Appellants are not relatives and Appellants' interests are presently aligned with Respondent Mother who is a party to the proceeding.

B. Intervention is not in the children's best interests.

Because this issue is not an appealable issue properly before the Court, this Court should not address it. If it does, the district court's decision should be affirmed because intervention is not in the children's best interests.

Appellants sought permissive intervention in the underlying CHIPS proceeding pursuant to Minn. R. Juv. Pro. P. 34.02, which provides that: "Any person *may* be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child" (emphasis added).

The Rules of Juvenile Protection Procedure, promulgated by the Minnesota Supreme Court, are clear that, in proceedings involving an Indian child, the best interests of the child shall be determined consistent with the Indian Child Welfare Act ("ICWA" - 25.U.S.C. §§ 1901-1963) and the Minnesota Indian Family Preservation Act (MIFPA - Minn. Stat. §§ 260.751 – 260.835). *See* Minn. R. Juv. Prot. P. 28.05.

MIFPA defines best interests of an Indian child as compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. "The best interests of an Indian child support the child's sense of belonging to family, extended family and tribe. The best interests of an Indian child are

interwoven with the best interests of the Indian child's tribe." Minn. Stat. § 260.755 subd.2a (emphasis added).

ICWA does not specifically define best interests but imposes a federal standard on all states that the best interests of Indian children will be served by protecting "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." H.R. REP. NO. 95-1386 at 23 (1978).

In applying best-interests under MIFPA and ICWA, the district court found that the children did not attend a single tribal event; never met their older sister or many of their other extended family members; and were not enrolled for membership with their Tribe while placed with Appellants. The district court found that the Tribe does not approve of Appellants as the children's foster or permanency home and the best interests of the children would not be advanced by further delay in finalization of the children's case. *See In re Welfare of R.D.L.,* 853 N.W.2d 127, 134-135 (Minn. 2014) (holding that timely resolution and reducing unnecessary delays are critical considerations for the wellbeing of children.)

Each of the district court's findings was made alongside the children's best interests and was tied to concerns about intervention. Moreover, the burden of establishing that intervention is in the best interests of the children lies with Appellants who failed in this showing.

The district court's factual findings are supported by the record. It correctly applied the law, and its ultimate decision was not an abuse of discretion. As such, the denial of permissive intervention should be affirmed.

II. Appellants lack standing to seek third party custody and their petition was properly dismissed.

After filing a motion to intervene, and after the children were moved from Appellants' care into relative placement, Appellants filed a family court petition into the existing juvenile court CHIPS action seeking third party custody of the minor children pursuant to Minn. Stat. § 257C.03, subd. 1 as "interested third parties".

To establish oneself as an interested third party, an individual must:

(1) show by clear and convincing evidence that one of the following factors exist:

(i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;

(ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or

(iii) other extraordinary circumstances;

(2) prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party;…

See Minn. Stat. § 257C.03, subd. 7.

In determining best interests, the court must apply standards in section 257C.04 except for cases governed by the Indian Child Welfare Act or the Minnesota Indian Family Preservation Act. *See* Minn. Stat. §§ 257C.03, Subd. 7(c), 257C.02(a).

Pursuant to Subd. 8 of the statute, the court must dismiss a petition for custody if the court finds that:

(1) the petitioner is not a de facto custodian as set forth in section 257C.01, subdivision 2;

(2) the petitioner does not establish at least one of the factors of interested third party; or

(3) placement of the child with the petitioner is not in the best interests of the child. *See* Minn. Stat. § 257C.03, subd. 8.

The district court dismissed Appellants' third party custody petition finding that an interested third party does not include an individual who has a child placed in the individual's care through a court order or voluntary placement under chapter 260C. (App. Add. 007.)

The district court further found that placement with Appellants was not in the children's best interests. *Id.*

A. As non-parties, Appellants had no legal basis to file a petition into the underlying CHIPS file and the district court properly dismissed the petition.

Filing motions or other legal documents into an existing court file is a right generally reserved for parties. *See* R. Juv. Prot. P. 32.02 (outlining the

rights of parties). Because Appellants were denied party status in the underlying CHIPS proceeding, they had no legal basis to file a petition for third party custody into that proceeding and it was properly dismissed by the Court.

