Case No.: A-18-1141

IN THE NEBRASKA COURT OF APPEALS

IN THE MATTER OF THE GUARDIANSHIP OF ELIZA W.

SUSAN ELAINE W.,

Appellee,

vs.

TARA SUZANNE W.,

Appellant,

vs.

DEIONDRAY B.,

Appellee.

APPEAL FROM THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

THE HONORABLE MARCELA A. KEIM, COUNTY COURT JUDGE

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

This appeal arises from a guardianship case filed in the County Court of Douglas County, Nebraska (County Court). Appellee Susan W. filed an Amended Petition asking she be appointed temporary and permanent guardian of Eliza W., an "Indian Child" pursuant to the Nebraska Indian Child Welfare Act. (T16-23; 31:23-32:2; E2,1-2:89). The Appellant is the child's mother. (T1). The Appellant requested the County Court appoint her an attorney pursuant to Neb. Rev. Stat. § 43-1505(2) on October 4, 2018, October 22, 2018, and October 23, 2018. (T61-64; Conf. T1-9; 13:12-15). The County Court did not appoint Appellant an attorney. On November 13, 2018, the County Court entered an Order appointing Appellee Susan W. the guardian of Eliza W. (T70-73).

The Appellant timely filed her notice of appeal on December 5, 2018. (Notice of Appeal p.1). The Appellant filed a motion to proceed *in forma pauperis* and notarized poverty affidavit on December 4, 2018, and was granted leave to proceed *in forma pauperis* by the County Court on December 5, 2018. (Motion for Leave to Proceed *In Forma Pauperis* p.1-5; Order to Proceed *In Forma Pauperis* p.1). Thus, the Appellant does not have to prepay the docketing fees and costs. Neb. Rev. Stat. §§ 25-2301 *et. seq*.

The November 13, 2018 order is a final, appealable order. In matters arising under the Nebraska Probate Code, appeals may be taken to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals. Neb. Rev. Stat. § 30-1601(1). An order affecting a substantial right in a special proceeding is a final, appealable order. Neb. Rev. Stat. § 25-1902. Guardianship proceedings are special proceedings within the meaning of § 25-1902. In re Guardianship of Forster, 22 Neb. App. 478, 489 (2014).

A substantial right is affected if an order of the trial court affects the subject matter of the litigation such as by diminishing a claim or defense that would have otherwise been available to a

litigant before the order was entered. Big John Billiards, Inc. v. State, 283 Neb. 496, 501-502 (2012). An order that completely disposes of the subject matter of the litigation is final and affects a substantial right because it conclusively determines a claim or defense. Id., at 502.

The November 13, 2018 Order finally determined whether to grant the relief sought by Appellee in her Amended Petition for guardianship; completely diminished Appellant's defenses against the relief sought in the Amended Petition; and finally determined Appellant's request for court appointed counsel prior to resolution of this matter. (T70-73). The November 13, 2018 Order therefore affects the substantial rights of the parties, including those of Appellant, and is a final, appealable order. Jurisdiction is granted to the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. §§ 30-1601; 25-1901; 25-1902; 25-1911; 25-1912; and 25-1913; as the Appellant has followed all necessary procedures to perfect this appeal.

STATEMENT OF THE CASE

(1) Nature of the Case: Appellant Tara W. (Tara) is the mother of a minor child, Eliza W. (Eliza). On August 7, 2018, Appellee Susan W. (Susan) filed an Amended Petition with the County Court of Douglas County, Nebraska, seeking guardianship of Eliza. (T16-23). Eliza is an "Indian Child" pursuant to the Nebraska Indian Child Welfare Act, found at Neb. Rev. Stat. §§ 43-1501 *et seq*. (NICWA) and the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq*. (ICWA). (31:23-32:2; E2,1-2:89). Prior to trial, Tara requested court-appointed counsel pursuant to NICWA and ICWA, which was denied. (T61-65; Conf. T. 1-9; 13:12-15). After trial, the County Court appointed Susan guardian of Eliza. (T70-73). Tara now appeals.

(2) Issues Tried in the Court Below:

A. Whether NICWA and ICWA applied to this matter.

B. Whether this proceeding is a "foster care placement" pursuant to NICWA and ICWA.

C. Whether to appoint an attorney to represent Tara pursuant to NICWA and ICWA.

D. Whether sufficient notice was made as required by NICWA and ICWA.

E. Whether sufficient "active efforts" were made to provide remedial services and rehabilitative programs designed to prevent the breakup of Eliza and Tara's family and whether such efforts proved unsuccessful.

F. Whether clear and convincing evidence was presented, including the testimony of qualified expert witnesses, showing continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza.

G. Whether Susan stated a claim upon which relief could be granted.

H. Whether Tara was unfit to have custody of Eliza.

I. Whether to appoint Susan guardian of Eliza.

(3) How the Issues were decided:

A. The County Court determined NICWA and ICWA applied to this case.

B. The County Court determined this proceeding was not a foster care placement pursuant to NICWA and ICWA.

C. The County Court determined it would not appoint an attorney to represent Tara pursuant to NICWA and ICWA.

D. The County Court determined sufficient notice was made under NICWA and ICWA.

E. The County Court determined this proceeding was not a foster care placement pursuant to NICWA and ICWA, that NICWA and ICWA only required a specified form of notice in this proceeding and, therefore, proof of "active efforts" was not required.

F. The County Court determined this proceeding was not a foster care placement pursuant to NICWA and ICWA, that NICWA and ICWA only required a specified form of

notice in this proceeding and, therefore, proof by clear and convincing evidence that continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to the child was not required.

G. The Court granted the relief requested in the Amended Petition.

H. The Court determined Tara was unfit to have custody of Eliza.

I. The Court appointed Susan guardian of Eliza.

(4) Scope of Appellate Review: Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. In re Guardianship of D.J., 268 Neb. 239, 243 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Id. On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. In re Guardianship of Elizabeth H., 17 Neb. App. 752, 760 (2009). An appellate court will not substitute its factual findings for those of the lower court where competent evidence supports those findings. Id.

ASSIGNMENT OF ERRORS

I. The County Court erred by failing to correctly apply NICWA and ICWA to this guardianship proceeding.

II. The County Court erred in appointing Susan guardian of Eliza because the Amended Petition failed to sufficiently plead the standard of proof required by NICWA and ICWA.

III. The County Court erred in appointing Susan guardian of Eliza because insufficient evidence was presented that Tara is unfit to care for Eliza or that Tara has forfeit her right to custody of Eliza.

PROPOSITIONS OF LAW

1. The Nebraska Indian Child Welfare Act (NICWA) and the federal Indian Child Welfare Act (ICWA) apply to "child custody proceedings" involving Indian children. Neb. Rev. Stat. §§ 43-1501 *et seq.*; 25 U.S.C. §§ 1901 *et seq.*
2. The purpose of NICWA and ICWA is to protect the best interests of Indian children through the establishment of minimum standards for the removal of Indian children from their families. Neb. Rev. Stat. §§ 43-1502, 43-1503(2); 25 U.S.C. § 1902.
3. "Child custody proceedings" pursuant to NICWA and ICWA include "foster care placements" as defined therein. Neb. Rev. Stat. § 43-1503(3)(a); 25 U.S.C. § 1903(1)(i).
4. Under ICWA, "foster care placement" is defined to mean,

   > "any action removing an Indian child from his or her parent or Indian custodian for temporary 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."

   25 U.S.C. § 1903(1)(i); *see also* Neb. Rev. Stat. § 43-1503(3)(a).
5. Under Nebraska law, the guardian of a child "has the powers and responsibilities of a parent who has not been deprived of custody of his or her minor and unemancipated child…". Neb. Rev. Stat. § 30-2613(1).
6. An order appointing a guardian for a minor provides for the legal custody and physical custody of the child." In re Guardianship of Luis J., 300 Neb. 659, 667 (2018); In re Guardianship of D.J., 268 Neb. 239, 248 (2004).
7. Under NICWA and ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe

and is the biological child of a member of an Indian tribe." Neb. Rev. Stat. § 43-1503(8); 25 U.S.C. § 1903(4).

8. Guardianships are "no more than a temporary custody arrangement." In re Guardianship of D.J., 268 Neb. 239, 248 (2004); In re Guardianship of Zyla, 251 Neb. 163 (1996).
9. A guardian's authority terminates only on the death, resignation, or removal of the guardian, or through the minor's death, adoption, marriage, or attainment of the age of majority. Neb. Rev. Stat. § 30-2614.
10. In order to remove a guardian, an interested party must petition the court and obtain court approval. Neb. Rev. Stat. § 30-2616(a).
11. "The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights." In re Guardianship of D.J., 268 Neb. 239, 248 (2004); In re Guardianship of Zyla, 251 Neb. 163, 166 (1996).
12. Guardianships and similar arrangements are foster care placements as defined in ICWA. *See* Empson-Laviolette v. Crago, 760 N.W.2d 793 (Mich. Ct. App. 2008); In re Custody of A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993); Rice v. McDonald, 390 P.3d 1133 (Alaska 2017); Erika K. v. Brett D., 75 Cal. Rptr. 3d 152, 161 Cal. App. 4th 1259 (2008); In re Q.G.M., 808 P.2d 684 (Okla. 1991); In re S. B. R., 719 P.2d 154 (Wash. Ct. App. 1986).
13. In December 2016, the United States Department of the Interior Bureau of Indian Affairs published guidelines for state courts in implementing ICWA. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 20, 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

14. The ICWA Guidelines "provide a reference and resource for all parties involved in child custody proceedings involving Indian children." Guidelines, 81 Fed. Reg. at 96,477.

