IN THE NEBRASKA COURT OF APPEALS

Case No. A 22-653

In re Interest of Manuel C. & Mateo S.

APPEAL FROM THE SEPARATE JUVENILE COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Shellie D. Sabata,
Judge of the Separate Juvenile Court
of Lancaster County, Nebraska

BRIEF OF APPELLANT
Amber Spencer

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STATEMENT OF THE BASIS OF JURISDICTION

On August 26, 2022, the Separate Juvenile Court of Lancaster County, Nebraska, entered an order that determined the Indian Child Welfare Act (ICWA) 25 U.S.C. § 1902 did not apply to Appellant, Amber Spencer's, proceedings. (T133-136). Furthermore, the lower court denied both the Motion to Intervene filed by the Red Lake Band of Chippewa Indians and a Motion to Continue the formal trial as to Termination of Parental Rights. On August 30, 2022, Appellant timely filed her notice of appeal. (T137-138). The Appellant was granted leave to proceed in this appeal *in forma pauperis* on August 30, 2022. (T147-148). Hence, the Appellant did not have to prepay the docketing fee and costs. *See* NEB. REV. STAT. § 25-2301 *et seq*. Jurisdiction in the Court of Appeals is governed by NEB. REV. STAT. § 43-2,106.01 (Reissue 2016) which states that, "Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals." The Separate Juvenile Court Order of August 26, 2022, affects substantial rights of the parties and, thus, is a final, appealable order. *See* NEB. REV. STAT. § 25-1301. Jurisdiction is appropriate according to NEB. REV. STAT. § 43-2,106.01 (Reissue 2016), as this is an appeal of a vacated Order Granting the Motion to Intervene by the Red Lake Band of Chippewa Indians; the denial of a Motion to Continue; and the finding that the Indian Child Welfare Act 25 U.S.C. § 1902 did not apply to the case which was, entered by the Separate Juvenile Court of Lancaster County, Nebraska on August 26, 2022. (T133-136). The Appellant has perfected the appeal in accordance with Nebraska law.

STATEMENT OF THE CASE

A. Nature of the Case

The case initially involved abuse and neglect allegations made by the State of Nebraska against the parents of Manuel C. and Mateo S., both of whom were determined to be juveniles under NEB. REV. STAT. § 43-247(3)(a). A motion to terminate the parental rights was

filed and the matter was set for final hearing. A motion to intervene was filed by the Red Lake Band of Chippewa Indians and a motion to continue the formal trial on termination was also filed. The lower court was asked to make a determination as to whether the Indian Child Welfare Act applied in this case. Appellant appeals the August 26, 2022, order from the Separate Juvenile Court of Lancaster County, Nebraska, which vacated the Order Granting the Motion to Intervene by the Red Lake Band of Chippewa Indians, and denied their Motion for Intervention as well as denied the Motion to Continue the Termination of Parental Rights formal trial, and found that the Indian Child Welfare Act did not apply to the case.

B. Issues Tried in the Court Below

The issues tried in the court below, as set forth, were as follows:

1. Whether the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. and the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501 et seq. applies to Appellant and Appellant's children.
2. Whether the Motion to Intervene by the Red Lake Band of Chippewa Indians should be granted;

C. How the Issues were Decided

The Separate Juvenile Court's order was filed on August 26th, 2022. The order found:

1. The Court found that Appellant's children Manual C. and Mateo S. did not meet the definition of an Indian child under the federal and Nebraska Indian Child Welfare Acts which requires they be: an 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.
2. The Court vacated the Order granting the Motion to Intervene by the Red Lake Band of Chippewa Indians

due to the finding that the children were not Indian children.

D. Scope of Appellate Review

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Walter W.*, 274 Neb. 859 (2008).

ASSIGNMENTS OF ERROR

I

The Separate Juvenile Court of Lancaster County, Nebraska erred in finding that the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. and the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501 et seq. did not apply to Appellant and Appellant's children.

II

The Separate Juvenile Court of Lancaster County, Nebraska erred in vacating the Order granting the Motion to Intervene by the Red Lake Band of Chippewa Indians.

PROPOSITIONS OF LAW

I

We agree that, under the ICWA, enrollment is not a necessary condition of tribal membership. Although membership may be established through proof of enrollment, enrollment is not the exclusive test of membership.

