Case No. 923-2014

IN THE SUPREME COURT OF THE STATE OF WHITTIER
January Term 2015

DANIEL LITTLE BEAR
Defendant-Petitioner

v.

STATE OF WHITTIER
Ms. Kathryn Candler
Dir. of the Whittier
Dep't of Child Welfare
Plaintiff-Respondent

On Writ of Certiorari to the
State of Whittier Court of Appeal

BRIEF FOR PETITIONER

January 5, 2015

Team #14
Brief for Petitioner

QUESTIONS PRESENTED

I. The Indian Child Welfare Act requires the proponent of a parental termination proceeding to engage in active efforts to provide remedial services. The proponent must also show those efforts failed. The Department of Child Welfare made active efforts to provide remedial services to Mr. Little Bear, and he showed substantial improvement and potential. Did the Juvenile Court err in finding, by clear and convincing evidence, the active efforts provided to Mr. Little Bear failed?

II. The Indian Child Welfare Act requires the party who wishes to deviate from adoptive placement preferences, to show good cause to do so. The Department of Child Welfare failed to show good cause when they placed Sienna Little Bear with a non-relative, non-Indian family. Did the Juvenile Court err in finding good cause to deviate from adoptive placement preferences outlined in the Indian Child Welfare Act?

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OPINION BELOW

The unreported opinion of the State of Whittier Court of Appeal appears on pages 1 – 17 of the record. *Little Bear v. State of Whittier* (Whit. Ct. App. Nov. 15, 2014), *cert granted* (923-2014) (Whit. Nov. 14, 2014).

STATEMENT OF JURISDICTION

This Court granted the petition for writ of certiorari on November 14, 2014 pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Preliminary Statement

On June 15, 2013, the Jenning County Juvenile Court adjudicated Sienna Little Bear ("Sienna"), a dependent child under the Whittier Juvenile Code section 100(b). Record ("R") 4. The court properly found Sienna subject to the Indian Child Welfare Act ("the Act"). R 4. The Department of Child Welfare ("DCW") filed a Notice of Intervention from the Cherokee Nation with the Juvenile Court. R 4. The Cherokee Nation provided a declaration stating the Act requirements for Sienna's temporary removal from Daniel Little Bear ("Mr. Little Bear") were satisfied. R 4.

On August 20, 2013, the court conducted adjudication and disposition hearings. R 5. The DCW subsequently removed Sienna and placed her in a non-relative foster home. R 5.

At the six-month hearing on December 15, 2013, the court addressed Mr. Little Bear's progress and recent missteps. R 6. In June 2014, at the twelve-month hearing, the Juvenile Court terminated remedial services to Mr. Little Bear. R 6. Subsequently, the DCW declined to place Sienna with her paternal Aunt, Patricia Redbird ("Ms. Redbird"). R 6. The court set the matter for contest and asked the parties to address whether good caused existed to depart from the Act's placement preferences. R 6.

The Juvenile Court ordered Sienna adoptively placed with her non-relative foster parents on July 2, 2014. R 10. Mr. Little Bear timely appealed both the termination of his remedial services and the adoptive placement order. R 10. The court of appeal affirmed. R 10. Mr. Little Bear filed for writ of certiorari, which was granted on November 14, 2014. R 10.

Statement of the Facts

On November 1, 2012, Sienna was born to Melissa Diaz ("Ms. Diaz") and Mr. Little Bear, both eighteen at the time of Sienna's birth. R 1. Mr. Little Bear and Sienna are both members of the Cherokee Nation, a federally recognized tribe. R 1. Sienna was given a Cherokee blessing by her paternal aunt, Ms. Redbird, shortly after her birth. R 1.

Mr. Little Bear took Sienna to her six-month-well-child check-up in May 2013. R 2. Dr. Humphrey found Sienna was underweight and suffering from plagiocephaly, a condition resulting from extensive time spent lying on the back. R 2. Dr. Humphrey provided Mr. Little Bear with instructions for Sienna's care, diapers, and a can of formula. R 2. Dr. Humphrey asked Mr. Little Bear to return every week so he could monitor Sienna's health. R 2.

During Mr. Little Bear's third visit on May 21, 2013, Dr. Humphrey confirmed Sienna had gained three ounces. R 2. Mr. Little Bear informed Dr. Humphrey that Ms. Diaz was not coming home and working as a prostitute. R 3. Dr. Humphrey contacted the DCW to report possible neglect. R 3. Dr. Humphrey felt Mr. Little Bear was doing his best; but as a mandatory reporter was required to disclose that information. R 3.

The next day, Ms. Diaz was murdered. R 3. Sonia White ("Ms. White"), a DCW social worker, advised Mr. Little Bear the DCW would need his cooperation in an investigation into Sienna's welfare. R 3. Mr. Little Bear agreed to cooperate in the investigation and to take steps to provide Sienna a better home. R 3. With the help of Ms. White, Mr. Little Bear signed up for WIC, obtained a crib and clothing for Sienna, signed up for a support program for Native American fathers, and was referred to a grief counselor for ten free sessions. R 3.

Mr. Little Bear attended grief counseling, but had tremendous difficulty dealing with the death of Ms. Diaz. R 3. Mr. Little Bear struggled with his role as a single father. R 3. Mr. Little

Bear was unemployed, facing eviction, and unable to pay his bills. R 3. Ms. White put Mr. Little Bear in touch with a job training program and subsidized housing but he was waitlisted for both. R 4. Mr. Little Bear relocated to an emergency shelter arranged by Ms. White. R 4.

Sienna was adjudicated as a dependent child on June 15, 2013. R 4. The Juvenile Court heard testimony from Ms. White, because of her familiarity with American Indian heritage and families, and reviewed Dr. Humphrey's reports. R 4. The court found Mr. Little Bear's continued custody of Sienna would likely cause her emotional or physical damage. R 4. Sienna was taken from Mr. Little Bear's custody and placed with her maternal grandparents for the reunification process. R 4-5.

