NO. A-18-001141

IN THE NEBRASKA COURT OF APPEALS

IN THE MATTER OF THE GUARDIANSHIP OF ELIZA W.

SUSAN ELAINE W.,
APPELLEE

v.

TARA SUZANNE W.,
APPELLANT

v.

DEIONDRAY B.,
APPELLEE

On Appeal from the County Court of Douglas County, Nebraska
The Honorable Marcela A. Keim
Case Number PR 18-1151

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

Susan W. (hereinafter, "Susan" or "Appellee") agrees with Tara W.'s (hereinafter, "Tara" or "Appellant") Statement of Jurisdiction, excepting Tara's statements regarding her applications for court-appointed counsel, for reasons more thoroughly explained in Appellee's argument below.

STATEMENT OF THE CASE

(1) The kind of action or nature of the case. Susan agrees with Tara's statements regarding the nature of this case, excepting Tara's statements regarding her applications for court-appointed counsel, for reasons more thoroughly explained in Appellee's argument below.

(2) The issues actually tried in the court below. The County Court for Douglas County, Nebraska, the Honorable Marcela A. Keim presiding, (hereinafter, the "Trial Court") considered whether Tara was entitled to the appointment of legal counsel pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., (hereinafter, "ICWA") and the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. §§ 43-1501 et seq., (hereinafter, "NICWA"). (19:6-20:12). Further, the Trial Court examined whether ICWA and NICWA apply for the purposes of notice and for application to the substantive proceeding before the Trial Court. (31:23-32:3; 198:22-24).

(3) How the issues were decided and what judgment or decree was entered by the trial court. The Trial Court determined that Tara had not followed the procedural requirements to have counsel appointed for her. (19:6-20:12). Furthermore, the Trial Court applied ICWA and NICWA for notice, but held that ICWA and NICWA did not apply to the substantive proceeding, as it found that a private guardianship proceeding is not a foster care placement under Neb. Rev. Stat. § 43-1503(3)(a). (31:23-32:3; 198:22-24).

(4) Scope of appellate review. Susan generally agrees with Tara's statements regarding the scope of appellate review for this case, but further advises this Court that when neither party has requested the trial court to make specific findings of fact and conclusions of law and where there is a conflict in the evidence, the reviewing appellate court presumes that all

controverted facts were decided in favor of the successful party. *Foiles v. Midwest Street Rod Association of Omaha, Inc.*, 254 Neb. 552, 553 (1998). Such finding should not be disturbed unless it is clearly wrong. *Id*. at 553-54.

PROPOSITIONS OF LAW

(1) Where neither party has requested the trial court to make specific findings of fact and conclusions of law, where evidence is in conflict, the reviewing appellate court presumes that all controverted facts were decided in favor of the successful party and the findings will not be disturbed unless clearly wrong. *Foiles v. Midwest Street Rod Association of Omaha, Inc.*, 254 Neb. 552, 553-54 (1998).

(2) The purpose of the Indian Child Welfare Act is to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families . . ." and to establish "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 . . . ." 25 U.S.C. § 1902.

(3) The Nebraska Indian Child Welfare Act was passed for the purpose of "clarify[ing] state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act." Neb. Rev. Stat. § 43-1502.

(4) In order to comply with ICWA and NICWA, parties undertaking a child custody proceeding must take the following steps: (1) provide notice to the parents, or the Indian custodian, and the Indian child's tribe or tribes, by registered mail with return receipt requested; (2) if the trial court determines the parent or the Indian custodian is indigent, the trial court must provide for court-appointed counsel; (3) prove that active efforts, as defined by Neb. Rev. Stat. § 43-1503(1), have been made to attempt to prevent the breakup of the Indian family; and (4) that clear and convincing evidence, including testimony of a qualified expert witness, shows that the child is likely to suffer serious emotional or physical damage by remaining with the parent or Indian

custodian. *See* Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912.

(5) A party seeking the application of ICWA and NICWA has the burden of showing that it applies to the proceeding before the court. *In re Adoption of Kenten H.*, 272 Neb. 846, 853 (2007); *In re Interest of Nery V.*, 20 Neb. App. 798, 811 (2013).

(6) A child custody proceeding includes five separate actions: 1) a foster care placement, (2) a proceeding to terminate parental rights, (3) a preadoptive placement, (4) an adoptive placement, and (5) a voluntary foster care placement. Neb. Rev. Stat. § 43-1503(3); *see also* 25 U.S.C. § 1903(1).

(7) A foster care placement is an action removing an Indian child from (1) his or or her parent, (2) from an Indian custodian for temporary or emergency placement in a foster home or institution, or (3) from the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. *See* Neb. Rev. Stat. § 43-1503(3)(a).