Nelson v. Hunter, 132 Or. App. 361, 364 (1995)

II

The principal purposes of the Act are to promote the stability and security of Indian tribes by preventing further loss of their children; and to protect the best interests of Indian children by retaining their connection to their tribes.

In Re Baby Girl Doe, 262 Mont. 380, 388 (1993)

III

The legislation was Congress' response to its findings that "... an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions...."

In re Junious M., 144 Cal. App. 3d 786, 790 (1983)

IV

As to determining the status of a child as an Indian child, the Guidelines provide: "When a state court has *reason to believe* a child involved in a child custody proceeding is an Indian, the court *shall seek verification* of the child's status from either the Bureau of Indian Affairs or the child's tribe ... *The determination by a tribe* that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe *is conclusive.*

In re Junious M., 144 Cal. App. 3d 786, 790 (1983)

V

The commentary to this portion of the Guidelines states, "This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942)."

In re Junious M., 144 Cal. App. 3d 786, 793 (1983)

VI

The statutory definition of Indian child, taken together with the Nooksack constitutional provisions, resulted in an ambiguity which was not easily resolved…. This difficulty was compounded by the parties' and the trial court's focus on whether appellant (and the minor) were "enrolled."

In re Junious M., 144 Cal. App. 3d 786, 796 (1983) (citation omitted)

VII

For a court to determine that some recognized tribal members, or persons eligible to become members, are not members of a tribe for purposes of the ICWA would interfere with the tribes' sovereign right to determine for themselves membership qualifications and classifications.

Matter of N.C.H., 311 Or. App. 102, 108 (2021)

VIII

The Supreme Court has directed that the ambiguities in statutes enacted for the benefit of tribes should be resolved in favor of tribal interests.

Matter of N.C.H., 311 Or. App. 102, 110 (2021)

IX

The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

25 C.F.R. § 23.108(b)

STATEMENT OF FACTS

On January 28, 2021, the Lancaster County Attorney filed a Petition with the Separate Juvenile Court of Lancaster County alleging Manuel C. and Mateo S. (hereinafter "the children") were juveniles as defined in Neb. Rev. Stat. § 43-247(3)(a). (T1-2). On February 16, 2021 an Amended Petition was filed, and subsequently a Supplemental Amended Petition, were filed alleging the same. (T11-12, 28-30).

On March 4, 2021, the Court adjudicated the children as juveniles as defined in Neb. Rev. Stat. § 43-247(3)(a). (T13-16). On April 12, 2022, the Lancaster County Attorney filed a Motion for Termination of Parental Rights, and on July 13, 2022, a Supplement Motion for Termination of Parental Rights, seeking an order terminating the parental rights of the children's parents, Amber Spencer (hereinafter "Spencer") and Benjamin Chavez. (T69-73, 100-101).

On August 16, 2022, the Red Lake Band of Chippewa Indians (hereinafter "the Tribe") filed a Motion to Intervene in the Separate

Juvenile Court of Lancaster County matter concerning Manuel C. and Mateo S. which asserted that the minor children involved in the proceeding were "Indian children" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(4). (T121-123). On August 24, 2022, the Tribe filed a Motion to Continue Termination of Parental Rights Trial to allow them to be meaningful participants in the juvenile court case and to ensure the proceedings were in compliance with the Indian Child Welfare Act (ICWA). (T124-126).

On August 25, 2022, an Order Granting Motion to Intervene filed by the Tribe was entered and determined that the Tribe had submitted proof to the Court that the children involved in the matter were "Indian children" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(4). (T127-129).

On August 25, 2022, the Lancaster County Attorney filed a Motion to Reconsider Order Granting Motion to Intervene. (T130-132). In the Motion to Reconsider the Lancaster County Attorney stated the mother and the children were eligible for membership in the Tribe. (T130). The Motion to Reconsider further stated that the tribe had declared the mother was a member of the Tribe for purposes of ICWA. (T130). The Motion to Reconsider also stated the Bureau of Indian Affairs' final rules does not allow tribes to claim children. (T130).

