

STATE OF MICHIGAN  
IN THE SUPREME COURT

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IN THE MATTER OF JEREMIAH LEONARD GORDON

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

Supreme Court  
No. 143673

-vs-

Court of Appeals  
No. 301592

COURTNEY HINKLE,

Family Court  
No. 2008-746988-NA

Respondent-Appellant.

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PETITIONER'S RESPONSE TO RESPONDENT'S APPLICATION FOR  
LEAVE TO APPEAL

(ORAL ARGUMENT REQUESTED)

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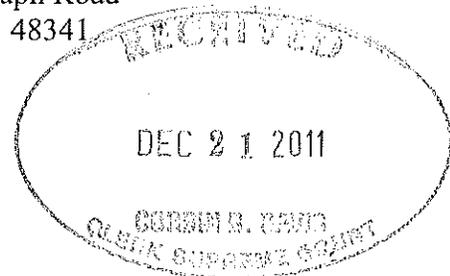


TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES CITED.....	iii
RESPONSE TO APPELLANT’S JURISDICTIONAL STATEMENT.....	viii
COUNTERSTATEMENT OF QUESTIONS PRESENTED .....	ix
COUNTERSTATEMENT OF FACTS .....	1

ARGUMENT:

I. RESPONDENT FAILED TO MEET HER BURDEN TO SHOW THAT THE NOTICE PROVISIONS OF THE INDIAN CHILD WELFARE ACT WERE TRIGGERED MUCH LESS THAT PLAIN ERROR OCCURRED WHEN THERE WAS NO INFORMATION ON THE RECORD THAT JEREMIAH WAS A TRIBE MEMBER OR ELIGIBLE FOR MEMBERSHIP, NO INFORMATION THAT RESPONDENT HERSELF WAS A TRIBE MEMBER, RESPONDENT AFFIRMATIVELY INDICATED THAT BOTH SHE AND HER SON WERE NOT TRIBE MEMBERS, AND THERE WAS NOTHING CONTRADICTING HER STATEMENT ON THE RECORD.

<i>Standard of Review and Issue Preservation</i> .....	14
<i>Discussion</i> .....	15

III. RESPONDENT WAIVED HER CLAIM THAT THE COURT HAD REASON TO KNOW THAT JEREMIAH WAS AN INDIAN CHILD WHEN SHE STATED THAT SHE AND HER SON WERE NOT TRIBE MEMBERS.

<i>Standard of Review and Issue Preservation</i> .....	31
<i>Discussion</i> .....	32

II. THE EXISTING RECORD SHOWS THAT THE TRIBE HAD ACTUAL NOTICE AND THEREFORE EVEN IF THE FAMILY COURT HAD A REASON TO KNOW AT SOME POINT IN THE PROCEEDINGS THAT THE CHILD WAS AN INDIAN CHILD, THE ICWA WAS SATISFIED AND RESPONDENT HAS FAILED TO SHOW PLAIN ERROR RESULTING IN A MISCARRIAGE OF JUSTICE.

*Standard of Review and Issue Preservation* .....38

*Discussion* .....38

RELIEF .....45

INDEX TO AUTHORITIES CITED

<u>CASES:</u>	<u>PAGE</u>
<i>Arizona Dep't of Econ. Sec. v Bernini</i> , 48 P3d 512 (Ariz App, 2002) .....	18
<i>B.H. v People ex rel X.H.</i> , 138 P3d 299 (Colo, 2006) .....	22
<i>Bruce L v W.E.</i> , 247 P3d 966 (Alaska, 2011) .....	21
<i>Dependency of E.S.</i> , 92 Wn App 762; 964 P2d 404 (1998).....	39
<i>Empson-Laviolette v Crago</i> , 280 Mich App 620; 760 NW2d 793 (2008).....	16
<i>In re A.B.</i> , 245 P3d 711 (Utah, 2010) .....	32
<i>In re A.S.</i> , 614 NW2d 383 (SD, 2000) .....	14, 23
<i>In re Adoption of a Child of Indian Heritage</i> , 111 NJ 155; 543 A2d 925 (1988) .....	18, 21
<i>In re Adoption of C.D.</i> , 751 NW2d 236 (ND, 2008) .....	23
<i>In re Anaya J.G.</i> , 403 Ill App 3d 875; 932 NE2d 1192 (2010) .....	25
<i>In re Anderson</i> , 176 Ore App 311; 31 P3d 510 (2001).....	26, 27
<i>In re Baby Boy Doe</i> , 123 Idaho 464; 849 P2d 925 (1993).....	14
<i>In re C.P.</i> , 181 NC App 698; 641 SE2d 13 ( 2007).....	14
<i>In re Cain Keel L</i> , 911 NYS3d 335; 78 AD3d 541 (2010) .....	14
<i>In re Dependency and Neglect of A.L.</i> 442 NW2d 233 (SD, 1989).....	39
<i>In re Fried</i> , 266 Mich App 535; 702 NW2d 192 (2005) .....	38
<i>In re Gorden</i> , unpublished per curiam opinion of the Court of Appeals dec'd August 11, 2011 (Docket No. 301592).....	2, 3
<i>In re Guardianship of J.O.</i> , 327 NJ Super 304; 743 A2d 341 (2000) .....	20
<i>In re Hatcher</i> , 443 Mich 426; 505 NW2d 834 (1993).....	40
<i>In re I.W.</i> , 180 Cal App 4 <sup>th</sup> 1517; 103 Cal Rptr 3d 538 (2009) .....	39
<i>In re IEM</i> , 233 Mich App 438; 592 NW2d 751 (1999).....	20, 43
<i>In re Interest of J.L.M.</i> , 234 Neb 381; 451 NW2d 377 (1990) .....	14

<i>In re Jeremiah G</i> , 172 Cal App 4 <sup>th</sup> 1514; 92 Cal Rptr 3d 203 (2009) .....	20
<i>In re JL</i> , 483 Mich 300; 770 NW2d 853 (2009) .....	14, 16
<i>In re Johanson</i> , 156 Mich App 608; 402 NW2d 13 (1986).....	20, 21
<i>In re Kenten H</i> , 272 Neb 846; 725 NW2d 548 (2007).....	37
<i>In re L.B.</i> , 110 Cal App 4 <sup>th</sup> 1420; 3 Cal Rptr 16 (2003) .....	39, 40, 41
<i>In re Levi U.</i> , 78 Cal App 4th 191; 92 Cal Rptr 648 (2000) .....	40
<i>In re NEGP</i> , 245 Mich App 126; 626 NW2d 921 (2001).....	20, 39, 43
<i>In re S.B.</i> , 130 Cal App 4th 1148; 30 Cal Rptr 3d 726 (2005) .....	34, 35
<i>In re S.Z.</i> , 325 NW2d 53 (SD, 1982) .....	39
<i>In re T.A.</i> , 378 Ill App 3d 1083; 883 NE2d 639 (2008).....	14, 20, 26
<i>In re the Termination of Parental Rights to Arianna R.G.</i> , 259 Wis 2d 563; 657 NW2d 363 (2003).....	14, 24
<i>In re TM</i> , 245 Mich App 181; 628 NW2d 570 (2001).....	20, 39
<i>In re Trever I</i> , 973 A2d 752 (Me, 2009).....	24
<i>In the Interest of A.E.</i> , 749 P2d 450 (Colo App, 1987).....	28
<i>In the Interest of A.G.-G.</i> , 899 P2d 319 (Colo App, 1995).....	27
<i>In the Interest of A.L.</i> 623 NW2d 418 (ND, 2001) .....	23
<i>In the Interest of J.D.B.</i> , 584 NW2d 577 (Iowa App, 1998).....	36
<i>In the Interest of J.J.G.</i> , 32 Kan App 2d 448; 83 P3d 1264 (2004) overruled on other grounds, 286 Kan 686; 187 P3d 594 (2008).....	39
<i>In the Interest of R.M.W.</i> , 188 SW3d 831 (Tex App, 2006) .....	26
<i>In the Interest of T.D.</i> , 890 So2d 473 (Fla App, 2004) .....	20
<i>In the Interest of Z.H.</i> 740 NW2d 648 (Iowa App, 2007).....	19, 20
<i>In the Matter of the Appeal in Maricopa County Juvenile Action No. A-25525</i> , 667 P2d 228 (Ariz App, 1983).....	19
<i>Meecham v Knolls Atomic Power Lab.</i> , 554 US 84; 128 S Ct 2395; 171 L Ed 2d 283 (2008)....	14