(8) The active-efforts standard comprises eight examples: (1) a concerted level of case work, consistent with the social and cultural normal of the Indian child's tribe, to the extent possible; (2) a request to the tribe known to the department or the state to provide support and services; (3) actively engaging with the family to provide culturally appropriate resources, if available, from the child's extended family, tribe, and Indian caregivers; (4) identify appropriate community, state, and federal resources that may offer housing, financial, transportation, and other assistance and help the Indian child's family to access such resources; (5) identify and attempt to engage tribally-designated representatives under NICWA; (6) consult with extended family members or, if unavailable, with the tribally-designated NICWA representative; (7) exhaust all tribally-appropriate family preservation alternatives; and (8) the department or state must provide a written report of the active-efforts attempts. Neb. Rev. Stat. § 43-1503(1).

(9) Nothing within ICWA or the regulations is intended to force a minor child to assume a cultural identity or to create a relationship with a tribe that was not pre-existing, whether

that relationship would have existed through either "[the Indian child's] membership, or through the citizenship of a parent and [the minor child's] eligibility for citizenship . . . ." 81 FR 38792 (June 14, 2016).

(10) An Indian child is an individual under the age of eighteen and is either a member of an Indian tribe or is eligible for membership and is the biological child of a member. Neb. Rev. Stat. § 43-1503(8).

(11) An indigent parent or Indian custodian has the right to court-appointed counsel in a proceeding involving ICWA and NICWA. 25 U.S.C. § 1912(b); Neb. Rev. Stat. § 43-1505(2).

(12) Indigency is generally defined when a party "'is unable to pay . . . attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents.'" *White v. White*, 293 Neb. 439, 446 (2016) (*quoting Mathews v. Mathews*, 267 Neb. 604, 612 (2004)).

(13) "It is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or nature of the case, asserts the affirmative of an issue." *Waste Connections of Nebraska, Inc. v. City of Lincoln*, 269 Neb. 855, 866 (2005) (*citing Miller v. Westwood*, 238 Neb. 896 (1991)).

(14) When a party voluntarily stipulates to a matter, he or she may only obtain relief from such a stipulation under exceptional circumstances. *In re Estate of Mithofer*, 243 Neb. 722, 726-27 (1993) (*quoting Martin v. Martin*, 188 Neb. 393, 397-98 (1972).

(15) "It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed." *Shipferling v. Cook*, 266 Neb. 430, 435 (2003) (*citing WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522 (1995)).

(16) No technical forms of pleading or motions are required; a party need only set forth

a caption, a short and plain statement of the claim showing that the pleader should have relief, and a demand for the judgment sought from the court. Neb. R. Ct. § 6-1108.

(17) Even when a party does not move to amend his or her pleadings, the trial court may constructively amend those pleadings on unpled issues in order to issue a decision that is consistent with the evidence provided at trial. *Denali Real Estate, LLC v. Denali Custom Builders, Inc.*, 302 Neb. 984, 997 (2019).

(18) A qualified expert witness must testify regarding whether the continued custody by the parent is likely to result in serious emotional or physical damage to the Indian child, but should also be qualified to testify regarding the social and cultural standards of the Indian child's tribe. 25 C.F.R. § 23.122.

(19) A qualified expert witness can be "'[a] lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.'" *In re Interest of C.W.*, 239 Neb. 817, 824 (1992) (*quoting* 44 FR 67584, 67593 (Nov. 26, 1979)), *overruled on other grounds*, *In re Interest of Zylena R.*, 284 Neb. 834 (2012).

(20) A parent may not be deprived of the custody of his or her minor child unless the petitioner affirmatively shows that the parent is unfit to perform the duties required of such a relationship or has forfeited that right. *In re Guardianship of D.J.*, 268 Neb. 239, (2004).

STATEMENT OF FACTS

Eliza W. (hereinafter, "Eliza") is a minor child born in 2014 to Tara and, upon information and belief, to Deiondray B. (T1; 34:7-8). Susan and Jay W. (hereinafter, "Jay") are the maternal grandparents of Eliza. (T1). In the months prior to seeking a guardianship over Eliza, Susan and Jay had noticed changes in Tara's behavior that caused concerns regarding her ability to serve as a fit, proper, and suitable parent to Eliza and that Tara may be placing Eliza in harm's way. (39:24-41:1; 54:11-17).

Over the past few years, Tara and Eliza have resided with Susan and Jay. (44:17-45:5). When Tara resides with Susan and Jay, she either sleeps downstairs in the basement or in a secondary building on the property. (44:18-45:2). Approximately once per a week, Tara will go to sleep for a period between twelve (12) and up to thirty-six (36) hours while Eliza is in Tara's care. (68:17-69:14). Try as they might, neither Eliza nor Susan are able to wake her during these periods. (68:21-69:14).

At other times, Tara will leave Susan and Jay's residence without any notification, leaving Eliza in their care for periods between twenty-four (24) and thirty-six (36) hours, without warning and with neither Susan nor Jay being aware of when Tara will return. (39:9-40:23; 78:4-20). Over a twelve (12) month period, these excursions occur on approximately half of the nights. (39:24-40:2).