On August 26, 2022, a hearing was held for a docket call on the Motion for Termination of Parental Rights, a hearing on determining the applicability of the ICWA, and lastly the Motion to Continue filed by the Tribe. (4:25, 5:1-6). The Court expressed that it is the Court's normal practice to grant a Motion to Intervene when such motions are filed in these types of proceeding as they are normally not set for hearing or contested. (5:6-13). The Court stated that on the morning of August 26, 2022, it received the Motion to Reconsider and that the Court had let the parties know the day before that the Court was willing to hear evidence at the August 26, 2022 hearing and consider whether or not the Order granting the Tribe's Motion to Intervene should be vacated or continued. (5:16-25).

Mr. Jonathan Braaten, counsel for biological father, Benjamin Chavez, was initially present, but waived his appearance for the rest of the hearing after 9:00 am. (7:7-12). Braaten indicated to the Court he had spoken to his client and would be adopting the same position as Appellant's counsel and would submit the matter based on Appellant's counsel's comments and arguments. (7:13-16).

The Court asked if Mr. Joe Plumer, counsel for the Tribe, had evidence regarding the Motion to Intervene. (8:1-3). Plumer stated it is the Indian tribe that decides who is a member of the Tribe, and that the Tribe intervened after the case had been proceeding because Appellant did not know she was eligible for membership in the tribe. (8:5-12). Plumer mentioned that the children's grandfather had been adopted by someone outside of the tribe, and therefore his tribal ties had been severed. (8:12-15).

The Court took judicial notice of the Tribe's Motion to Intervene, and admitted a letter from the Red Lake Nation Indian Child Welfare Office stating the children subject to this matter and/or Amber Spencer (hereinafter "Spencer") are eligible for enrollment of "Miskwaagamiwii-Zaagaigan". (9:17-12:24, E22, p. 1). The Court also received into evidence a series of emails between Maureen Lamski, Deputy Lancaster County Attorney, and Mr. Plumer. (13:12-14:19). In the emails Ms. Lamski asked Mr. Plumer whether Spencer is considered a member of the Tribe and Mr. Plumer responded that because Spencer is eligible for enrollment in the Tribe, the Tribe considered Spencer a member of the Tribe for the purposes of being accorded the protections of the ICWA. (E23, p. 1).

Ms. Sarah Greenhalgh, a representative of the Tribe, was called to testify by the children's Guardian ad Litem, Ms. Michelle Paxton. (6:24-25, 7:1, 17:3-5). Greenhalgh stood in for the Tribe's assigned worker for the case because the assigned worker was sick. (17:12-14). Plumer also noted that they were not expecting any of the Tribe's workers to be called at the hearing. (17:10-12).

Greenhalgh testified she is employed with the Tribe as an ICWA worker. (19:21-22). She testified that her job duties were to provide religious and cultural support, case management, and to ensure the safety and wellbeing of families. (19:25, 20:1-3). Greenhalgh said she was not a member of the Tribe, but instead a representative of the Tribe. (20:8-10).

Greenhalgh testified that in 2019 the Tribe enacted a new resolution for descendancy laws that changed blood quantum and the way that enrollment and eligibility are applied for the Tribe. (21:20-23). Due to the 2019 resolution, Tribal membership was able to be increased, as was the number of people eligible for enrollment. (21:23-25, 22:1-3). The new descendancy laws apply even if a person is no longer with their biological family or has been adopted outside of the Tribe. (22:1-6).

Greenhalgh testified that Spencer and her children were eligible for enrollment with the Tribe. (22:19-25). Greenhalgh stated that once Spencer was enrolled in the Tribe she would be a "citizen" of the Tribe. (22:20-21).

Greenhalgh was asked if there was a distinction in the Tribe between "enrollment" and "membership." (23:1-2). Greenhalgh initially stated there was not, but then said that there are different words sovereign nations use, such as citizenship, membership, parentage, affiliation. (23:3-5). Greenhalgh said that for the Red Lake Nation, all of those terms refer to direct ties and being a part of the Tribe. (23:3-7).

Greenhalgh was asked if there was a distinction with the Tribe in how it defines "eligibility" versus being an enrolled member. (23:12-15). Greenhalgh testified being "eligible for enrollment," particularly in ICWA, means the Tribe is able to intervene in ICWA proceedings, but that "enrollment" means the person is able to get certain benefits and vote in the tribe. (23:16-24). Greenhalgh stated she was not aware of Spencer's enrollment status. (24:2).

