

**IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
CAVANAGH, P.J., and WILDER and OWENS, JJ.**

In the matter of J.L. GORDON, Minor,

_____/
DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee,

S.Ct. No. 143673
COA No. 301592
LC No. 2008-746988-NA

v.

COURTNEY HINKLE,
Respondent-Appellant.

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**AMICUS CURIAE ON BEHALF OF MICHIGAN INDIAN LEGAL SERVICES, INC
AND THE AMERICAN INDIAN LAW SECTION OF THE STATE BAR OF MICHIGAN**

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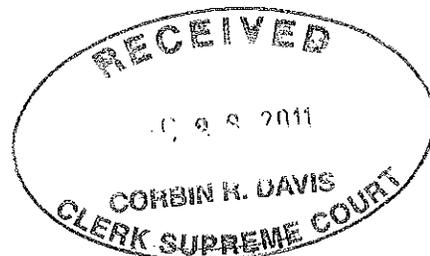


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INTRODUCTION AND INTEREST OF AMICUS

The American Indian Law Section of the State Bar of Michigan and Michigan Indian Legal Services, Inc. files this amicus curiae brief pursuant Michigan Supreme Court Order, Docket No. 143673 (November 23, 2011).

Michigan Indian Legal Services, Inc (MILS) is a non-profit legal aid office, which was incorporated in 1975 in Michigan. MILS provides services statewide with a focus on civil legal services to low income Indian individuals and tribes to further self sufficiency, overcome discrimination, assist tribal governments and preserve Indian families.

The American Indian Law Section is not the State Bar of Michigan itself, but rather a Section of the State Bar of Michigan whose members choose voluntarily to join based on a common professional interest. The positions expressed in this brief are that of the American Indian Law Section only, and not the position of the State Bar of Michigan. The State Bar of Michigan, to date, has not had a position on this matter.

The affairs of the American Indian Law Section are administered by an elected Council of twelve members. The drafting and filing of this brief by the Corporate Laws Committee of the Section were initially approved by the Council after discussions held at a meeting convened in conformance with the Section's bylaws on December 13, 2011. The positions taken in this brief were formally adopted by ten members of the Council (with one abstention) at a meeting held in conformance with the Section's bylaws. The subject matter of the positions taken in this Brief is within the jurisdiction of the American Indian Law Section, and the positions taken in this Brief were adopted in accordance with the Section's bylaws. The requirements of State Bar of Michigan Bylaw Article VIII have been satisfied.

STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae concurs with the Statement of Appellate Jurisdiction set forth in the Brief of Appellant Courtney Hinkle.

QUESTIONS PRESENTED

Amicus Curiae concurs with the Questions Presented set forth in the Brief of Appellant Courtney Hinkle.

STATEMENT OF FACTS

Amicus Curiae concurs in the Statement of Facts set forth in the Brief of Appellant Courtney Hinkle.

SUMMARY OF ARGUMENT

Amicus Curiae urges this Court to either grant leave to appeal or to reverse the order of Court of Appeals. Congress enacted the Indian Child Welfare Act (“ICWA”) in 1978, PL 95-608; 25 USC 1901-1963, after more than four years of hearings, deliberation, and debate, in order to alleviate a terrible crisis of national proportions – the “wholesale separation of Indian children from their families” and their tribal communities. *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes*, H R Rep 95-1386, at 9 (July 24, 1978)(“1978 House Report”).¹

Congress recognized that state law and policy affecting Indian children and families had an enormous impact on the future of Indian tribes. Congress found “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.” 25 USC 1901(3). The Supreme Court echoed that finding by relying upon the statements of Calvin Issac, the Chief of the Mississippi Band of Choctaw, who stated:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships. [*Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 34; 109 S Ct 1597 (1989) quoting *Indian Child Welfare Act of 1978*, Hearings before the Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong, 2d Sess, at 193 (Feb. 9 &

¹The text of ICWA, the legislative history, and any draft bills or Congressional materials dealing with ICWA cited in this brief are available at the web site of the Native American Rights Fund. <<http://narf.org/icwa/federal/lh.htm>>.

Mar. 9, 1978)(“1978 Hearings”)].

Requiring states to notify tribes prior to placement of Indian children as wards of state courts is a primary focus of the Act, realigning state interests to acknowledge and to accept significant tribal interest in the tribe’s children. Because Congress’s legislative scheme involves the transfer of jurisdiction over Indian children primarily from state courts to tribal courts, notifying tribes or the Secretary of the Interior is the most important part of the legislation. The first step in the Congressional scheme is to identify children that are or may be Indian children. 25 USC 1912(a). State courts are required to notify tribes “where the court knows or has reason to know” an Indian child is involved. In cases where the “identity or location” of the tribe cannot be determined, the petitioning party must serve notice upon the Secretary of the Interior. This procedural requirement, which state courts must follow prior to removing Indian children from Indian families and before terminating the parental rights, *id.*, allows for tribes to identify the child as a member or eligible for membership. Tribal membership can only be determined by tribes and therefore courts must comply with the plain language of ICWA and require notice prior to commencing proceedings.