15. Nebraska appellate courts have looked to and relied on the ICWA Guidelines when interpreting ICWA. *See* In re Interest of Audrey T., 26 Neb. App. 822, 836 (2019); In re Interest of Tavian B., 292 Neb. 804, 809-810 (2016).

16. Under NICWA and ICWA, "parents shall have the right to court-appointed counsel" if the proceeding is one for "removal, placement, or termination", and 2) if the court determines the parent is indigent. Neb. Rev. Stat. § 43-1505(2); 25 U.S.C. § 1912(b).

17. The right to court appointed counsel contained in 25 U.S.C. § 1912 applies to "child custody proceedings" and "foster care placement" proceedings as defined in ICWA. *See* In re Custody of A.K.H., 502 N.W.2d 790, 796 (Minn. Ct. App. (1993); In re M. E. M., 635 P.2d 1313, 1316-1317 (Mont. 1981); B.R.T. v. Executive Director of Social Service Bd., 391 N.W.2d 594, 600 (N.D. 1986).

18. Pursuant to NICWA and ICWA,

> "In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall send a notice … to the parents, the Indian custodian, and the Indian child's tribe or tribes, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention."

Neb. Rev. Stat. § 43-1505(1); *see also* 25 U.S.C. § 1912(a) (almost identical provision).

19. In 2016, the United States Department of the Interior Bureau of Indian Affairs promulgated regulations implementing ICWA, which became effective December 12, 2016. Indian Child Welfare Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016).

20. ICWA's implementing regulations are intended to provide a binding, consistent, and nationwide interpretation of the minimum requirements of ICWA. Indian Child Welfare Proceedings, 81 Fed. Reg. 38,778, 38,851 (June 14, 2016).

21. When the court knows or has reason to know that the subject of an involuntary foster care placement is an Indian child, the court must ensure each notice required under 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111 is filed with the court together with any return receipts or other proof of service. 25 C.F.R. § 23.111(a).

22. The notice required by 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111 "must be in clear and understandable language" and include the information set forth in 25 C.F.R. § 23.111(d), including a statement that if the parent is unable to afford counsel and is indigent, the parent has a right to court appointed counsel. 25 C.F.R. § 23.111(d).

23. NICWA and ICWA both state,

> "Any party seeking to effect a foster care placement of … 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."

Neb. Rev. Stat. § 43-1505(4); *see also* 25 U.S.C. § 1912(d) (almost identical provision).

24. NICWA requires that prior to the court ordering a foster care placement, "the court shall make a determination that active efforts have been provided or that the party seeking placement … has demonstrated that attempts were made to provide active efforts to the extent possible under the circumstances." Neb. Rev. Stat. § 43-1505(4).

25. ICWA's binding regulations require that, prior to ordering an involuntary foster care placement, "the court must conclude that active efforts have been made to prevent the breakup

of the Indian family and that those efforts have been unsuccessful," and the active efforts must be detailed in the record. 25 C.F.R. § 23.120.

26. In 2015, the Nebraska legislature amended NICWA, adding a definition of active efforts. Neb. Rev. Stat. 43-1503(1); 2015 Neb. Laws 566.

27. Pursuant to § 43-1503(1), "Active efforts shall mean and include, but not be limited to, *inter alia*, the following,

> "A concerted level of casework, both prior to and after the removal of an Indian child…in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe…to the extent possible under the circumstances;" "A request to the Indian child's tribe…to convene traditional and customary support and services;" "Actively engaging, assisting, and monitoring the family's access to and progress in culturally appropriate and available resources of the Indian child's extended family member, tribal service area, Indian tribe…, and individual Indian caregivers;" … "Identification of and attempts to engage tribally designated Nebraska Indian Child Welfare Act representatives; [and]" … "Exhaustion of all available tribally appropriate family preservation alternatives".

Neb. Rev. Stat. § 43-1503(1)(a), (b), (c), (e), and (g).

28. ICWA's binding regulations define active efforts to mean,

> "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family…. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural condition and way of life of the Indian child's Tribe and should be conducted in partnership with the

Indian child and the Indian child's parents, extended family member, Indian custodians, and Tribe."

25 C.F.R. § 23.2.

29. NICWA states,

"The court shall not order foster care placement … in the absence of a determination by the court, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

Neb. Rev. Stat. 43-1505(5); *see also* 25 U.S.C § 1912(e) (almost identical provision).

30. ICWA's binding regulations state,

"A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe."

25 C.F.R. § 23.122(a).

31. NICWA and ICWA both state,

"When any petitioner in an Indian child custody proceeding before a state court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his or her parent or Indian custodian unless returning the child to his or her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger."

Neb. Rev. Stat. § 43-1512; 25 U.S.C. § 1920.

32. ICWA's binding regulations state that in the course of any child custody proceeding,

> "If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger."

25 C.F.R. § 23.114.

33. A Petitioner must make specific allegations regarding the heightened standards of proof required by NICWA and ICWA in their pleadings. In re Interest of Sabrienia B., 9 Neb. App. 888 (2001); In re Interest of Dakota L., 14 Neb. App. 559 (2006); In re Interest of Shayla H., 17 Neb. App. 439 (2009).

34. The parental preference principle provides that a court may not properly deprive a biological parent the custody of his or her minor child unless it is affirmatively shown that such parent is unfit or has forfeited that right. In re Guardianship of D.J., 268 Neb. 239, 244 (2004).

35. The parental preference principle protects parents' constitutional rights to companionship, care, custody, and management of his or her child, and the child's reciprocal constitutional right to be raised and nurtured by his or her parents. Uhing v. Uhing, 241 Neb. 368, 374-375 (1992); (citing Bellotti v. Baird, 443 U.S. 622 (1979)).

36. In minor guardianship proceedings, the individual seeking a minor guardianship has the burden of proving by clear and convincing evidence that the child's parents are either unfit or have forfeit their right to custody. In re Guardianship of D.J., 268 Neb. 239, 248-249 (2004).

37. A parent forfeits his or her rights to a child through complete indifference to their child's welfare over a long period of time. In re Guardianship of D.J., 268 Neb. 239, 249-251 (2004).

38. "Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." Uhing v. Uhing, 241 Neb. 369, 375 (1992).
39. Evidence of unfitness should be focused upon a parent's present ability to care for a child, and not moral failings a parent may have. In re Guardianship of Lakota Z., 282 Neb. 584, 594 (2011).
40. Evidence of a parent's past failings are pertinent only insofar as they suggest present or future faults. In re Guardianship of Lakota Z., 282 Neb. 584, 594 (2011).

STATEMENT OF FACTS

Eliza W. (Eliza) is a four and a half year old girl. (38:18-19). Tara W. (Tara) is Eliza's mother. (152:24-153:5). Tara moved in with her parents, Susan W. (Susan) and Jay W. (Jay), when Tara was pregnant with Eliza. (172:17-19). When Eliza was born, Tara was working full-time for Marriott, and was Eliza's permanent caregiver. (122:22-25; 157:1-4). Tara continued to work for Marriott for the first two years of Eliza's life. (67:3-4). When working for Marriott, Tara supported Eliza financially and provided health insurance for Eliza. (41:25-42:2; 57:25-58:10).

In November 2016, Tara was diagnosed with viral meningitis. (113:11-15; 166:10-14). The viral meningitis caused the tissue around Tara's brain to inflame, which caused headaches. (112:17-24). The headaches, combined with Tara's history of migraines, were debilitating and they lingered. (112:17-25). As a result, Tara became unable to do many of the things she previously did for herself and Eliza, so Susan took over much of the primary care of Eliza. (113:1-4; 123:1-4).

Tara's neurologist released Tara to return to work in December 2016, and Tara returned to her job with Marriott. (166:14-17). When Tara returned to work, Tara was taking numerous

medications to treat the meningitis, and proved unable to continue work after a month. (166:16-19). Tara stopped working because of her illness. (42:4-6).

In February 2017, Tara attended an outpatient program to treat bipolar disorder and to help Tara adjust to the viral meningitis. (50:18-51:7). Over time, Tara's migraines and the headaches caused by her viral meningitis improved. (167:1-15). As of November 2018, Tara's migraines were few and far between, and Tara only experienced headaches from time-to-time. (167:10-15).

As Tara's medical condition improved, Tara enrolled in college around the fall of 2017. (147:11-19; 37:18). Tara made the decision to enroll in college based, in part, on communications she had with Susan and Jay. (147:11-148:1). Tara's parents encouraged Tara to not seek state aid or seek to establish paternity for Eliza, and indicated to Tara that they would help support Tara and Eliza. (147:23-148:1). Tara believed furthering her education would result in a better future for her and Eliza. (151:8-12).

