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IN THE NEBRASKA COURT OF APPEALS

Case No. A 22-653

In re Interest of Manuel C. & Mateo S.

ON CROSS-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 APPELLEE
Red Lake Band of Chippewa Indians

Prepared and Submitted by:
Joseph Plumer (MN Bar No. 164859)
Red Lake Band of Chippewa Indians
P.O. Box 567
Red Lake, MN 56671
(218) 679-1404
joe.plumer@redlakenation.org

Attorney for Appellee

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STATEMENT OF BASIS FOR JURISDICTION

On August 26, 2022, the Separate Juvenile Court of Lancaster County entered an order finding that the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1902, *et seq.*, and Nebraska Indian Child Welfare Act ("NICWA"), Neb. Rev. Stat. § 43-1501, *et seq.*, did not apply to proceedings involving the termination of Appellant Amber Spencer's parental rights. (T133-136). The court also vacated a motion to intervene and denied motion to continue the termination trial filed by the Red Lake Band of Chippewa Indians (hereinafter the "Tribe"). On August 30, 2022, Appellant Spencer filed a notice of appeal. (T137-138). Appellant was granted leave to proceed *in forma pauperis* on August 30, 2022.

This Court has jurisdiction over this appeal pursuant to Neb. Rev. Stat. § 43-2,106.01 as it involves an appeal of an order vacating the Tribe's motion to intervene, and the denial of the Tribe's motion to continue the termination trial, and finding that ICWA did not apply to the proceedings involving the termination of Appellant Spencer's parental rights.

The Tribe files this brief via facsimile as a matter of federal statutory right pursuant to Neb. Ct. R. App. P. § 2-103(C)(5). *See In Re Interest of Elias L.*, 277 Neb. 1023 (2009). The Tribe is currently is attempting to register with Nebraska.gov to e-file the brief, but has been unable to successfully do so as of this date and any Nebraska Court Rules requiring the Tribe to associate with local counsel are preempted by the Indian Child Welfare Act as the Tribe has a federal right to participate in the proceedings.

STATEMENT OF THE CASE

A. Nature of the Case

This case arose from child 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). The State of Nebraska subsequently filed a motion to terminate the parent rights of Appellant Spencer, who is the mother of Manuel C. and Mateo S. The Tribe filed a motion to intervene and a motion to continue the termination trial involving the parental rights of Appellant Spencer.

On August 26, 2022, the Separate Juvenile Court of Lancaster County vacated the order granting the Tribe's motion to intervene, and denied the Tribe's motion to continue the termination trial involving Appellant Spencer's parental rights. Appellant Spencer has appealed the order vacating the prior order granting the Tribe's motion to intervene and motion to continue the termination trial.

B. Issues Tried in the Court Below

The issued tried by the Separate Juvenile Court of Lancaster County included:

1. Whether the Indian Child Welfare Act and the Nebraska Indian Child Welfare Act, apply to Appellant Spencer and Appellant Spencer's children Manuel C. and Mateo S.
2. Whether the motion to intervene filed by Appellee Red Lake Band of Chippewa Indians should be granted.

C. How the Issues were Decided

On August 26, 2022, the Separate Juvenile Court of Lancaster County issued an order making the following findings:

1. Appellant Spencer's children Manuel C. and Mateo S. are not Indian children for purposes of the Indian Child Welfare Act and Nebraska Indian Child Welfare Act, which require that Indian children be an unmarried person who is under the age of eighteen and is either: (a) a member of an Indian tribe, or (b) is eligible for membership of an Indian tribe and is the biological child of a member of an Indian tribe.
2. The order granting the Tribe's motion to intervene was vacated based on the finding that the Appellant Spencer's children Manuel C. and Mateo S. are not Indian children.

D. Scope of Appellate Review

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

ASSIGNMENTS OF ERROR

1. The Separate Juvenile Court of Lancaster County erred in finding that the Indian Child Welfare Act and Nebraska Indian Child Welfare Act did not apply to Appellant Spencer and Appellant's children.
2. The Separate Juvenile Court of Lancaster County erred in vacating the order granting the Red Lake Band's motion to intervene.