<i>Mississippi Choctaw Indian Band v Holyfield</i> , 490 US 30; 109 S Ct 1597; 104 L Ed 2d 29 (1989).....	16, 21
<i>Nielson v Ketchum</i> , 640 F3d 1117 (CA 10, 2011).....	16, 19, 33
<i>Paschke v Retool Indus.</i> , 445 Mich 502; 519 NW2d 441 (1994).....	34
<i>People ex rel A.G.-G.</i> , 899 P2d 319 (Colo App, 1995).....	14, 20
<i>People v Carines</i> , 460 Mich 750; 597 NW2d 130 (1999).....	15, 38
<i>People v Carter</i> , 462 Mich 206; 612 NW2d 144 (2000).....	34
<i>People v Dowdy</i> , 489 Mich 373; 802 NW2d 234 (2011).....	14, 21
<i>People v Hardin</i> , 421 Mich 296; 365 NW2d 101 (1984).....	34
<i>People v Pollick</i> , 448 Mich 376; 531 NW2d 159 (1995).....	34
<i>People v Riley</i> , 465 Mich 442; 636 NW2d 514 (2001).....	32
<i>People v Shahideh</i> , 482 Mich 1156; 758 NW2d 536 (2009).....	34
<i>People v White</i> , 208 Mich App 126; 527 NW2d 32 (1994).....	42
<i>State ex rel Juv Dept v Tucker</i> , 76 Or App 673; 710 P2d 793 (1985).....	37
<i>State ex rel MJ</i> , ___ P3d ___ (Utah App, 2001).....	25, 31

STATUTES:

MCL 16.550.....	42
MCL 712A.14.....	4
MCL 712A.17c(4).....	4
MCL 722.1104.....	16

MISCELLANEOUS AUTHORITIES:

25 CFR 23.2.....	18
25 CFR 23.11.....	17
25 CFR 23.11(a)(d).....	38

25 USC §1902.....	16, 31
25 USC §1903.....	29
25 USC §1903(4).....	30
25 USC §1903(9).....	33
25 USC §1911.....	33
25 USC §1911(a).....	16
25 USC §1911(b).....	17
25 USC §1911(c).....	16
25 USC §1912.....	17, 33
25 USC §1913.....	33
25 USC §1914.....	33
44 Fed Reg at 67,584.....	21
44 Fed. Reg at 67,586.....	21
Black's Law Dictionary (9 <sup>th</sup> ed.).....	22, 34

RULES:

MCR 2.613(C).....	14
MCR 3.002.....	16, 18, 29
MCR 3.903.....	3
MCR 3.905.....	16, 17
MCR 3.915.....	4
MCR 3.961.....	18
MCR 3.963.....	4
MCR 3.965.....	18, 19, 39
MCR 3.967.....	3, 4, 18

MCR 7.210.....	41
MCR 7.316.....	43

RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT

On November 23, 2011 this Court, when considering respondent's application for leave to appeal from the August 11, 2011 judgment of the Court of Appeals' terminating parental rights, allowed supplemental briefing on three specific issues.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. DID RESPONDENT FAIL TO MEET HER BURDEN TO SHOW THAT THE NOTICE PROVISIONS OF THE INDIAN CHILD WELFARE ACT WERE TRIGGERED MUCH LESS THAT PLAIN ERROR OCCURRED WHEN THERE WAS NO INFORMATION ON THE RECORD THAT JEREMIAH WAS A TRIBE MEMBER OR ELIGIBLE FOR MEMBERSHIP, NO INFORMATION THAT RESPONDENT HERSELF WAS A TRIBE MEMBER, RESPONDENT AFFIRMATIVELY INDICATED THAT BOTH SHE AND HER SON WERE NOT TRIBE MEMBERS, AND THERE WAS NOTHING CONTRADICTING HER STATEMENT ON THE RECORD?

Respondent contends the answer should be, "no."

Petitioner submits the answer is, "yes."

The guardian ad litem did not assert in the family court or on appeal that the record revealed that Jeremiah was an Indian child.

The Court of Appeals answered:

"[G]iven respondent's own statement in court that she received a response that she and her son were not eligible for tribal membership, the trial court was relieved from embarking on further ICWA tribal notification efforts."

The family court did not find that the child was an Indian child.

III. DID RESPONDENT WAIVE HER CLAIM THAT THE COURT HAD REASON TO KNOW THAT JEREMIAH WAS AN INDIAN CHILD WHEN SHE STATED THAT SHE AND HER SON WERE NOT TRIBE MEMBERS?

Respondent contends the answer should be, "no."

Petitioner submits the answer is, "yes."

The guardian ad litem did not assert in the family court or on appeal that the record revealed that Jeremiah was an Indian child.

The Court of Appeals again answered:

“[G]iven respondent's own statement in court that she received a response that she and her son were not eligible for tribal membership, the trial court was relieved from embarking on further ICWA tribal notification efforts.”

The family court did not find that the child was an Indian child.

II. WHEN, EVEN IF THE FAMILY COURT HAD A REASON TO KNOW AT SOME POINT IN THE PROCEEDINGS THAT THE CHILD WAS AN INDIAN CHILD, DID THE EXISTING RECORD SHOWS THAT THE TRIBE HAD ACTUAL NOTICE?

Respondent contends the answer should be, “no.”

Petitioner submits the answer is, “yes.”

The guardian ad litem did not raise any violation of the ICWA in the family court or on appeal.

The Court of Appeals found that there was sufficient evidence on the record that the tribe received actual notice.

The family court again, did not find that an Indian child was involved.

THEREFORE HAS RESPONDENT HAS SHOWN THE ICWA WAS VIOLATED OR THAT PLAIN ERROR RESULTING IN A MISCARRIAGE OF JUSTICE OCCURRED?

Respondent contends the answer should be, “yes.”

Petitioner submits the answer is, “no.”

The guardian ad litem did not raise any violation of the ICWA in the family court or on appeal.

The Court of Appeals found that there was sufficient evidence on the record that the tribe received actual notice.

The family court again, did not find that an Indian child was involved.

## COUNTERSTATEMENT OF FACTS

On August 11, 2011, the Court of Appeals found sufficient statutory grounds for termination of respondent-mother's parental rights as well as that termination was in the child's best interest. (The biological father of the child was unknown.<sup>1</sup>) The Court found the following:

- The trial court did not clearly err in finding that MCL 712A.19b(3)(c)(i), (g), and (j) were established by clear and convincing evidence.
- The conditions that led to adjudication included respondent's unsuitable housing, financial instability, and emotional instability.
- Respondent had more than two years to provide a suitable home environment, achieve financial and emotional stability, and establish or maintain a parental bond with her son.
- There was sufficient evidence that petitioner provided respondent with reasonable services to facilitate reunifying the family. Offered services included psychological evaluations, psychiatric evaluation, individual and domestic violence counseling, parenting classes, parenting time, and transportation assistance.
- The trial court properly concluded that respondent had not substantially complied with and benefited from her case treatment plan. Specifically, respondent failed to (1) maintain stable, suitable housing, (2) maintain regular, legal, and verifiable employment, (3) consistently attend court-ordered parenting time, and (4) establish or maintain a parental bond with the child. Failure to comply with a court-ordered case service plan is indicative of neglect. *In re Trejo*, 462 Mich 341, 360-361 n 16; 612 NW2d 407 (2000). A parent must benefit from services in order to provide a safe, nurturing home for the child. *In re JL*, 483 Mich 300, 330-331; 770 NW2d 853 (2009).
- Respondent failed to address the issues that led to adjudication. The trial court heard persuasive testimony from the case worker and the clinical psychologist that, despite support services, respondent's behaviors, particularly her poor judgment and decision making, remained unchanged.
- Additionally, the lawyer-guardian ad litem recommended termination of respondent's parental rights and told the court that she observed many instances where it seemed the child was not respondent's primary focus

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<sup>1</sup> 5/22/08 T at 5, 6, 8; 7/21/08 T at 4

and interest. Other people and interests misdirected respondent's time, money, and attention away from the child, placing him at risk.