Greenhalgh testified that the Tribe, as a sovereign nation, is the entity that determines who is considered an Indian child or member in the Tribe and that such a determination included being accorded the protections of ICWA. (24:11-19, 25:15-18). Greenhalgh testified that, for ICWA purposes, Spencer and her children were members of the Tribe. (24:20-25, 25:1-3).

Greenhalgh went on to testify that it was her understanding that the Tribe had filed a Motion to Intervene in Spencer's case. (25:19-22). Greenhalgh stated that by filing the Motion to Intervene, the Tribe considered Spencer and her children to be members of the Tribe and were granted ICWA protections. (27:5-10).

Greenhalgh testified that the Tribe's ICWA unit meets biweekly to staff ICWA cases and decide them as a team. (31:16-22). She testified the Tribe's ICWA unit staffed Spencer's case and that she was familiar with Spencer and her family. (31:23-25, 32:1-3). During those staffing meetings, the Tribe's ICWA unit never concluded Spencer and her children were not eligible for membership in the Tribe. On questioning from the Deputy County Attorney, Greenhalgh testified that Spencer was not an enrolled member of the Tribe. (32:19-22).

The Court then asked Greenhalgh questions. (33:4-35:9). The Court asked Greenhalgh to explain how, when the Tribe determined the "Tribe's opinion" that the children in question were Indian children under ICWA, the Tribe determined the children had a biological parent who was "enrolled." (33:4-10). Greenhalgh responded "our eligibility again is decided by this tribe." (33:11-12). Greenhalgh said Spencer's grandfather was an enrolled member, and that the Tribe's 2019 descendency laws "changes the percentage of [sic] which we determine enrollment and eligibility." (33:12-25). Greenhalgh said that through the 2019 descendency laws, "blood quantum was able to change to extend further and so the blood quantum decides [sic] were updated and changed for [Spencer] and her children [and for] the entire [Tribe]." (33:15-20).

The Court asked Greenhalgh if Spencer had a parent who was enrolled in the Tribe and Greenhalgh said she was unsure. (34:1-5). The Court asked Greenhalgh to confirm Spencer "is not currently an enrolled member of the tribe". (34:6-16). Greenhalgh responded, "Yes, and I believe that Mr. Plumer stated that their, their ties to the tribe have been severely severed which is why enrollment has never happened and is in the process now." (34:17-20).

The Court asked Greenhalgh, "Is an enrolled member and member two different things to you or is the terminology the same?" to which Greenhalgh responded, "For me, my definition is largely the same." (34:23-25; 35:1). The Court asked Greenhalgh if "having ties to the tribe or affiliation with the tribe… sort of a lesser connection than an enrolled member or member?" (35:2-5). Greenhalgh responded, "Not lesser connection, but there are times that someone may be affiliated but not eligible for enrollment, and that is dependent on that… tribe's eligibility requirements." (35:6-9).

On recross examination, Greenhalgh testified that she was not the actual representative of the Tribe handling Spencer's case and that Allison Cloud was the representative of the Tribe that had been in contact with the family. (35:20-25, 36:5-7).

On August 26, 2022, the Court entered an Order determining Manual C. and Mateo S. did not meet the definition of an "Indian child" under ICWA, and therefore did not apply ICWA to the matter before the Court and stated Appellant is eligible for enrollment and has in fact recently begun the process, but is not currently enrolled. (T133 – 136). Furthermore, the Court vacated the Order Granting Motion to Intervene due to the findings the children were not "Indian children." (T133 – 136). The Court subsequently denied the Tribe's Motion to Continue the Termination of Parental Rights Trial. (T133 – 136). On August 30, 2022, Appellant timely filed her notice of appeal. (T137-138). The Appellant was granted leave to proceed in this appeal *in forma pauperis* on August 30, 2022. (T147-148).