In addition to the requirements imposed upon DHS by ICWA, DHS accepted additional responsibilities in cases involving Saginaw Chippewa Indian child and their descendant children. There is a distinct relationship between the Department of Human Services and the Saginaw Chippewa Indian Tribe of Michigan pursuant to a federal consent decree. The Saginaw Chippewa Reservation Boundary Settlement created a separate duty on the Department of Human Services to provide notice to the Tribe in cases involving their children and children of Saginaw Chippewa descent, a duty which is not subject to waiver. Although the case before this Court was heard at the trial level in 2008, the ICWA duty to provide notice is an on-going requirement.

The Department of Human Services and the Family Court are obligated to make a complete

record of their compliance with the IWCA notice requirements. DHS Policy and Procedure Manuals require case workers to keep accurate and up-to-date records of all action, including records of notice. The precise wording of 25 USC 1912(a) demonstrates the care Congress took to ensure that the trial court would not only monitor notice, but make a complete record of compliance. First, ICWA requires generation of evidence in the “return receipt requested.” Second, by requiring that no hearing be held until after the receipt of notice, ICWA commands the trial court not only to ensure that the Department of Human Services has provided notice but also requires DHS to provide a copy of the that receipt to the court. The BIA Guidelines sustain and supplement the requirement to maintain evidence of notice. Further, the 2008 and current Michigan Court Rules similarly put the court under a duty to make a complete record of compliance with the ICWA notice requirement.

A parent cannot waive the notice requirement nor can she waive any of the other substantive or procedural protections afforded by ICWA. First, the tribe has separate interests in the child guaranteed by the Act, which includes an unqualified right to intervene and to participate as a full party and to seek transfer of jurisdiction. Second, the United State Supreme Court in *Holyfield* recognized that parents’ actions cannot defeat the applicability of ICWA. Third, the canons of construction require strict compliance with the ICWA statutory scheme. A parent’s ambiguous comment cannot be construed as a waiver of the federal protections, such as the requirement that Department of Human Services provide active efforts to reunify the family, provide culturally appropriate services, place children in family and/or Indian homes, provide an expert witness to testify, and meet heightened standards of proof that are guaranteed to her, her child, and the child’s tribe. 25 USC 1912.

The Court of Appeals opinion cannot stand.

ARGUMENT

I. **BECAUSE MEMBERSHIP IS PECULIARLY WITHIN THE PROVINCE OF EACH TRIBE, SUFFICIENTLY RELIABLE INFORMATION OF VIRTUALLY ANY CRITERIA UPON WHICH MEMBERSHIP MIGHT BE BASED MUST BE CONSIDERED ADEQUATE TO TRIGGER NOTICE.**

A. **The ICWA Notice Provision is Triggered When the Court Knows or Has Reason to Know an Indian Child is Involved.**

The Indian Child Welfare Act (“ICWA”) mandates notice be provided to the child’s tribe or the Secretary of the Interior (“Secretary”) when the Department of Human Services (“DHS”)

“knows or has reason to know” an Indian child is involved;

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 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 ... the tribe cannot be determined, such notice shall be given to the Secretary in like manner... No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the ...Secretary... [25 USC 1912 (emphasis added).]

This ICWA notice requirement is clear and unambiguous. This Court has long held that its “primary obligation is to discern legislative intent as reflected in the plain language of the statute.” *Dimmitt & Owen Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). “When the language of a statute is unambiguous, the Legislature’s intent is clear, and judicial construction is neither necessary nor permitted.” *Id.* In drafting ICWA, Congress did not require a final decision on the Indian status of the child for the notice requirement to be triggered. Congress acknowledged that in early stages of any proceeding, the parties may have difficulty determining if an Indian child is involved. Clearly the phrase means the child need not yet be identified as an “Indian child” or the phrase “has reason to know” would be superfluous. DHS must also send notice to the Secretary

when the tribe is unknown. When the tribe is unknown, the child is not yet determined to be an “Indian child.” In addition, the language of 1912 is imperative: “No foster care placement or parental rights termination proceeding shall be held until 10 days after receipt of the notice.” 25 USC 1912(a). Without this notice, state agencies deprive tribes of their right under ICWA to identify their children, to intervene, to transfer the case, to ensure placement preferences are met, and to otherwise participate in the case. By mandating that “no ... proceeding shall be held”, *id.*, Congress limited the power of the court to act prior to receipt of notice. Doing otherwise disregards the plain language and protections guaranteed in ICWA.

The Michigan Court Rules require the inquiry process be on the record in order to eliminate any mistake about whether the court “knows or has reason to know” an Indian child is involved. In 2008, the Michigan Court Rules provided “The court **must inquire** if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child’s tribe, **notify the tribe or band**, and follow the procedures set forth in MCR 3.980” at the preliminary hearing. MCR 3.965(B)(9)(emphasis added). The current court rule is substantially similar; “[t]he court must inquire if the child or either parent is a member of an Indian tribe,” at the preliminary hearing. MCR 3.965(B)(2). The notice provisions of the Michigan Court Rules are precise and clear in their mandates. Inquiry must be made.