- There was ample evidence that respondent did not show any insight into what was important for the child. Rather than taking responsibility for problems, respondent blamed someone else. These proofs satisfied all three statutory grounds for termination.<sup>2</sup>

On appeal, respondent had also claimed that the Department and the family court failed to comply with the obligations of the Indian Child Welfare Act. The guardian ad litem did not claim any violation of the ICWA in the lower court or on appeal. The Court of Appeals addressed this issue in the following manner:

- Respondent argues that the trial court erred when it failed to address respondent's claimed Native American heritage pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 et seq. Issues regarding the interpretation and application of ICWA present questions of law that this Court reviews de novo. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).
- Respondent did not object to the manner in which the ICWA notice was given or to the insufficiency of documentation in the lower court record until this appeal.
- This Court has previously held that substantial compliance with the notice requirements of the ICWA is sufficient where the trial court record established that the appropriate tribes received actual notice, and that no tribe came forward to intervene in the proceedings. *In re TM (After Remand)*, 245 Mich App 181, 190-191; 628 NW2d 570 (2001).
- The record in this case shows that petitioner complied with ICWA by sending notice to the appropriate tribe and received an acknowledgment from the tribe that the notice was received. There is ample evidence that the tribe had actual notice of the proceeding. There is no substantiation for respondent's position that the trial court did not adequately adhere to ICWA.

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<sup>2</sup> *In re Gorden*, unpublished per curiam opinion of the Court of Appeals dec'd August 11, 2011 (Docket No. 301592)[Appendix A]

- Given respondent's own statement in court that she received a response that she and her son were not eligible for tribal membership, the trial court was relieved from embarking on further ICWA tribal notification efforts. Therefore, respondent has failed to show any error requiring remand for further inquiry or reversal.<sup>3</sup>

Respondent-mother filed an application for leave and in lieu of granting respondent's application, this Court asked the parties to address the following three questions:

- (1) whether the notice requirements of § 1912(a) of the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., are invoked, such that the family court knows or has reason to know that an Indian child is involved in an involuntary child protective proceeding, when, as occurred here, the respondent mother stated at the preliminary hearing that her parents were tribal members but she was not;
- (2) if so, whether the Department of Human Services (DHS) and the family court are under a duty to make a complete record of their compliance with the notice requirements of the ICWA; and
- (3) whether a parent can waive a minor child's status as an "Indian Child" under the ICWA, 25 USC 1903(4), or waive compliance with the federal law's requirements, and, if so, whether the respondent mother's statement on the record that her family had been notified directly by the tribe that they were not entitled to money or benefits constituted a waiver.<sup>4</sup>

The following proceedings occurred in the lower court with regard to the Indian Child Welfare Act procedures:

#### **A. Emergency Removal- May 21, 2008**

A complaint was filed by the Department on May 20, 2008.<sup>5</sup> At the time of the child's

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<sup>3</sup> *Id.* [Appendix A]

<sup>4</sup> *In re Gorden*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2011).

<sup>5</sup> Appendix B Though respondent claims that the emergency removal impermissibly occurred before the case was officially begun, a petition is only required to begin a case when there are no exigent circumstances. MCR 3.961(A). Furthermore, the Department had filed a complaint before the request for emergency removal. See: MCR 3.903(A)(1)(a)(indicating that a case can be initiated by a complaint) & MCR 3.903(A)(19)(indicating that a "petition" includes a "complaint.")

emergency removal (when respondent was not present<sup>6</sup>) the Department believed that the child was *not* an American Indian tribal member or eligible for tribal membership.<sup>7</sup> The court specifically asked Protective Services Worker Nina Bailey, “is there any American Indian tribal membership or eligibility for membership?” She indicated, “no.”<sup>8</sup>

#### **B. Temporary Wardship Petition- May 22, 2008**

On May 22, 2008, the Department of Human Services filed a temporary wardship petition.<sup>9</sup> The specific box on the petition that can be checked if the child was a tribe member or eligible for membership, was not checked.<sup>10</sup>

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<sup>6</sup> Nothing in the court rules require that the parents be notified or required to participate in an emergency removal proceeding that takes place before a court order is issued. An emergency removal proceeding, by its nature, takes place under emergent circumstances in which the Department is seeking a court order for immediate removal of the child upon “reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child.” MCR 3.963(B). MCR 3.963(C)(2) also indicates that the parent must be informed of the date, time and place of the subsequent preliminary hearing. See also: MCL 712A.14. If an Indian child is removed under MCR 3.963(B) a custody hearing is held within 14 days with a higher standard of proof. MCR 3.967(A). However, the court did not find or have reason to know that an “Indian child” was involved at the emergency removal proceeding. Furthermore, those court rule provisions were not in effect at the time of the OTTIC.

Furthermore, the court rules indicate that the parent is advised at “respondent’s first court appearance” of the right to counsel for any “hearing conducted pursuant to these rules. . .” MCR 3.915(B)(1)(a); MCL 712A.17c(4). Respondent had not made her first court appearance and is only entitled to counsel after respondent makes a request for such appointment. MCR 3.915(B)(1)(b)(i).

<sup>7</sup> 5/21/08 T at 7

<sup>8</sup> *Id.* Respondent had a previous abuse/neglect case in Shiawassee County as well as a guardianship. Ms. Bailey had been in contact with respondent’s previous worker and presumably if Jeremiah had been designated an Indian child in those proceedings the previous worker would have communicated this to Ms. Bailey. Appendix B, C

<sup>9</sup> Appendix C

<sup>10</sup> *Id.*

### C. Preliminary Hearing-May 22, 2008

At the preliminary hearing, when the referee asked whether respondent was reporting any Native American Indian heritage, the following colloquy took place:

[R's ATTY]: They're saying is there any Native—do you belong to a tribe. . .  
. You have to speak up. . .

[R]: My family's part of the Saginaw Chippewa Indian tribe<sup>11</sup> in Mt. Pleasant.

[COURT]: Okay. Thank you very much Ma'am. *But are you a card member?* Have you attended any tribal events or anything like that?

[R]: No, my parents have.

[COURT]: Okay. Your parents have? Are your parents tribe members? Do you know if they are-- . . . That's okay, don't worry about it. So I will order DHS to do an investigation regarding that and notify the tribe for us and see if they want to respond in this case.<sup>12</sup> (emphasis provided)

Though the court ordered notification, the court did not find that an Indian child was involved in the proceeding.

Respondent's mother requested a judge conduct the preliminary hearing so another hearing was scheduled.<sup>13</sup>

### D. Preliminary Hearing-June 3, 2008

Though apparently appellant did not order the preliminary hearing on June 3, 2008

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<sup>11</sup> The Saginaw Chippewa Indian Tribe of Michigan (previously listed as the Saginaw Chippewa Indian Tribe of Michigan, Isabella Reservation) is a federally recognized tribe. 67 Fed Reg at 46,328 (July 11, 2002).

<sup>12</sup> 5/22/08 T at 27-28

<sup>13</sup> 5/22/08 T at 21

transcribed, after the hearing the court indicated, "ICWA<sup>14</sup> has been notified."<sup>15</sup>

**E. Plea to Temporary Wardship Petition-July 21, 2008**

On the date of the trial, respondent pled no contest to the allegations in the petition.<sup>16</sup> During the proceeding, Protective Services Worker Nina Bailey updated the court regarding tribal notification:

THE COURT: . . . I just have a couple of—of questions. Number one, has the Department heard back at all with respect to Indian heritage?

MS. BAILEY: No. *I received my certified letter back that they have received it* but they have not gotten back with me about any results. (emphasis provided)<sup>17</sup>

**F. Disposition-September 22, 2008**

At disposition, the following colloquy took place regarding tribal membership:

THE COURT: All right. I have a question here, I'm not sure. Is there American Indian?

[R]: On my mother's side. . . .

THE COURT: Was she a member of a tribe?

[R]: No. My mom ain't, my aunts and uncles are, but my mother is not.