SUMMARY OF ARGUMENT

The Separate Juvenile Court of Lancaster County, Nebraska erred in finding that Manual C. and Mateo S. did not meet the definition of an Indian child under the Indian Child Welfare Act (ICWA). The Red Lake Band of Chippewa Indians (the Tribe) is a federally recognized sovereign nation which has the sole authority to decide who is considered a member of its tribe. The vacated Motion to Intervene filed by the Tribe sets forth the Tribe's belief that the case involves Indian children of their tribe and its firm belief that this is a case governed by ICWA. The Tribe's counsel also confirmed in correspondence that Appellant is considered a member of the Red Lake Band of Chippewa Indians for purposes of being accorded the protections of ICWA. The record also shows that the tribal representative understood that the Red Lake Band of Chippewa Indians considered Appellant a member of the tribe for the purpose of being accorded the protections of ICWA. Therefore, ICWA applies in Appellant's case. Furthermore, the Court erred in vacating the Order granting the Motion to Intervene by the Red Lake Band of Chippewa Indians, as Manuel C. and Mateo S. are the Indian children identified by the tribe and ICWA allows them to intervene in cases involving the Indian children of their sovereign nation.

ARGUMENT

I. THE SEPARATE JUVENILE COURT OF LANCASTER COUNTY ERRED IN FINDING THAT THE INDIAN CHILD WELFARE ACT 25 U.S. CODE § 1901 ET SEQ. AND THE NEBRASKA INDIAN CHILD WELFARE ACT, NEB. REV. STAT. § 43-1501 ET SEQ. DID NOT APPLY TO APPELLANT AND APPELLANT'S CHILDREN.

The purpose of the Nebraska Indian Child Welfare Act (NICWA) and the federal Indian Child Welfare Act (ICWA) is to protect the best interests of Indian children and promote the stability of Indian tribes and families through the establishment of minimum standards for the

removal of Indian children from their families. Neb. Rev. Stat. § 43-1502; 25 U.S.C. § 1902.

In enacting ICWA, Congress declared, "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children… an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions," and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

The Nebraska Indian Child Welfare Act (NICWA) and the federal Indian Child Welfare Act (ICWA) apply to termination of parental rights proceedings involving an "Indian child." Neb. Rev. Stat. § 43-1503(3)(c); 25 U.S.C. § 1903(1)(iii). NICWA and ICWA define "Indian child" as "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).

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.

Pursuant to the regulations, "The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in

the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law." 25 C.F.R. § 23.108(a). "The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 25 C.F.R. § 23.108(b). In December 2016, the United States Department of the Interior Bureau of Indian Affairs published updated guidelines for state courts in implementing ICWA in light of the 2016 regulations. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 20, 2016). The notice announcing the Guidelines states they are not binding, but, "[P]rovide 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).

As it pertains to 25 C.F.R. § 23.108, the Guidelines state, "Tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen (or member) of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe." *Indian Child Welfare Act Proceedings*, 81 FR 38778-01.

The Guidelines encourage informal communication with Tribes to verify who is a citizen or member of Tribes. *Id.* Written verification

from the Tribe is an acceptable method of verifications, as is testimony from a Tribe's representative. *Id*.

In the present case, the record unequivocally shows that the Red Lake Band of Chippewa Indians (hereinafter "the Tribe"), had determined Spencer and the children were members of the Tribe and, therefore, that each of the children are an "Indian child" as defined in NICWA and ICWA.

First, on August 16, 2022, the Tribe filed its Motion to Intervene stating that the children were Indian children as defined by ICWA. (T124-128). On August 18, 2022, Joe Plumer, attorney for the Tribe, sent an email to Maureen Lamski, the Deputy Lancaster County Attorney on this case that stated Spencer was eligible for enrollment in the Tribe. (E23, p. 1). On August 24, 2022, Ms. Lamski replied and asked Mr. Plumer if, for purposes of ICWA Spencer was considered a member of the Tribe. (E23, p. 1). Later than day, Mr. Plumer replied as follows, "Yes, because she is eligible for enrollment, the Red Lake Band of Chippewa considers Amber Spencer a member for purposes of being accorded the protections of ICWA." (E23, p. 1).

The following day, on August 25, 2022, the Court entered an order granting the Tribe's Motion to Intervene. (T127-129). Later on August 25, 2022, the Lancaster County Attorney filed a Motion to Reconsider the Order. (T130-132). In the Motion, the Lancaster County Attorney admitted that "The tribe has stated that mom is a member for purposes of ICWA…." (T130-132).