Medically, Tara has previously been diagnosed with viral meningitis, which, when combined with her previous history of migraines, continues to be debilitating. (112:17-113:4). In addition, Tara suffers from bipolar disorder and has had episodes. (172:6-9). Tara also suffers from paranoia, believing that people are following her. (49:15-24). At trial, Susan and Jay testified that they frequently find butcher knives and/or hatchets by her couch or door. (50:2-4). More disturbing is that these weapons, after being removed from secured areas, were stowed in locations readily accessible to Eliza. (50:5-8; 86:3-11). Jay testified that his sharp wood-turning tools in his workshop have been known to disappear and are later found in Tara's possession. (81:17-82:3). Tara does not recall removing and storing certain weapons, such as knives, machetes, and hatchets around the house. (178:16-24).

Tara has a history of drug use. (50:13-51:23). During her time at college, Tara has abused alcohol. (50:13-17). While living with Susan and Jay, Susan discovered drug-related paraphernalia in her home, which she attributed to Tara. (51:18-23). To help with drug-related issues, Tara attended an outpatient drug treatment program in February of 2017. (50:18-51:17). At the end of

the program, Tara dropped out because she was required to take a drug test and refused to do so. (51:9-17). Further, Jay testified that some of his solvents, superglues, acetone, and similar substances would disappear from his locked workshop and re-appear in Tara's possession. (82:4-9; 87:17-88:6).

For the past few years, Tara has been unable to maintain stable employment. (42:4-6; 67:3-8). Tara had previously been considered for director of sales positions in Omaha and Des Moines. (158:18-159:6). However, Tara rejected these job opportunities in order to pursue her education, without considering, or even asking for, information regarding the salary or wage attached to such positions. (159:2-6; 161:16-19).

Susan and Jay have previously paid for transportation for Tara. (43:4-15; 67:20-68:7). One vehicle was taken from Tara at a party and was later retrieved by Susan in pieces after party-goers took the vehicle for a "joyride." (67:20-68:2). When last used by Tara, the most recent vehicle was returned with damage, as Tara's then significant other caused damage to the side during the break-up. (*Id.*). Susan cosigned on a loan for another vehicle, Tara was only able to make payments on it for two or three months. (67:9-15). Since then, Tara has purchased a new vehicle, though Susan and Jay are not comfortable with Eliza riding in it during the winter, as the windows do not roll up, exposing Eliza to the cold. (42:17-43:3; 67:16-19).

Immediately prior to Susan filing the Petition with the Trial Court, Tara resided with a friend of hers, Mark Kelly, Sr., (hereinafter, "Mark") and his four children. (45:14-22). Tara introduced Eliza to Mark and his children, and they both began staying over at Mark's residence from time to time, notwithstanding Mark's previous convictions regarding drug usage, though this is not the first time that Tara has introduced Eliza to person's with criminal backgrounds. (*Id.*; 54:2-17; 142:24-143:15). On at least one occasion, Susan picked up Eliza from Mark's residence and brought her back to Susan's and Jay's residence, due to Eliza desiring to be removed from Mark's residence. (47:15-22). After knowing Mark for only a month or so, Tara began making

preparations to move to Oklahoma with Mark, so that the Muscogee Nation could take care of them. (45:22-46:8; 175:1-9).

This all resulted with Susan filing the Petition due to her concern that Tara was placing Eliza in harm's way. (T1-7, 16-23; 54:11-17). Jay testified that Tara frequently puts her own self-interest over and above Eliza's needs. (77:11-78:12). Tara has missed scheduled family outings for personal reasons. (77:15-24). When Tara falls into one of her long sleeps for between twelve (12) and thirty-six (36) hours, Tara does not make arrangements for who will care for Eliza and simply assumes that Susan will take care of Eliza. (68:17-69:14; 78:21-79:13) Tara has acknowledged that it is in Eliza's best interests for Susan to continue helping care for Eliza. (173:16-174:17). At trial, Tara explained that she has a significant understanding of Indian culture. (181:21-182:16). However, Tara admitted, albeit in a roundabout manner, that she does not always consider Eliza's best interests when making decisions. (175:4-18). Tara puts Eliza in harm's way by exposing her to individuals that have criminal records and who have assaulted Tara. (54:2-17).

Susan stated that she intends to encourage and maintain a relationship between Tara and Eliza, by offering a family counselor to restructure the household dynamic between everyone involved. (55:9-14). Were it not for the actions of Susan and Jay providing financial support and housing, Tara would have neither. (42:7-16; 43:16-20). Tara's own testimony provides that she has been without stable housing and transportation. (162:7-13). Though Tara stated at trial that she had a room in Council Bluffs, she refused to disclose whose house she was residing in. (164:1-19).