[R's MOM] No, I'm not. I'm her mom. I'm her biological mother. I—I—I'm still waiting on that.

THE COURT: You're still waiting—

[UNIDENTIFIED]

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<sup>14</sup> ICWA is a euphemism used by the court and various individuals for the appropriate Native American agencies involved in child custody proceedings.

<sup>15</sup> Appendix D

<sup>16</sup> 7/21/08 T at 3, 5-9

<sup>17</sup> *Id.* at 4

SPEAKER]: We are Native Americans, yes.

[R]: [Referring to her mother.] Her brothers and sis—her brothers and sisters get it.

THE COURT: --okay. And has notice been sent to ICWA?

[APA]: Notice has been sent. *We did receive the certified receipt showing that, you know the agencies did receive that. We have not received any response back at this date.*

THE COURT: Okay. And—

[APA]: Yes, notices were sent.

THE COURT: --all right. Would you—would you send a copy of that to the Court for its file to ensure that ICWA was notified and----<sup>18</sup> (emphasis provided)

#### **G. Review Hearing-January 5, 2009**

At the review hearing, Foster Care Worker Lisa Smith updated the Court on further proceedings regarding the ICWA:

MS. SMITH: . . .The paperwork for the ICWA has been mailed back to the ICWA representative. He sent it back to us for more information regarding Courtney [Hinkle]'s family history, which she had to fill out and now I've sent back to him. So—

THE COURT: I'm sorry, who was this?

MS. SMITH: ICWA.

THE COURT: ICWA, okay.

MS. SMITH: Mm-hmm. And so now we're waiting for a response from the ICWA Office regarding that—the tribal information.<sup>19</sup>

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<sup>18</sup> 9/22/08 T at 10

<sup>19</sup> 1/5/09 T at 4

## H. Review Hearing-April 2, 2009

At the next review hearing, the Foster Care Worker Lisa Smith again updated the court on tribal notification:

MS. SMITH: Last time we were here I wanted to let you know that the grandmother has been receiving papers back from the Native American [sic]. We had to send out the information about the—the Native American [sic] that we were researching.

THE COURT: Yes.

MS. SMITH: *The grandmother just let me know today she's been receiving papers saying that they will not be eligible from the tribe to get Native American benefits. I don't know if you recall that. . . .*

THE COURT: I need something for the file that indicates--

MS. SMITH: She—she says she'll bring me the paperwork—the letter that she received from them this week at the visit. So I can send that over to the Court. . . .

THE COURT: Is that correct?

UNIDENTIFIED  
SPEAKER: Yes, that is correct. I got told here from relatives that are on the reservation and stuff and helping me to try to get my money so I could, you know, help with—[inaudible]—it's turned around now. So as soon as I get the paper I will bring it to the DSS Office. *We—we are not entitled . . . the membership that's on the reservation, because they found out our grandparents aren't fully qualified. My grandma has not . . . got enough Indian . . . So we're—none of us are going to get it. So that means our kids and grand kids.*

THE COURT: I'm not concerned about money. Okay. That's not my issue. Okay. My issue is the fact . . .

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[R]: *My son and I don't have enough heritage to get—to be part of the tribe in other words.*

THE COURT: Okay. That's what I'm looking for. . . is a letter indicating that.

UNIDENTIFIED SPEAKER: Right. We're supposed to be getting a letter here soon.

THE COURT: I thought you said she had it?

MS. SMITH: She told me she had some type of papers. . .

[R]: She has a—she has a paper from—

UNIDENTIFIED SPEAKER: Can I speak, I'm the foster. . . that has Jeremiah and I am a tribal member. So I--

THE COURT: But, but it's not you, Ma'am that--

UNIDENTIFIED SPEAKER: I understand that. But this letter she's talking about, she is—had the kids taken away from her so she's not on the birth certificate [presumably referring to respondent's mother<sup>20</sup>]. I went to court, I talked to the social—what do want to call it . . . the DHS Department like through tribal and he said the only that that information would be allowed on Jeremiah is if the courts were to petition it to him. Because I went there over Christmas to get that information . . . for these ladies the last time . . . and they said they can't give any information out. Whether—

THE COURT: All right. Just—just a moment. The Court's only concern is whether or not there is Indian heritage and if so whether someone representing the tribes are going to come in on behalf of the minor child . . . It's got nothing to do with money or trying to get th—

UNIDENTIFIED SPEAKER: That's what I'm saying, I don't care about the money. I'm saying I tried to do that for you the last time and he said he can't give that information out to anybody unless . . . one of these ladies or you ask for it.

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<sup>20</sup> Respondent's mother's parental rights were terminated and her aunt, Margaret Hinkle, adopted her. 10/8/09 T at 8-9 Jeremiah was placed with another aunt, Charel Stevens. 10/25/10 T at 120.

THE COURT: We'll we've all ready—okay. The request has been sent to ICWA, has it not?

MS. SMITH: Yes.

UNIDENTIFIED SPEAKER: It's not ICWA, it's . . . Saginaw/Chippewa Indian Tribe of Mount Pleasant.

UNIDENTIFIED SPEAKER: And I have the guy's business card.

THE COURT: All right. But—but, Ma'am there is . . . a location in Washington where the information is sent by the department to them and they have to respond to us . . . It's got nothing to do with local tribes. I mean . . . I need you to contact ICWA.

MS. SMITH: I have sent papers to ICWA, yes.

THE COURT: I'm sorry?

MS. SMITH: I have sent papers to ICWA.

THE COURT: But, I need you to contact them to see why they haven't responded because we need the response directly from ICWA. And they're not going to send it to anybody else, they're going to send it to the department because you're the one that's making the request.

MS. SMITH: Okay.

THE COURT: Okay?

MS. SMITH: All right. Okay.

THE COURT: So you need to contact ICWA again as to what their status is and why they haven't responded to us.

MS. SMITH: Okay.<sup>21</sup>

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<sup>21</sup> 4/2/09 T at 5-11

#### **H. Permanent Wardship Petition-May 11, 2010**

On May 11, 2010, the Department filed a permanent wardship petition.<sup>22</sup> The specific box on the petition that can be checked if the child was a tribe member or eligible for membership, was not checked.<sup>23</sup>

#### **I. Trial-Statutory Bases-June 29, 2010**

At the trial, the court found that Petitioner met its burden to prove all three of the statutory grounds alleged.<sup>24</sup>

There was no discussion of Indian heritage.

#### **J. Best Interest Hearings-October 25, 2010, November 1, 2010**

At the conclusion of a two-day best interest hearing, the court terminated parental rights. The court found that termination served Jeremiah's best interest.<sup>25</sup>

No mention was made by the respondent's attorney regarding any issues regarding tribal membership.

In the order following the hearing to terminate parental rights, the court did not find Jeremiah was an Indian child.<sup>26</sup>

Additional pertinent facts will be discussed in the body of the argument section of this brief, *Infra* to the extent necessary to fully advise this Honorable Court as to the issues raised by respondent.

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<sup>22</sup> Appendix E

<sup>23</sup> *Id.*

<sup>24</sup> 6/29/10 T at 241-245

<sup>25</sup> *Id.* at 152-153

<sup>26</sup> Appendix F

ANSWERS TO THIS COURT'S QUESTIONS

**Q1.** Whether the notice requirements of § 1912(a) of the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., are invoked, such that the family court knows or has reason to know that an Indian child is involved in an involuntary child protective proceeding, when, as occurred here, the respondent mother stated at the preliminary hearing that her parents were tribal members but she was not?

**A. No.**

*When there was no information on the record that Jeremiah was a tribe member or eligible for membership, no information that respondent herself was a tribe member, respondent indicated affirmatively that both she and her son were not tribe members, and there was nothing on the record contradicting her statement, the court did not have reason to know that Jeremiah was an Indian child. Therefore, respondent failed to meet her burden to show that the notice provisions of the ICWA were triggered.*

**Q3.** Whether a parent can waive a minor child's status as an "Indian Child" under the ICWA, 25 USC 1903(4), or waive compliance with the federal law's requirements?