Amicus urges the Court to adopt the approach taken by the Colorado Supreme Court in *BH v People ex rel XH*, 138 P3d 299, 304 (Colo 2006). The court reasoned

Precisely what constitutes "reason to know" or "reason to believe" in any particular set of circumstances will necessarily evade meaningful description. As in other contexts, reasonable grounds to believe must depend upon the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and

the basis of the source's knowledge. In light of the purpose of the Act, however, to permit tribal involvement in child-custody determinations whenever tribal members are involved, the threshold requirement for notice was clearly not intended to be high.[*Id.* at 303.]

The Colorado Court proceeded to hold

Because membership is peculiarly within the province of each Indian tribe, sufficiently reliable information of virtually any criteria upon which membership might be based must be considered adequate to trigger the notice provisions of the Act. These criteria have included, but are not necessarily limited to, such considerations as enrollment, blood quantum, lineage, or residence on a reservation. *See Broncheau*, 597 F2d at 1263. [*Id.* at 304.]

The Colorado approach is supported by the Bureau of Indian Affairs Guidelines (“BIA Guidelines”). A state court may have reason to believe an Indian child is involved if “any party” to the case informs the court the child is an Indian child, the state protective agency “discovers information suggesting the child is an Indian child,” the child gives the court “a reason to believe he or she is an Indian child,” the child or parents lives in a “predominantly Indian community” or an office of the court “has knowledge that the child may be an Indian child.” Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* B.1, 44 Fed Reg 67584, 67592 (Nov. 26, 1979).²

Current Michigan case law correctly employs this identification standard. *See In re IEM*, 233 Mich App 438, 447-449; 592 NW2d 751 (1999). The courts require notice when a parent checked in a box on the Family Independence Agency (“FIA”)³ amended petition indicating the child was a member of or eligible for enrollment with no other specific information. *Id.* Also, in *In re TM*, 245 Mich App 181; 628 NW2d 570 (2001), the Court of Appeals found the mother’s

²The BIA Guidelines, while nonbinding, have been considered persuasive by Michigan courts. *In re IEM*, 233 Mich App 438, 445 n. 2; 592 NW2d 751 (1999).

³Now known as the Department of Human Services.

testimony that she believed “she was of Cherokee ancestry” sufficient to require the lower court to notify the three Cherokee tribes. *Id.* at 187-188.

The State of Michigan, through the Department of Human Services, already requires its employees provide notice not just in cases where an “Indian child” is involved but in all cases where there is “reason to believe” an Indian child may be involved. In its Policy and Procedure Manuals, DHS states three times that the requirements of ICWA are to be applied to every case where the employee has reason to believe the child may be Indian:

Where there is reason to believe a child may be Indian, the worker must follow ICWA regarding that child, pending verification of the child’s Indian status. [*DHS Policy and Procedures Manual, Native American Affairs*, NAA 200, page 2.]⁴

and

Where there is reason to believe a child may be Indian, the worker must follow the Indian Child Welfare Act (ICWA) requirements regarding that child, pending verification of the child’s Indian status. [NAA 205, page 1.]⁵

and

Where there is reason to believe a child may be Indian, the worker must follow the Indian Child Welfare Act (ICWA) requirements regarding that child, pending verification of the child’s Indian status. [NAA 210, page 1.]⁶

By these policy pronouncements, DHS has shown that the ICWA notice requirement, which is triggered when there is reason to know an Indian child is involved, can be easily followed and is not burdensome to the state.

Ideally, parents and children would already be enrolled members of a tribe when an ICWA

⁴<<http://www.mfia.state.mi.us/olmweb/ex/naa/200.pdf>>

⁵<<http://www.mfia.state.mi.us/olmweb/ex/naa/205.pdf>>

⁶<<http://www.mfia.state.mi.us/olmweb/ex/naa/210.pdf>>

case is filed, but Congress's mandate to notify the Secretary of the Interior demonstrates awareness that an Indian child or parent may not yet be enrolled with a tribe at the outset of a proceeding. If the Secretary is able to identify the tribe when the case is first initiated, the tribe can advise the parent what additional steps the parent must take to render the child eligible for membership. Establishing membership with a tribe can be a long and complicated process. For many reasons a person may put off investing the time and effort to gather the historical and family documents necessary to qualify for tribal membership. Under the gun of a child welfare proceeding, where the need for establishing membership is crucial, most people will begin the process of gathering the information needed for membership applications.

If notice is not given when the court has "reason to believe" an Indian child is involved, but only when the court knows the child is an Indian child, this procedure will have the opposite result of the one Congress intended. Reversal in cases of failure to give timely notice when the court had "reason to know" an Indian child was involved, as required by ICWA, will ensure that the will of Congress is followed and both the parents and the tribe will have the time needed to establish tribal membership or determine eligibility.

B. The Saginaw Chippewa Reservation Boundary Settlement Created a Separate Duty on DHS to Provide Notice, Which is not Subject to Waiver.