PROPOSITIONS OF LAW

1. In 1978, Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.
2. In ICWA, Congress not sought to protect the interests of Indian child but also avoid the weakening of a "tribe's ability to assert its interest in its

children." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (1986)).

3. ICWA provides that an Indian tribe "shall have a right to intervene at any point in the proceeding" of a state court case involving the termination of parental rights to an Indian child. 25 U.S.C. § 1911(c).
4. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).
5. Under 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.
6. "[I]n determining whether a child is an 'Indian child' pursuant to the ICWA, the Tribe is the ultimate authority on eligibility for tribal membership." *In re Adoption of Riffle*, 277 Mont. 388, 391 (1996).
7. "The Indian tribe determines whether the child is an Indian child. A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive." *In re Francisco*, 139 Cal. App. 4th 695, 702 (2006) (citations omitted).
8. "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).
9. "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 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).
10. "[T]here is perhaps no greater intrusion upon tribal sovereignty than for a [non-tribal] court to interfere with a sovereign tribe's membership

determinations." *In re Welfare of S.N.R.*, 617 N.W.2d 77, 84 (2000) (quoting *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995)).

STATEMENT OF FACTS

On January 28, 2021, the Lancaster County Attorney filed a petition with the Separate Juvenile Court of Lancaster County alleging that Manuel C. and Mateo S. are juveniles as defined in Neb. Rev. Stat. § 43-247(3)(a). On February 16, 2021, an amended petition was filed, and subsequently a supplemental amended petition, both asserting the same allegations. (T11-12, 28-30).

On March 4, 2021, the Separate Juvenile Court of Lancaster County determined Manuel C. and Mateo S. were 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, filed a supplemental motion for termination of parental rights, seeking an order terminating the parental rights of the Manuel C. and Mateo S.'s parents, Amber Spencer and Benjamin Chavez. (T69-73, 100-101).

On August 24, 2022, the Tribe filed a motion to intervene in the Separate Juvenile Court of Lancaster County in the case concerning Manuel C. and Mateo S., asserting that they were "Indian children" for purposes of ICWA (T121-123). On August 25, 2022, the court entered an order granting the Tribe's motion to intervene, determining that the Tribe had submitted sufficient proof that the Manuel C. and Mateo S. were "Indian children" for purposes of ICWA. (T124-126).

On August 25, 2022, the Lancaster County Attorney filed a motion to reconsider the order granting the Tribe's motion to intervene. (T130-132). On August 26, 2022, a hearing was held concerning the State of Nebraska's motion for termination of parental rights, determining the applicability of ICWA, the Tribe's motion to continue the termination trial. (4:25, 5:1-6). At the hearing, Red Lake's counsel explained that the Tribe has authority to decide who is a member of the Tribe, and Appellant Spencer was not aware that she was eligible for membership in the Tribe. (8:5-12). Red Lake's counsel further stated that Manuel C. and Mateo S.'s grandfather had been adopted out of the Tribe and his ties with the Tribe 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 Manuel C. and Mateo S. and Appellant Spencer are eligible for enrollment in the Tribe. (9:17-12:24, E22. P.1). The court also admitted into evidence a series of

emails between Red Lake's counsel and Maureen Lamski, Deputy Lancaster County Attorney. (13:12-14:19). In the emails, Red Lake's counsel explained that Appellant Spencer and her minor children Manuel C. and Mateo S. are eligible for enrollment in the Tribe, and the Tribe considers Appellant Spencer and her minor children Manuel C. and Mateo S. members of Tribe for purposes of ICWA. (E23, p.1).

