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 REPLY BRIEF

Jonathan Seagrass, #24258
Legal Aid of Nebraska
209 S. 19th Street, Ste. 200
Omaha, Nebraska 68102
Office: (402) 348-1069, ext. 266
Fax: (402) 348-1065
jseagrass@legalaidofnebraska.org
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Nebraska Statutes

Nebraska Cases

Federal Statutes

Federal Regulations

Federal Register

Federal Cases

Other Cases

PROPOSITIONS OF LAW

1. The plain language of NICWA and ICWA do not require a state actor for a proceeding to be a foster care placement as defined therein. Neb. Rev. Stat. § 43-1503(3); 25 U.S.C. § 1903(1).

2. The definition of foster care placement in NICWA and ICWA anticipates cases without a state actor by stating a foster care placement means "any action removing an Indian child." Neb. Rev. Stat. § 43-1503(3); 25 U.S.C. § 1903(1).

3. When interpreting federal Indian legislation, any doubts or ambiguities in the legislation must be resolved in favor of the Tribe, and the legislation must be construed liberally toward carrying out its protective purposes. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

4. NICWA and ICWA apply prospectively from the date Indian child status is established on the record. In re Adoption of Kenten H., 272 Neb. 846, 855 (2007).

5. Stipulations are not binding when they are contrary to good morals or sound public policy, or when other good cause exists. In re Estate of Mithofer, 243 Neb. 722, 726-727 (1993).

6. A qualified expert witness should be someone who can provide an outside opinion. 81 Fed. Reg. 96,476 (https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf, p. 54).

ARGUMENT

I. NICWA and ICWA apply in this case.

Appellee Susan W. (Susan) argues NICWA and ICWA are only intended to apply in proceedings initiated by the government or similarly situated entities, citing Neb. Rev. Stat. 43-1502, the statute setting out the overarching legislative purpose of NICWA. (Brief of Appellee 16). Susan states she is unaware of any Nebraska appellate cases applying NICWA and ICWA when the party seeking removal has not been a state actor. (Brief of Appellee 16).

Susan's argument ignores the plain language of NICWA and ICWA, which does not require a state actor in the definition of foster care placement. Neb. Rev. Stat. § 43-1503(3); 25 U.S.C. § 1903(1). This definition in fact anticipates cases without a state actor by stating a foster care placement means "any action removing an Indian child". Id. Further, in 2016 the Nebraska Supreme Court decided In re Adoption of Micah H., in which the Court held NICWA and ICWA applied to proceedings filed by grandparents to terminate an Indian child's parents' rights and to adopt the Indian child. 295 Neb. 213, 222-224. *See also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (applying ICWA to private adoption matter). Additionally, because ICWA is federal Indian legislation, if the Court believes 25 U.S.C. § 1903(1) is ambiguous, it must construe it liberally toward carrying out the protective purposes of ICWA, and ambiguities must be resolved in favor of the Tribe. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

Susan also argues Appellant Tara W. (Tara) failed to prove her daughter Eliza W. (Eliza) was an Indian child as defined in NICWA and ICWA. (Brief of Appellee 18-19). NICWA and ICWA apply prospectively from the date Indian child status is established on the record. In re Adoption of Kenten H., 272 Neb. 846, 855 (2007). Here it was established Eliza is an Indian child when Susan stated in her Amended Petition that Eliza was subject to ICWA. (T16). The record is replete with evidence indicating Eliza is an Indian child. (T16; T32-33; T39-40; T42-55; Conf. T1-6; 14:7-14; 27:19-23; 28:23-32:3; 37:9-15; 56:18-22; 57:25-58:5; 66:9-24; 88:8-12; 154:10-15; 181:23-182:16; 195:20-21; E2, 1-2:89). No evidence disputed Eliza is an Indian child, and the County Court found Eliza was an Indian child. (31:23-32:4). Susan's argument is without merit.

II. The County Court erred in not appointing an attorney to represent Tara.

Susan argues Tara failed to prove she was indigent, and therefore, the County Court was correct to not appoint her counsel. (Brief of Appellant 20-21). NICWA and ICWA require the

appointment of counsel for parents when "the court determines indigency". Neb. Rev. Stat. § 43-1505(2); 25 U.S.C. § 1912(b). No specific procedure is required for requesting appointed counsel. Id. Courts must inform parents who appear in court without counsel of their rights under ICWA, including any applicable right to court appointed counsel. 25 C.F.R. § 23.111(g). Other states have held ICWA requires mandatory appointment of counsel for indigent parents, whether or not requested. *See* In re M. E. M., 635 P.2d 1313, 1316-1317 (Mont. 1981); In re J. W., 742 P.2d 1171, 1173-1174 (Okla. Civ. App. 1987).

Tara asked for court appointed counsel several times, along with evidence of her indigency. (T61-64; Conf. T1-9; 13:12-25). The County Court denied the requests, but not due to indigency. (T65; Conf. T10; 12:12-24:19). After trial the County Court held Tara was financially unable to support Eliza. (199:7-11). All of the evidence indicates Tara is indigent.

III. Insufficient notice was given pursuant to NICWA and ICWA.

Susan argues Tara stipulated ICWA notice was sufficient and that she cannot now claim on appeal to the contrary. (Brief of Appellee 21). The cases Susan cites indicate stipulations are not binding on the parties when they are contrary to good morals or sound public policy, or when other good cause exists. *See* In re Estate of Mithofer, 243 Neb. 722, 726-727 (1993).