At an adjudication and disposition hearing on August 20, 2013, the court offered Mr. Little Bear remedial services, and Sienna's maternal grandparents asked Sienna be removed from their home. R 5. Sienna was placed into a non-relative, non-Indian foster home with Matthew Davidson and Howard Pratt ("foster parents"), a Caucasian married couple. R 5. The Tribe, for the purpose of reunification efforts, consented to Sienna's placement with her foster parents. R 5.

Sienna's foster parents closely monitored her plagiocephaly. R 5. At Sienna's one-year-well-child check up, Dr. Humphrey found her health greatly improved. R 5. Sienna's plagiocephaly had nearly subsided, and she gained a healthy amount of weight. R 5.

Mr. Little Bear attended parenting classes at the Indian Family Support Center throughout the first two months of Sienna's foster care, and did not miss a visit with Sienna during that time. R 5. Mr. Little Bear attended one-on-one therapy arranged by Ms. White for six weeks, and obtained a part-time job to save for Sienna's return. R 6. Unfortunately, Mr. Little Bear was ticketed by the police for being inebriated in public in November 2013 and began to miss scheduled visits with Sienna. R 6.

At the six-month hearing on December 15, 2013, the court ordered Mr. Little Bear to enroll in substance abuse counseling. R 6. Because of an error by Ms. White, Mr. Little Bear's enrollment was delayed by one month. R 6. Once enrolled, Mr. Little Bear attended the substance abuse counseling consistently. R 6.

Mr. Little Bear met with Sienna and her foster parents on December 23, 2013 for a long visit. R 6. Sienna received a homemade card and a Cherokee Indian doll from Mr. Little Bear. R 6. Mr. Little Bear continued to regularly visit with Sienna over the next few months. R 6.

Mr. Little Bear was arrested for driving under the influence of alcohol on March 17, 2013, and incarcerated for 12-18 months. R 6. Sienna's foster parents brought Sienna to the Jenning County Jail to visit with Mr. Little Bear several times. R 6. Mr. Little Bear called and sent mail to Sienna as often as possible. R 6.

The Juvenile Court terminated Mr. Little Bear's remedial services in June 2014. R 6. The court found the DCW proved, by clear and convincing evidence, active remedial efforts were made. R 14. The court further noted, due to Mr. Little Bear's incarceration, any further reunification efforts would fail. R 7. Ms. Sanchez again objected to the evidentiary standard used, but her objection was overruled. R 7.

Ms. Redbird was contacted by the DCW in accordance with the Act's pre-adoptive placement preferences because she had previously expressed an interest in custody of Sienna. R 7. Placement with Ms. Redbird had originally been denied because reunification could not be facilitated out of state. R 7. Upon contact, Ms. Redbird expressed she would happily take custody of Sienna, and ultimately adopt her. R 7. The DCW objected to a change in Sienna's placement, and the court set the matter for contest. R 7.

At the hearing to address whether good cause existed to depart from the Act's placement preferences on July 2, 2014, Sienna's counsel argued Sienna would suffer emotional harm if separated from her foster parents, and it was in her best interest to remain with them. R 7. These contentions were supported by testimony from Carolyn Swift ("Ms. Swift"), Sienna's play therapist. R 7. Ms. Swift testified Sienna was disinterested in Mr. Little Bear and bonded to her foster parents. R 7.

Thomas Peabody ("Mr. Peabody"), a child development specialist from the University of Whittier testified on behalf of the DCW. R 8. Mr. Peabody testified, after reviewing reports, Sienna may not recover after removal from a loving home, could have trouble forming further attachments, and the removal could cause some trauma. R 8.

Ed Sky ("Mr. Sky"), a tribal elder from the Cherokee Nation, testified there was no good cause to deviate from the placement preferences. R 8. Mr. Sky testified to Sienna's strong attachment to her foster parents, but noted the attachment was not as significant as her attachment to her Cherokee heritage. R 9. Mr. Sky noted Sienna would be able to form a strong bond to Ms. Redbird, and was confident any trauma Sienna experienced could be rectified by parenting, support, and therapy. R 9.

Deborah Marcus ("Ms. Marcus"), a child psychologist from the Indian Family Support Center, testified Sienna was well adjusted and able to form attachments, and would be able to form a lifetime attachment to Ms. Redbird, with whom Sienna shared Cherokee heritage. R 9. Ms. Marcus's testimony was based on research that explained once a child forms attachments, that child could form attachment again. R 9.

On July 2, 2014, the Juvenile Court terminated Mr. Little Bear's parental rights and adoptively placed Sienna with her foster parents, where she remains. R 10.

SUMMARY OF ARGUMENT

I. The Juvenile Court did not apply the correct burden of proof pursuant to section 1912(d) in a parental termination proceeding under section 1912(f) of the Act. In a parental termination proceeding, the correct burden of proof under section 1912(d) is proof beyond a reasonable doubt active remedial efforts were made and those efforts failed. Even if this court applies the lower burden of proof of clear and convincing evidence, active remedial efforts were still not satisfied. The DCW did not meet its burden of proof that its active remedial efforts to Mr. Little Bear and Sienna were substantially more likely than not to fail.

II. The Juvenile Court improperly found the DCW established good cause to deviate from adoptive placement preferences outlined under section 1915(a) of the Act. A showing of good cause can be established through consideration of several factors. Mr. Little Bear is desperately interested in parenting Sienna, and never requested to place Sienna with a family outside the adoptive placement preferences. Furthermore, Sienna does not have any extraordinary physical or emotional needs that would support deviating from the adoptive placement preferences, and there is a suitable placement available to Sienna.