**A. No.**

*If the record showed that Jeremiah qualified as an Indian child, respondent could not waive compliance with the ICWA.*

**Q3.** Whether the respondent mother's statement on the record that her family had been notified directly by the tribe that they were not entitled to money or benefits constituted a waiver?

**A. Yes, but she stated that she and her son did not have sufficient heritage to be part of the tribe.**

*In this case it is the respondent-mother who is appealing raising the issue of noncompliance with the ICWA neither the child nor the tribe. Though she claims on appeal that the court had reason to know that Jeremiah was an Indian child, the court did not further pursue the issue of whether Jeremiah qualified as Indian child after respondent indicated that neither she nor her son qualified as tribe*

*members. She is estopped from now claiming that the court erroneously relied on her own statement.*

**Q2.** Whether the Department of Human Services (DHS) and the family court are under a duty to make a complete record of their compliance with the notice requirements of the ICWA?

**A.** **Does the ICWA require it? No. Is it preferable? Yes.**

*The existing record shows that the Department ensured that tribe had actual notice and therefore the ICWA was satisfied and respondent has failed to show plain error resulting in a miscarriage of justice.*

## ARGUMENT

I. RESPONDENT FAILED TO MEET HER BURDEN TO SHOW THAT THE NOTICE PROVISIONS OF THE INDIAN CHILD WELFARE ACT WERE TRIGGERED MUCH LESS THAT PLAIN ERROR OCCURRED WHEN THERE WAS NO INFORMATION ON THE RECORD THAT JEREMIAH WAS A TRIBE MEMBER OR ELIGIBLE FOR MEMBERSHIP, NO INFORMATION THAT RESPONDENT HERSELF WAS A TRIBE MEMBER, RESPONDENT AFFIRMATIVELY INDICATED THAT BOTH SHE AND HER SON WERE NOT TRIBE MEMBERS, AND THERE WAS NOTHING CONTRADICTING HER STATEMENT ON THE RECORD.

### *Standard of Review and Issue Preservation:*

Whether the family court was required, under the facts of this case, to give notice under the Indian Child Welfare Act (hereinafter "ICWA") involves an issue of statutory construction and, as such, this Court reviews the issues de novo.<sup>27</sup> Any factual findings are reviewed for clear error, however.<sup>28</sup>

As is true generally where a party seeks the benefits afforded by a civil statute,<sup>29</sup> "[t]he burden of proof is upon the party asserting the applicability of ICWA to produce evidence for the court to decide whether a child is an Indian child."<sup>30</sup> Furthermore, respondent waived her right to

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<sup>27</sup> *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 234 (2011); *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009); *In re the Termination of Parental Rights to Arianna R.G.*, 259 Wis 2d 563, 571; 657 NW2d 363 (2003); *In re T.A.*, 378 Ill App 3d 1083, 1087; 883 NE2d 639 (2008).

<sup>28</sup> MCR 2.613(C).

<sup>29</sup> *Meecham v Knolls Atomic Power Lab.*, 554 US 84, 91-92; 128 S Ct 2395; 171 L Ed 2d 283 (2008).

<sup>30</sup> *In re Adoption of C.D.*, 751 NW2d 236, 242 (ND, 2008); *State ex rel MJ*, \_\_\_ P3d \_\_\_ (Utah App, 2001)[2011 Utah App LEXIS 398]. See also: *In re Trever I*, 973 A2d 752, 758 (Me, 2009); *In re A.S.*, 614 NW2d 383, 385 (SD, 2000); *In re Baby Boy Doe*, 123 Idaho 464, 470; 849 P2d 925 (1993); *In re Interest of J.L.M.*, 234 Neb 381, 396; 451 NW2d 377 (1990); *In re Cain Keel L*, 911 NYS3d 335, 336; 78 AD3d 541 (2010); *In re T.A.*, 378 Ill App 3d at 1090; *In re C.P.*, 181 NC App 698, 701-702; 641 SE2d 13 (2007); *In re Anderson*, 176 Ore App, 311, 315; 31 P3d 510 (2001); *In the Interest of J.D.B.*, 584 NW2d 577, 582 (Iowa App, 1998); *People ex rel A.G.-G.*, 899 P2d 319, 322 (Colo App, 1995).

later claim that the court erroneously relied on her own statement that she and her son were not tribe members. See: Argument III.

Even if not waived, there was clearly no objection in the lower court. Unpreserved issues are reviewed for plain error that affects substantial rights. Three requirements must be met to withstand forfeiture under the plain error rule: (1) the error must have occurred, (2) the error must have been plain, i.e. clear or obvious, and (3) the plain error must have affected substantial rights. Reversal is only required if plain error affected the fairness, integrity or public reputation of the judicial proceedings.<sup>31</sup> As stated *infra* in Argument III, there was no indication that the ICWA was intended to preempt Michigan's error preservation rules.

*Discussion:*

When there was no information on the record that Jeremiah was a tribe member or eligible for membership, no information that respondent herself was a tribe member, respondent indicated affirmatively that both she and her son were not tribe members, and there was nothing on the record contradicting her statement, the court did not have reason to know that Jeremiah was an Indian child. Therefore, respondent failed to meet her burden to show that the notice provisions of the ICWA were triggered. Furthermore because respondent presented no evidence that either she or her son were tribe members, she has failed to show plain error resulting in a miscarriage of justice.

**A. The Purpose of the Act**

The United States Congress enacted the Indian Child Welfare Act to respond to a crisis occurring in Indian tribes in which large numbers of Indian children were removed from their

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<sup>31</sup> *People v Carines*, 460 Mich 750, 763, 774: 597 NW2d 130 (1999).

families for placement in non-Indian homes.<sup>32</sup> The Act was intended to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of Indian children in foster or adoptive homes reflecting the values of Indian culture.<sup>33</sup> Pursuant to the federal Indian Child Welfare Act, state child custody proceedings involving foster care placement or termination of parental rights to an Indian child are subject to these specific federal procedures and standards.<sup>34</sup> The Michigan Legislature has not enacted any standards providing greater protections than the ICWA.<sup>35</sup>

“The ICWA provides rights to the Indian child, the child's parents, and the child's tribe.”<sup>36</sup> Under the Act, tribal courts are granted exclusive jurisdiction over a child-custody proceeding involving an Indian child who resides or is domiciled within the tribe's reservation or who is a ward of a tribal court.<sup>37</sup> State courts and tribal courts have concurrent jurisdiction over proceedings involving an Indian child who is not domiciled or residing within the reservation of the Indian child's tribe.<sup>38</sup> In the case of concurrent jurisdiction, the state court must transfer the proceedings to the tribal courts upon the petition of either parent, an Indian custodian, or the

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<sup>32</sup> *Mississippi Choctaw Indian Band v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989); *In re JL*, 483 Mich at 316. The child in this case was placed with respondent's aunt [his prospective adoptive placement] who indicated that she was a tribe member, however. 4/2/09 T at 8 Respondent has, even on appeal, not asserted that upon remand she could demonstrate that she was a tribe member or that Jeremiah was a tribe member or eligible for membership.

<sup>33</sup> 25 USC §1902.

<sup>34</sup> MCR 3.002; MCR 3.905(C); *In re JL* at 317.

<sup>35</sup> *Empson-Laviolette v Crago*, 280 Mich App 620, 625; 760 NW2d 793 (2008). See also: MCL 722.1104.

<sup>36</sup> *Nielson v Ketchum*, 640 F3d 1117, 1119-11120 (CA 10, 2011).

<sup>37</sup> 25 USC §1911(a); MCR 3.002(2).

<sup>38</sup> 25 USC §1911(e); MCR 3.905(C)(3).

Indian child's tribe absent good cause to the contrary, objection by either parent, or declination of jurisdiction of the tribal court.<sup>39</sup>

### **B. Notice Requirements**

Under the Indian Child Welfare Act, notice must be given to tribe when the court knows or has reason to know an Indian child is involved. The ICWA states the following:

(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. (emphasis provided)<sup>40</sup>

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<sup>39</sup> 25 USC §1911(b); MCR 3.905(C)(1).