B. Appellants are statutorily excluded from seeking custody as "interested third parties".

Even if Appellants were to refile their third party custody petition into a separate file under a new court file number, Appellants are statutorily excluded from seeking custody as interested third parties.

Minnesota Chapter 257C. In 2002, the Minnesota legislature enacted Chapter 257C to address custody and visitation petitions brought by third-party non-parents. *See* 2002 Minn. Laws. Ch. 304, §§ 1-6, 13 (enacting Chapter 257C).

Prior to the enactment of 257C, third party custody was governed by Minn. Stat. § 518.156, subd. 1(b) (2000) which placed no limitations on who could seek custody of a child. *See In re Kayachith*, 683 N.W.2d 325, 327 (Minn. App. 2004).

Chapter 257C places significant limitations on who is permitted to seek custody. One of those limitations is that any individual who has a child placed in their care: (1) through a custody consent decree under section 257C.07; (2) through a court order or voluntary placement under chapter 260C; or (3) for

adoption under chapter 259 is specifically excluded as an interested third party. *See* Minn. Stat. § 257C.01, subd. 3(b) (emphasis added).

It is not disputed that the children were placed with Appellants through a court order under chapter 260C. It is also not disputed that the relationship between Appellants and the children stems from that court-ordered foster care placement. The children had no preexisting relationship with Appellants.

Statutory Interpretation. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." *In re Welfare of J.P.–S.*, 880 N.W.2d 868, 871 (Minn. App. 2016). When discerning the meaning of a statute's plain language, appellate courts may consider the statute's subject matter as a whole. *See Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019) (statutory provisions are not read in isolation); *see, e.g.*, *City of East Bethel v. Anoka Cnty. Hous. & Redevelopment Auth.*, 798 N.W.2d 375, 380 (Minn. App. 2011) (reviewing a statute's content to discern meaning of plain language).

The first step in statutory interpretation is to determine whether the statute's language, on its face, is ambiguous. *Larson v. State,* 790 N.W.2d 700, 703 (Minn. 2010) (citing *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)). A statute is ambiguous if its language is subject to more than one reasonable interpretation. *State v. Mauer,* 741 N.W.2d 107, 111 (Minn. 2007).

If a statute is unambiguous, courts "apply the statute's plain meaning." *Larson*, 790 N.W.2d at 703. If the statute is ambiguous, courts are directed to look to the canons of construction to ascertain its meaning. *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018).

Pursuant to the canons of construction, when ascertaining the intention of the legislature, it is presumed that:

> (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
> (2) the legislature intends the entire statute to be effective and certain;
> (3) the legislature does not intend to violate the Constitution of the United States or of this state;
> (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
> (5) the legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17.

The statutory phrase is subject to more than one interpretation. Because the statutory language prohibiting the grant of standing to "an individual who has a child placed in the individual's care…under chapter 260C" is subject to more than one reasonable interpretation, it is ambiguous. It may be interpreted to mean an individual who *presently* has a child placed in their care under 260C, or it may be interpreted to mean an individual who has a child placed under 260C any time in which the relationship between the individual and child flows from a 260C placement.

Under the first interpretation, an individual who is presently providing foster care for a child would be prohibited from seeking custody as an interested third party. Another foster care provider, however, who experienced a change in child placement out of their home that same day, would have standing as an interested third party. Under the first interpretation, almost any and all former foster care providers who had no established relationship with the child prior to the government-initiated, court-ordered foster care placement, would have standing bestowed upon them immediately by virtue of the agency or the court removing the child from that individual's care.

This would cause an absurd result and could not be what the Legislature intended. Moreover, following this interpretation to its logical conclusion would result in individuals being able to do an end-run and get a second bite at the apple nearly any time the district court denied a motion to intervene.

For example, if any person meeting the definition of interested third party or de facto custodian filed a motion to intervene in an underlying CHIPS, permanency or adoption file, but was denied intervention, that person could simply file a chapter 257C third party custody petition and do an end run around the juvenile court's order denying intervention.