STANDARD OF REVIEW

I. This Court reviews issues involving the "application and interpretation of the [the Act] *de novo* as questions of law." *In re J.L.,* 770 N.W.2d 853, 863 (Mich. 2009). Regarding whether active efforts were provided under the Act "is a mixed question of law and fact subject to de novo review." *People In Interest of S.H.E.,* 824 N.W.2d 420, 425 (S.D. 2012).

II. A finding of good cause to deviate from the Act's placement preferences is reviewed for an abuse of discretion. *See In re Adoption of Sara J.,* 123 P.3d 1017, 1021 (Alaska 2005). "It would be an abuse of discretion for a superior court to consider improper factors or improperly weigh certain factors in making its determination." *Id.*

ARGUMENT

The Indian Child Welfare Act ("the Act") was passed in 1978 due to the "alarmingly high percentage of Indian families . . . broken up by the [often unwarranted] removal of their children. 25 U.S.C.A. § 1901(4). Congress found "there is no resource more vital to the continued existence of Indian tribes than their children . . ." 25 U.S.C.A. § 1901(3). In passing the Act, Congress recognized courts often failed to acknowledge cultural and social standards that exist in Indian families and communities. 25 U.S.C.A. § 1901(5). As a result, the Act sets federal requirements to state child custody proceedings involving any Indian child who is a member of a federally recognized tribe. 25 U.S.C.A. § 1901(3). Mr. Little Bear and his two-year-old daughter Sienna, are both members of the Cherokee Nation, a Federally recognized tribe. Record ("R") 1.

I. THE DEPARTMENT OF CHILD WELFARE DID NOT MEET ITS BURDEN OF PROOF IN PROVIDING ACTIVE REMEDIAL EFFORTS IN A PARENTAL TERMINATION PROCEEDING.

In a child custody proceeding, focused on preventing the breakup of the Indian family, the Act requires any party attempting to terminate parental rights show active efforts have been made to provide remedial and rehabilitative services. 25 U.S.C.A. § 1912(d). Furthermore, the party seeking the termination of parental rights must establish the "active efforts" failed. *Id.*

Section 1912(d) is silent on the proper burden of proof to use in proving whether the active efforts requirement has been satisfied. *Id.; see also Brown County v. Shannon R.*, 706 N.W.2d 269, 292 (Wis. 2005). There is a split of authority between using the "beyond a

reasonable doubt" burden of proof, or the "clear and convincing" burden of proof under section 1912(d). *See In re G.S.,* 59 P.3d 1063, 1071 (Mont. 2002) (holding termination of parental right proceedings requires proof beyond a reasonable doubt section 1912(d) has been met); *People In Interest of S.R.,* 323 N.W.2d 885, 887 (S.D. 1982) (holding "the same burden required to prove serious emotional or physical harm under [section] 1912(f) . . . would also be required to prove active efforts); *Matter of Welfare of M.S.S.,* 465 N.W.2d 412, 418 (Minn. Ct. App. 1991) (holding a reasonable doubt standard is appropriate in determining whether the petitioning party complied with section 1912(d)); *People In Interest of R.L.*, 961 P.2d 606, 609 (Colo. App. 1998) (adopting the beyond a reasonable doubt standard for section 1912(d) in a parental termination proceeding); *Contra Matter of Baby Boy Doe,* 902 P.2d 477, 483 (Idaho 1995) (holding a clear and convincing standard is the appropriate standard for section 1912(d)); *In Interest of A.P.,* 961 P.2d 706, 715 (Kan. Ct. App. 1998) (holding clear and convincing evidence is the appropriate standard under section 1912(d)). This question is a matter of first impression in the State of Whittier.

A. In A Parental Termination Proceeding, The Proper Burden Of Proof To Determine Whether Active Efforts For Remedial Services Have Been Made Under Section 1912(d) Is Beyond A Reasonable Doubt.

The Act specifies two types of child custody proceedings: (1) foster care placement proceedings, 25 U.S.C. § 1912(e); and (2) parental right termination proceedings, 25 U.S.C. § 1912(f). Foster care placement proceedings require proof by *clear and convincing evidence* continued custody by the parent is likely to result in serious emotional or physical harm to the child. 25 U.S.C. § 1912(e) *(emphasis added)*. However, in a parental termination proceeding, the Act requires proof *beyond a reasonable doubt* continued custody by the parent is likely to result in serious emotional or physical harm to the child. 25 U.S.C. §1912(f) *(emphasis added)*. Both

proceedings require active efforts be made to provide remedial services in an attempt to prevent the breakup of the Indian family. 25 U.S.C. §1912(d).

The differing evidentiary standards result from varying levels of permanency between the two proceedings. According to the Act, termination of parental rights under section 1912(f), results in the "*permanent placement*" of an Indian child for adoption. 25 U.S.C.A. §1903(1) *(emphasis added)*. Conversely, foster care placement under section 1912(e) results in "*temporary placement"* of an Indian child in a foster home. *Id. (emphasis added).*

In determining whether active efforts have been made, the Bureau of Indian Affairs has elaborated on the burden of proof required, stating, "Evidence of [active efforts] must be 'clear and convincing' for [foster care] placements and 'beyond a reasonable doubt' for [parental] terminations." Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). Put simply, the burden of proof under section 1912(d) is beyond a reasonable doubt when the underlying proceeding is for parental termination under section 1912(f).

Separation of parental rights significantly decreases the transmission of tribal heritage to younger generations, contrary to the primary intent of the Act. *See* 25 U.S.C.A. § 1901. Congress employs a higher burden of proof in parental termination proceedings because, " . . . removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty . . ." H.R.Rep. No. 1386, 95th Cong.2nd Sess. 22 (1978). The Supreme Court of the United States further articulated the necessity for a higher burden of proof in *any* parental termination proceeding:

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense . . . The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoy full access to all public records concerning the family. The state may call on experts in family relations, psychology, and medicine to

> bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents.

Santosky v. Kramer, 455 U.S. 745, 763 (1982).