Here the alleged stipulation was not independently presented by the parties to the County Court. (28:23-32:3). The County Court twice asked if Tara acknowledged Susan complied with ICWA. (31:10-12; 31:17-18). Each time Tara's answer was equivocal. (31:13-16; 31:19-22). Therefore, Tara did not stipulate notice was proper. In addition, the questions the County Court asked implied it had already determined sufficient ICWA notice was made. (31:10-12; 31:17-18). If this Court believes a stipulation was made, given the record and Tara's *pro se* status, it is contrary to good morals or sound public policy to enforce it now, and good cause exists to disregard it.

Susan also argues Tara failed to prove sufficient ICWA notice was not made. (Brief of Appellee 21-22). NICWA and ICWA require the party seeking a foster care placement provide sufficient notice to the Indian child's parents and tribe, and require the court to ensure the notice is filed together with proof of service of the notice. Neb. Rev. Stat. § 43-1505(1); 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(a)(2). Therefore it is Susan's responsibility to provide sufficient ICWA notice and to file the notice with the court along with proof of service. The absence of Susan's ICWA notice in the record is itself proof that sufficient ICWA notice was not made. Further, the record indicates Tara never received Susan's purported ICWA notice because Susan's husband signed for the ICWA notice purportedly served on Tara. (T45-46).

IV. Pleading Requirements.

Susan argues the requirements of ICWA were not required to be pled. (Brief of Appellee 22-23). Susan tries to distinguish this case from 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 Interest of Shayla H., 17 Neb. App. 436 (2009), by arguing those cases were termination of parental rights cases, and that in each a demurrer and/or motion to dismiss was filed challenging the pleadings. (Brief of Appellee 22). Dakota L. and Shayla H. in fact involved an adjudication under Neb. Rev. Stat. § 43-247. Dakota L., 14 Neb. App. at 560-561; Shayla H., 17 Neb. App. at 436-437. In Shayla H., the father moved to dismiss after trial, during closing arguments. Id., at 440. Susan argues her pleadings sufficiently pled the matters required by ICWA, while admitting they lacked detail. (Brief of Appellee p. 23). A similar argument was rejected in Sabrienia B. 9 Neb. App. 888, 894-897 (2001).

V. Active Efforts and Heightened Standard of Proof.

NICWA and ICWA require the trial court to 1) make a determination on the record that active efforts exists, 2) detail the active efforts in the record, and 3) make a determination that

continued custody of the child by its parent is likely to result in serious emotional or physical damage to the child. Neb. Rev. Stat. § 43-1505(4) and (5); 25 U.S.C. § 1912(e); 25 C.F.R. § 23.120.

Susan argues it can be presumed the County Court made the required determinations because no party asked the County Court to make specific findings of fact on these issues. (Brief of Appellee 26). Susan's argument is misplaced. Here, the law required the County Court to make specific determinations and findings whether or not a party asked it to do so. Susan's argument would impermissibly have the law apply only when a party requests its application.

Susan also argues Tara is a qualified expert witness pursuant to NICWA and ICWA. (Brief of Appellant 25). A qualified expert witness should be someone who can provide an outside opinion, which Tara is not. 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, 54). The record indicates Tara does not meet the qualifications to be a qualified expert witness. S*ee* Neb. Rev. Stat. § 43-1503(15); 25 C.F.R. § 23.122. The County Court never qualified Tara as an expert, nor was the County Court asked to do so. Tara is not a qualified expert witness.

CONCLUSION

For the reasons contained herein and in Tara's original brief, this Court must grant the relief requested herein and in Tara's original brief.

RESPECTFULLY SUBMITTED ON BEHALF OF:

TARA SUSANNE W., Appellant.

/s/ Jonathan Seagrass
JONATHAN SEAGRASS, #24258
Legal Aid of Nebraska
209 S. 19th Street, Ste. 200
Omaha, NE 68102
Office: (402) 348-1069 ext. 266
Fax: (402) 348-1065
Email: jseagrass@legalaidofnebraska.org

CERTIFICATE OF SERVICE

I, JONATHAN SEAGRASS, hereby certify that on June 13, 2019, the foregoing Appellant's Reply Brief 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 Appellant's Reply Brief, were sent by regular, United States mail, sufficient postage paid, on June 13, 2019, to the following parties and counsel at the following addresses:

Jacob A. Acers
Smith, Slusky, Pohren, & Rogers, LLP
8712 West Dodge Road, Suite 400
Omaha, NE 68114
Attorney for Appellee Susan Elaine W.

Deiondray B.
1507 N. 52nd Street
Omaha, NE 68104

Kimee Wind-Hummingbird
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447

BY: /s/ Jonathan Seagrass
Jonathan Seagrass
Attorney for Appellant

Certificate of Service

I hereby certify that on Thursday, June 13, 2019 I provided a true and correct copy of this *Reply Brief of Appellant-Tara* to the following:

Deiondray A Bass (Self Represented Litigant) service method: **First Class Mail**

Guardianship of Eliza S Witty represented by Angela Forss Schmit (25150) service method: Electronic Service to **aschmit@schmitlawfirm.com**

Jay H Witty represented by Angela Forss Schmit (25150) service method: Electronic Service to **aschmit@schmitlawfirm.com**

Susan E Witty Guardian represented by Angela Forss Schmit (25150) service method: Electronic Service to **aschmit@schmitlawfirm.com**
Susan E Witty Guardian represented by Ashley Lee Albertsen (24374) service method: Electronic Service to **aalbertsen@smithslusky.com**
Susan E Witty Guardian represented by Jacob A. Acers (26001) service method: Electronic Service to **jacers@smithslusky.com**
Susan E Witty Guardian represented by Melissa Marie Oestmann (24434) service method: Electronic Service to **moestmann@smithslusky.com**

Muscogee Creek Nation (Self Represented Litigant) service method: **First Class Mail**

Signature: /s/ Seagrass, Jonathan Scott (24258)