At the time of trial, Tara was enrolled full-time at the University of Nebraska-Omaha. (80:5-6; 153:9-10). Tara was working towards a bachelor's degree in multidisciplinary studies with an emphasis in business administration, and sub-concentrations in Native American studies and mathematics. (160:2-6).

In 2018, Susan, Jay, and Tara shared duties caring for Eliza. (35:25-37:22). Susan, Jay, and Tara all tended to Eliza's developmental needs and implemented discipline when necessary. (36:10-14). Until August 1, 2018, Susan and Tara attended Eliza's doctor appointments and they both scheduled the appointments. (36:19-37:4). Susan, Jay, and Tara all helped implement any treatment plans recommended for Eliza and obtain medications prescribed for Eliza. (37:5-8).

Eliza is enrolled in the Omaha Public Schools N.I.C.E program, a Native American studies program with the Omaha Public Schools. (37:11-12). Eliza was enrolled in the N.I.C.E. program

by mutual agreement after Susan, Jay, and Tara all talked about and planned for this program. (37:9-17; 154:14-15). Prior to Eliza's participation in the N.I.C.E. program, Eliza was in the Omaha Early Learning facility. (154:15-17). When Eliza attended the Omaha Early Learning facility, Tara served as president of the facility's parent advisory board. (154:17-18).

Susan generally picked up and dropped off Eliza from school because Tara was enrolled in college. (37:18-20). Tara received Medicaid and food stamps for Eliza, which contributed to Eliza's medical and financial support. (41:25-42:3; 57:25-58:10; 162:16-18). Susan and Eliza attended Sunday school and church together. (36:17-18). Tara and Eliza attended Pow Wows and Sweats together and they went to the medicine wheel. (181:23-182:16).

As 2018 progressed, Tara's relationship with her parents soured to the point that she determined it was best for Eliza and her to move out of Susan and Jay's home. (148:6-8; 148:10-15; 151:17-24; 175:12-176:7). Tara began working to obtain public benefits and social services to assist her to live on her own with Eliza. (153:12-14; 154:23-155:9). Tara discussed her options for living with Eliza apart from her parents with her psychiatrist. (147:2-5). One option Tara considered was moving to Oklahoma where her Tribe is located and where Tara had friends. (56:18-22; 147:3-7). Tara told Susan at one point in late July 2018 that she intended to move to Oklahoma once she graduated from college and that she intended to work there. (56:6-22). Tara ultimately moved with Eliza into the home of a friend in Omaha, Nebraska in late July or early August 2018. (45:6-13; 130:1-2; T36). Tara intended Eliza to have a slow and smooth transition out of Susan and Jay's home. (155:22-156:5; 173:3-23.)

After Tara told Susan she intended to move to Oklahoma, Susan did not know how Tara was going to get to Oklahoma or what Tara was going to do in Oklahoma, and she panicked. (56:23-57:2). Susan did not want Tara to take Eliza to Oklahoma, because then Susan and Jay

would not be able to intervene and help thus, because of Tara's decision to move, Susan decided to seek emergency guardianship of Eliza. (57:5-9; 65:5-8).

On August 2, 2018, Susan filed a Petition with the County Court of Douglas County, Nebraska (hereinafter "County Court") for temporary and permanent guardianship and conservatorship of Eliza, along with an Ex Parte Application requesting the County Court enter an immediate order appointing Susan guardian and conservator of Eliza. (T1-10). That same day, the County Court entered an Order appointing Susan temporary guardian and conservator of Eliza. (T11-12). The August 2, 2018 Order does not state the County Court's reasoning for appointing Susan temporary guardian and conservator of Eliza (T11-12).

On August 7, 2018, Susan filed an Amended Petition requesting the same relief sought in the original Petition. (T16-22). Paragraph seven of the Amended Petition states, "The minor child is subject to the Indian Child Welfare Act. The Petitioner's husband and the minor child's maternal grandfather, [Jay], is a registered member of the Muscogee Creek Indian Nation." (T16).

On August 20, 2018, Susan filed a Certificate of Mailing stating that on August 20, 2018, Susan mailed an "Indian Child Welfare Act Notice" to Tara, Eliza's putative father, the Muscogee (Creek) Nation, and the Aberdeen Regional Director of the Bureau of Indian Affairs. (T32-33). The notices referenced in the Certificate of Mailing were not filed with the County Court.

On September 10, 2018, Susan filed two letters addressed to Susan's attorney from the Muscogee (Creek) Nation Child and Family Services Administration. (T39-40). The letters state Eliza was either eligible for enrollment or enrolled in the Muscogee (Creek) Nation, and that Eliza was an "Indian child" as defined in the federal Indian Child Welfare Act. (T39-40).

On September 11, 2018, Susan filed a Notice of Service, stating that on August 20, 2018, Susan mailed a "Notice of Guardianship/Conservatorship of Minor Child Indian Child Welfare

Act (ICWA) Notice-Court Case" and other documents to Tara. (T45). The Notice of Service states Tara signed for the mailed documents on August 23, 2018. (T45). Certified mail receipts were attached to the Notice of Service as "Exhibit A", but they do not contain Tara's signature or otherwise indicate Tara signed for any documents, but instead were signed by Jay. (T46). On September 12, 2018, a hearing was held. (T56). At the hearing Susan's attorney stated ICWA was involved in this case, and that Eliza was an Indian child. (5:19-20).

On October 4, 2018, Tara filed a request for court appointed counsel. (T61-64). In her request, Tara stated she is indigent, cannot afford an attorney, and that she has the right to request a public defender pursuant "section 43 1505, subsection #2". (T61). The request sets out information showing Tara has no monthly income, apart from food stamps and Medicaid benefits. (T61-64).

On October 5, 2018, a letter was written by a "Meghann Shudak" to the presiding County Court Judge, the Honorable Marcela A. Keim, that disclosed Tara's request for court appointed counsel and asked the Court how to proceed. (T65). The letter contains handwritten words that appear to be from the presiding Judge responding request as how to proceed. The handwritten response states "This form is not used in probate cases–", "Leave hrg set for 10/23/18 no action needed". (T65). The handwriting is signed "mak", and is dated "10/9/18". (T65).

On October 22, 2018, Tara filed a letter requesting again that the County Court appoint her an attorney. (Conf. T1-10). In this second request, Tara states she is enrolled in the Muscogee (Creek) Nation, is Eliza's mother, and that Eliza is eligible for enrollment with the Muscogee (Creek) Nation. (Conf. T1). Tara states Eliza is an Indian child as defined in Neb. Rev. Stat. § 43-1503(8) and that the Indian Child Welfare Act applies to this case. (Conf. T1). Tara also states she

cannot afford a private attorney, is receiving food stamps and Medicaid benefits, and that she has a right to court appointed counsel pursuant to Neb. Rev. Stat. § 43-1505(2). (Conf. T1).

A copy of Tara's Muscogee (Creek) Nation Citizenship ID was attached to Tara's second request as Exhibit A. (Conf. T2). A letter from the Muscogee (Creek) Nation Children and Family Services Administration stating Eliza is enrolled or eligible for enrollment in the Muscogee (Creek) Nation was attached as Exhibit C. (Conf. T6). Copies of two "Notice of Action" documents from the Nebraska Department of Health and Human Services were attached as Exhibits D and E. (Conf. T7-9). Exhibit D is dated June 12, 2018, and states Tara's application for food stamps was approved for June 2018. (Conf. T7). Exhibit E is dated August 20, 2018, and states Tara was approved for Medicaid coverage effective September 1, 2018. (Conf. T9).

On October 23, 2018, a hearing was held. (T66). At the hearing, Tara objected to the appointment of Susan as guardian of Eliza. (13:2-5). Tara requested the Court appoint her an attorney pursuant to Neb. Rev. Stat. § 43-1505(2) before any further proceedings in the case. (13:12-15; 16:14-17). Tara said she sought private counsel, but could not afford such counsel. (13:15-16). Tara said she spoke with "Legal Aid", but said they were unable to represent her because their caseload was "overfilled". (13:16-20).

In response, the Court said that if Tara wanted counsel, she needed "to follow the proper procedure". (19:20-21). The Court acknowledged Tara's right to counsel in removal, placement, or termination proceedings, but said "you don't necessarily get a lawyer in guardianship and conservatorship proceedings, okay? You're not necessarily entitled to one, whether you can afford one or not. That's not what the law says." (19:22-20:12). The Court indicated the present proceedings did not fit the legal definitions of the terms contained in Neb. Rev. Stat. § 43-1505(2). (16:10-18:1; 19:22-20:2; 20:8-12; 23:10-24:17). The Court also indicated Tara's first request for

court appointed counsel was made on the wrong form, and that Tara did not request a court appointed attorney "the right way". (14:17-21; 20:14-16).

On November 5, 2018, trial was held. (T68). Prior to testimony, Susan's attorney asked the Court to take "judicial notice of the pleadings filed in this matter, including proof of service upon [Tara]." (26:24-27:1). The Court decided to take judicial notice of "the pleadings, including the notice provisions that were noted by counsel". (27:24-28:1). A Journal Entry and Order entered after the November 5, 2018 trial indicates judicial notice was taken of the Petition, the Amended Petition, and the Proof of Service documents filed on August 31, 2018, and October 1, 2018. (T68).