In *In re G.S.*, the Department of Public Health and Human Services ("DPHHS") temporarily removed an Indian child from custody of her natural parents after a domestic violence dispute. 59 P.3d at 1065. In making its decision to place the child in foster care under section 1912(e), that court found the DPHHS showed, by clear and convincing evidence, active efforts were employed to provide remedial services under section 1912(d). *Id.* at 1071. However, in addressing which evidentiary standard to apply to section 1912(d), the court clarified, " If . . . the underlying proceeding is termination of parental rights under [section] 1912(f), the district court must be satisfied by 'proof beyond a reasonable doubt' that [section] 1912(d) has been met." *Id.*

In *Matter of Welfare of M.S.S.*, an Indian child was sent to live with her biological mother after her father was sentenced to prison for sexual misconduct involving her two step sisters. 465 N.W.2d at 413. Subsequently the child was sent to foster care under section 1912(e) after allegations her uncle was sexually abusing her. *Id.* When the father was released from prison, he was unable to retain custody of the child. *Id.* The father suggested his daughter live with his brother-in-law, of Indian decent. *Id.* at 414. The state opposed this suggestion and filed a petition for termination of parental rights under section 1912(f). *Id.* The court heard testimony from numerous qualified expert witnesses, but did not hear any testimony from the father's brother-in-law. *Id.* at 415. Subsequently the court issued an order terminating parental rights. *Id.* On appeal, the court found the State did not prove beyond a reasonable doubt active efforts were made to provide remedial services. *Id.* at 419. The court stated Congress intended "the reasonable doubt

standard of proof under section 1912(f) to be applied to the requirements of section 1912(d)." *Id.*at 418; *see also* Guidelines for State Courts, 44 Fed. Reg. 67592 (Nov. 26, 1979).

Here, the Whittier Juvenile Court terminated Mr. Little Bear's parental rights pursuant to section 1912(f). R 10. The court erred in applying a clear and convincing standard to section 1912(d), because it was not for a temporary foster care placement proceeding, pursuant to section 1912(e). The court should have applied a reasonable doubt standard in determining whether the DCW provided active remedial efforts to Mr. Little Bear under section 1912(d) of the Act.

Parental rights cannot be terminated without a showing of active efforts pursuant to section 1912(d). As a result, the efficiency of the active efforts to provide remedial services by the DCW directly effects the termination of parental rights. Therefore, the burden of proof for the active efforts required must mirror the underlying proceeding. Here, the underlying proceeding was a parental rights termination, requiring a burden of proof beyond a reasonable doubt.

The entire basis of the Act is to ensure the protection and preservation of Indian families through the protection of Indian children. Termination of parental rights indisputably disrupts that goal. Termination of parental rights results in the permanent placement of the Indian child with another family. Therefore, the burden of proof is beyond a reasonable doubt when determining whether active remedial efforts were made in a parental termination proceeding.

B. The Department Of Child Welfare Did Not Meet Its Burden Of Proof That Active Efforts Were Made To Provide Remedial Services By Clear And Convincing Evidence Under Section 1912(d).

Even if this Court finds the burden of proof to provide active efforts is clear and convincing evidence, the DCW still failed to meet its burden. A clear and convincing burden of proof requires evidence "so clear as to leave no substantial doubt [and is] sufficiently strong to

command the unhesitating assent of every reasonable mind." *In re Angelia P.,* 623 P.2d 198, 204 (Cal. 1981). Therefore, the DCW must prove it is substantially more likely than not its active efforts were unsuccessful.

1. The Department of Child Welfare failed to prove by clear and convincing evidence its active efforts to provide remedial services were unsuccessful.

The Act does not define active efforts. However, it is generally agreed upon the active efforts requirement implies "a heightened responsibility compared to passive efforts." *In re A.N.,* 106 P.3d 556, 560 (Mont. 2005); *see also People In Interest of S.H.E.,* 824 N.W.2d at 426 (purely passive efforts cannot satisfy the active efforts requirement of the Act); *In re Interest of Walter W.,* 744 N.W.2d 55, 61 (Neb. 2008) (the active efforts standard requires more than the 'reasonable efforts standard applied in [cases not under the Act]"); *A.A. v. State, Dep't of Family & Youth Servs.,* 278 P.2d 256, 261 (Alaska 1999) (active efforts are clearly distinguishable from passive efforts). There is no defined procedure for active efforts; therefore, the active efforts standard requires a case-by-case analysis. *See Walter W.*, 744 N.W.2d at 61.

Courts should consider the parent's cooperation when determining whether the active efforts failed pursuant to section 1912(d). In *Baby Boy Doe*, a non-Indian mother placed her child up for adoption shortly after birth. 902 P.2d at 480. When the adoptive parents initiated proceedings to terminate the father's parental rights, the father's Indian Tribe intervened and filed a paternity claim on the father's behalf. *Id.* The father never took any affirmative steps to support or initiate contact with the child. *Id* at 483. The father further refused to attend counseling with a social worker, pay child support, or cooperate with his court appointed attorney. *Id.* Due to the father's general indifference, the court found by clear and convincing evidence, active remedial efforts were provided but proved unsuccessful. *Id.*

In *Walter W.*, immediately after the birth of an Indian child the State filed a petition to take temporary custody. 744 N.W.2d at 58. The Juvenile Court placed the child in the state's temporary custody because the mother was unable to provide a safe household. *Id.* The mother's use of alcohol and controlled substances also factored into whether the child was at risk in the mother's custody. *Id.* The mother already had five children under the Juvenile Court's jurisdiction. *Id.* Furthermore, the newborn baby tested positive for amphetamine at birth. *Id.*

Before seeking to terminate the mother's parental rights, the case manager gave the mother information about drug abuse programs, and faxed necessary records to the programs at the mother's request. *Id.* at 61. The mother told the case manager she was visiting a program on a weekly basis. *Id.* However, when the case manager contacted that program, he was told the mother had not been there in months. *Id.* The case manager also helped the mother gain access to a housing authority, but after only a month in the housing shelter, the mother was kicked out for being intoxicated. *Id.* In the termination proceeding, the court found by clear and convincing evidence, the state did its best to provide active remedial efforts but those efforts failed. *Id.* at 62.