Based on all of the evidence presented, the Trial Court issued an order granting a guardianship over Eliza to Susan. (T70-73). The only specific findings made by the Trial Court were that notice was proper, that Tara is not a fit and proper parent of Eliza, and that Susan is a proper guardian for Eliza. (197:18-199:14). Neither Tara nor Susan requested that the Trial Court make specific findings. (*See generally id*.).

ARGUMENT

(1) The Indian Child Welfare Act and the Nebraska Indian Child Welfare Act do not apply.

Appellant's arguments are premised, in whole, as though ICWA and NICWA apply to the action before the Trial Court. *See generally* Appellant's Brief. However, as discussed below, ICWA and NICWA are inapplicable to this proceeding. Therefore, the Trial Court was not required to follow the higher standards promulgated in 25 U.S.C. §§ 1901 et seq. and Neb. Rev. Stat. §§ 43-1501 et seq.

(a) The Indian Child Welfare Act and the Nebraska Indian Child Welfare Act do not apply to private guardianship proceedings.

The United States Congress enacted ICWA in order to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families . . . ." 25 U.S.C. § 1902. To effectuate that intent, Congress used ICWA to establish "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 . . . ." *Id*. Following the passing of ICWA under 92 Stat. 3069 (1978), Nebraska passed NICWA for the purpose of "clarify[ing] state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act." Neb. Rev. Stat. § 43-1502.

To comply with ICWA and NICWA, parties filing a child custody proceeding must take the following steps: (1) provide notice to the parents, or the Indian custodian, and the Indian child's tribe or tribes, by registered mail with return receipt requested; (2) if the trial court determines the parent or the Indian custodian is indigent, the trial court must provide for court-appointed counsel; (3) prove that active efforts, as defined by Neb. Rev. Stat. § 43-1503(1), have been made to attempt to prevent the breakup of the Indian family; and (4) that clear and convincing evidence, including testimony of a qualified expert witness, shows that the child is likely to suffer serious emotional or physical damage by remaining with the parent or Indian custodian. *See* Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912. A party seeking the application of ICWA and NICWA has the burden of

showing that it applies to the proceeding before the court. *In re Adoption of Kenten H.*, 272 Neb. 846, 853 (2007); *In re Interest of Nery V.*, 20 Neb. App. 798, 811 (2013).

Under the terms of ICWA and NICWA, a child custody proceeding includes five separate definitions: (1) a foster care placement, (2) a proceeding to terminate parental rights, (3) a preadoptive placement, (4) an adoptive placement, and (5) a voluntary foster care placement. Neb. Rev. Stat. § 43-1503(3); *see also* 25 U.S.C. § 1903(1). Pertinently, a foster care placement is defined as follows:

> [A]ny action removing an Indian child from his or her parent or Indian custodian for temporary or emergency placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]

Neb. Rev. Stat. § 43-1503(3)(a). Under a plain reading of this statute, a foster care placement encompasses three separate scenarios: any action removing an Indian child from (1) his or her parent, (2) from an Indian custodian for temporary or emergency placement in a foster home or institution, or (3) from the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. *See* Neb. Rev. Stat. § 43-1503(3)(a). This reading is supported by the purpose of NICWA: "[t]he purpose of the Nebraska Indian Child Welfare Act is to clarify **state** policies and procedures regarding the implementation by the **State of Nebraska** of the federal Indian Child Welfare Act." Neb. Rev. Stat. § 43-1502 (emphasis added). From this language, it is clear that NICWA was intended to apply to actions and proceedings initiated by the government or similarly situated non-governmental entities. *See generally id*. Susan and her counsel are unaware of any appellate case from the state of Nebraska where ICWA and NICWA have been applied to the proceedings where the party seeking the removal of an Indian child has not been a state actor, whether the State of Nebraska, the Nebraska Department of Health and Humans Services, or some other state actor. *See generally In re Interest of Zylena R.*, 284 Neb.

834 (2012); *In re Interest of Shayla H.*, 22 Neb. App. 1 (2014); *In re Interest of Walter W.*, 274 Neb. 859 (2008); *In re Interest of Nery V.*, 20 Neb. App. 798 (2013); *In re Interest of Ramon N.*, 18 Neb. App. 574 (2010); *In re Interest of J.L.M., et al.*, 234 Neb. 381 (1990); *In re Interest of Melaya F.*, 19 Neb. App. 235 (2011); *In re Interest of Tavian B.*, 292 Neb. 804 (2016); *In re Interest of Brittany C.*, 13 Neb. App. 411 (2005); *In re Interest of Enrique P.*, 14 Neb. App. 453 (2006); *In re Interest of Phoebe S.*, 11 Neb. App. 919 (2003); *In re Interest of Jassenia H.*, 291 Neb. 107 (2015); *In re Interest of Mischa S.*, 22 Neb. App. 105 (2014); *In re Interest of Jayden D.*, 21 Neb. App. 666 (2014); *In re Interest of Dakota L.*, 14 Neb. App. 559 (2006); *In re Interest of Lawrence H.*, 16 Neb. App. 246 (2007); *In re Interest of Bird Head*, 213 Neb. 741 (1983); *etc*.