In addition to the requirements imposed upon DHS by ICWA, DHS accepted additional responsibilities in cases involving Saginaw Chippewa Indian children and tribal descendant children. Department of Human Services has a distinct and particular relationship with the Saginaw Chippewa Indian Tribe of Michigan pursuant to a federal consent decree. The Saginaw Chippewa Reservation Boundary Settlement created a separate duty on DHS to provide notice to the Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Chippewa"), an obligation that is not subject to

waiver by a parent. In 2010, the State of Michigan, the Federal government and the Saginaw Chippewa entered a settlement agreement in the US District Court for the Eastern District of Michigan regarding the exterior boundaries of the Isabella reservation.⁷ This settlement consisted of several parts, including, as relevant here, an agreement between Michigan DHS, the federal government and the Tribe regarding child welfare matters. *Saginaw Chippewa Tribe of Michigan v Granholm*, Case no. 05-10296-BC, Exhibit B (ED Mich. Nov. 9, 2010).⁸ This agreement became effective on December 17, 2010, upon entry by the federal court of the Order for Judgment. *Saginaw Chippewa Tribe of Michigan v Granholm*, Case no. 05-10296-BC (ED Mich. December 17, 2010).⁹ Although the case before this Court was heard at the trial level in 2008, the ICWA duty to provide notice is an on-going requirement. 25 USC 1912(a). As long as this case is actively before the Michigan courts, DHS is compelled to provide notice to the Tribe.

In addition to affirming its responsibilities under the ICWA, DHS accepted additional duties and agreed to cooperate with this particular Tribe regarding both Saginaw Chippewa and descendant children. With regard to notice,

County DHS offices must timely notify SCIT by mail of every Child-Custody Proceeding either by sending a notice of proceeding, if one is issued, or by sending a writing with enough information to determine the nature of the action and the status of the SCIT Child (*or SCIT Descendent Child, where allowed by law*) so that SCIT may participate in a Child-Custody Proceeding or may choose to exert tribal jurisdiction over a SCIT Child in the circumstances prescribed by ICWA. 25 USC 1911(b) and 1912(a). SCIT must make good-faith efforts to respond to any such notice it receives.

⁷A copy of the entire agreement and all related orders can be found on TurtleTalk; the blog for the Indigenous Law and Police Center at the Michigan State University College of Law. <<http://turtletalk.files.wordpress.com/2010/11/joint-motion-to-enter-order-for-judgment.pdf>>

⁸<<http://turtletalk.files.wordpress.com/2010/11/exhibit-b-icwa-agreement.pdf>>

⁹<<http://turtletalk.files.wordpress.com/2010/12/dct-order-approving-settlement.pdf>>

If the identity or location of a Parent or Indian Custodian or an Indian Child's tribe cannot be determined, county DHS offices must give notice to the Secretary of the Interior in like manner. *Id.* See also Mich. Ct. R. 3.905(c) and 3.920(c)(Proceedings Involving Juveniles, American Indian Children), 3.921(B)(2)(j)(requiring tribal notice in protective proceedings). [*Saginaw Chippewa Tribe of Michigan v Granholm*, Case no. 05-10296-BC, Exhibit B, Part III (G)(1)(ED Mich. Nov. 9, 2010).]

The agreement defines a descendant child as "a child who has Indian ancestry but who is not eligible for enrollment in a tribe or whose eligibility for enrollment cannot be determined." *Id.* at Part II(L).

The agreement also contains commitments regarding services and placement protocols for Saginaw Chippewa children, which stated in part "County DHS offices must immediately notify designated SCIT authorities when a SCIT Child, or a child whose SCIT Indian identity is not yet confirmed but for whom there are indicators of SCIT Indian heritage, is involved in either a child-welfare investigation or proceeding, including as soon as possible in emergency situations, regardless of where the child Resides or is Domiciled" *Id.* at Part III(B). The settlement agreement also covers DHS's obligation to work with Saginaw Chippewa to provide services to descendant children:

Both Parties recognize that a collaborative approach may allow the county DHS and SCIT authorities to offer more services to SCIT Descendent Children and their families, even if it is determined that ICWA does not apply. For SCIT Descendent Children, the DHS must consult with SCIT and carefully consider SCIT comments for issues including, but not limited to, appropriate potential placements, sibling visits, and Extended Family visits. Where allowed by law, county DHS must also coordinate with SCIT authorities in order to investigate and assess allegations of maltreatment and neglect of SCIT Descendent Children domiciled on the Reservation. DHS must also consider using joint investigations for SCIT Descendent Children Domiciled outside the Reservation. [*Id.* at Part III (C).]

The argument put forward by DHS, that the mother in this case waived ICWA applicability and DHS's obligation to provide notice to the Tribe, is contrary to the explicit and binding commitment DHS made to the Saginaw Chippewa Tribe. The agreement between DHS and the Saginaw Chippewa Tribe affirms that the ICWA notice requirement includes not only Indian children but

also descendant children. Thus, whether the mother in this cases made statements that indicated the child might not be eligible for services from the Tribe is irrelevant to the analysis of whether DHS must provide notice and whether the ICWA applies. By this agreement, DHS reaffirmed its commitment to provide notice to the Tribe regardless of whether the child was eligible for membership and regardless of any potential waiver by a parent. DHS made promises to this particular Tribe and those promises have the full force of a federal court order.