Contrary to the parents in *Baby Boy Doe* and *Walter W.*, Mr. Little Bear has shown a high degree of interest in wanting to provide and care for his daughter before any foster care placement or parental termination proceedings were commenced. Here, Mr. Little Bear has an extremely positive attitude towards reunification with Sienna. Prior to Sienna's placement in foster care, Mr. Little Bear personally took Sienna to a child physician who believed Mr. Little Bear was truly trying his best to provide for his daughter. R 3.

Mr. Little Bear continued to regularly visited Sienna until his incarceration. R 6. Mr. Little Bear did not have a criminal history or prior trouble with alcohol. Despite his incarceration, Mr. Little Bear continues to call and write Sienna whenever he can. R 6.

Unlike *Baby Boy Doe,* here, the DCW has failed to show by clear and convincing evidence, its active efforts to prevent the break up of Mr. Little Bear's family proved unsuccessful. Mr. Little Bear made every attempt to utilize the services provided by the DCW. Furthermore, Mr. Little Bear showed an active interest in wanting to provide and care for Sienna. Mr. Little Bear's therapist, assigned by the DCW, informed the court prior to the parental termination proceeding Mr. Little Bear, "was making significant progress prior to his incarceration and that he desperately wanted to parent Sienna." R 9.

The DCW's active efforts did not prove to be unsuccessful as required by section 1912(d). Instead, the DCW's active efforts only proved, with more instruction and training, Mr. Little Bear has the potential to be a good father. Mr. Little Bear is just now coming into adult-hood after spending his entire childhood in foster care. Through Mr. Little Bear's response to the DCW's active efforts he has shown he is committed to keeping Siena within his family. Therefore, the DCWs active efforts did not clearly prove to the unhesitating assent of every reasonable mind, they were unsuccessful in preventing the breakup of Mr. Little Bear's family.

2. The Juvenile Court erred when it found providing active remedial efforts following Mr. Little Bear's incarceration to be futile.

Even if a parent is incarcerated, the proponent of the parental termination proceeding is not relieved of their duty to make active remedial efforts under the Act. *See A.A.,* 278 P.2d at 261. Additionally, active efforts should be relevant to the parent's current circumstances. *See In re J.L.,* 770 N.W.2d at 867.

In *A.A.*, the father of an Indian child was convicted of murder. 278 P.2d at 258. During his incarceration, the state maintained contact with the father, informed the father of the potential risk his parental rights might be terminated, and attempted to get him to participate in a treatment plan. *Id.* at 262. Despite the state's efforts, the father demonstrated a lack of willingness to

participate in treatment. *Id.* Subsequently, the father's murder conviction was reversed. *Id.* Even after the father's murder conviction was reversed and the state filed a parental termination petition, the father was involved in three different assaults on prison staff and other inmates. *Id.* The court concluded the state made active efforts to provide the father with remedial services. *Id.* Despite these active efforts, the father's failures to participate in treatment and continuing illegal behavior after recognizing his parental rights were at stake, terminated his parental rights. *Id.*

Simply because a parent is incarcerated does not give the proponent of a termination proceeding the leeway to stop all active efforts to provide remedial services because it is possible further efforts will be futile. *See J.L.,* 770 N.W.2d at 868. In *J.L.*, the court declined to adopt a "futility test," in which the active efforts requirement may be satisfied by efforts to remedy a parent's deficiencies before the current dependency proceedings. *Id.* at 867.The court specified, ". . . even if services have been provided to the parent in the past, [the parental termination proponent must] conduct a thorough and contemporaneous review of those services and the parent's progress . . . in response to the *current* proceeding." *Id.* at 868. *(emphasis added)*. A parent's ability to become proficient at parenting is not an invariable concept, "much can happen in six months." *In re Roe*, 764 N.W.2d 789, 809 (Mich. 2008) (Gleicher, J., concurring in part and dissenting in part), *overruled by In re J.L.,* 770 N.W.2d 853 (Mich. 2009) (adopting the opinion of Gleicher, J.).

Unlike *A.A.*, after Mr. Little Bear was incarcerated for a non-violent crime of driving under the influence, he showed no perverse tendencies. R 9. Mr. Little Bear remained actively engaged in the parental termination proceeding and even requested Sienna go live with her paternal Aunt, Ms. Redbird, who expressed interest in caring for Sienna. R 7.

Here, the DCW provided active remedial efforts pursuant to a foster care placement proceeding under section 1912(e). However, the DCW did *not* provide active remedial efforts before Mr. Little Bear's parental termination proceeding required by section 1912(f). R 4. Unlike *J.L.*, Mr. Little Bear received no active reunification efforts during his *current* parental rights termination proceeding pursuant to section 1912(d) and (f). Despite testimony from Mr. Little Bear's therapist that, "[He] actively participated in Sienna's life to the extent possible [even] while incarcerated [,]" Mr. Little Bear continued to do his best to obtain custody of Sienna. R 9. Mr. Little Bear's therapist further testified Mr. Little Bear was making notable improvements prior to his incarceration. R 9.

Incarceration hinders the ability to provide active remedial efforts, but it does not make it impossible. Active remedial efforts should be continued despite incarceration, especially when the parent has made significant progress and showed an active interest in reunification. Mr. Little Bear is a young, single-father, who is learning how to effectively parent his daughter. To terminate remedial services to Mr. Little Bear simply because of his incarceration for a non-violent crime, and subsequently terminate his parental rights to his only daughter, does not reinforce the important purpose of the Act. Furthermore, because of the DCW's failure Mr. Little Bear was enrolled in substance abusing counseling a month late. R 6. As a result Mr. Little Bear lost out on a month of substance abuse support prior to his March 2014 arrest.