Tara then asked the Court to make a ruling as to whether the Indian Child Welfare Act applied in this case. (28:23-25; 29:25-30:2). Tara also said, "The petition does not uphold the verbiage that would be necessary … to grant a removal." (31:19-21). After discussion, the Court stated "[T]he Court does find that, obviously, there is an – the Federal Indian Child Welfare Act, even according to the tribe, indicates the above-named child will be considered an Indian child pursuant to that Act, and the notice requirements of ICWA have been complied with …". (31:23-32:3). The Court found the Indian Child Welfare Act applied "in this particular case". (32:9-10).

During trial, Susan testified Eliza had "Indian insurance", which Susan said meant Eliza is able to receive services at "the Ponca clinic and any other Indian clinic as a Native child." (57:25-58:5; 66:9-24). Jay testified Eliza is a member of the Muscogee Creek Indian Nation. (88:8-12). Tara testified Eliza identifies as "a Muscogee Creek Wind Clan", and that she and her family are Native American. (154:10-13; 158:4-5). The Court received Exhibit 2, two letters from the Muscogee (Creek) Nation stating Eliza is either enrolled in the Nation or eligible for enrollment in the Nation through her mother, Tara. (E2,1-2:89). The letters state Eliza will be considered an Indian child as defined in the federal Indian Child Welfare Act. (E2,1-2:89).

Susan testified Tara had recently been receiving "state aid for food", that Tara was not employed, and that she thought Tara recently received "grants and loans for going to school". (42:2-6; 42:19-20; 44:1-4). Tara testified she is a full-time student, is receiving food stamps and Medicaid, and had recently sought out and applied for public housing assistance. (147:18-19; 148:1-5; 153:9-10; 153:12-16; 154:7-8; 162:16-22). Tara testified she was unemployed, primarily because Tara preferred to focus on and complete her college degree. (158:22-25; 159:2-6).

John Franklin (Dr. Franklin) testified he is a family physician who had been friends with Susan and Jay for 15 years. (103:13-104:2). Dr. Franklin said he believed Tara and Eliza have a good relationship, and that, "Eliza and Tara act as -- they love each other and they interact very well. It's a mother and daughter relationship in that manner." (106:10-17). Dr. Franklin said Eliza is one of his patients, and that when Susan and Tara are present at Eliza's appointments both are equally engaged with him. (107:12-23). When asked if he had any concerns if the Court did not grant the proposed guardianship, Dr. Franklin said "that which I can speak to is that, perhaps, Eliza's mother would take Eliza somewhere and there would be question [sic] of whether there would be good support for her." (111:2-7). Dr. Franklin went on to say he believed Eliza would receive appropriate support in Susan and Jay's home, and said "I don't know that Tara would be able to do that. That's what I would worry about." (111:8-21).

After the conclusion of testimony, Tara made a closing argument. (190:6-195:10). Among other things, Tara argued Susan's pleadings did not sufficiently place at issue the Indian Child Welfare Act requirements that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of Tara and Eliza's family, or that continued custody of Eliza with Tara is likely to result in serious emotional or physical harm to Eliza. (193:11-24).

After arguments the Court found Tara was personally served with the Amended Petition on September 24, 2018, and that Tara made an appearance in the proceeding. (197:18-25). As a result the Court concluded service was proper. (197:18-25). The Court found there was a sufficient basis for appointing Susan guardian of Eliza. (198:1-3). The Court said financial issues do not "necessarily disqualify a parent, especially under the parental preference principle" but said "even if you took the financial situation aside, the evidence today … indicates [Tara] is not in a position, at this time, to parent her child alone". (198:4-10).

The Court cited Tara's refusal to "provide information regarding housing options", Tara's inability "to provide information about a lot of different things", and that Tara agreed to "a lot of the things that the petitioners put forth in their case-in-chief". (198:10-14). The Court indicated Tara agreed Susan's home was the home Eliza had always known, that "Tara does come and go occasionally because she was suffering and it was best for her to disassociate off and on, which left her four-year-old without anyone, except for her grandparents", and that "CPS has not been involved primarily because of the grandparents." (198:14-20). The Court also said Tara acknowledges the strong bond her parents have with Eliza. (198:20-21).

The Court found this proceeding was "not a removal proceeding, not a foster care placement proceeding." (198:22-23). The Court then said, "And guardianships, by nature, by definition, are temporary. So, again, when we talk about permanent appointment, it's almost as if that's just a legal fiction…" (198:23-199:1).

The Court found Tara was not a fit and proper person to care for Eliza, that Tara was unable to provide a safe and secure environment for Eliza, and that Tara was financially unable to support Eliza and, in so finding, stated that "[Tara] has not provided financial support or a secure and safe environment since birth essentially." (199:4-11).

On November 13, 2018, the County Court entered an Order finding, "Upon clear and convincing evidence presented to the Court, there is a sufficient basis for the appointment of a guardian for [Eliza]" and that there are no less restrictive alternatives than the appointment of a guardian. (T70). The Order says appointment of a guardian is necessary because "[Tara] is not a fit, proper and suitable person to provide care and custody of a minor, nor is she able to provide a safe and secure environment. Appointment is in minor's best interest." (T70). The Order finds Susan is entitled to appointment pursuant to Neb. Rev. Stat. § 30-2608 and should be appointed Eliza's guardian. (T70). The Order then appoints Susan guardian of Eliza, upon Letters of Guardianship being issued to Susan and upon the filing of documents set out in the Order. (T71).

On or about December 5, 2018, Tara timely filed a Notice of Appeal and a Motion and Affidavit seeking permission to proceed on appeal *in forma pauperis.* (Notice of Appeal p.1; Motion to Proceed *In Forma Pauperis* p.1-5). On or about December 5, 2018, the County Court entered an Order allowing Tara to proceed on appeal *in forma pauperis*, without being require to pre-pay the costs of appeal, including the docketing fee, the cost of the transcript or bill of exceptions, or supersedeas bond pursuant to Neb. Rev. Stat. § 30-1601(3). (Order to Proceed *In Forma Pauperis* p.1). This matter is properly before the Nebraska Court of Appeals.

SUMMARY OF ARGUMENT

The Nebraska Indian Child Welfare Act (NICWA) and the federal Indian Child Welfare Act (ICWA) apply to "child custody proceedings" as defined in NICWA and ICWA. Under NICWA and ICWA, a "foster care placement", is a "child custody proceeding". Neb. Rev. Stat. § 43-1503(3)(a); 25 U.S.C. § 1903(1)(i). Under NICWA and ICWA, five elements must be met for a proceeding to be a "foster care placement": 1) The proceeding must be an action to remove a child from his or her parent, 2) the child must be an "Indian child" as defined in NICWA and

ICWA, 3) the proceeding must be for temporary placement in a foster home, in an institution, with a guardian, or with a conservator, 4) the placement must be such that the parent cannot have the child returned upon demand, and 5) the placement must not terminate the parents' parental rights. Neb. Rev. Stat. § 43-1503(3)(a); 25 U.S.C. § 1903(1)(i).

In this case, all five elements are met. This proceeding is one where Susan W. (Susan) is seeking to remove Eliza W. (Eliza), an Indian child, from her parent, Tara W. (Tara), for temporary placement in the home of a guardian, a legal arrangement in which Tara cannot have Eliza returned to her on demand, but does not terminate her parental rights. This proceeding is therefore a foster care placement as defined in NICWA and ICWA.

Because guardianship proceedings involving Indian children are "foster care placements" under NICWA and ICWA, a court can only appoint a guardian for an Indian child if four NICWA and ICWA requirements are met: 1) that an indigent parent must be appointed counsel, 2) that certain notice requirements are met, 3) that active efforts are made to provide services and programs designed to prevent the breakup of the Indian family, and 4) that clear and convincing evidence is presented, including expert testimony, showing continued custody of the Indian child by its parent is likely to result in serious emotional and physical harm to the child. Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912.

Here, the County Court of Douglas County, Nebraska (County Court) correctly determined Eliza was an "Indian child" and that NICWA and ICWA applied to this case. However, the County Court incorrectly held this guardianship proceeding was not a foster care placement under NICWA and ICWA. The County Court also incorrectly failed to appoint counsel for Tara, incorrectly found NICWA and ICWA's notice requirements were met, incorrectly failed to find sufficient active efforts had been made, and incorrectly failed to find clear and convincing evidence, including

expert testimony, had been presented that continued custody of Eliza with Tara mother is likely to result in serious emotional and physical damage to Eliza.

As a result, Eliza was improperly removed from Tara. Therefore, pursuant to Neb. Rev. Stat. § 43-1512, 25 U.S.C. § 1920, and 25 C.F.R. § 23.114, this Court must vacate the County Court order appointing Susan guardian of Eliza, and remand this proceeding to the County Court with instructions to decline any further jurisdiction in this proceeding, and to return Eliza to Tara unless doing so would subject Eliza to substantial and immediate danger or threat of such danger.

In addition, a petitioner must plead sufficient facts to place the standard of proof required under the law into issue. Here, the pleadings failed to sufficiently place into issue the standards of proof required by NICWA and ICWA. The County Court therefore erred by granting the relief sought in the pleadings. As a result, this Court must vacate the County Court's guardianship order.