Additionally, it is clear that the active-efforts standard was not intended to be applied to family members and private individuals seeking to place a guardianship over a minor child. By its own definition, the active-efforts standard requires a higher level of action than the reasonable-efforts standard in Neb. Rev. Stat. § 43-283.01, both prior to and after the removal of an Indian child. Neb. Rev. Stat. § 43-1503(1). This includes eight separate examples by the actor removing an Indian child: (1) a concerted level of case work, consistent with the social and cultural normal of the Indian child's tribe, to the extent possible; (2) a request to the tribe known to the department or the state to provide support and services; (3) actively engaging with the family to provide culturally appropriate resources, if available, from the child's extended family, tribe, and Indian caregivers; (4) identify appropriate community, state, and federal resources that may offer housing, financial, transportation, and other assistance and help the Indian child's family to access such resources; (5) identify and attempt to engage tribally-designated representatives under NICWA; (6) consult with extended family members or, if unavailable, with the tribally-designated NICWA representative; (7) exhaust all tribally-appropriate family preservation alternatives; and (8) the department or state must provide a written report of the active-efforts attempts. *Id*. These requirements require a colossal undertaking and expenditure of resources which could preclude

some family members from seeking to protect others within their own family from serious harm of physical damage, simply because they lack the resources to comply with the active-efforts standard.

Under a plain reading of Neb. Rev. Stat. § 43-1503(3)(a), read in conjunction with the active-efforts standard found in Neb. Rev. Stat. § 43-1503(1), it is clear that the Nebraska legislature did not intend a foster care placement to include a private-action guardianship undertaken by family members of the purported Indian Child. *See generally* Neb Rev. Stat. §§ 43-1503(1) and 43-1503(3)(a). Therefore, this Court should affirm the Trial Court's order granting Susan a guardianship over her granddaughter, Eliza.

(b) Tara failed to prove that the Indian Child Welfare Act and the Nebraska Indian Child Welfare Act applied to this guardianship proceeding

Additionally, the requirements listed under the active-efforts standard must also be viewed through the lens of federal regulations as well. The Department of the Interior (hereinafter, the "Department") has also defined some of the activities which may comprise the active-efforts standard. 25 C.F.R. § 23.2. In her brief, Tara points to the regulations promulgated by the Department of the Interior to argue that ICWA must apply to this proceeding. *See* Appellant's Brief, p. 35, 38. However, in discussing the definition of the active-efforts standard, the Department specifically notes that nothing within ICWA or within the regulations is intended to force a minor child to assume a cultural identity or to create a relationship with a tribe that was not pre-existing, whether that relationship would have existed through either "[the Indian child's] membership, or through the citizenship of a parent and [the minor child's] eligibility for citizenship . . . ." 81 FR 38792 (June 14, 2016).

Therefore, to apply ICWA and NICWA depends either upon the Indian child's membership or both the Indian child's eligibility and the parent's membership. *See* Neb. Rev. Stat. § 43-1503(3)(a); 81 FR 38792 (June 14, 2016). To be considered an Indian child, two elements must be

proven: (1) the individual must be an unmarried person under eighteen years of age and (2) is either (a) a member of an Indian tribe or (b) is eligible for membership and is the biological child of a member. Neb. Rev. Stat. § 43-1503(8). At the outset of the matter, the Trial Court preliminarily determined that Eliza was an Indian child as defined by ICWA and NICWA for the purposes of notices. (31:23-32:4). However, at the trial on this matter, Tara introduced no evidence that she is or was the member of an Indian tribe. *See generally* Bill of Exceptions. The Trial Court ultimately did not apply ICWA and NICWA to the whole proceeding. (198:22-199:14). Therefore, though The Trial Court did not explain its reasoning why in full, it is possible that the Trial Court refused to apply ICWA and NICWA because Tara failed to introduce any evidence showing that Eliza was an Indian child as defined by ICWA and NICWA and that the proceeding had before the Trial Court was one to which ICWA and NICWA must be applied. *See generally* Bill of Exceptions. As Tara did not request specific findings and conclusions of law, these findings are presumed to be in favor of Susan. *Foiles v. Midwest Street Rod Association of Omaha, Inc.*, 254 Neb. 552, 553 (1998). Tara has not and cannot show that these findings and conclusions are clearly wrong. *Id*.

Ultimately, Tara had the burden before the Trial Court of proving that ICWA and NICWA applied to the proceeding then had. *In re Adoption of Kenten H.*, 272 Neb. at 853 (2007); *In re Interest of Nery V.*, 20 Neb. App. at 811. Tara failed to prove to the Trial Court that the private-action guardianship proceeding before the Trial Court was of the same type and character that requires the application of the heightened standards of ICWA and NICWA. Therefore, this Court should affirm the Trial Court's order granting a guardianship over Eliza to Tara's mother and Eliza's grandmother.