In addition, DHS proclaimed notice to the Tribe and tribal participation is the best interest of Indian children. The agreement states as its purpose “is to protect the long-term best interests of Indian Children and their families by maintaining the integrity of the tribal family, Extended Family [], and an Indian Child’s tribal relationship. The Parties’ intent in entering into this Agreement is to strengthen implementation of the letter, spirit, and intent of the Act.” *Id.* at Part I(B). The stated purpose of the service portion of the settlement agreement was “to secure and to preserve an Indian Child’s sense of belonging to her or his family and tribe. The Parties agree that cooperating to combine their abilities and resources to provide effective assistance to Indian Children and their families is the best means to reach this shared goal.” *Id.* at Part III (A). The argument that the mother could waive notice to the Tribe by making ambiguous statements regarding eligibility for tribal services is contrary to the very principals DHS claimed to hold in this federal settlement. By the terms of the agreement, DHS confirmed the importance of tribal involvement in child welfare cases and its responsibility to provide notice to this particular Tribe.

II THE DEPARTMENT OF HUMAN SERVICES AND THE FAMILY COURT ARE REQUIRED TO MAKE AND TO MAINTAIN AN ACCURATE CASE RECORD.

The Court of Appeals opinion cannot stand because the lower court record is devoid of any

evidence of notification to either the Tribe or the Secretary. The plain language of ICWA, the 2008 and current Michigan Court Rules and the DHS Policy and Procedure Manuals commit the trial court and DHS to keeping a complete record of compliance with the ICWA notice requirement.

A. DHS Policy and Procedure Manuals Require Case Workers to Keep Accurate and Up-to-Date Records of All Actions, Including Records of Notice.

The State of Michigan, through the Department of Human Services, requires its employees to make and to maintain accurate records of notice to the tribes or Secretary. “State and federal law require the DHS to promulgate rules, policies, and instructions to carry out the statutory mandates,” *In re Rood*, 483 Mich 73, 96; 763 NW2d 587, 600 (2009), and the current DHS Records Management Policy requires all DHS workers to keep accurate and contemporaneous case records. The Policy states “the local office director or designee **must** assign specific responsibilities for case record maintenance. It is imperative that records be kept current at all times.” *DHS Records Management - Case Record Policy Manual*, AHS 502, page 1 (emphasis added).¹⁰ DHS requires its social workers to keep accurate and up-to-date information on all relevant case data within the case record. This includes, but is not limited to, “signed and witnessed application for, or recipient of, all services requested or provided.” AHS 502, page at 1.

DHS imposes upon itself stricter notice requirements than required by the plain language of ICWA in its Policy and Procedure Manuals. In its current Native American Affairs Manual, DHS employees are instructed to give notice to parents, tribes or the Secretary within three working days of assignment of a CPS complaint for investigation or any case opening for children’s services that

¹⁰Copies of the DHS Policy and Procedure Manuals are located on the DHS web site. <<http://www.mfia.state.mi.us/olmweb/ex/ahs/ahs.pdf>>.

involves a child with possible tribal affiliation. NAA 200, page 4.¹¹ DHS further instructs its employees on proper notice procedure and record retention requirements:

In any child custody proceeding in a family court where the worker knows, has reason to know, or at any time learns, that an Indian child is involved, the DHS-120, Notice Of Proceedings Concerning North American Indian Child (see RFF 120) must be sent by **registered mail with return receipt** to all of the following:

Parent(s).

Indian custodian(s) (if any).

Indian child's tribe when known or upon receipt of verification from the Midwest Bureau of Indian Affairs of the Indian ancestry of that tribe.

Midwest Bureau of Indian Affairs (as designated for Michigan by the Secretary of the Interior) if tribal affiliation is unclear.

The worker must also send the DHS-120 according to the instructions above when seeking foster care placement of, termination of parental rights to, or adoption of, an Indian child.

Note: The parent(s) or Indian custodian(s) and the child's tribe or Secretary of the Interior must receive the notice 10 days before the date of the hearing. **A copy of the DHS-120 and return receipt must be filed in the Indian child's case record.**

Failure to complete proper notice may jeopardize and nullify the court proceedings. [NAA 210, page 1 (emphasis added).]¹²

By enacting this policy, DHS has accepted the responsibility to maintain records of notice within the child's case file and has shown the ICWA notice is not a burden on the state. In addition, DHS concedes the possibility of reversal for failure to comply with ICWA notice provisions. NAA 210. Fortunately for the State, compliance with the notice scheme is easy and inexpensive.

B. 25 USC 1912(a), the BIA Guidelines, and the Michigan Court Rules Require the Family Court to Ensure and Record that the Petitioner has Given Notice to the Tribe.

ICWA and the Michigan Court Rules compel the court to ensure DHS has given notice to

¹¹<<http://www.mfia.state.mi.us/olmweb/ex/naa/naa.pdf>>

¹²<<http://www.mfia.state.mi.us/olmweb/ex/naa/210.pdf>>

the tribes or the Secretary and to make a complete record of compliance. Section 1912(a) requires:

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[.] [25 USC 1912(a).]