Additionally, while the child's parents and the child would be entitled to court-appointed legal counsel at public expense, a case plan, supportive reunification efforts, and myriad other protections and services in a juvenile

court chapter 260C proceeding, they would not be entitled to any of those rights or protections in a family court 257C proceeding. *See generally* Minn. Stat. §260C.163, subd. 3 providing a statutory right to effective assistance counsel at public expense and various other provisions of 260C providing parents and children with myriad rights and protections. *See generally* Minn. Stat. 257C providing no statutory right to effective assistance of counsel at public expense, no required case plan, no required efforts or supports for reunification, etc.

In considering the statute, and the statutory scheme, as a whole, it is clear that the legislature intended to provide standing to a narrow and limited group of persons who established a significant relationship with a child separate from a systems-created relationship stemming from a CHIPS placement or adoption placement under chapters 260C or 259.

Notwithstanding the dictum of the Court in *Matter of Welfare of Child of F.J.V.,* it is also appears clear that the legislature did not intend for family court 257C third party custody actions to be filed in juvenile court during the pendency of a CHIPS, permanency or adoption proceeding. *See Matter of Welfare of Child of F.J.V.,* No. A21-0522, 2021 WL 4944677, at *4 (Minn. Ct. App. Oct. 25, 2021).

C. Appellants' third party custody petition was properly dismissed at it was not in the best interests of the children.

If the court finds that placement of the child with the petitioner is not in the best interests of the child, the court must dismiss the third party custody petition. Minn. Stat. § 257C.03, subd. 8(3). Third-party custody proceedings concerning an Indian child are governed by the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. Minn. Stat. § 257C.02(a).

As the children are American Indian children, their best interests are to be construed consistent with those Acts. *See* Minn. Stat. § 257C.02(a); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. App. 1992).

Pursuant to the Indian Child Welfare Act,

> It is the policy of the United States to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of 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 values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. 25 U.S.C. § 1902 (emphasis added).

The best interests of an Indian child "means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe." Minn. Stat. § 260.755, subd. 2a.

In the years leading up to passage of the ICWA, nearly one-third of all Indian children were removed from their families and placed in non-Indian homes on the false assumption that "most Indian children would really be better off growing up non-Indian." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1 (1977) (*1977 Hearing*) (statement of Sen. Abourezk); *see also Mississippi Band of Choctaw Indians*, 490 U.S. at 32-33. The consequences for those children removed and placed with non-Indian families were devastating. Indian children were deprived of their Indian identities and often were never fully accepted or assimilated into their new, non-Indian communities. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1(1989) ("[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." (quoting *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 46 (1974) (*1974 Hearings*) (statement of Dr. Joseph Westermeyer)). As a result, many children suffered from "ethnic confusion" and a "pervasive sense of abandonment." *1977 Hearing* 114 (statement of Drs. Carl Mindell and Alan Gurwitt). Additionally, Indian children were significantly more likely to experience physical, sexual, and emotional abuse in foster and adoptive homes than their white counterparts. *Haaland v. Brackeen*, 599 U.S. 255, 143 S. Ct.

1609, 1645, (2023) (citing A. Landers, S. Danes, A. Campbell, & S. White Hawk, Abuse After Abuse: The Recurrent Maltreatment of American Indian Children in Foster Care and Adoption, 111 Child Abuse & Neglect 104805, p. 9 (2021)).

Ki.K. and Kh.K. are currently placed with R.J.F., who is their relative, a member of their Tribe, a licensed foster care provider, and the legal custodian of their four-year old sister. (App. Add. 007.) The children have transitioned well into their current placement with R.J.F. *Id.* They have attended tribal events and are able to live with their sibling. *Id.*

The Indian Child Welfare Act requires the court to place an Indian child with an Indian caretaker if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there. *Haaland v. Brackeen* 143 S.Ct. 1609, 1622. The children are placed with a relative Indian caretaker and their sibling where the unique values of their Indian culture is reflected. This in accord with their best interests and the law.

Regardless of whether Appellants fall within or are excluded from the definition of interested third party, their custody petition was properly dismissed as placement with them was not in the children's best interests.