(2) Tara is not entitled to court-appointed counsel.

As explained above, Tara is not entitled to court-appointed counsel as ICWA and NICWA did not apply to the matter before the Trial Court.

Alternatively, a parent or Indian custodian has the right to court-appointed counsel in a

proceeding involving ICWA and NICWA. 25 U.S.C. § 1912(b); Neb. Rev. Stat. § 43-1505(2). However, the appointment of counsel for a parent or Indian custodian is limited only to scenarios where the court has determined that the parent or Indian custodian is indigent. *See id*. Indigency is generally defined when a party "'is unable to pay . . . attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents.'" *White v. White*, 293 Neb. 439, 446 (2016) (*quoting Mathews v. Mathews*, 267 Neb. 604, 612 (2004)).

Susan and her counsel are unaware of any Nebraska appellate court decision determining who has the burden of proving indigency. However, "[i]t is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or nature of the case, asserts the affirmative of an issue." *Waste Connections of Nebraska, Inc. v. City of Lincoln*, 269 Neb. 855, 866 (2005) (*citing Miller v. Westwood*, 238 Neb. 896 (1991)). In claiming indigency, Tara was making an affirmative statement to the Trial Court regarding her financial ability to provide for the necessities of life. (*See generally* T61-65; Conf. T1-9). Therefore, Tara had the burden of proving her indigency to the Trial Court.

The documents that Tara submitted to the Trial Court failed to provide any documentation regarding Tara's financial situation beyond plain statements alleging indigency, that Tara would be unable to pay attorney fees, let alone that such inability to pay would affect her financial ability to pay for the necessities of life in a meaningful way. (*See generally* T61-65; Conf. T1-9; 12:19-15:6). Simply stated, Tara failed to meet her burden to show that she was indigent and, therefore, the Trial Court correctly refused to grant her court-appointed counsel.

(3) If the Nebraska Indian Child Welfare Act does apply to this guardianship proceeding, the Trial Court correctly applied the Nebraska Indian Child Welfare Act.

As explained above, to comply with ICWA and NICWA, parties filing a child custody proceeding must take the following steps: (1) provide notice to the parents, or the Indian custodian,

and the Indian child's tribe or tribes, by registered mail with return receipt requested; (2) if the trial court determines the parent or the Indian custodian is indigent, the trial court must provide for court-appointed counsel; (3) prove that active efforts, as defined by Neb. Rev. Stat. § 43-1503(1), have been made to attempt to prevent the breakup of the Indian family; and (4) that clear and convincing evidence, including testimony of a qualified expert witness, shows that the child is likely to suffer serious emotional or physical damage by remaining with the parent or Indian custodian. *See* Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912.

(a) Tara has waived any improper notice or, alternatively, Susan provided sufficient notice of this guardianship proceeding in accordance with Nebraska law.

Under ICWA and NICWA, the party seeking a foster care placement of an Indian child must notify the parents, Indian custodian(s), and tribe of the Indian child by certified mail, with return receipt requested, notifying each of their right to intervene. Neb. Rev. Stat. § 43-1505; 25 C.F.R. § 23.11.

At trial, Tara stipulated that the notices provided by Susan were sufficient. (31:10-32:4). When a party voluntarily stipulates to a matter, he or she may only obtain relief from such a stipulation under exceptional circumstances. *In re Estate of Mithofer*, 243 Neb. 722, 726-27 (1993) (*quoting Martin v. Martin*, 188 Neb. 393, 397-98 (1972)). In her brief, Tara fails to make any contention of exceptional circumstances for why she should obtain relief from her stipulation made before the Trial Court. *See generally* Appellant's Brief, pp. 32-33. As a result, Tara cannot now complain that the notices were insufficient.

Alternatively, the Trial Court's record discloses that notices were sent to the appropriate parties of the proceedings had before the Trial Court. (T27-29, 32-37, 42-47, 50-55, 59-60). However, the actual notice sent does not appear in the Trial Court's record. (*See generally id*.). As Tara has the duty to present a record which supports the errors she has assigned, she cannot now complain about the notices sent without providing a record that evidences their purported

deficiencies. (*See generally* Transcript); *Shipferling v. Cook*, 266 Neb. 430, 435 (2003) (*citing WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522 (1995)).

(b) Risk of serious emotional or physical damage to Eliza and active efforts are ultimate facts to be proven at trial and need not be specially pled.