<sup>40</sup> 25 USC §1912. See also: 25 CFR 23.11 (indicating that notice must be given "where the court knows or has reason to know that an Indian child is involved . . .") The Michigan court rules' standard to trigger the ICWA notice is even more stringent than 25 USC §1912. MCR 3.965(B)(2) indicates for instance in pertinent part:

#### B) Procedure.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. *If the child is a member, or if a parent is a 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,* and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been

(FOOTNOTE CONT'D NEXT PAGE)

“The ‘reason to know’ standard of § 1912(a), however, applies only to notice.”<sup>41</sup>

“‘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.”<sup>42</sup> (An earlier draft of the ICWA did not define ‘Indian child,’ but rather defined ‘Indian’ as ‘any person who is a member of or who is eligible for membership in a federally recognized Indian tribe.’<sup>43</sup>) “ICWA’s requirement of current tribal membership of at least one party to the proceedings is an outgrowth of the limits on Congressional authority in Indian legislation. Congressional authority to legislate extends only to

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(FOOTNOTE CONT'D FROM PREVIOUS PAGE)

notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony. (emphasis provided)

This court rule went into effect, May 1, 2010. The court rule, MCR 3.965(B)(9), in effect at the time of the preliminary hearing was substantially similar:

(9) The court must inquire if the child or either parent is a member of any 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.

Furthermore, MCR 3.961(B)(5) in existence at the time of the issuance of the petition required that the petition contain *if known*, “the child’s membership or eligibility for membership in an American Indian tribe or band, if any and the identity of the tribe.” This is consistent with the court rule and did not contain a “reason to know” requirement. Nina Bailey confirmed that she did not believe that the child was a member or eligible for membership in a tribe. 5/21/08 T at 7 Even at the first preliminary hearing, respondent did not indicate that she was a tribe member but when the court asked if she was a card member or attended any tribal events, she indicated, “no”. 5/22/08 T at 27-28

<sup>41</sup> *In re Adoption of a Child of Indian Heritage*, 111 NJ 155, 189; 543 A2d 925 (1988); *Arizona Dep’t of Econ. Sec. v Bernini*, 48 P3d 512, 514 (Ariz App, 2002).

<sup>42</sup> 25 USC §1903(4). See also: 25 CFR 23.2. See also: MCR 3.002(5).

<sup>43</sup> *Nielson v Ketchum*, 640 F3d at 1124 citing 123 Cong. Rec. S37223 (1977).

tribal Indians, and creates a political rather than a racial, preference . . . the different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe.”<sup>44</sup>

The ICWA’s heightened standards for termination of parental rights apply only if an Indian child, as defined in the Act, is involved and the court must make a threshold determination that an Indian child is in fact involved in the case.<sup>45</sup> “Before any section of the Act applies, it must be established on the record that the child meets one or both of the definitional criteria; only then does a parent or tribe qualify for ‘protection’ under the ICWA.”<sup>46</sup> Furthermore, the party requesting application of the ICWA must establish either that the child was actually a tribe member or that the biological parent was a tribe member and the child was eligible for membership.<sup>47</sup> “The ultimate determination of whether a child is a member or eligible to become a member of a particular tribe is the prerogative of that tribe. *Nevertheless, whether a court has ‘reason to know’ that a child is an Indian child ‘necessarily arises preliminary to an ultimate determination’ of a child’s Indian status.*”<sup>48</sup> (emphasis provided). Furthermore, under MCR 3.965 the court’s obligation to notify the tribe only arises if the child or parent was in fact a tribe member.

Also, while the standard for the ICWA notice is low, it is not without reasonable limits<sup>49</sup>

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<sup>44</sup> *In Re Adoption of C.D.*, 751 NW2d at 244 (citations omitted).

<sup>45</sup> *Id.* at 240.

<sup>46</sup> *In the Matter of the Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P2d 228, 231 (Ariz App, 1983).

<sup>47</sup> *In Re Adoption of C.D.*, 751 NW2d at 241.

<sup>48</sup> *State ex rel MJ, supra.* (citations omitted).

<sup>49</sup> *In the Interest of Z.H.* 740 NW2d 648, 653 (Iowa App, 2007); *In re the Termination of Parental Rights to Arianna R.G.*, 259 Wis 2d at 578).

and is not meaningless.<sup>50</sup> Reviewing courts have recognized that there must be sufficient indication that the child is an Indian child within the meaning of the ICWA to invoke notice requirements. Thus, many courts applying the federal statute, have found a mere hint or suggestion, or vague assertion of Indian ancestry is not sufficient to require notice.<sup>51</sup> Other state courts have also found that “an assertion that a child or parent is of Indian heritage or blood provides no evidence that any of the children are Indian children under the ICWA”<sup>52</sup> and that the “mere mention of Indian heritage does not give a trial court reason to know that the child is an Indian child.”<sup>53</sup> The Wisconsin Supreme Court for instance, stated that the term “Indian child” as defined by ICWA means “something more specific than merely having Native American ancestors.”<sup>54</sup> As a Colorado court noted, “[t]he evidence that has been determined to be insufficient when the record was devoid of any indication that the child, father, or mother was a member of an Indian tribe. . .”<sup>55</sup>

Recent Michigan appellate court decisions *In re IEM*, 233 Mich App 438, 440-443; 592 NW2d 751 (1999), *In re TM*, 245 Mich App 181, 187-188; 628 NW2d 570 (2001), and *In re NEGP*, 245 Mich App 126, 133; 626 NW2d 921 (2001), have in contrast determined that in those cases the mere mention of Indian heritage was sufficient to trigger the notice requirements though an earlier court decision, *In re Johanson*, 156 Mich App 608, 613; 402 NW2d 13 (1986),

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<sup>50</sup> *State ex rel MJ, supra.*

<sup>51</sup> See: *In re Jeremiah G*, 172 Cal App 4<sup>th</sup> 1514, 1520; 92 Cal Rptr 3d 203 (2009); *In re Trever I*, 973 A2d 752 at 757; *In the Interest of Z.H.*, 740 NW2d at 653; *In re the Termination of Parental Rights to Arianna R.G*, 259 Wis 2d at 579-580; *In re Guardianship of J.O.*, 327 NJ Super 304, 316; 743 A2d 341 (2000); *In the Interest of T.D.*, 890 So2d 473, 475 (Fla App, 2004).

<sup>52</sup> *In re Adoption of C.D.*, 751 NW2d at 243-244; *In the Interest of R.M.W.*, 188 SW3d 831, 833 (Tex App, 2006).

<sup>53</sup> *In re T.A.*, 378 Ill App 3d at 1092.

<sup>54</sup> *In re the Termination of Parental Rights to Arianna R.G.*, 259 Wis 2d at 574.

<sup>55</sup> *People ex rel A.G.-G.*, 899 P2d at 322.

had indicated that the fact that the child “may have Indian heritage does not qualify him as an Indian child under §1903(4).” *In re Johanson*, better tracks the language of the ICWA.<sup>56</sup>

The meaning of the terms “Indian child” and “reason to know” are central to the court’s obligation to provide notice under the ICWA. In construing the extent of the court’s obligation under state law, the courts look to the words of the statutes to determine legislative intent and to fulfill the purpose of the law. Significance is given to every word, phrase, sentence and part of the act in pursuing the legislative purpose.<sup>57</sup> The ICWA and the applicable federal regulations do not define “reason to know.”<sup>58</sup> However, “in the absence of a statutory definition we ‘start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.’”<sup>59</sup> If the ordinary meaning of the language is clear, the court looks no further to discern Congress’ intent.<sup>60</sup> “Reason to know” is broadly defined as “[i]nformation from which a

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<sup>56</sup> However, the Department has, as a policy, decided to proceed more proactively than is mandated by the ICWA. See: Department of Human Services Manual on Native American Affairs, hereinafter “NAA.” NAA 200 [www.michigan.gov/dhs-manuals](http://www.michigan.gov/dhs-manuals) (accessed December 17, 2011) The question in this case is whether the ICWA was violated, however.

<sup>57</sup> *Dowdy, supra*.