At the hearing, Sara Greenhalgh, an ICWA worker for the Tribe, testified that Appellant Spencer and her minor children Manuel C. and Mateo S. are eligible for enrollment in the Tribe. (22:19-25). Ms. Greenhalgh testified that the Tribe, as a sovereign nation, is the entity that determines who is a member of the Tribe and who is an Indian child for purposes of ICWA. (24:11-19, 25:15-18). Ms. Greenhalgh further testified that the Tribe considers Appellant Spencer and her minor children Manuel C. and Mateo S. as members of the Tribe for purposes of ICWA. (24:20-25, 25:1-3).

On August 26, 2022, the court entered an order determining that Manuel C. and Mateo S. are not "Indian children" for purposes of ICWA, and therefore, ICWA did not apply to the parental termination proceedings. (T133-136). The court also vacated the order granting the Tribe's motion to intervene due to the finding that Manuel C. and Mateo S. are not Indian children. (T133-136). The court further denied the Tribe's motion to continue the trial for the termination of parental rights. (T133-136).

On August 30, 2022, Appellant Spencer filed a notice of appeal. (T137-138). Appellant was subsequently granted leave to proceed in this appeal *in forma pauperis*. (T147-148). The Tribe's argument follows.

SUMMARY OF ARGUMENT

The Separate Juvenile Court of Lancaster County below incorrectly denied the Tribe's motion to intervene based on the finding that Appellant Spencer and her children Manuel C. and Mateo S. are not presently enrolled members of the Tribe. It is the Tribe—not a state court—who makes the final determination on whether a minor child is an Indian child for purposes of ICWA. Because the record shows that the Tribe has made the determination that Manuel C. and Mateo S. are members of the Tribe for the purposes of applying the protections of ICWA to the proceedings in this case, the court must accept such determination as final and conclusive.

ARGUMENT

I. THE COURT BELOW ERRED IN VACATING THE ORDER GRANTING THE TRIBE'S MOTION TO INTERVENE BASED ON THE FINDING THAT ICWA DOES NOT APPLY TO APPELLANT SPENCER AND HER MINOR CHILDREN MANUEL C. AND MATEO S.

In 1978, Congress enacted ICWA due to a crisis faced by tribes and their members caused by the operation of state family law by state courts. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) ("[ICWA] was the product of rising concerns in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."). ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA is based on the basic idea that when Indian children stay with their families and tribal communities, tribes and Indian children are better off. By implementing this idea, ICWA "promote[s] the stability and security of Indian tribes and families" and "protect[s] the best interests of Indian children." *Id.*

To carry out its purposes, ICWA allows an Indian tribe to intervene at any point in a state court proceeding involving the foster care place of, or the termination of parental rights, an Indian child. 25 U.S.C. § 1911(c). By allowing tribes to intervene, ICWA "presumes it is in the child's best interests to retain tribal ties and heritage and that it is in the tribe's interest to preserve future generations." *In re Robert A.*, 147 Cal. App. 4th 982, 988 (2007). NICWA is also allows an Indian tribe to intervene in a case involving the termination of parental rights of an Indian child at any point in the proceedings. Neb. Rev. Stat. § 43-1504.

Indian tribes are "separate sovereigns pre-existing the Constitution" with the "right to define [their] own membership," which is "central to [their] existence as ... independent political communities." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 72 n.32 (1978); *see also Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership[.]"). "Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. Formal membership

requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership." *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 255 (2002) (citations omitted). "Case law makes it clear ... that enrollment in a tribe or registration with a tribe is not the only way to establish membership." *In re R.R., Jr.*, 294 S.W.3d 213, 217 (2009). "Enrollment is not always required in order to be a member of a tribe." *Id.* at 218.

ICWA's "Indian child" definition covers children who are "a member of an Indian Tribe" and children who are "eligible for membership in an Indian tribe and [are] the biological child[ren] of a member." 25 U.S.C. § 1903(4). ICWA does not define the terms "member of a tribe" or "eligible for membership. *See In re R.R., Jr.*, 294 S.W.3d at 218. In applying ICWA, "[t]he 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) (emphasis added). Case law also establishes that "a tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an 'Indian child' under [ICWA]." *In re Welfare of S.N.R.*, 617 N.W.2d 77, 84 (2000); *see also Matter of N.C.H.*, 311 Or. App. 102, 105 (2021) ("A tribe's word on the matter of membership or eligibility for membership is conclusive on the point[.]").