Finally, to obtain a minor guardianship, the petitioner must prove by clear and convincing evidence that the child's parents are unfit or have forfeited their rights to their child. No competent evidence exists to support the County Court's finding that the child's mother is unfit. Furthermore, the decision does not conform to law and is arbitrary, capricious, and unreasonable. This Court must therefore vacate the County Court's guardianship order, and remand the case with instructions to deny the relief sought in the Petitioner's pleadings.

ARGUMENT

I. The County Court erred by failing to correctly apply NICWA and ICWA to this guardianship proceeding.

The Nebraska Indian Child Welfare Act (NICWA) and the federal Indian Child Welfare Act (ICWA) apply to "child custody proceedings" involving Indian children. Neb. Rev. Stat. §§ 43-1501 *et seq.*; 25 U.S.C. §§ 1901 *et seq*. The purpose of NICWA and ICWA is to protect the

best interests of Indian children through the establishment of minimum standards for the removal of Indian children from their families. Neb. Rev. Stat. §§ 43-1502, 43-1503(2); 25 U.S.C. § 1902. "Child custody proceedings", pursuant to NICWA and ICWA, include "foster care placements" as defined therein. Neb. Rev. Stat. § 43-1503(3)(a); 25 U.S.C. § 1903(1)(i).

As argued below, NICWA and ICWA apply to guardianship proceedings as they are "foster care placements" as defined in those Acts. To order a "foster care placement", four NICWA and ICWA requirements must be met: 1) an indigent parent must be appointed counsel, 2) certain notice requirements must be met, 3) active efforts to prevent the breakup of the Indian family must be made and shown to be unsuccessful, and 4) clear and convincing evidence must be presented, including expert testimony, that continued custody of the child with its parent is likely to result in serious emotional or physical damage to the child. Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912.

In this case, the County Court correctly determined Eliza was an "Indian child" and that NICWA and ICWA applied. However, the County Court erred as a matter of law as follows: finding this guardianship proceeding was not a foster care placement; failing to appoint counsel, incorrectly finding the notice requirements were met; failing to find active efforts had been made; and failing to find by clear and convincing evidence, including expert testimony, that continued custody with Tara would result in serious emotional or physical damage.

a. Guardianships are foster care placements under NICWA and ICWA.

Under ICWA, "foster care placement" is defined to mean,

> "any action removing an Indian child from his or her parent or Indian custodian for temporary 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."

25 U.S.C. § 1903(1)(i). NICWA contains substantially similar language. Neb. Rev. Stat. § 43-1503(3)(a).

Under this definition, five elements must be met for a proceeding to be a foster care placement under NICWA and ICWA: 1) The proceeding must be an action to remove a child from his or her parent, 2) the child must be an "Indian child" as defined in NICWA and ICWA, 3) the proceeding must be for temporary placement in a foster home, in an institution, with a guardian, or with a conservator, 4) the placement must be such that the parent cannot have the child returned upon demand, and 5) the placement must not terminate the parents' parental rights. Neb. Rev. Stat. § 43-1503(3)(a); 25 U.S.C. § 1903(1)(i). In this case, all five elements are met.

In Susan's Petition and Amended Petition, Susan asks the County Court to appoint her the temporary and permanent guardian and conservator of Eliza. (T1-7, T16-22). Under Nebraska law, the guardian of a child "has the powers and responsibilities of a parent who has not been deprived of custody of his or her minor and unemancipated child…". Neb. Rev. Stat. § 30-2613(1). An order appointing a guardian for a minor has been recognized as providing for the legal custody and physical custody of the child." *See* In re Guardianship of Luis J., 300 Neb. 659, 667 (2018) (guardianship is a child custody determination pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act); In re Guardianship of D.J., 268 Neb. 239, 248 (2004) (guardianship is a custody arrangement). The first element is met because this guardianship proceeding is an action to remove Eliza from the legal custody of her parent.

Under NICWA and ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Neb. Rev. Stat. § 43-1503(8); 25 U.S.C. § 1903(4). On September 10, 2018, Susan's attorney filed two letters from the Muscogee

(Creek) Nation stating that Eliza was either enrolled in the Muscogee (Creek) Nation or eligible for enrollment in the Muscogee (Creek) Nation through her relation to Tara. (T39-40). The letters state Eliza is an Indian Child as defined in ICWA. (T39-40). These letters were received as Exhibit 2 at trial. (E2, 1-2:89). Tara attached a copy of her Muscogee (Creek) Nation enrollment card to her October 22, 2018 request for court appointed counsel. (Conf. T2). At trial, no one disputed that Eliza was an Indian child. Jay testified Eliza is a member of the Muscogee (Creek) Nation. (88:8-12). Prior to trial, the County Court found Eliza "will be considered an Indian child pursuant to [ICWA]". (31:23-32:2). The second element is met because Eliza is an "Indian child" as defined in NICWA and ICWA.

After trial, pursuant to the relief requested in the Amended Petition, the County Court appointed Susan guardian of Eliza. (T1-7, T16-22, T70-72). Nebraska appellate courts have held that that guardianships are "no more than a temporary custody arrangement." D.J., 268 Neb. at 248; citing In re Guardianship of Zyla, 251 Neb. 163 (1996). At trial, the County Court agreed, stating, "…guardianships, by nature, by definition, are temporary. So, again, when we talk about permanent appointment, it's almost as if that's just a legal fiction…" (198:23-199:1). The third element is met because this guardianship proceeding is one for temporary placement of Eliza in the home of a guardian.

Guardians have the powers and responsibilities of a parent who has not been deprived of custody of his or her minor child, including legal custody of the child. *See* Neb. Rev. Stat. § 30-2613(1); Luis J., 300 Neb. at 667 (2018); D.J., 268 Neb. at 248 (2004). A guardian's authority terminates only on the death, resignation, or removal of the guardian, or through the minor's death, adoption, marriage, or attainment of the age of majority. Neb. Rev. Stat. § 30-2614. In order to remove a guardian, an interested party must petition the court and obtain court approval. Neb. Rev.

Stat. § 30-2616(a). The fourth element is met because, once the County Court appointed Susan guardian of Eliza, Tara no longer had the ability to have Eliza returned to her upon demand.

The Nebraska Supreme Court has held "the appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights." D.J., 268 Neb. at 248; *citing* Zyla, 251 Neb. at 166 (internal quotations omitted). The fifth element is met because Susan's appointment as guardian of Eliza did not terminate Tara's parental rights.

As set out above, this proceeding is one to remove Eliza, an Indian child, from her parent, Tara, for temporary placement in the home of a guardian, a legal arrangement in which Tara cannot have Eliza returned to her on demand, but does not terminate Tara's parental rights. Therefore, this proceeding is a foster care placement as defined in NICWA and ICWA.

The issue of whether a guardianship is a foster care placement as defined in NICWA and ICWA is one of first impression in Nebraska appellate courts, however several other states have held guardianships and similar arrangements are foster care placements as defined by ICWA. *See* Empson-Laviolette v. Crago, 760 N.W.2d 793 (Mich. Ct. App. 2008); In re Custody of A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993); Rice v. McDonald, 390 P.3d 1133 (Alaska 2017); Erika K. v. Brett D., 75 Cal. Rptr. 3d 152, 161 Cal. App. 4th 1259 (2008); In re Q.G.M., 808 P.2d 684 (Okla. 1991); In re S. B. R., 719 P.2d 154 (Wash. Ct. App. 1986).

In Empson-Laviolette v. Crago, the Court of Appeals of Michigan held minor guardianship proceedings concerning an Indian child involved a foster care placement as defined by ICWA. 760 N.W.2d 793, 799 (2008). In Empson-Laviolette, the trial court appointed two persons co-guardians of an Indian child. Id., at 796. Prior to the appointment, the guardians filed documents indicating the mother consented to their appointment as guardians. Id. A year later, the child's mother sought

to terminate the guardianship and withdrew her consent to the guardianship. Id., at 797. The mother argued ICWA applied and that ,pursuant to ICWA, the child should have been returned to her after she withdrew consent to the guardianship. Id. The Court of Appeals of Michigan agreed, found the guardianship was a foster care placement as defined in ICWA, vacated the guardianship, and ordered the child returned to her mother. Id., at 798-799, 802.

In another case, In re Custody of A.K.H., the Court of Appeals of Minnesota held that a proceeding in which a grandmother sought custody of her Indian grandchild was a foster care placement as defined by ICWA. 502 N.W.2d 790, 791-793 (1993). In A.K.H., the trial court denied the child's Tribe's motion to intervene in the proceedings pursuant to ICWA. Id., at 792. On appeal, the Court of Appeals of Minnesota held the proposed custody of the child with its grandmother was similar to that of a guardianship and was therefore a foster care placement as defined in ICWA. Id., at 792-793. As a result, the Court of Appeals reversed the trial court's decision to not allow the child's Tribe to intervene. Id., at 796.

In a third case, Rice v. McDonald, the Alaska Supreme Court held a custody proceeding concerning three Indian children filed by the children's aunt against the children's father was a child custody proceeding and foster care placement as defined by ICWA. 390 P.3d 1133, 1135-1137 (2017). In doing so, the Alaska Supreme Court stated, "Since the early days of ICWA, we have rejected the claim that ICWA applies only to custody proceedings involving the removal of Indian children from their homes by nonfamily public and private agencies." Id., at 1136 (internal quotations omitted).