A party seeking the appointment of a guardianship over an Indian child must prove, by clear and convincing evidence, including the testimony of a qualified expert, that the continued custody of the Indian child is likely to result in serious emotional or physical damage to the Indian child and that the active-efforts standard has been met. Neb. Rev. Stat. § 43-1505(5); 25 U.S.C. § 1912. However, Tara contends, supported by the Court of Appeals' opinions in *In re Interest of Sabrienia B.*, 9 Neb. App. 888 (2001), *In re Interest of Dakota L.*, 14 Neb. App. 559 (2006), and *In re Interests of Shayla H.*, 17 Neb. App. 436 (2009), that these matters must be pled in order for a guardianship order to issue. *See* Appellant's Brief, pp. 41-42. Tara's reliance upon these opinions is misplaced. Each of those cases was for the termination of parental rights, rather than a guardianship proceeding. *See generally id*. Furthermore, in both *Sabrienia B.* and *Shayla H.*, the appellants had filed a demurrer and/or motion to dismiss in response to alleged insufficiencies in those pleadings. *In re Interest of Sabrienia B.*, 9 Neb. App. at 890; *In re Interest of Shayla H.*, 17 Neb. App. at 444. Additionally, the trial court in *In re Interest of Dakota L.* dealt with the original petition before it, rather than the amended petition which did contain the ICWA and NICWA language requirements. *See In re Interest of Dakota L.*, 14 Neb. App. at 564. Here, Tara made no such motion and the Trial Court was under no misapprehension as to which pleading was operative before it. (*See generally id.*).

Furthermore, Susan is unaware of any statute or court rule requiring a petitioner in a case involving ICWA and NICWA must plead matters with specificity. Instead, under Neb. R. Ct. § 6-1108, a pleading need only set forth a caption, a short and plain statement of the claim showing that the pleader should have relief, and a demand for the judgment sought from the court. Neb. R.

Ct. § 6-1108. No technical forms of pleading or motions are required. *Id*. Even when a party does not move to amend his or her pleadings, the trial court may constructively amend those pleadings on unpled issues in order to issue a decision that is consistent with the evidence provided at trial. *Denali Real Estate, LLC v. Denali Custom Builders, Inc.*, 302 Neb. 984, 997 (2019). Therefore, as there exists testimony provided at trial that, when in Tara's care, Eliza may be subjected to serious emotional or physical damage and that Susan provided active efforts, the Trial Court correctly conformed the pleadings to the evidence elicited before it. (39:9-40:23; 50:2-4; 50:13-51:23; 55:9-14; 68:17-69:14; 78:4-20; 81:17-82:3; 86:3-11; 162:7-13); *see Denali Real Estate, LLC*, 302 Neb. at 997.

Alternatively, the Petition does state that Eliza was at risk of serious emotional or physical damage in the custody of Tara and that Susan and Jay maintain positive relationships with the family. (T2-4; 17-19). Though the Petition and the Amended Petition lack detail regarding each of these, the Trial Court's order should nonetheless be affirmed as its order is consistent with the evidence provided at trial. *See Denali Real Estate, LLC*, 302 Neb. at 997.

(c) The Trial Court applied the appropriate standards to find that a guardianship for Eliza was necessary.

As explained above, a party seeking the appointment of a guardianship over an Indian child must prove, by clear and convincing evidence, including the testimony of a qualified expert witness, that the continued custody of the Indian child is likely to result in serious emotional or physical damage to the Indian child and that the active-efforts standard has been met. Neb. Rev. Stat. § 43-1505(5); 25 U.S.C. § 1912. The qualified expert witness must testify regarding whether the continued custody by the parent is likely to result in serious emotional or physical damage to the Indian child, but should also be qualified to testify regarding the social and cultural standards of the Indian child's tribe. 25 C.F.R. § 23.122. This qualified expert witness can be "'[a] lay expert witness having substantial experience in the delivery of child and family services to Indians, and

extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.'" *In re Interest of C.W.*, 239 Neb. 817, 824 (1992) (*quoting* 44 FR 67584, 67593 (Nov. 26, 1979)), *overruled on other grounds*, *In re Interest of Zylena R.*, 284 Neb. 834 (2012). Additionally, a parent may not be deprived of the custody of his or her minor child unless the petitioner affirmatively shows that the parent is unfit to perform the duties required of such a relationship or has forfeited that right. *In re Guardianship of D.J.*, 268 Neb. 239, (2004).

To meet the active-efforts standard, a party seeking custody of an Indian child has several options. Active-efforts can be met by some or any of the following actions: (1) a concerted level of case work, consistent with the social and cultural normal of the Indian child's tribe, to the extent possible; (2) a request to the tribe known to the department or the state to provide support and services; (3) actively engaging with the family to provide culturally appropriate resources, if available, from the child's extended family, tribe, and Indian caregivers; (4) identify appropriate community, state, and federal resources that may offer housing, financial, transportation, and other assistance and help the Indian child's family to access such resources; (5) identify and attempt to engage tribally-designated representatives under NICWA; (6) consult with extended family members or, if unavailable, with the tribally-designated NICWA representative; and (7) exhaust all tribally-appropriate family preservation alternatives. Neb. Rev. Stat. § 43-1503(1); *see also* 25 C.F.R. § 23.2. Importantly, what efforts do and do not meet the active-efforts standard must be contemplated on a case-by-case basis. 25 C.F.R. § 23.2.