At the August 26, 2022, hearing, the Tribe's representative, Sara Greenhalgh, testified that Spencer and the children are considered by the Tribe to be members of the Tribe and are entitled to the protections in ICWA. (24:11-25:3). Greenhalgh stated that, as evidenced by the act of filing the Motion to Intervene and the allegations stated therein, that the Tribe at that time considered, and had considered, Spencer and her children to be members of the Tribe for the purposes of all ICWA protections. (27:5-10).

There is ample evidence in the record that shows the Tribe had determined that the Spencer and the children were members of the Tribe for the purposes of ICWA. The Lancaster County Attorney acknowledged the fact of that determination in its Motion to Reconsider. And the Court acknowledged the fact of the Tribe's determination when the Court asked Greenhalgh to explain "the Tribe's opinion" that the children were Indian children as defined in ICWA. (33:4-10). No evidence exists in the record that refutes the Tribe's determination that Spencer and the children were members of the Tribe for the purposes of ICWA.

Because the Tribe clearly indicated Spencer and the children were members of the Tribe, the children are both considered an Indian child as defined in NICWA and ICWA, and therefore NICWA and ICWA apply to this case and to these children.

In the Court's August 26, 2022, Order finding that the children were not Indian children for the purposes of ICWA, the Court based its finding that the children were not Indian children on its reasoning that neither Spencer nor the children were enrolled in the Tribe. (T133-136). The Court's reliance on the enrollment status of Spencer and the children is inapposite and is a rejection of the Tribe's authority to determine whether someone is an Indian child for the purposes of ICWA.

Under NICWA and ICWA, an Indian child is defined as an unmarried person under age 18 who is either a member of an Indian Tribe or who is eligible to be a member in an Indian Tribe and is the biological child a member of an Indian Tribe. Neb. Rev. Stat. § 43-1503(8); 25 U.S.C. § 1903(4). Enrollment is not mentioned in the definition of Indian child. *Id.* Thus, the juvenile court judge's reliance on a lack of enrollment is in error.

The issue of whether a child can be an Indian child as defined in NICWA and ICWA while not being enrolled in a Tribe, and not being the biological child of someone enrolled in a Tribe, appears to be an

issue of first impression in Nebraska appellate courts. However, many courts from other jurisdictions have addressed this issue.

In response to an Indian defendant's claims against federal jurisdiction over his assault case, the Ninth Circuit stated that "enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative." *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

The Oregon Court of Appeals, reviewed a termination of parental rights case that potentially involved Indian children. While the court affirmed the termination, it agreed that the trial court erred in treating enrollment as the sole test of tribal membership for purposes of ICWA and stated, "We agree that, under the ICWA, enrollment is not a necessary condition of tribal membership. Although membership may be established through proof of enrollment, enrollment is not the exclusive test of membership." *Nelson v. Hunter*, 132 Or. App. 361, 364 (1995).

Additional case law from the California Court of Appeals, First District, concurs with the belief that enrollment is not dispositive for an individual to be an Indian member of a tribe. The California Court of Appeals reviewed a termination of parental rights proceeding where the trial court held that the child was not an "Indian child," because neither the child nor Appellant were enrolled members of the tribe. *In re Junious M,* 144 Cal.App.3d 786, 796 (1983). The California Court of Appeals disagreed with this interpretation stating, "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date." *Id.*

Furthermore, in *Junious M.,* when deciding if ICWA should have applied to the proceedings, the California Court of Appeals stated that, "[I]t is not clear whether the tribe would have found appellant to be a member had it been given the opportunity to rule on the

question." *Id.* The court implied that the tribe itself should be sought in determining if an individual is a member of any particular tribe. *Id.*

Because enrollment is not the only method in which persons can become member of Tribes and because the evidence in the record unequivocally states that Spencer and the children are members of the Tribe for the purposes of ICWA, the children herein are both Indian children as defined in ICWA and ICWA applies to Appellant's case.