Currently, Mr. Little Bear may not be ready to take sole custody of Sienna. However, Mr. Little Bear has made incremental steps to become the father both the State and Sienna need him to be. During Mr. Little Bear's incarceration, he continued to improve his parenting skills and abstained from drugs and alcohol. There is a strong indication in approximately two months Mr. Little Bear will leave a yearlong incarceration an improved man and parent.

Therefore, the Juvenile Court erred in terminating remedial services to Mr. Little Bear upon his incarceration and prior to the parental termination proceeding.

II. THE JUVENILE COURT ERRED IN FINDING GOOD CAUSE TO DEVIATE FROM THE ADOPTIVE PLACEMENT PREFERENCES SET FORTH IN THE INDIAN CHILD WELFARE ACT.

The Act requires, when adoptively placing an Indian child under state law and absent good cause to the contrary, Indian children should be placed with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 28 U.S.C.A. § 1915(a). While the Act does not provide an explicit definition of good cause, the Bureau of Indian Affairs has set forth a framework of considerations, when used alone or in conjunction with each other, can establish a good cause exception. *See* Guidelines for State Courts, 44 Fed.Reg. 67.584 (Nov. 26, 1979). These considerations include: (1) the request of the biological parents or the child when the child is of sufficient age; (2) the extraordinary physical or emotional needs of the child as established by the testimony of a qualified expert witness; or (3) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria. *Id.*

Through application of the good-cause exception, courts have looked to additional factors, including: (1) the Indian child's interest in permanency or the existence of bonding between the child and nonpreffered adoptive or foster parents; (2) the Indian child's cultural or social needs; (3) the preservation of sibling relationships; and (4) the best interest of the Indian child. *See In re Adoption of Sara J.*, 123 P.3d 1017, 1022-23 (Alaska 2005) (noting the Indian child's social and cultural needs are important in a good cause analysis when there are questions about suitability of the preferred placement preference); *see also In re Adoption of Keith M.W.*, 79 P.3d 623 (Alaska 2003) (holding the consideration of bonding between the Indian child and

adoptive parents proper to establishing good cause for); *Fresno County Dept. of Children and Family Services v. Superior Court*, 19 Cal.Rptr.3d 155, 169-70 (Cal. Ct. App. 2004) (determining the consideration of a sibling relationship important in determining whether good cause existed); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) (determining it was in the best interest of the Indian child to be placed with his paternal grandmother). The burden of proof falls on the party urging an exception be made, to prove good cause existed to depart from the adoptive placement preferences. *See* Guidelines for State Courts, 44 Fed.Reg. 67.584 (Nov. 26, 1979). Here, no good cause existed to support a deviation from the placement preferences established under the Act.

A. Mr. Little Bear Consistently Sought Permanent Custody Of Sienna Little Bear Throughout The Reunification Process.

The first consideration for establishing good cause to depart from placement preferences under the Act, is the request of the biological parent or the child when the child is of sufficient age. *Id.* The Act provides a great deal of protection to parents by allowing them to withdraw their consent to adoption prior to the final judgment. *See In re Adoption of Keith M.W.*, 79 P.3d 623, 626 (Alaska 2003). This consideration is of great import once a parent's preference is to deviate from those established by the Act. *Id.* In those cases, a parent's wishes can be fundamental to a finding of good cause. *Id*.

In *Keith M.W*., an Indian mother made an affirmative decision to relinquish her parental rights and place her child with a non-Indian family. *Id*. at 629. The court held the mother's wishes presented good cause to deviate from the Act's placement preferences. *Id*. at 632.

Similarly, in *Liliana S.*, an Indian mother lost custody of her two children when the County Department of Health and Human Services petitioned to have both children removed and placed with their paternal non-Indian grandmother. *See In re Liliana S.*, 10 Cal.Rptr.3d 553, 587

(Cal. Ct App. 2004). In determining whether there was good cause to deviate from the placement preferences, the court looked to the parents' wishes as a primary factor and found they were sufficient for a finding of good cause. *Id*.

In *Baby Girl*, an Indian father opposed the adoption of his child to a non-Indian family. *See Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2555 (2013). The mother agreed to the adoption after the father voluntarily relinquished his parental rights during the pregnancy. *Id*. at 2554. The adoptive parents supported the mother for the remainder of her pregnancy and petitioned for adoption. *Id*. The Court reversed the decision of the state supreme court, explaining, " . . . a biological father could abandon his child in utero and refuse any support for the birth mother – perhaps contributing to the mother's decision and the child's best interests." *Id*. at 2565.

Here, Mr. Little Bear has not made an affirmative decision to relinquish his parental rights. Contrarily, Mr. Little Bear has continuously attempted to work towards reunification with Sienna. R 5. Prior to Sienna's adjudication as a dependent child, Mr. Little Bear diligently implemented the suggestions of Sienna's physician, Dr. Humphrey. R 2,3. Despite several personal setbacks, Mr. Little Bear has consistently attempted to complete the reunification process. R 2-3, 5-6, 8. Throughout the reunification process, Mr. Little Bear attended parenting classes, therapy, substance abuse counseling, and maintained consistent contact with Sienna. R 5,6.

Mr. Little Bear's case is highly distinguishable from *Keith M.W.*, *Liliana S.*, and *Baby Girl,* as Mr. Little Bear is neither affirmatively choosing to relinquish custody of Sienna, nor asking to place Sienna with a non-Indian adoptive family. Moreover, Mr. Little Bear's behavior is distinct from the Indian father in *Baby Girl*, because Mr. Little Bear has been actively involved

in Sienna's life since her birth. R 1. Unlike the father in *Baby Girl*, Mr. Little Bear has consistently attempted to work on his own personal issues. R 2-3, 5-6, 8. Here, no parent is requesting a deviating from the placement preferences to establish good cause. Rather, Mr. Little Bear is asking for the placement preferences to be honored so his daughter can be raised within the Cherokee culture.