As a common practice, courts defer to a tribe's determination on a minor child's status as an "Indian child" under ICWA. In *In re Adoption of Riffle*, 277 Mont. 388 (1996), the Montana Supreme Court determined that a minor child was an "Indian child" under ICWA based on documentation presented by the tribe "recognizing [the child] as an Indian child and a 'member of the tribe' under the provisions of ICWA." *Id.* at 392. As the court explained, "enrollment of the child in the Tribe is not required so long as the Tribe recognizes the child as a member." *Id.* "Given the Tribe's determination that [the minor child] is an Indian child," the Montana Supreme Court held that the district court "correctly concluded that the Tribe's determination was conclusive." *Id.*

Likewise, in *In re Jack C.*, 192 Cal. App. 4th 967 (2011), the California Court of Appeal held that minor children who "were not enrolled members of the [Bois Forte Band of the Lake Superior Chippewa] at the time of the proceedings

... were Indian children within the meaning of the federal and state definitions of 'Indian child.'" *Id.* at 977. Notwithstanding the minor children's father's "lack of membership in the Band," the court explained that the "records show the Band considered the children to be Indian children within the meaning of ICWA." *Id.* at 978.

The court in *In re Jack C.* reasoned that "[t]he decision whether a child is a member of, or eligible for membership in, the tribe is the sole province of the tribe. A tribe's determination that a child is a member or is eligible for membership in the tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, is conclusive." *Id.* 980 (citations omitted). Because a representative of the Band presented evidence establishing that the minor children "would be enrolled in the Band" following the completion of the Band's "bureaucratic" requirements, the Court of Appeal stated that the juvenile court "should have proceeded as if the children were Indian children." *Id.* at 981-82.

Here, the Tribe has presented sufficient evidence showing that it has determined Appellant Spencer and her minor children Manuel C. and Mateo S. to be members of the Tribe for purposes of applying ICWA to the proceedings in this case. This evidence included the Tribe's motion to intervene, its response to the State of Nebraska's notice, testimony of the Tribe's representative, and correspondence with the Tribe's legal counsel. (T121-123, 24:20-25, 25:1-3, 27:5-10 E2201, E23:1-2). Specifically, Ms. Greenhalgh, the Tribe's ICWA worker, testified that the Tribe as a sovereign nation determines who is considered an Indian child and that the Tribe's has determined that Manuel C. and Mateo S. are members of the Tribe for purposes of ICWA. (24:11-19, 24:20-25, 25:1-3, 25:15-18). Ms. Greenhalgh also testified that by filing the motion to intervene, the Tribe considers Manuel C. and Mateo S. to be members of the Tribe to be accorded ICWA protections. (27:5-10).

Because the record clearly shows that the Tribe has made a determination that Appellant Spencer and her minor children Manuel C. and Mateo S. are members of the Tribe to be accorded ICWA protections, the court below improperly substituted its own judgment for that of the Tribe regarding Manuel C. and Mateo S.'s membership in the Tribe. *See In re K.P.*, 242 Cal. App. 4th 1063, 1074 (2015) ("A state court may not substitute its own determination for that of the tribe regarding a child's membership or eligibility for membership in a tribe."). "[T]here is perhaps no greater intrusion upon tribal sovereignty than for a

[non-tribal] court to interfere with a sovereign tribe's membership determinations." *In re Welfare of S.N.R.*, 617 N.W.2d 77, 84 (2000) (quoting *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995)). The court below therefore erred when it determined Appellant Spencer and her minor children Manuel C. and Mateo S. may not be accorded protections under ICWA based on its finding that they are not yet enrolled members of the Tribe.