The Lancaster County Attorney argued to the lower court that it was "irrelevant" whether the Tribe says Spencer and the children were members "for ICWA purposes." (26:1-6). The Lancaster County Attorney argued that the Tribe's method of determining Spencer's and the children's memberships in the Tribe equated to the Tribe claiming children, which it argued is not allowed under NICWA and ICWA. (T130-132, 26:1-6, 43:6-14). This argument is also misplaced.

As stated above, under NICWA and ICWA, an Indian child is defined as an unmarried person under age 18 who is either a member of an Indian Tribe, or who is eligible to be a member 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).

Nothing in the statutory definition of "Indian child" distinguishes or gives preference to one kind of tribal membership versus any other. All that the definition states is that an Indian child is a child who is "a member of an Indian Tribe" or who is eligible "to be a member in an Indian Tribe" and is the biological child of "a member in an Indian Tribe."

The ICWA regulations similarly make no distinction or give preference between different forms of tribal membership. Under the regulations, the Tribe determines "whether the child is a member of the Tribe or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe". 25 C.F.R. § 23.108(a). And it is "solely within the jurisdiction and authority of the Tribe" to determine membership in the Tribe. 25

C.F.R. § 23.108(b). Thus, the Deputy County Attorney's definition of membership is erroneous.

For this Court, or any Nebraska state court, to pick some forms of tribal membership over any others would directly violate the regulations because, as the regulations state, "The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 23 C.F.R. § 23.108(b).

The Oregon Court of Appeals reviewed an order finding that a child was not an Indian child and thus the ICWA did not apply. *Matter of N.C.H.,* 311 Or. App. 102 (2021). That court agreed that, "For a court to determine that some recognized tribal members, or persons eligible to become members, are not members of a tribe for purposes of the ICWA would interfere with the tribes' sovereign right to determine for themselves membership qualifications and classifications." *Id.* at 108.

The Supreme Court has held that, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Moreover, the Lancaster County Attorney's argument that ICWA and NICWA does not apply as the "final rule" prohibits tribes from claiming children is misleading. (T130-132, 26:1-6, 43:6-14). It is misleading because what she claims to be the "final rule," is, in fact, not a rule at all but rather, an answer to Frequently Asked Questions as to the Final Rules. (E24).

Furthermore, if there are any ambiguities as to whether Appellant is an Indian member of the Tribe or whether her children are Indian children of the Tribe, it should be construed to favor the Tribe's interest. *See, e.g., Matter of N.C.H.*, 311 Or. App. 102, 105 (2021). Under ICWA, NICWA, relevant case law, the minor children

are Indian children for the purposes of invoking the protections of the Indian Child Welfare Act.

II. THE SEPARATE JUVENILE COURT OF LANCASTER COUNTY, NEBRASKA ERRED IN VACATING THE ORDER GRANTING THE MOTION TO INTERVENE BY THE RED LAKE BAND OF CHIPPEWA INDIANS DUE TO THE FINDING THAT THE CHILDREN WERE NOT INDIAN CHILDREN.

In its Order of August 26, 2022, the juvenile court determined that the children were not Indian children due, in part, to the Court having vacated its Order Granting Motion to Intervene. (T133 – 136). The Court also found in the same order that ICWA does not apply to Appellant's proceeding due to the finding that the children were not Indian children. (T133 – 136).

Case law shows that it is, "apparent that by granting tribes the right to intervene as parties in any proceeding involving the placement of Indian children, Congress intended to recognize the strong interest of tribes, as distinct from their individual members, in the placement of Indian children." *In Re Baby Girl Doe*, 262 Mont. 380, 385 (1993). The Red Lake Band of Chippewa Indians relayed to this Court their interest in the present proceedings by filing the Motion to Intervene when they received formal notice of the proceedings. (T118-120, 121-123).

Additionally, both NICWA and ICWA are clear that the Tribe, shall have a right to intervene at any point in the proceeding. Neb. Rev. Stat. Ann. § 43-1504; 25 U.S.C.A. § 1911.

As noted above, the Court initially granted the Motion to Intervene filed by the Red Lake Band of Chippewa Indians, on August 25, 2022. (T124-126). The initial findings were that the children were Indian children and Red Lake Band of Chippewa Indians was their identified tribe. It is significant that the tribe filed this Motion to Intervene as they are posturing that this is a case governed by ICWA

and that Appellant is considered a member of the tribe for purposes of being granted the protections of ICWA. If the tribe did not believe this, they would have no use in filing the Motion to Intervene.