The evidence provided before the Trial Court cumulatively shows that Tara was not fit to parent Eliza and had forfeited some of those responsibilities, whether by failing to maintain stable employment, drug use, placing her own self-interests above those of Eliza, keeping weapons in areas accessible to Eliza, sleeping for days and being unable to be awoken by Eliza, allowing Eliza to travel with her in freezing weather in a vehicle with down windows, leaving Eliza with Susan and Jay without prior notice for extended periods, taking Eliza into situations with known

criminals, and turning down potential employment without even questioning whether it would be sufficient to provide for herself and Eliza. (39:9-40:23; 42:4-6; 42:17-43:3; 50:13-51:23; 67:3-8; 67:16-19; 68:17-69:14; 77:11-78:12; 142:24-143:15; 158:18-159:6; 197:18-198:21). Some of this testimony was even provided by Tara herself, or her own witness, where Tara acknowledged that she does not always consider Eliza's best interest when making decisions, that Tara subjects Eliza to persons with criminal records, and that it is in Eliza's best interest for Susan to continue to care for Eliza. (*See* 142:24-143:15; 173:16-174:17; 175:4-18).

Tara correctly notes that Dr. Franklin's testimony does not meet the requirements for a qualified expert witness under ICWA and NICWA. Appellant's Brief, pp. 39-40. However, Tara overlooks her own testimony. At trial, Tara testified regarding her understanding of tribal culture, explaining that she speaks Cherokee, attended an all-Indian college, has served as the president of the Omaha Public Schools Native Indian Centered Education program, and has substantial education in Native American Studies. (154:10-18; 160:2-6). Clearly, Tara is precisely the person contemplated as a qualified expert witness under the Federal Regulations. *See* 44 FR at 67593. When coupled together with Tara's own indirect testimony implying that she does not consider Eliza's best interests and subjects Eliza to harmful situations and that it was in Eliza's best interest to remain in Susan's care, the Court was provided with a clear understanding that Eliza would likely suffer serious emotional or physical damage if she remained in Tara's custody. (*See* 142:24-143:15; 173:16-174:17; 175:4-18).

Furthermore, Susan presented significant evidence of the active efforts she and Jay provided to Tara. Susan and Jay provided no fewer than two motor vehicles for Tara, co-signed on a third motor vehicle, provided stable housing for Tara at their home, provided food for Tara and Eliza, provided child care for Eliza with Indian extended family members, and agreed to continue to seek counseling for the family. (35:10-21; 36:19-37:8; 42:7-16; 43:4-15; 43:16-20; 55:9-14; 67:9-15; 67:20-68:7). This evidence was generally uncontradicted at trial. (*See generally* Bill of

Exceptions). Further, these actions by Susan and Jay provided Tara with opportunities to reunite with Eliza; requested the efforts of Tara's extended family, through Susan and Jay; and provided resources to Tara, such as housing, transportation, food, medical expenses, and child care. (*Id*.); Neb. Rev. Stat. § 43-1503(1); 25 C.F.R. § 23.2. Clearly, the Trial Court reviewed testimony provided to it and found that the active-efforts standard had been met, based upon the circumstances of the case. (T70-73; 197:18-199:14).

Finally, neither Susan nor Tara requested that the Trial Court make specific findings of fact or conclusions of law. (T70-73). The Trial Court's order does not explain which law it applied to the facts presented to the Trial Court. (*Id*.). However, the Trial Court needed to find that Tara is not a fit and proper parent for Eliza, that there was qualified expert testimony that Eliza is likely to experience serious emotional or physical damage in Tara's custody, and that Susan took active efforts to prevent the break up of the Indian family. As explained above, evidence was presented on these issues and, therefore, it should be presumed that any controverted facts presented to the Trial Court were decided in favor of Susan and should not be disturbed here, as the findings are not clearly wrong. *See Foiles*, 254 Neb. at 553-54.

In sum, there existed sufficient evidence before the Trial Court, including the testimony of a qualified expert witness, to find that Tara's continued custody over Eliza would likely result in serious emotional or physical damage to Eliza and that Susan had undertaken active efforts to prevent the break up of the Indian family. Therefore, this Court should affirm the order of the Trial Court granting Susan guardianship over Eliza.

CONCLUSION

WHEREFORE, Susan W. respectfully requests that this Court issue its order affirming the Trial Court's November 13, 2018 Order appointing Susan W. as guardian of Eliza W. Alternatively, Susan W. respectfully requests that this Court issue an order remanding this matter for further proceedings with the Trial Court, but allowing the August 2, 2018 Order appointing

Susan W. as temporary guardian for Eliza to stand until such time as this matter can be reheard by the Trial Court.

Dated this 16th day of May, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of May, 2019, a true and correct copy of the above Appellee's Brief has been forwarded by first class U.S. Mail to the following:

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Certificate of Service

I hereby certify that on Thursday, May 16, 2019 I provided a true and correct copy of this *Brief of Appellee Susan* to the following:

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