B. Expert Testimony Failed To Prove Sienna Little Bear Has Extraordinary Physical Or Emotional Needs Precluding Implementation Of Placement Preferences.

The second consideration for establishing good cause to depart from placement preferences under the Act is the extraordinary physical or emotional needs of the child, as established by the testimony of a qualified expert witness. *See* Guidelines for State Courts, 44 Fed.Reg. 67.584 (Nov. 26, 1979). The Act is based on the presumption that an Indian child's best interest is to be placed according to the statutory preferences. *See In re C.H.*, 997 P.2d 776, 784 (Mont. 2000). If trauma is certain to result from a transfer of custody, it can be sufficient to constitute good cause. *Id*. at 783. The mere likelihood of developing emotional or physical disorders is not strong enough to constitute good cause. *Id*. The bond between an Indian child and non-Indian custodians do not outweigh tribal interests, per se. *Id*. There must be a showing by clear and convincing evidence of a " . . . significant risk that a child will suffer serious harm as a result of a change in placement." *In re Alexandria P.*, 176 Cal.Rptr.3d 468, 493 (Cal. Ct. App. 2014). The Whittier Court of Appeal failed to recognize the interplay between *C.H*. and *Alexandria P*. Instead in its decision, the court applied *Alexandria P.* in lieu of *C.H.* R 16. While *C.H.* focuses on what evidence is *not sufficient* to establish good cause, *Alexandria P.* focuses on what evidence *is sufficient* to establish good cause. See *In re C.H*., 997 P.2d at 784 (*emphasis added)*; *see also Alexandria P.*, 176 Cal.Rptr.3d at 493.

In *C.H.*, an abused and neglected Indian child was removed from the home and placed with a non-Indian foster family. 997 P.2d at 778. The tribe challenged the child's placement as contrary to the Act, and requested the child be placed in the care of a relative Indian family. *Id*. at 779. The lower court found good cause to deviate from the placement preferences because of the child's extraordinary physical and emotional needs caused by her potential exposure to drugs and alcohol in utero. *Id*. Drug and alcohol exposure carries a high risk of developing neurodevelopmental and emotional problems. *Id*. at 781. Furthermore, based on the bond developed between the child and the non-Indian foster family, there was potential for the development of an attachment disorder if removed from their custody. *Id*. The court determined these potential problems were insufficient to establish good cause for deviation of the placement preferences because, "[t]he risk that a child might develop . . . problems in the future is simply too nebulous and speculative a standard on which to determine good cause exists . . ." *Id*. at 783.

In *Alexandria P.*, an Indian child was removed from the custody of her mother due to the mother's extensive substance abuse problems, criminal history, and previous loss of custody of six other children. 176 Cal.Rptr.3d at 472. In an effort to facilitate reunification of the child and her Indian father, the child was placed in foster care with a non-Indian family. Id. at 473. When reunification was unsuccessful, it was recommended by all parties the child be placed with the relative non-Indian family. *Id.* Unlike *C.H.,* the court held in order to find good cause to deviate from the placement preferences, the moving party is not required to show a certainty of harm to the child. *Id.* at 493. Instead, the moving party must show by clear and convincing evidence, a significant risk of harm as a result of a placement change. *Id.*

In *Navajo Nation*, an Indian child was placed in a non-Indian foster home where the child remained for fifteen months. *See Navajo Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 37

(Ariz. Ct. App. 2012). At the placement hearing, an expert testified a reciprocal bond had been formed between the Indian child and the foster family and the child would face "significant risk of emotional disturbance if removed from the home." *Id*. at 33. The court held the presence of a significant risk of emotional harm was good cause to deviate from the placement preferences. *Id*. at 38.

In *Adoption of F.H.*, an Indian child was born with a blood alcohol content of .275 and immediately removed from the custody of the mother. *See In re Adoption of F.H.*, 851 P.2d 1361, 1362 (Alaska 1993). The child was found to be at high risk for Fetal Alcohol Effects, which can cause developmental, behavior, and learning problems. *Id*. The court recognized a strong bond between the Indian child and the foster parents and noted placement with the foster parent, was in the best interest of the child and good cause existed to deviate from the placement preferences. *Id*. at 1365.

Here, Sienna does not suffer from any physical medical issues like the children in *C.H.* and *F.H.* Those children were at high risk for developing medical conditions due to actual or potential exposure to alcohol or substances in utero. Sienna was not born under the effects of drugs or alcohol, and there is no evidence Sienna was exposed to drugs or alcohol in utero. R 1. Sienna's mother Ms. Diaz did not struggle with drugs and alcohol until after Sienna was born. R 1. The only physical medical conditions Sienna struggled with included low weight and plagiocephaly, both of which have subsided. R 2,5. As such, Sienna does not have any current or potential medical conditions sufficient to establish good cause to deviate from the placement preferences.

While Sienna's play therapist reasoned she would suffer emotional harm if separated from her foster parents, the child development specialist provided, "with any removal from a

loving home, there is some risk that the child may not recover or find attachment again." R 7-8. The child development expert further explained predicting Sienna's future emotional response was impossible, but she would suffer trauma as a result of removal, and noted the trauma *may* be irreparable. R 8 (*emphasis added*).