The State argues that the tribe cannot "claim children," in their motion to reconsider. (T130-132). At no point and time did the tribe try to claim Mateo C. and Manuel S. In the alternative, the Tribe showed that there is a direct connection to the Tribe by discussing the family's lineage. (38:12-25, 39:1-5, 40:16-24, 41:5-6). These ties were unfortunately severed through no fault of Appellant or the tribe. Instead, as explained by testimony, it was a different type of child custody proceeding prior to the enactment of ICWA that caused the severance. (38:12-25, 39:1-5, 40:16-24, 41:9-11).

Additionally, the Tribe relayed that they considered the children Indian children and the Appellant to be a member for the purposes of being accorded the protections of ICWA. This was explained in multiple ways by their Motion to Intervene, their response to Lancaster County's notice, testimony of their tribal representative, and correspondence with the Tribe's counsel. (T121-123, 24:20-25, 25:1-3, 27:5-10 E22:1, E23:1-2).

It is extraordinarily important to understand that the original child custody proceeding that made for the delay in the tribe intervening was due to a case that was at the heart of why ICWA was enacted: to protect Indian children from losing connection to their tribes through court proceedings. *See* (38:12-25, 39:1-5, 40:16-24, 41:5-6) Appellant's father was adopted by someone outside of the Tribe and, as a result of legal force, he lost his culture, his familial ties, and his tribal relationship. It should be noted that the same Frequently asked Questions, Bureau of Indian Affairs, Final Rule: ICWA Proceedings, that the State used to argue the inapplicability of ICWA, also cites this as a main factor in its enactment as well as the continued fact that these things continue to happen to Native children at an alarming rate. (E24:3-4).

That the Tribe's counsel spoke to this is more impactful as the Tribe is trying to protect their descendants in these types of proceedings and ensure Appellant's and her children's tribal ties are not further severed. (38:12-25, 39:1-5, 40:16-24, 41:5-6) It is a tribe's right to protect its members and descendants, and important to maintain their traditions and culture as it has historically been eroded away. This is even more important in light of the fact that the statistics still show that native families are being disbanded at alarming rates. Due to this and the fact that the children are Indian children, the tribe should be granted the Motion to Intervene in the present proceedings.

CONCLUSION

The Red Lake Band of Chippewa Indians considers Appellant a member for purposes of being accorded the protections of ICWA. Appellant's children are eligible for membership of the Red Lake Band of Chippewa Indians, and the tribe considers them Indian children. Due to these facts the ICWA applies to these proceedings, as the children are Indian children. As the Appellant is considered a member of Red Lake Band of Chippewa Indians and her children are Indian children, the tribes Motion for Intervention should have been granted. The Nebraska Court of Appeals should make a determination that Appellant is a member of the tribe and that the ICWA applies to the proceeding as well as Red Lake Band of Chippewa Indians should be allowed to Intervene in the proceedings and become an up to date party in the case as it involves Indian children of their tribe and they have an interest in ensuring their tribal connections remain intact.

The State and the Court erred when they assumed that only enrollment can be dispositive of membership in an Indian tribe as it is clear from case law that it is not the sole marker of determining membership. The tribe should be looked to for answers on who is considered a member and here the tribe from its actions has set forth that Appellant is a member and that Appellant and her children should be granted the protections and accords of ICWA. Therefore, for

all the reasons set forth in this brief, the Court of Appeals should remand this case to the Separate Juvenile Court of Lancaster County, Nebraska, to vacate the order determining ICWA does not apply to the proceeding and grant the Motion to Intervene by the Red Lake Band of Chippewa Indians as well as Order the Separate Juvenile Court of Lancaster County, Nebraska to apply ICWA in full force.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF WORD COUNT

I, Jacinta Dai-Klabunde, state that I prepared this document using Microsoft Word 2016 and that this brief complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103, and contains 7,298 words not including this certification.

/s/Jacinta Dai-Klabunde

Certificate of Service

I hereby certify that on Thursday, November 17, 2022 I provided a true and correct copy of this *Brief of Appellant Amber S.* to the following:

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