III. Appellants failed to demonstrate good cause to deviate from ICWA and MIFPA's placement preferences.

When placing an Indian child, the district court is required to follow the order of placement preferences except where the court determines good cause to the contrary. Minn. Stat. § 260.773, subd. 10. ICWA creates "a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children." *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994).

ICWA sets forth a hierarchy of foster care placement preferences, which MIFPA generally follows except that MIFPA's placement preferences now articulate a first-tiered preference for non-custodial parents or Indian Custodians. Minn. Stat. § 260.773, subd. 3; 25 U.S.C. § 1915. ICWA's placement preferences start with most preferred, and are to be considered sequentially, without skipping any. *See* BIA Guidelines for Implementing the Indian Child Welfare Act at H.2 "Foster Care Placements" (2016), 25 CFR § 23.131.

In accordance with ICWA, placement preference shall be given, in the absence of good cause to the contrary, in the following descending order to:

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. 25 U.S.C. § 1915(b).

A member of the Indian child's extended family, "Shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." 25 C.F.R. § 23.2. The children's current relative caregiver is a member of the children's extended family. Appellants are not.

MIFPA itemizes four factors for the district court to consider in determining whether good cause exists to deviate from the placement preferences:

> (1) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;
>
> (2) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;
>
> (3) the testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an expert witness who meets [the] qualifications of [the statute], that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or
>
> (4) the testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria. Minn. Stat. § 260.773, subd. 10.

Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the good cause factors, shall not be considered good cause to keep an Indian child in a lower preference or nonpreference placement. Minn. Stat. § 260.773, subd. 11. Ease of visitation and facilitation of relationship with the Indian child's parents, Indian custodian, extended family, or Tribe *may* be considered when determining placement. *Id. (emphasis added)*.

Any party seeking to deviate from the placement preferences bears the burden of proving by clear and convincing evidence that good cause exists to modify the order of placement preferences. Minn. Stat. § 260.773, subd. 12; *In re Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993) *rev'd on other grounds,* 521 N.W.2d 357 (Minn. 1994); *see also* BIA Reg. § 23.132 (stating that the party seeking departure from the placement preferences "should" bear the burden of proof by clear and convincing evidence).

At the district court, Appellants sought a finding of good cause to deviate from the placement preferences based upon (1) the children's extraordinary medical needs and bonding or attachment to the foster family; (2) the reasonable request of the children's mother; and (3) the children's best interests.

In order to deviate from the placement preferences due to extraordinary physical or emotional needs, MIFPA requires the testimony of a qualified

expert witness designated by the child's tribe. Minn. Stat. § 260.773, subd. 10(2)(iii).

Under both ICWA and MIFPA, where appropriate and reasonable, the court shall consider the preference of the Indian child or the Indian child's parent as to the issue placement. 25 U.S.C. § 1915(c); BIA Reg. § 23.131(d); Minn. Stat. § 260.773, subd. 10(2)(i).

Appellants rely on an Iowa Supreme Court decision, *In re N.N.E.,* 752 N.W.2d 1 (Iowa 2008) to support an argument that MIFPA's placement preferences and good cause requirements violate L.K.'s due process rights under the United States Constitution by elevating the rights of a Tribe paramount to the rights of a parent who has not been deemed unfit.

Appellants reliance on this non-binding, non-precedential opinion, however, is wrongly placed. Respondent Mother L.K. is not similarly situated to the Mother in *In re N.N.E.* as L.K. has been deemed presumably unfit. *See* Minn. Stat. § 260C.301, subd. (b)(4) – stating that it is presumed that any parent is palpably unfit to be a party to the parent and child relationship upon a showing that the parent's custodial rights to another child have been involuntarily transferred to a relative under Minn. Stat. § 260C.515, subd. 4, or a similar law of another jurisdiction.

As Mother L.K.'s custodial rights to her daughter G.G.G., born August [redacted] 2019, were involuntarily transferred to R.J.F. under Minn. Stat. §

260C.515, subd. 4, she is presumed palpably unfit to parent. (Doc. ID #1 and #135.)

With regard to deviating based upon the parent's preference, the district court did consider L.K.'s preference, but gave it less weight finding that L.K. has been minimally involved with this case; has not made progress on her case plan; has not resolved her chemical dependency issues; and does not have stable housing. As a result, she has not rebutted the presumption against her. Additionally, there is a risk that she continues to be under the influence of mood-altering chemicals that can significantly compromise her decision-making capabilities. (App. Add. 003.)