Here, the proceedings Susan filed for guardianship of Eliza are similar to the proceedings found to be foster care placements in Empson-Laviolette, A.K.H., and Rice. As in those cases,

Susan, a non-parent, is seeking to remove an Indian child from her parent for temporary placement in the custody of a non-parent where the child cannot be returned to the parent on demand.

Finally, in December 2016, the United States Department of the Interior Bureau of Indian Affairs published guidelines for state courts in implementing ICWA. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 20, 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (Guidelines). The notice announcing the Guidelines states they are not binding, but, "provide a reference and resource for all parties involved in child custody proceedings involving Indian children." Guidelines, 81 Fed. Reg. at 96,477. While not binding, Nebraska appellate courts have looked to and relied on the Guidelines when interpreting ICWA. *See* In re Interest of Audrey T., 26 Neb. App. 822, 836 (2019); In re Interest of Tavian B., 292 Neb. 804, 809-810 (2016) (prior version of Guidelines). The Guidelines state, "ICWA also applies to placements with a guardian or conservator, because ICWA includes guardianships in the definition of 'foster care placement'." Guidelines, p. 14, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

For all of the foregoing reasons, the County Court erred as a matter of law by finding this guardianship proceeding was not a foster care placement under NICWA and ICWA.

b. NICWA and ICWA require counsel be appointed for indigent parents, certain notice requirements be met, active efforts be made, and, a heightened standard of proof be shown prior to a court entering a guardianship order.

As argued above, this proceeding is a "foster care placement" as defined in NICWA and ICWA. When a proceeding is a foster care placement, NICWA and ICWA both require: 1) that an indigent parent must be appointed counsel, 2) that certain notice requirements must be met, 3) that active efforts to prevent the breakup of the Indian family must be made and be shown to be

unsuccessful, and 4) that clear and convincing evidence must be presented, including expert testimony, that continued custody of the child with the child's parent will result in serious emotional or physical damage to the child. Neb. Rev. Stat. § 43-1505; 25 U.S.C. § 1912(b). None of these NICWA and ICWA requirements were met prior to the court appointing Susan guardian.

i. Right to Court Appointed Counsel

Under NICWA and ICWA, parents shall have the right to court-appointed counsel: 1) if the proceeding is one for "removal, placement, or termination", and 2) if the court determines the parent is indigent. Neb. Rev. Stat. § 43-1505(2); 25 U.S.C. § 1912(b); *see also* 25 C.F.R. § 23.111(g) (when a parent of an Indian child appears in court without an attorney the court must inform the parent of their right to court appointed counsel).

Tara asked the County Court to appoint her an attorney on three occasions prior to trial, including twice in writing, all of which were denied. (T61-65; Conf. T. 1-9; 12:12-20:18). Because the County Court erred as a matter of law in finding this proceeding was not a foster care placement and because the evidence established Tara was indigent, the County Court erred as a matter of law in not appointing an attorney to represent Tara.

"Removal, placement, and termination" as found in Neb. Rev. Stat. § 43-1505(2) and 25 U.S.C § 1912(b), is not specifically defined in NICWA or ICWA. In addition, the issue of when a court must appoint counsel for a parent pursuant to Neb. Rev. Stat. § 43-1505(2) and 25 U.S.C. § 1912(b) appears to be an issue of first impression in Nebraska appellate courts. However, the right to court appointed counsel contained in 25 U.S.C. § 1912 has been held by other states to apply to "child custody proceedings" and "foster care placement" proceedings as defined in ICWA. *See* In re Custody of A.K.H., 502 N.W.2d 790, 796 (Minn. Ct. App. (1993) (Mother was entitled to court appointed counsel in foster care placement proceeding); In re M. E. M., 635 P.2d 1313, 1316-1317

(Mont. 1981) ("We interpret [ICWA] as requiring the appointment of counsel for indigent Indian parent in 'child custody proceedings' as defined by [ICWA]."); *see also* B.R.T. v. Executive Director of Social Service Bd., 391 N.W.2d 594, 600 (N.D. 1986) (legislative history of 25 U.S.C. 1912(b) provides an indigent parent has a right to court appointed counsel in any involuntary State proceeding for foster care placement or termination of parental rights).

Therefore, "removal, placement, and termination", as used in Neb. Rev. Stat. § 43-1505(2) and 25 U.S.C § 1912(b) refers to "child custody proceedings" and proceedings for "foster care placement" as defined in NICWA and ICWA. As argued above, this guardianship proceeding is a "foster care placement" under NICWA and ICWA, and therefore is also a "removal, placement, or termination" proceeding pursuant to Neb. Rev. Stat. § 43-1505(2) and 25 U.S.C § 1912(b). Tara has the right to court appointed counsel if she is indigent. All of the evidence contained in the record indicates that she is indigent and entitled to court-appointed counsel.

On October 4, 2018, and October 22, 2018, Tara filed two written requests for a court appointed attorney that, indicated her only sources of income were food stamps and Medicaid. (T61-64; Conf. T1-9). At a hearing held October 23, 2018, Tara said she had sought private counsel but could not afford it. (13:15-16). At trial, Tara testified she was unemployed, was a full-time student, was receiving food stamps and Medicaid, and had recently applied for public housing assistance. (147:19; 153:9-10; 154:7-8; 162:16-22; 148:1-5; 153:12-16; 158:22-25; 159:2-6). Susan admitted at trial Tara was receiving "state aid for food", and that she believed Tara was receiving "grants and loans for going to school". (42:2-3; 42:19-21). After trial the Court acknowledged Tara's indigency by ruling guardianship was warranted "financial issues aside", and later stating, "At this particular time, [Tara] is financially unable to support her own daughter…". (198:1-10; 199:7-9).

Because this proceeding is one for "removal, placement, or termination" pursuant to Neb. Rev. Stat. § 43-1505(2) and 25 U.S.C § 1912(b), and because Tara is indigent, the court erred in not appointing an attorney to represent Tara.

ii. Notice Requirements

Pursuant to NICWA,

> "In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall send a notice conforming to the requirements of 25 C.F.R. 23.11 to the parents, the Indian custodian, and the Indian child's tribe or tribes, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention."

Neb. Rev. Stat. § 43-1505(1). ICWA contains a similar provision, but it does not reference 25 C.F.R. 23.11. 25 U.S.C. § 1912(a).

In 2016, the United States Department of the Interior Bureau of Indian Affairs promulgated regulations implementing ICWA. Indian Child Welfare Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016). The regulations became effective December 12, 2016. Id. The regulations are intended to provide a binding, consistent, and nationwide interpretation of the minimum requirements of ICWA. Id., at 38,851.

These binding regulations provide that when the court knows or has reason to know that the subject of an involuntary foster care placement is an Indian child, the court must ensure each notice required under 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111 is filed with the court together with any return receipts or other proof of service. 25 C.F.R. § 23.111(a). The notice "must be in clear and understandable language" and include the information set forth in 25 C.F.R. § 23.111(d),

including a statement that if the parent is unable to afford counsel and is indigent, the parent has a right to court appointed counsel. 25 C.F.R. § 23.111(d). Nebraska appellate courts have previously vacated orders when insufficient ICWA notice is given. In re Interest of Nery V., 20 Neb. App. 798 (2013); In re Interest of Walter W., 14 Neb. App. 891 (2006).

Here, the court knew or had reason to know that this proceeding involved an Indian child as early as August 7, 2018, when Susan stated in her Amended Petition, "The minor child is subject to the Indian Child Welfare Act." (T16); *see* 25 C.F.R. § 23.107(c) (stating when a court has reason to know a child is an Indian child). This statement triggered the notice requirements of Neb. Rev. Stat. § 43-1505(1), 25 U.S.C. § 1912(a), and 25 C.F.R. § 23.111, which include the requirement that the prescribed notices be filed with the court. 25 C.F.R. § 23.111(a).

At no point in this proceeding was any notice meeting the requirements of 25 C.F.R. § 23.111, or any notice of any other kind, filed with the court. Susan purported to have sent notice to Tara, Eliza's Tribe, her father, and the Bureau of Indian Affairs, but there is no indication what these notices said. Therefore, Susan did not provide adequate notice as required by Neb. Rev. Stat. § 43-1505(1); 25 U.S.C. § 1912(a); and 25 C.F.R. § 23.111.

Because the County Court appointed Susan guardian of Eliza even though the notice requirements under NICWA and ICWA were not complied with, the County Court erred in appointing Susan guardian of Eliza.

iii. Active Efforts

NICWA and ICWA both state,

"Any party seeking to effect a foster care placement of … 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."

Neb. Rev. Stat. § 43-1505(4); *see also* 25 U.S.C. § 1912(d).

NICWA further requires that prior to the court ordering a foster care placement, "the court shall make a determination that active efforts have been provided or that the party seeking placement … has demonstrated that attempts were made to provide active efforts to the extent possible under the circumstances." Neb. Rev. Stat. § 43-1505(4). ICWA's binding regulations require that, prior to ordering an involuntary foster care placement, "the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful." 25 C.F.R. § 23.120. Active efforts must be detailed in the record. Id.