<sup>58</sup> Though the Bureau of Indian Affairs has furnished guidelines for compliance with the ICWA, these guidelines are not mandatory. 44 Fed Reg at 67,584 (indicating, “They are not entitled to have binding legislative effect.”) In accord: *In Re TA.*, 378 Ill App 3d at 1090; *In Re Trever I*, 973 A2d at 757, n 3; *Bruce L v W.E.*, 247 P3d 966, 975 n 22 (Alaska, 2011)(indicating the BIA guidelines ‘have important but not controlling significance’ because, although not promulgated as regulations, they represent the BIA’s interpretation of ICWA.” (citations omitted))

The BIA indicates, in conflict with §1912(a), that the standard is “reason to believe” rather than the more stringent requirement of “reason to know.” 44 Fed. Reg at 67,586 par. B.1.a.; *In Re Trever I*, 973 A2d at 757 (noting the conflict); *In re the Termination of Parental Rights to Arianna R.G.*, 259 Wis 2d at 578 n 18 (noting the conflict and using the wording of ICWA); *State ex rel M.J., supra* (indicating “we do not adopt the ‘reason to believe’ standard because we are convinced that the plain language of the statute requires use of the somewhat more demanding, ‘reason to know.’”); *In re Adoption of Child of Indian Heritage*, 111 NJ at 187 n 12 (declining to follow the guidelines). The language of the ICWA controls.

<sup>59</sup> *Holyfield*, 490 US at 47; *State ex rel MJ, supra*.

<sup>60</sup> *Holyfield, supra*; *Dowdy, supra*.

person of ordinary intelligence . . . would infer that the fact in question exists or that there is a substantial enough chance of its existence that, if the person exercises reasonable care, the person can assume the fact exists.’<sup>61</sup>

The Maine Supreme Court stressed the importance of reviewing the totality of circumstances test to determine whether the ICWA notice is required:

Precisely what constitutes “reason to know” . . . in any particular set of circumstances will necessarily evade meaningful description. As in other contexts, reasonable grounds to believe must depend on the totality of circumstances and include consideration of not only the nature and specificity of available information but also credibility of the source of that information and the basis of the source’s knowledge.<sup>62</sup>

A Utah court adopted the following definition for “reason to know”:

We conclude that before a court has “reason to know” that an Indian child is involved in the proceedings, the party asserting that ICWA applies must produce sufficient evidence for a person of ordinary intelligence to infer that a child is either a) a member of an Indian tribe or b) eligible to become a member of an Indian tribe and the biological child of a member of an Indian tribe.

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[T]he assertion must be “sufficiently reliable” and support a low but reasonable probability that a child is a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.<sup>63</sup>

This definition, in conjunction with the indication by the Maine Supreme Court that the family court should make its decision reviewing the totality of the circumstances, best defines the standard under the ICWA.

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<sup>61</sup> Black’s Law Dictionary (9<sup>th</sup> ed.) In accord: *State ex rel MJ, supra*.

<sup>62</sup> *In re Trever I*, 973 A2d at 759 citing *B.H. v People ex rel X.H.*, 138 P3d 299, 303 (Colo, 2006).

<sup>63</sup> *State ex rel MJ, supra*.

### C. Specific Examples

Applying the “reason to know” standard, the courts in certain circumstances have found that the parents have failed to meet their burden to demonstrate that the notice requirements of the ICWA were triggered.

For instance the Supreme Court in South Dakota in *In re A.S.*, 614 NW2d 383, 385-386 (SD, 2000), found the evidence insufficient to trigger the notice requirements. Mother testified she believed she herself might be enrolled because she received funding from the tribe at one time. The court found that this was not evidence of enrollment, there was no evidence of enrollment forthcoming from the tribe even though the tribe at one point indicated that it believed it would intervene, and no additional evidence of enrollment was produced, and therefore mother failed to meet her burden to show ICWA protections were triggered.

*In re Adoption of CD*, 751 NW2d 236, 245 (ND, 2008) found that the evidence presented by the parent, “establishing her Indian heritage, Indian blood quantum, acceptance in the Indian community, and receipt of Indian scholarships, awards, and benefits, but without a corresponding connection to tribal membership, was irrelevant to the determination whether the [child] is a biological child of a member of an Indian tribe and thus an Indian child under 25 USC 1903(4)(b).” The Court indicated that the statute clearly required that the parent demonstrate that she was currently a member of a federally recognized Indian tribe and that her son was eligible for membership in the tribe and she failed to do so in that case.<sup>64</sup>

Also in *In the Interest of A.L.* 623 NW2d 418 (ND, 2001) the Court found that there was insufficient information to suggest that the children were tribe members or eligible for

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<sup>64</sup> 751 NW2d at 245.

membership in a tribe. *The attorney for the mother indicated that the mother was a tribe member*, but only one-fourth Indian and the father was supposed to be one-half Native American.<sup>65</sup> The attorney for the state indicated that the Indian child welfare act coordinator asserted that the children would not be eligible for membership but the attorney for the mother disputed the representations made by the welfare act coordinator. The court found “[n]othing in this record suggests the children were members of an Indian tribe, or eligible for membership in an Indian tribe, and counsel’s unsupported and vague statements were insufficient to suggest ‘Indian child’ status.”<sup>66</sup>

In *In re Trever, I*, 973 A2d 752, 758, 759 (Me, 2009) the parent alleged that he had some Indian heritage and later that he believed that he had some Cherokee background but failed to provide any information to support his allegations. The court found that these vague and questionable eleventh hour suggestions did not cause the Department or the Court to know or to have reason to know that the child might be an Indian child.<sup>67</sup>

In *In re the Termination of Parental Rights to Arianna R.G.*, 259 Wis 2d 563, 567; 657 NW2d 363 (2003), the parent indicated that he had Indian heritage both on his mother’s and father’s side which stemmed from the Ojibwa Tribe and that the children’s great-great-grandmother was a member of the tribe. Also the children’s grandmother was born on a reservation in Canada. The court determined that the information before the circuit court was too vague for the court to have reason to know that the children met the definition of “Indian child.”<sup>68</sup> *The court noted that the parent never asserted that the children were members of a*

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<sup>65</sup> 623 NW2d at 421.

<sup>66</sup> *Id.*

<sup>67</sup> 793 A3d at 759.

<sup>68</sup> 259 Wis 2d at 571.

*tribe or were eligible for membership and were biological children of a tribe member and he never stated that he was a tribal member.*<sup>69</sup> In that case as well, the Department of Interior indicated that if additional information became available the Department should notify the tribe, but the existing information was insufficient.

In *State ex rel M.J.*, \_\_\_P3d\_\_\_ (Utah App, 20011)[2011 Utah App LEXIS 398] both parents indicated that they were tribe members, but instead of identifying the tribe, indicated that they were members of the Oklevueha Native American Church. The court told the parents that they should provide valid documentation but they only provided church membership cards. While proceedings were still pending, the parents both asserted that they were members of Oglala Sioux Tribe again because they were church members. The Department indicated that blood heritage was required. The parents provided no further verification of their alleged tribal membership. The parents later presented tribal enrollment numbers but after a phone conference a representative of the tribe indicated to the attorneys that the enrollment numbers were not valid. Mother again asserted that she and the children had Indian blood and were federally recognized in the Oglala Sioux Tribe and membership did not require enrollment. Mother later acknowledged that she only believed that she had Indian blood. The court found that the parents' assertions continually changed and were incredible and vague and therefore did not produce sufficiently reliable evidence that would prompt a person of ordinary intelligence to infer that the children were Indian children.<sup>70</sup>

In *In re Anaya J.G.*, 403 Ill App 3d 875; 932 NE2d 1192 (2010), the court also found that the parents had alleged insufficient information to trigger ICWA notice requirements. The

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<sup>69</sup> *Id.* at 578.