The precise wording of 25 USC 1912(a) demonstrates the care Congress took to ensure the trial court would not only monitor notice, but make a complete record of compliance. First, ICWA not only requires notice to the Tribe, it mandates specific evidence that the Tribe received notice, namely the “return receipt requested.” Second, by requiring no hearing be held until after the receipt of notice, ICWA commands the trial court not only to ensure that DHS has provided notice but also that it receive a copy of the return receipt. By mandating that “no ... proceeding shall be held”, *id.*, Congress limited the power of the court to act prior to its receipt of evidence of notice. Allowing it to do otherwise disregards the plain language and protections guaranteed in ICWA.

The ICWA requirement to maintain a record of compliance with statutory notice provision is sustained and supplemented in the BIA Guidelines; which provide, in relevant part: “[t]he original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.” *BIA Guidelines*, B.5(d), 44 Fed Reg at 67588.

The 2008 and current Michigan Court Rules put the court under a duty to make a complete record of compliance with the ICWA notice requirement. Michigan has incorporated many of the ICWA procedural requirements into the juvenile proceedings section of the Michigan Court Rules. MCR Chapter 3.900. In 2008, the Michigan Court Rules provided that at the preliminary hearing,

The court must inquire if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, **the court must determine the identity of the child's tribe, notify the tribe or band**, and follow the procedures set forth in MCR 3.980. [MCR 3.965(B)(9).]

The rule, as it existed in 2008, clearly obligated the court to ensure that notice occurred and, accordingly, required that a complete record of compliance be maintained. In addition, MCR 3.980(A)(2) reflected the notice provision of 25 USC 1912(a) by requiring notice of any proceedings to be sent to the child's tribe and, if the tribe is unknown, to the Secretary of Interior. Further, the Michigan Court Rules generally require the trial court to make a complete record of notice. MCR 3.920(d)(1) mandates "notice of a hearing must be given in writing or on the record at least 7 days before the hearing except as provided in sub-rules (D)(2) and (D)(3), or as otherwise provided in the rules."

The current Michigan Court Rules more closely track the procedural requirements mandated by ICWA; Chapter 3.900 was substantially amended in 2010 in order to update and integrate ICWA requirements. MCR 3.905(c) states, in relevant part,

if an Indian child is the subject of a protective proceeding [] **the court shall ensure** that the petitioner has given notice of the proceedings to the persons described in MCR 3.921 in accordance with MCR 3.920(C). [MCR 3.905(c)(emphasis added).]

MCR 3.920(C) further provides

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, **by personal service or by registered mail with return receipt requested**, of the pending proceedings on petition filed under MCR 3.931 or MCR 3.961 and of their right of intervention **on a form approved by the State Court Administrative Office**. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior **by registered mail with return receipt requested**. Subsequent notices shall be served in accordance with this subrule for proceedings under MCR 3.967 and MCR 3.977.

(2) **the court shall notify** the parent or Indian custodian and the Indian child's tribe

of all hearings other than those specified in subrule (1) as provided in subrule (D). If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be by first-class mail. [MCR 3.905(C)(emphasis added)].

It is clear and unambiguous that the court is obligated to ensure the tribe or Secretary receives notice and, in some cases, the court is itself obligated to provide the notice.

The plain language of ICWA, the BIA Guidelines, and the 2008 and current Michigan Court Rules put the court under a duty to make a complete record of compliance with the ICWA notice requirements. Accordingly, the Court of Appeals opinion cannot stand because the court record is devoid of any evidence that notification took place.

III. A PARENT CANNOT WAIVE THE APPLICATION OF THE FEDERAL ICWA AND A TRIBE'S RIGHTS.

Contrary to the position taken by DHS and accepted by the Court of Appeals, a parent cannot waive the application of the federal ICWA and the rights guaranteed thereunder to a tribe. Therefore, the Court of Appeals opinion cannot stand.

A. The Tribe has Separate Interests in the Child Guaranteed by ICWA.

The tribe has a separate interest in the child that is guaranteed by ICWA and cannot be defeated by the actions of a parent. Congress enacted the Indian Child Welfare Act ("ICWA") in 1978, PL 95-608; 25 USC 1901-1963, to prevent the "wholesale separation of Indian children from their families" and their tribal communities. *1978 House Report*, at 9. Congress recognized that state law and policy affecting Indian children and families had an enormous impact on the future of Indian tribes. ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society." *Holyfield*, 490 US at 37

(quoting *1978 House Report*, at 23, U.S.Code Cong. & Admin.News 1978, at 7546). As the US

Supreme Court quoted Chief Isaac of the Mississippi Band of Choctaw

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships. [*Holyfield*, 490 US at 34 (citing *1978 Hearings*, at 193).]

The *Holyfield* Court found “placements in non-Indian homes deprive[] the child of his or her tribal and cultural heritage,” *Id.* at 50 n. 24 (quoting Senate Rep. No. 95-9597, p. 45 (1977), and “[i]t is in the Indian child’s best interest that its relationship to the tribe be protected.” *Id.* at 50.