N.N.E. is further differentiated in that it involves a voluntary termination of parental rights and adoption while this instant case involves an involuntary CHIPS proceeding in which the state has removed Mother's children from her care because of Mother's inability to appropriately and safely parent them.

Because placement of the children with the extended family member R.J.F. and their sibling is in the children's best interests, because Appellants failed to demonstrate good cause to deviate from the placement preferences by clear and convincing evidence including failing to provide testimony of a qualified expert witness, good cause does not exist and the district court properly placed the children according to the placement preferences with their

extended family member R.J.F. where the children will be able to maintain and develop their identity as Indian children, their connection to extended family, and their connection to community and Tribe. *See In re Welfare of S.N.R.*, 617 N.W.2d 77, 85 (Minn. Ct. App. 2000) (holding that the court did not err in dismissing an adoption petition when the adoption petitioner failed to qualify as a preferred placement option and failed to provide the testimony of a qualified expert witness as required to demonstrate good cause on the basis of extraordinary physical or emotional needs.)

IV. This Court should decline to address Appellants' equal protection challenges as they are not properly before the Court.

This court's review is necessarily limited to issues which were actually raised in, and decided by, the trial court as demonstrated by the record. *Thayer v. American Financial Advisors, Inc.,* 322 N.W.2d 599, 604 (Minn. 1982). Although Appellants raised their constitutional arguments below, those issues were not briefed by the parties, were not argued to the court, and were not decided by the district court. Consequently they are not properly before this Court and this Court should decline to address them. In the event this Court chooses to address the constitutional arguments, the children's Guardian ad Litem adopts and joins in the brief and legal arguments of the Minnesota Office of Attorney General in opposition to Appellants' claims and in support of the constitutionality of the challenged provisions. As Justice Neil Gorsuch so

eloquently wrote in his concurring opinion in the *Brackeen* decision, "In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design." Haaland v. Brackeen, 599 U.S. 255, 333, 143 S Ct. 1609, 1661 (2023).

CONCLUSION

The minor children's Guardian ad Litem respectfully requests that this Court affirm the district court's October 31, 2023 order denying Appellants' motion to intervene; affirm the district court's determination that Appellants failed to demonstrate good cause to deviate from ICWA and MIFPA's placement preference; and affirm the district court's September 13, 2023 order placing the children with their sibling and extended family member as this is in the children's best interests.

Appellants' argument that they are essentially the only family the children have ever known, that the children have been placed with strangers, and the children's medical needs and best interests can only be met by Appellants and by medical providers at Mayo Clinic is troubling, contrary to traditional Anishinaabe beliefs, and rooted in deep-seated stereotypes about

American Indian people.[1] The children's relative caregiver, and other Tribal citizens residing within the boundaries of the Red Lake Nation, are modern day Indians. They have cars and they have roads. While the children's Guardian ad Litem believes that the children's medical needs can be met by expert, dedicated and caring medical professionals in Bemidji or Grand Forks or Duluth or Minneapolis or St. Paul in addition to the dedicated medical professionals at the Mayo clinic, the children can be transported to the Mayo Clinic if necessary. The children's relative care provider, Red Lake Nation professionals and Martin County Human Services have all committed to assisting with this if necessary.

With respect to knowing their extended family, it is a sincerely held spiritual/religious belief of the Anishinaabe that the spirit of an Anishinaabe child chooses their parent knowing their parent and their extended family long before their birth.

Ki.K. and Kh.K. are right where they belong, placed with their sibling and loving extended family member within their Tribal Community. This placement is in their best interests and their Guardian ad Litem respectfully requests that it be upheld.

Respectfully submitted,

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[1] Matthew L. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act,* 120 MICH. L. REV. (2022).

STATE OF MINNESOTA
GUARDIAN AD LITEM PROGRAM

Dated: February 6, 2024

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. P. 132.01 for a brief produced with proportional font. The length of this brief is 7,010 words. The brief was prepared using Microsoft Office 365 Word Version 2308.