Here, the County Court did not make any determination that active efforts were provided. (197:18-202:13; T68-73). After trial, the County Court said, "This is, again, not a removal proceeding, not a foster care placement proceeding." (198:22-23). The County Court therefore never even considered, let alone decided, whether active efforts were provided.

This case is analogous to the Nebraska Supreme Court case, In re Adoption of Micah H., 295 Neb. 213 (2016). In Micah H., the grandparents of an Indian child appealed a trial court decision denying their petition to adopt the Indian child. Id., at 214-215, 221. On appeal, the Supreme Court held the trial court applied an incorrect burden of proof as to whether the child's father had abandoned the child, and remanded the case back the trial court to apply the correct burden of proof. Id., at 225. The Supreme Court also held that because the trial court did not make any findings as to whether active efforts were provided or attempted, the trial court was required on remand to determine if active efforts had been made or attempted. Id., at 227-228.

Here, the County Court held this proceeding was not a foster care placement as defined in NICWA and ICWA and, like in Micah H., did not make any determination that active efforts had been provided. Therefore, the County erred in appointing Susan guardian of Eliza in violation of NICWA and ICWA.

Furthermore, insufficient evidence was presented showing active efforts were made as required by NICWA and ICWA. Neb. Rev. Stat. § 43-1505(4); 25 U.S.C. § 1912(d).

In 2015, the Nebraska legislature amended NICWA adding a definition of active efforts. Neb. Rev. Stat. 43-1503(1); 2015 Neb. Laws 566. Pursuant to § 43-1503(1), "Active efforts shall mean and include, but not be limited to" a variety of matters set out in the statute. Neb. Rev. Stat. § 43-1503(1)(a)-(h). These matters include:

> "A concerted level of casework, both prior to and after the removal of an Indian child…in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe…to the extent possible under the circumstances;" "A request to the Indian child's tribe…to convene traditional and customary support and services;" "Actively engaging, assisting, and monitoring the family's access to and progress in culturally appropriate and available resources of the Indian child's extended family member, tribal service area, Indian tribe…, and individual Indian caregivers;" … "Identification of and attempts to engage tribally designated Nebraska Indian Child Welfare Act representatives; [and]" … "Exhaustion of all available tribally appropriate family preservation alternatives".

Neb. Rev. Stat. § 43-1503(1)(a), (b), (c), (e), and (g).

ICWA's binding regulations define active efforts to mean:

> "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family…. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural condition and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family member, Indian custodians, and Tribe."

25 C.F.R. § 23.2.

Here, the record contains no evidence of "affirmative, active, thorough, and timely efforts" intended primarily to prevent the breakup of Eliza and Tara's family. The record, in fact, shows 1) Susan and her husband Jay were not concerned with providing remedial services and rehabilitative programs to Tara designed to prevent the breakup of Tara and Eliza's family, 2) Susan and Jay refused Tara's attempts to engage them with such services and programs, and 3) Susan and Jay failed to follow through with the services and programs they themselves conceived of pertaining to the issues they raised at trial.

At trial, Susan testified that she had "talked" about getting a family counselor to help "restructure our household, our relationships." (55:9-14). While it is far from clear Susan talked about such a counselor as a way to provide services to Tara designed to prevent the breakup of Tara and Eliza's family, what is clear is that this idea had not progressed beyond talking. When pressed on cross-examination about "mediation and family counseling" Susan indicated she had not actively attempted to provide such services, telling Tara, "You find somebody". (62:24-63:5).

Susan testified Tara had sent Susan a temporary delegation of parental powers, which Susan refused to agree to. (63:6-64-2). Susan testified she stopped communicating with Tara

because, as she put it, "I got tired of listening to [Tara] complain to me". (64:25-65:4). As a result, Susan said there was not much discussion or conversation between Susan and Tara. (64:22-65:4).

Similarly, Jay testified he only rarely talks to Tara. (78:8-9). Jay testified that he and Susan had provided financial support to Tara, but not to prevent the breakup of Tara and Eliza's family. (100:18-101:10). Jay testified, "I never even gave Tara much of a thought. I was going to take care of Eliza no matter what. So, Susie and I, and Eliza, became more of my focus." (101:8-10).

Tara testified she had asked Susan about obtaining a mediator and had presented Susan with places they could go, but indicated those efforts were rebuffed by Susan. (149:2-4). Tara testified she asked Susan numerous times if they could "work this out as a family", questions she said were ignored or denied. (154:3-6).

The record contains no evidence that any level of casework was done by Susan either before or after Susan was appointed emergency guardian of Eliza. To the extent any casework was done, no evidence indicates it was consistent with the Muscogee (Creek) Nation's prevailing social and cultural conditions and way of life, or that Susan asked the Muscogee (Creek) Nation to convene traditional and customary support and services to Tara. No evidence is in the record indicating Susan actively engaged, assisted, and monitored Tara's access to and progress in culturally appropriate or other services. Besides the notice Susan's attorney indicated was sent to the Muscogee (Creek) Nation, no evidence is in the record that Susan actually attempted to engage the Muscogee (Creek) Nation's Nebraska Indian Child Welfare Act representatives. No evidence whatsoever is in the record about what tribally appropriate family preservation alternatives existed, let alone that all such alternatives were exhausted.

For the foregoing reasons, no competent evidence exists in the record showing Susan made active efforts, as defined in Neb. Rev. Stat. § 43-1503(1), 25 C.F.R. § 23.2, or otherwise, to provide

Tara remedial services and rehabilitative programs designed to prevent the breakup of Tara and Eliza's family and that such efforts were unsuccessful. The Court also made no determination that active efforts were made as is required by NICWA and ICWA's binding regulations. Because the County Court appointed Susan guardian of Eliza despite insufficient evidence of active efforts, and without making a determination sufficient active efforts were made, the County Court erred in appointing Susan guardian of Eliza.

iv. Heightened Standard of Proof

NICWA states,

> "The court shall not order foster care placement … in the absence of a determination by the court, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

Neb. Rev. Stat. 43-1505(5). ICWA contains an almost identical provision. 25 U.S.C. § 1912(e). ICWA's binding regulations state,

> "A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe."

25 C.F.R. § 23.122(a); *see also* Neb. Rev. Stat. § 43-1503(15).

Here, the County Court did not make any determination that continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza. (197:18-202:13; T68-73). This is a clear violation of NICWA and ICWA.

In addition, no qualified expert witness testified at trial. The only witnesses at trial were Susan, Jay, Tara, Tara's friend Mark Anthony Keller Sr., and Susan and Jay's family physician, Dr. Franklin. (2:5-11; 103:18-25; 135:14). No party asked the County Court to qualify any of these witnesses as an expert witness pursuant to NICWA or ICWA. In addition, none of the witnesses testified that they were qualified or otherwise had substantial education to testify regarding whether Tara's continued custody of Eliza was likely to result in serious emotional or physical damage to Eliza, or the prevailing social or cultural standards of the Muscogee (Creek) Nation.

Appellees may argue that Dr. Franklin is a qualified expert witness as defined in NICWA and ICWA. Even assuming, without conceding, that Dr. Franklin is a lawful qualified expert witness pursuant to NICWA and ICWA, he expressed no opinion as to whether continued custody of Eliza by Tara was likely to result in any damage to Eliza at all.

Dr. Franklin testified that Eliza is one of his patients, and that when Susan and Tara are present at Eliza's appointments, both are equally engaged with him. (107:12-23). Dr. Franklin testified he believed Tara and Eliza have a good relationship, and that "Eliza and Tara act as -- they love each other and they interact very well. It's a mother and daughter relationship in that manner." (106:10-17).

When Dr. Franklin was asked if he had any concerns about what would happen if the Court did not appoint Susan guardian of Eliza, Dr. Franklin said "that which I can speak to is that, perhaps, Eliza's mother would take Eliza somewhere and there would be question [sic] of whether there would be good support for her." (111:2-7). Dr. Franklin went on to say he believed Eliza would receive appropriate support in Susan and Jay's home, and said "I don't know that Tara would be able to do that. That's what I would worry about." (111:8-21). While these statements may support a finding that Eliza might not have "good support" in Tara's care, they do not

represent an expert opinion that continued custody of Eliza by Tara would be likely to result in serious emotional or physical damage to Eliza.

For the foregoing reasons, no competent evidence exists in the record to support a finding that clear and convincing evidence was presented, including the testimony of qualified expert witnesses, showing continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza. The Court also made no determination that continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza, as is required by NICWA and ICWA. Because the County Court appointed Susan guardian of Eliza despite insufficient evidence that continued custody of Eliza with Tara is likely to result in serious emotional or physical damage to Eliza, and without making a determination of the same, the County Court erred in appointing Susan guardian of Eliza.

NICWA and ICWA both state:

> "When any petitioner in an Indian child custody proceeding before a state court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his or her parent or Indian custodian unless returning the child to his or her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger."

Neb. Rev. Stat. § 43-1512; 25 U.S.C. § 1920; *see also* 25 C.F.R. § 23.114 (binding regulation stating that when the court finds an Indian child was improperly removed or retained, the court must terminate the proceedings and return the child to his or her parent immediately unless doing so would subject the child to substantial and immediate danger or threat of danger).