Based on the opinion of the Cherokee Nation expert, Mr. Sky, Sienna's attachment to her foster parents is less significant than her attachment to her Cherokee heritage. R 9. The expert opined Sienna would be able to form a similar attachment to her aunt, Ms. Redbird, and any trauma experienced as a result could be remedied through support, therapy, and parenting. *Id.* Additionally, a child psychologist from the Indian Family Support Center explained because Sienna was able to form attachments, she would be able to overcome the temporary loss of being separated from her foster parents and form an attachment again. *Id.* Sienna's placement with Ms. Redbird would also provide her the opportunity to form an attachment to her Cherokee heritage. *Id.*

While there is ample evidence to support separation will be difficult for Sienna, there is no evidence she suffers from any extraordinary physical or emotional needs that would provide good cause to deviate from the placement preferences. Similar to *C.H.*, the experts have not provided evidence Sienna is certain to suffer emotional, developmental, or attachment problems. To the contrary, Sienna's ability to bond and attach to her foster parents is a positive signal Sienna can successfully bond to others.

Unlike *Navajo Nation*, the experts have failed to show removing Sienna from her foster parents would cause a "significant risk of emotional disturbance." *See Alexandria P.*, 176 Cal.Rptr.3d at 493. While a child's best interest can be looked to when determining whether there is good cause to depart from placement preferences, the best interest of an Indian child is

presumed to be within their respective culture. The Whittier Court of Appeal would have this Court look to *Alexandria P.* in determining there is good cause to deviate from the Act's placement preferences. However, *Alexandria P.* is not factually similar to this case as the Indian child there had a history of difficulty with attachment. Sienna's ability to form attachments is strong. Her attachment to her foster parents is great, and their importance in her life is recognized. However, Sienna's placement as an Indian child must follow the placement preferences, as good cause to deviate is not present here.

C. There Is A Suitable Family Placement Available To Sienna Little Bear With Her Paternal Aunt, Ms. Redbird, Meeting The Preference Criteria.

The third consideration for establishing good cause to depart from placement preferences under the Act is the unavailability of suitable families for placement after a diligent search has been completed. *See J.S. v. State*, 50 P.3d 388, 394 (Alaska 2002); *see also* Guidelines for State Courts, 44 Fed.Reg. 67.584 (Nov. 26, 1979).

In *J.S.*, an Indian child was removed from the custody of his biological parents due to the mother's drug issues, and alleged sexual abuse by the father. 50 P.3d at 389. The Division of Family and Youth Services ("DFYS") searched for a foster home in line with placement preferences. *Id*. at 393. The child was placed with his aunt, but the arrangement was unsuccessful. *Id*. After an exhaustive search, a non-Indian foster family was found and the child was placed with good cause to deviate from the placement preferences. *Id*. at 394.

In *Adoption of Riffle*, an Indian child was removed from the custody of the biological parents and placed into foster care. *See Matter of Adoption of Riffle*, 922 P.2d 510, 512 (Mont. 1996). The child's foster parents and maternal uncle both petitioned for adoption. *Id*. The court found there was no good cause to deviate from the placement preferences because the child's maternal uncle was approved to provide an adoptive home, was related to the child, the

placement was supported by the biological mother and the department, and the maternal uncle was in contact with the child since birth. *Id*. at 515.

Here, the DCW diligently pursued placement options in line with placement preferences. R 4-5. When Sienna's original placement with her maternal grandparents was unsuccessful, she was placed with her current non-Indian foster parents. R 5. The DCW contacted Sienna's maternal aunt, Ms. Redbird, in accordance with placement preferences because Ms. Redbird previously expressed an interest in taking custody. R 6. Based on the testimony of Mr. Sky, a tribal elder from the Cherokee Nation, and the testimony of child psychologist, Ms. Marcus, Sienna has a significant interest in a connection with her Cherokee heritage. This connection is stronger than the attachment to the foster parents. R 9.

Unlike *J.S.*, the search for a placement preference option for Sienna has produced an Indian relative who satisfies the placement preferences, and can provide a sincere connection to Sienna's culture. Ms. Redbird has been involved in Sienna's life from her birth. R 1. This case is factually analogous to *Adoption of Riffle* in providing an option for placement that meets the requirements of the Act. Ms. Redbird's availability and willingness to take custody of Sienna precludes a finding of good cause to deviate from the placement preferences.

CONCLUSION

For the foregoing reasons, petitioner requests this Court reverse the State of Whittier Court of Appeal.

Dated January 5, 2015

Respectfully submitted,

_____

Team #14
Counsel for Petitioner

Appendix A

United States Code Annotated
Title 25. Indians
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1901

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) 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; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody

[1] So in original. Probably should be capitalized.

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.

CREDIT(S)

(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

25 U.S.C.A. § 1901, 25 USCA § 1901
Current through P.L. 113-209 approved 12-16-2014

Appendix B

25 U.S.C.A. § 1903

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its 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;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by

an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person

who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

CREDIT(S)

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

25 U.S.C.A. § 1903, 25 USCA § 1903
Current through P.L. 113-209 approved 12-16-2014

Appendix C

United States Code Annotated
Title 25. Indians
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1912

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where 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 notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.

CREDIT(S)

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

25 U.S.C.A. § 1912, 25 USCA § 1912
Current through P.L. 113-209 approved 12-16-2014

Appendix D

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1915

§ 1915. Proceedings in forma pauperis

Effective: April 26, 1996

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law,

an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same

manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 954; May 24, 1949, c. 139, § 98, 63 Stat. 104; Oct. 31, 1951, c. 655, § 51(b), (c), 65 Stat. 727; Sept. 21, 1959, Pub.L. 86-320, 73 Stat. 590; Oct. 10, 1979, Pub.L. 96-82, § 6, 93 Stat. 645; Dec. 1, 1990, Pub.L. 101-650, Title III, § 321, 104 Stat. 5117; Apr. 26, 1996, Pub.L. 104-134, Title I, § 101[(a)] [Title VIII, § 804(a), (c) to (e)], 110 Stat. 1321-73, 1321-74, 1321-75; renumbered Title I May 2, 1996, Pub.L. 104-140, § 1(a), 110 Stat. 1327.)

28 U.S.C.A. § 1915, 28 USCA § 1915
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