CONCLUSION

Based on the foregoing, the Separate Juvenile Court of Lancaster County's decision below should be reversed.

Dated: December 16, 2022

/s/ Joseph Plumer

Joseph Plumer (MN Bar No. 164859)
Red Lake Band of Chippewa Indians
P.O. Box 567
Red Lake, MN 56671
(218) 679-1404
joe.plumer@redlakenation.org

Attorney for Appellee

CERTIFICATE OF SERVICE

This is to certify that on this 16th day of December, 2022, a true and accurate copy of the foregoing brief was sent to the following:

Maureen Elizabeth Lamski for State of Nebraska through electronic service to MLamski@lancaster.ne.gov

Jonathan M. Braaten for Benjamin Chavez through electronic service to jbraaten@acwlaw.com

Marcia Little for Marcia Little through electronic service to malittle98@gmail.com

Jacinta Dai Klabunde for Amber Spencer through electronic service to jdaiklabunde@legalaidofnebraska.org

Jay Judds for NDHHS through electronic service to jay.judds@nebraska.gov

Michelle Paxton for Guardian ad Litem through electronic service to mpaxton@unl.edu

Julia Pomerenke for Guardian ad Litem through electronic service to law-cjclinicstu14@unl.edu

Hannah Lindblad through electronic service to hlindblad@casa4lancaster.org

Amelia Feit through electronic service to amelia.feit@gmail.com

Dated: December 16, 2022

/s/ Joseph Plumer

Joseph Plumer (MN Bar No. 164859)
Red Lake Band of Chippewa Indians
P.O. Box 567
Red Lake, MN 56671
(218) 679-1404
joe.plumer@redlakenation.org

Attorney for Appellee

CERTIFICATE OF WORD COUNT

This is to certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. §§ 6-1505, 2-103(C)(4). This brief contains 3,795 words, and was prepared using Microsoft Word Version 16.68.

Dated: December 16, 2022

/s/ Joseph Plumer
Joseph Plumer (MN Bar No. 164859)
Red Lake Band of Chippewa Indians
P.O. Box 567
Red Lake, MN 56671
(218) 679-1404
joe.plumer@redlakenation.org

Attorney for Appellee

Original Fax

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA IN THE INTEREST OF MANUEL CHAVEZ, MATEO SPENCER, JUVENILES.	Appellate Court Case No. A22-0653 Trial Court Case No. JV21-41 AFFIDAVIT OF JOSEPH PLUMER

STATE OF MINNESOTA)
) SS.
COUNTY OF BELTRAMI)

Joseph Plumer, your affiant, after first being duly sworn upon oath, deposes and says as follows:

1. That your affiant makes this affidavit for the purpose of filing via fax the Appellee Brief of the Red Lake Band of Chippewa Indians in the above-captioned matter.
2. That your affiant is an attorney licensed to practice in the State of Minnesota, and your affiant represents Appellee Red Lake Band of Chippewa Indians in the above-captioned matter, which has been appealed to the Nebraska Court of Appeals.
3. That your affiant appeared before the trial court, and is appearing in this Court pursuant to the Nebraska statute that pertains to the Pro hac vice admission of out of state attorneys, Nebraska statute section 3-122 (F), which provides as follows: "Counsel representing an Indian child's tribe or tribes in a child custody proceeding under the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. Section 43-1501, et seq., shall be exempt from all requirements of Section 3-122."
4. That in order to file the Appellee Brief of the Red Lake Band of Chippewa Indians, it is necessary to file the Brief via fax because your affiant is not barred in the State of Nebraska and does not have a bar number to register and file documents on the Nebraska Court of Appeals e-filing system.

Further your affiant sayeth not.

Joseph Plumer

Joseph Plumer, Affiant

Subscribed and sworn to before me this

16th day of December, 2022.

Nicole Spears

Notary Public

NICOLE R SPEARS
NOTARY PUBLIC - MINNESOTA
My Comm. Exp. Jan. 31, 2027