Because Susan was appointed guardian of Eliza after 1) Tara was improperly denied court appointed counsel, 2) the County Court incorrectly found the NICWA and ICWA notice requirements were met, 3) insufficient evidence of active efforts was proven and the County Court failed to make a determination that sufficient active efforts were made, and 4) insufficient evidence was presented that continued custody of Eliza by Tara was likely to result in serious emotional or physical damage to Eliza and the County Court failed to make a determination that such damage is likely to result to Eliza, the County Court improperly removed Eliza from Tara. Therefore, pursuant to Neb. Rev. Stat. § 43-1512, 25 U.S.C. § 1920, and 25 C.F.R. § 23.114, the Court of Appeals must vacate the County Court order appointing Susan guardian of Eliza, and remand this proceeding to the County Court with instructions to appoint counsel for Tara, to decline any further jurisdiction in this proceeding, and to forthwith return Eliza to Tara, unless doing so would subject Eliza to substantial and immediate danger or threat of such danger.

II. The County Court erred in appointing Susan guardian of Eliza because the Amended Petition failed to sufficiently plead the standard of proof required by NICWA and ICWA.

Nebraska Appellate Courts have ruled that in cases involving NICWA and ICWA, the Petitioner must plead specific allegations regarding the heightened standards of proof required by NICWA and ICWA. *See* In re Interest of Sabrienia B., 9 Neb. App. 888 (2001); In re Interest of Dakota L., 14 Neb. App. 559 (2006); In re Interest of Shayla H., 17 Neb. App. 439 (2009).

This case is analogous to In re Interest of Shayla H., where the father of three Indian children appealed an juvenile court order adjudicating the children as juveniles under Neb. Rev. Stat. § 43-247(3)(a) and placing the children out of the father's home. 17 Neb. App. 436. In Shayla H., after the adjudication trial, the father asked the juvenile court to dismiss the case because the

State's petition contained no allegations consistent with ICWA. Id., at 440. The juvenile court denied the request and adjudicated the children. Id., at 440-442. On appeal, the Court of Appeals held that because the State's petition contained no allegations concerning the requirements of NICWA and ICWA, the State failed to place in issue the standard of proof required by NICWA and ICWA, and it reversed the juvenile court's order adjudicating the children. Id., at 447-448.

Here, as set out in the Argument above, this proceeding is a "foster care placement" as defined in NICWA and ICWA. Therefore, for Susan to be appointed guardian of Eliza, Susan must prove active efforts were made pursuant to Neb. Rev. Stat. § 43-1505(4) and 25 U.S.C. § 1912(d), and that continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza pursuant to Neb. Rev. Stat. § 43-1505(5) and 25 U.S.C. § 1912(e).

Pursuant to Sabrienia B., Dakota L., and Shayla H., Susan was required to plead sufficient allegations to place into issue the standards of proof required by NICWA and ICWA. Susan did not do so. In her Amended Petition, Susan makes no allegation that she has made active efforts as required in NICWA and ICWA, and further makes no allegation that continued custody of Eliza by Tara is likely to result in serious emotional or physical damage to Eliza. (T16-22).

At trial in this proceeding, Tara raised the insufficiency of Susan's pleadings. (31:19-21; 193:11-17; 193:19-24). Doing so was an argument pursuant to Sabrienia B., Dakota L., and Shayla H., that the Amended Petition failed to state a claim upon which relief can be granted. Nonetheless, the County Court still appointed Susan guardian of Eliza. Because Susan failed to sufficiently plead allegations that place into issue the standards of proof required by NICWA and ICWA, Susan failed to state a claim upon which relief can be granted, and this Court must vacate the County Court's order appointing Susan guardian of Eliza.

III. The County Court erred in appointing Susan guardian of Eliza because insufficient evidence was presented that Tara is unfit to care for Eliza or that Tara has forfeit her right to custody of Eliza.

The parental preference principle provides that a court may not properly deprive a biological parent the custody of their minor child unless it is affirmatively shown that such parent is unfit or has forfeited that right. D.J., 268 Neb. at 244. The parental preference principle protects parents' constitutional rights to companionship, care, custody, and management of their child, and the child's reciprocal constitutional right to be raised and nurtured by their parents. Uhing v. Uhing, 241 Neb. 368, 374-375 (1992); (*citing* Bellotti v. Baird, 443 U.S. 622 (1979)). The parental preference principle applies in minor guardianship proceedings, and therefore the individual seeking a minor guardianship has the burden of proving by clear and convincing evidence that the child's parents are either unfit or have forfeit their right to custody. D.J., 268 Neb. at 248-249.

The Nebraska Supreme Court has said a parent forfeits their rights to their children through complete indifference to their child's welfare over a long period of time. Id., at 249-251. Here, Susan did not argue Tara forfeit her rights to custody of Eliza, and the record shows Tara has provided care to Eliza throughout Eliza's life. Therefore, Tara has not forfeit her rights to Eliza.

"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." Uhing, 241 Neb. at 375. Evidence of unfitness should be focused upon a parent's present ability to care for a child, and not moral failings a parent may have. In re Guardianship of Lakota Z., 282 Neb. 584, 594 (2011). Evidence of a parent's past failings are pertinent only insofar as they suggest present or future faults. Id.

Here, the evidence presented was that for the first two and a half years of Eliza's life, Tara, not Susan, was the primary caregiver of Eliza, even though Tara lived with Susan and Jay. (41:25-42:2; 57:25-58:10; 122:22-25; 172:17-19). In November 2016, Tara developed viral meningitis, a debilitating disease, and as a result, Susan took over parenting responsibility for Tara. (112:23-25; 113:11-15; 123:1-4; 166:10-14). Gradually Tara recovered from the viral meningitis, she enrolled in college, and by the time of trial, Tara was sharing caregiving responsibilities for Eliza with Susan and Jay. (35:25-37:22; 41:25-42:3; 147:11-19; 167:1-15; 181:23-182:16). Tara enrolled in school after discussing her situation with Susan and Jay. (147:11-148:1). Tara continued living at her parents' home, instead of applying for state or other aid and moving out, based on Susan and Jay's promise to help support her and Eliza. (147:23-148:1). As time went on Tara's relationship with her parents soured, and she decided that in order to be able to competently parent Eliza she would need to move out of her parents' home. (147:7-10; 148:6-8; 148:10-18; 151:17-24; 153:17-20; 154:23-155:9; 155:22-156:5). When Susan realized Tara's plans, she sought guardianship of Eliza, leading to this case. (65:6-57:12). These facts do not represent clear and convincing evidence Tara is unfit. They instead establish Tara to be a parent who has made reasonable decisions about how to best care and provide for her daughter. (151:8-14; 152:15-22).

Susan and Jay claimed that at some unspecified time Tara exhibited paranoia. (49:15-24; 81:13-16). No evidence indicates such behavior was an issue at the time of trial, or that it affects Tara's ability to care for Eliza. Susan and Jay claimed that at some unspecified time, Tara had woodworking tools and common household items in her vicinity that if Eliza had obtained would have posed a danger to Eliza. (50:2-12; 81:17-83:19; 85:4-86:15; 87:17-23). No evidence indicates Eliza was ever near these items, or that Tara had such items unsecured in her possession at the time of trial. Susan testified she believed Tara had a history of substance abuse, based on a

statement Tara allegedly made about not wanting to take a drug test at a time when Tara was recovering from the effects of viral meningitis, and based on Susan finding unspecified "drug paraphernalia" in Tara's possession at some unspecified point in the past. (50:13-51:23). No evidence indicates Tara had any issues with substance abuse at the time of trial.

In this case, there is no clear and convincing evidence Tara is unfit. As such, no competent evidence exists to support the County Court's finding and Tara is unfit. Furthermore, the decision does not conform to law and is arbitrary, capricious, and unreasonable. This Court must vacate the order appointing Susan guardian of Eliza, and remand the case with instructions to deny the relief sought in Susan's Amended Petition.

CONCLUSION

For the foregoing reasons, this Court must vacate the County Court order appointing Susan guardian of Eliza, and remand this proceeding to the County Court with instructions to appoint an attorney for Tara, and to deny the relief sought in Susan's Amended Petition. In the alternative this Court must vacate the County Court order appointing Susan guardian of Eliza, and remand this proceeding to the County Court with instructions to appoint an attorney for Tara, to decline any further jurisdiction in this proceeding, and to forthwith return Eliza to Tara, unless doing so would subject Eliza to substantial and immediate danger or threat of such danger.

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CERTIFICATE OF SERVICE

I, JONATHAN SEAGRASS, hereby certifies that on March 18, 2019, the foregoing Brief of Appellant for the case Susan Elaine W. v. Tara Susanne W., and Deiondray B., Case No. A-18-1141, was filed using the Nebraska Supreme Court eFiling system causing a copy of the Brief of Appellant to be sent to all counsel of record. Additionally, two (2) true and correct copies of the foregoing Brief of Appellant, were sent by regular, United States mail, sufficient postage paid, on March 18, 2019, to the following parties and counsel at the following addresses:

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Certificate of Service

I hereby certify that on Monday, March 18, 2019 I provided a true and correct copy of this *Brief of Appellant Tara* to the following:

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