Because of the history of state court and child welfare systems making ill-informed decisions regarding termination, removal and placement of Indian children due to ignorance of Indian culture and childrearing practices, 25 USC 1901(5), *see also Holyfield*, 490 US at 34-35, Congress ensured that tribes have an unqualified right of intervention and the right to seek the transfer of those cases. 25 USC 1911(c); *see also* MCR 3.807(B)(3); MCR 3.905(D); MCR 5.402(E)(4). Upon intervention, a tribe becomes a full party to the case and, as a result, is entitled to respond to and to file motions, call its own witness, and examine all relevant documents filed with the court. 25 USC 1912(c). As a party, the Tribe can also educate the court on tribal cultural and social standards. The state court is then a position to make more informed decisions that adhere to the spirit and intent of the act and thereby, protect both the best interest of the child as defined by ICWA and the continued existence and integrity of Indian tribes.

The ICWA also “creates concurrent but presumptively tribal jurisdiction” even where a state court has initial jurisdiction over a child welfare proceedings. 25 USC 1911(b), *see also Holyfield*, 490 US at 36. Parents, an Indian custodian, or the tribe may, at any time in the proceeding, petition

to transfer the proceeding to a tribal court. The petition must be granted unless one of the narrow exceptions is met. The federal legislation recognizes the sovereignty of tribal courts in making determinations regarding the placement and future of Indian children. "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings," *Holyfield*, 490 US at 36, and the Act recognizes there is real value in a tribe being able to make decisions in its children's best interest.

As Professor BJ Jones observed:

One of the fundamental underpinnings of the ICWA is the notion that a child's Indian tribe has a discrete interest, separate from a parent's or Indian custodian's, in any proceeding involving the child that must be protected throughout. [BJ Jones, *The Indian Child Welfare Act Handbook* 84 (2nd ed 2008).]

In order to ensure tribes' ability to make the important decisions for tribal children, ICWA ensures that tribes have an unqualified right of intervention, enabling them to both participate as a full party to the litigation, and to seek the transfer of those cases. "The Act clearly protects the right of the tribe independent from any rights held by either parent." *In re Kahlen W.*, 233 Cal App3d 1414, 1425 (Cal App 5th Dist 1991). These particular rights guaranteed to the tribes and the application of ICWA, in general, cannot be waived by a third party; even if that third party is a parent. "Congress passed ICWA to limit state court power by creating mandatory protective procedures and minimum evidentiary standards that must be applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA." *In re Baby Boy Doe*, 123 Idaho 464; 849 P2d 925, 932 (Idaho 1993).

B. The United States Supreme Court in *Holyfield* Recognized that Parents' Actions Cannot Defeat the Application of ICWA.

When asked to resolve the question of whether a parent's actions could defeat the application of the ICWA and the rights of the tribe, the United States Supreme Court answered with a resounding "NO!" In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30; 109 S Ct 1597 (1989), the US Supreme Court reviewed a case where an Indian mother attempted to divest the Choctaw Tribal Court of jurisdiction over the adoption of her twins. The mother was a tribal member and a resident of the reservation but decided to give birth to her children 200 miles from the reservation and to voluntarily put her children up for adoption in a Mississippi state court. *Id.* at 37-38. Two months after the adoption had been finalized, the Tribe moved to set aside the adoption on the basis that the Choctaw Tribal Court had exclusive jurisdiction over the children under ICWA. *Id.* at 38. The Mississippi trial court denied the Tribe's motion, a decision that was affirmed by the Court of Appeals and the Supreme Court of Mississippi on the basis that the children were never domiciled on the reservation. *Id.* at 39. On review, the US Supreme Court stated:

Tribal jurisdiction under 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. See 25 USC 1901(3)("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes"). The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e. g., 1911(a)(exclusive jurisdiction over reservation domiciliaries), 1911(b)(presumptive jurisdiction over nondomiciliaries), 1911(c)(right of intervention), 1912(a)(notice), 1914 (right to petition for invalidation of state-court action), 1915(c)(right to alter presumptive placement priorities applicable to state-court actions), 1915(e)(right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, **but also of the tribes themselves.** [*Id.* at 49 (emphasis added).]

The Court further reasoned

These congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended. *See In re Adoption of Child of Indian Heritage*, 111 N J 155, 168-171; 543 A2d 925, 931-933 (1988). The appellees in this case argue strenuously that the twins' mother went to great lengths to give birth off the reservation so that her children could be adopted by the Holyfields. But that was precisely part of Congress' concern. **Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish.** [*Id.* at 51 (emphasis added).]

Therefore, the Court concluded that a parent's actions could not defeat the rights of the Tribe.

Amicus urge this Court to adopt the approach taken by the Colorado Supreme Court in *B.H. v. People ex rel. X.H.*, 138 P3d 299 (CO 2006), where the Court applied the *Holyfield* analysis and holding to the situation currently facing this Court. In the Colorado case, the state alleged the mother had made statements to the effect that she and her child were not eligible for membership although they were of Cherokee descent. The Court stated "whether the child's mother denied applicability of the Act or not, and whether the child's grandmother actually expressed concerns about protecting the child's Indian heritage before the day of trial or not, the petitioning or filing party (the department) was clearly aware of the child's Indian ancestry, imposing upon it a duty of further inquiry and notice pursuant to the Act." *Id.* at 305. The Court concluded that "[b]ecause the protection of a separate tribal interest is at the core of the ICWA, *see Holyfield*, 490 U.S. at 52, otherwise sufficiently reliable information cannot be overcome by the statements, actions, or waiver of a parent, *id.* at 49." *B.H.*, 138 P3d at 304; *see also In re Kahlen W.*, 233 Cal App3d 1414, 1425 (Cal App 5th Dist 1991)("Nor can it be said Kathleen D., [Respondent-Mother,] by her silence, waived her rights under the Act. There has been no showing Kathleen knew the consequences of her and Kahlen's Indian status and knowingly relinquished them. Moreover, the [BIA] Guidelines provide that a juvenile court has an affirmative duty to inquire about a child's Indian status.") Thus, a

parent's statements or actions cannot waive the ICWA notice requirement or the application of the Act because the Tribe has a separate and protected interest in the child. Accordingly, the Court of Appeals opinion cannot stand.

C. Longstanding Michigan Court Precedent Imposes a Duty on Courts to Implement the Entire ICWA.

Recently, in the case of *Empson-Laviolette v Crago*, 280 Mich App 620; 760 NW2d 793 (2008), the Court of Appeals was called upon to harmonize two seemingly contradictory sections of the ICWA. The court employed two canons of construction to aid in resolving the question. First, it stated;

We liberally construe remedial statutes in favor of the persons intended to be benefitted. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993). The ICWA is a remedial statute designed to protect Indian children and the stability and security of Indian tribes and families... Accordingly, we are to construe the ICWA in favor of Empson, as she is the intended beneficiary of the ICWA. [280 Mich App at 629.]

The first canon is echoed by long standing United States Supreme Court precedent that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v Blackfeet Tribe of Indians*, 471 US 759, 766; 105 S Ct 2399 (1985). The argument that a tribe’s rights or the application of ICWA can be waived by a parent flies in the face of the Indian canon of construction. ICWA directs notice be provided to the tribe or Secretary when the court “knows or has reason to know” an Indian child is involved; this requirement must be given the full weight of its plain meaning as it benefits the tribe, the Indian child, and the family.

The second canon employed by the *Empson-Laviolette* court is similarly applicable here:

In addition, we must avoid a construction that would render any part of the statute surplusage or nugatory. *In re Complaint of McLeod USA Telecom Services, Inc*, 277 Mich App 602, 611; 751 NW2d 508 (2008). A statutory provision is rendered nugatory when an interpretation fails to give the provision meaning or effect. [280

Mich App at 629.]

The canons of construction state that a court must “avoid a construction that would render any part of the statute surplusage or nugatory.” It is well established and recently affirmed by this Court that “[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Driver v Naini*, 490 Mich 239, 256; 802 NW2d 311 (2011). The first step in the ICWA statutory scheme is to identify children that are or may be Indian children. 25 USC 1912(a). The petitioner is required to notify tribes “where the court knows or has reason to know” an Indian child is involved. In cases where the “identity or location” of the tribe cannot be determined, the petitioning party must serve notice upon the Secretary. *Id.* In this, ICWA “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society.” *Holyfield*, 490 US at 37 (quoting *1978 House Report*, at 23, U.S.Code Cong. & Admin.News 1978, at 7546). Where the language of the statute does not provide for waiver by a party, the plain language of the statute must be given full weight and the law must be followed as written; it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA.

CONCLUSION

Amicus Curiae respectfully request this Court to either grant leave to appeal or to reverse the order of Court of Appeals. Congress put the reputation of the United States behind the ICWA.

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families ... [25 USC 1902.]

Because membership is peculiarly within the province of each tribe, sufficiently reliable information

of virtually any criteria upon which membership might be based must be considered adequate to trigger notice. The plain language of ICWA mandates this approach, as does the Michigan Court Rules, the BIA Guidelines, current Michigan case law, and the DHS Policy and Procedure Manuals. Further, there is a distinct relationship between DHS and the Saginaw Chippewa pursuant to a federal consent decree, which created a separate duty on DHS to provide notice particularly to the Saginaw Chippewa Tribe. Not only are DHS and the Family Court responsible for ensuring notice occurred, they are obligated to make a complete record of compliance pursuant to the plain language of ICWA, the DHS Policy and Procedure Manuals, the BIA Guidelines and the Michigan Court Rules.

A parent's ambiguous comment cannot be construed as a waiver of the federal protections, such as the requirement that Department of Human Services provide active efforts to reunify the family, provide culturally appropriate services, place children in family and/or Indian homes, provide an expert witness to testify, and meet heightened standards of proof that guaranteed to her, her child, and the child's tribe. 25 USC 1912. The Tribe has a separate and protected interest in the child, which the US Supreme Court has found cannot be waived by the actions of a parent.

If notice is not given when the court has reason to believe an Indian child is involved but only when the court knows the child is an Indian child, this approach will have the opposite result of the one Congress intended. The remedy of reversal when DHS fails to provide notice when it knew or should known an Indian child was involved will encourage all parties to take the simple step of dropping an envelope in the mail to the tribe or the Secretary. Instead of condoning repeated violations of the ICWA notice requirements, the Court will be enforcing a clear imperative and instructing that henceforth the law must be followed as written.

Respectfully submitted,



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