<sup>70</sup> *State ex rel M.J.*, *supra*.

mother stated that her mother's side of the family had Cherokee blood but she herself was not a member of any American Indian tribe. The father indicated that the child had "Native American rights" because her mother was a tribe member and indicated that the child's grandmother was a Cherokee Indian.<sup>71</sup> The court indicated, "[w]hile we agree that Anaya's status as an Indian child does not exclusively depend on her biological parents' tribal membership . . . [w]e conclude that under the facts in this record, there was insufficient evidence to give the trial court reason to know that Anaya is a member of an Indian tribe."<sup>72</sup>

In the case of *In re T.A.*, 378 Ill App 3d 1083; 883 NE2d 639 (2008), the Illinois appellate court found that the parent failed to meet her burden to show the notice requirements were triggered when she claimed that she was of Native-American descent but she was not aware that any of her family were tribe members since "[n]o evidence or testimony suggests that either [the parent] or [the child] was even eligible for membership in a tribe."<sup>73</sup>

In *In the Interest of R.M.W.*, 188 SW3d 831, 833 (Tex App, 2006) the court found that the record was insufficient to trigger the notice requirements of ICWA:

*Nowhere in the record is there any assertion or evidence that the children are members of an Indian tribe, that the children are eligible for membership in an Indian tribe, or that either Robin or Angela is a member of an Indian tribe.* The record shows only that Robin may be of Cherokee Indian heritage because his mother, who also may or may not be a member of an Indian tribe, is of Indian heritage. The assertion that Robin is of Indian "heritage" or "blood" provides no evidence that any of the children are Indian children under the ICWA, and, concomitantly, cannot put the trial court on notice that any of the children are Indian children as narrowly defined by the ICWA. (emphasis provided)

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<sup>71</sup> 403 Ill App 3d at 879-880.

<sup>72</sup> 403 Ill App 3d at 1198.

<sup>73</sup> 378 Ill App 3d at 1091.

In *In re Anderson*, 176 Ore App 311, 313; 31 P3d 510 (2001) the Court found that the parents failed to meet their burden to show that the child was an Indian child. Although both parents testified to having some degree of Indian heritage, nothing in the record suggested that either mother or father was a member of any federally recognized Indian tribe. Mother testified, based on information provided by her own mother, that she believed herself to be one-quarter Blackfoot. However, her Blackfoot heritage was from her maternal grandfather and neither she nor her mother could remember his name. Moreover, mother was not and never had been an enrolled member of the Blackfoot Tribe, nor did she know whether she was eligible for membership. Father testified that his own father was “at least a quarter of either Crow or Blackfoot and then some of the other. I can't remember how much.” Father's mother had been adopted as a small child and knew nothing about the genetic makeup of her biological parents. Father himself was not a member of either the Crow or Blackfoot tribe and did not know whether his father had been a member of either tribe. Moreover, he did not know whether he himself was eligible for membership.<sup>74</sup> The court found that because there was no indication that the parents themselves were tribe members, ICWA notice requirements were not triggered.<sup>75</sup>

In *In the Interest of A.G.-G.*, 899 P2d 319, 322 (Colo App, 1995), the court found that the information was insufficient to trigger the notice requirements of ICWA. “Although the mother and father informed their caseworker and also testified that each had Indian heritage in the Sioux or Blackfoot Indian tribes, nothing in the record established their or the child’s membership or eligibility for membership in any tribe.” The Department also gave notice to the Secretary of the

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<sup>74</sup> *In re Anderson, supra.*

<sup>75</sup> *Id.* at 315.

Interior and no tribe responded. The court articulated the type of evidence which would meet the parent's burden:

Such evidence could include an affidavit of a tribal official stating the tribe's requirement for enrollment and that the child's father or mother was enrolled as a member of the tribe and owned property on the reservation. Additionally, testimony by the child's biological parents that they are members of federally recognized Indian tribes, corroborating testimony by tribal authorities and tribal enrollment forms showing the parents' membership, has been deemed to constitute sufficient evidence that a child was an "Indian child".<sup>76</sup>

In *In the Interest of A.E.*, 749 P2d 450, 451 (Colo App, 1987) the father indicated that the children were of Native American descent. An offer of proof as to the testimony of a social worker affiliated with the Indian Child Welfare Board was made, indicating that she believed the children were eligible for membership in the Creek Nation; when questioned, however, the social worker stated that she did not know the membership criteria of the Creek Nation. In addition, an offer of proof as to the testimony of the children's maternal grandmother was made, showing that she had been an enrolled member of the Creek Nation all of her life. The Court found, that "[t]here is nothing in the record establishing the children's membership or eligibility for membership in the Creek Nation, and no evidence was adduced establishing mother's membership or eligibility for membership in the Creek Nation. Furthermore, the Creek Nation did not respond to the notice of the proceedings, and no evidence concerning the membership criteria of the Creek Nation was introduced."<sup>77</sup>

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<sup>76</sup> *Id.* at 322.

<sup>77</sup> 749 P2d at 452.

#### D. This Case

Though both the family court and the Department responded more proactively and gave notice, the court never found that Jeremiah was an Indian child.<sup>78</sup> Furthermore, respondent never met her burden to demonstrate that Jeremiah was an Indian child. Respondent, when asked at the preliminary hearing by the court, “But are you a card member? Have you attended any tribal events or anything like that?” stated, “No my parents have.”<sup>79</sup> Then later at the disposition respondent stated that her mother was not a member of the tribe but her mother’s brothers and sisters obtained tribal benefits.<sup>80</sup> On the date of the April 2009 review hearing, the grandmother, presumably of Jeremiah, indicated that she was not eligible for benefits and that apparently the tribe indicated that none of the family was going to receive benefits.<sup>81</sup> The foster mother, an aunt, however, said she herself was a tribal member<sup>82</sup> but the thrust of her information, however, seemed to be that Jeremiah was not currently eligible for membership.<sup>83</sup> Respondent herself indicated, “My son and I don’t have enough heritage to get—to be part of the tribe. . .”<sup>84</sup> These representations were made by respondent in April of 2009 and termination did not occur until November of 2010 but no further mention was made by respondent, who was represented by counsel throughout the proceedings, of any tribe membership of either herself or Jeremiah in the

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<sup>78</sup> Appendix F

<sup>79</sup> 5/22/08 T at 28

<sup>80</sup> 9/22/08 T at 10

<sup>81</sup> 4/2/09 T at 6-7 Respondent claims her mother is now a tribe member. There is nothing on the record supporting this assertion. Again, the important facts are whether respondent herself was a tribe member and her son was at least eligible for membership or a tribe member himself. Respondent’s brief appears to acknowledge that neither respondent nor her son were tribe members. See: Respondent’s Supplemental Brief at 3.

<sup>82</sup> *Id.* at 8

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 7

interim.

Furthermore, though respondent asserted on appeal that her adopted mother was a tribe member, not only does that not establish that she, respondent, was a tribe member,<sup>85</sup> but in the family court she never specifically stated that her adopted mother was a tribe member. She only indicated that sisters and brothers of her biological mother received tribal benefits, but did not indicate that all of her mother's sisters, including her adopted mother, were tribe members. Also, respondent never stated that she, herself was a tribe member or that Jeremiah was either a tribe member or eligible for membership, the bare minimum to trigger the notice requirements.

Also, the Department sent notices out. (See: Argument II) The reasonable inference from the evidence was that notices were sent out both to the tribe and the Department of the Interior<sup>86</sup> which never sent any information indicating that Jeremiah was either a tribal member or was eligible for tribal membership or that respondent was a tribal member.

There was no information on the record that Jeremiah was a tribe member or eligible for membership and no information that respondent herself was a tribe member. In fact respondent indicated affirmatively that both she and her son were not tribe members<sup>87</sup> and there was nothing

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<sup>85</sup> MCR 3.002(10), cited by respondent, only defines parent, it does not define tribe member. Furthermore, MCR 3.002 (10), like 25 USC §1903, states in pertinent part:

(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.

This provision would not apply in this case because respondent was not an Indian child. This rule went into effect on May 1, 2010.

<sup>86</sup> Appendix C, 7/21/08 T at 4, 9/22/08 T at 10, 1/5/09 T at 4, 4/2/09 T at 10-11 See: Department of Human Services Manual on Native American Affairs, hereinafter "NAA." NAA 200 [www.michigan.gov/dhs-manuals](http://www.michigan.gov/dhs-manuals) (accessed December 17, 2011) [Petitioner acknowledges that this reflects current policy.]

<sup>87</sup> 4/2/09 T at 10-11

contradicting this statement. Reviewing the totality of the circumstances the respondent did not produce sufficient evidence for a person of ordinary intelligence to infer that a child was either a) a member of an Indian tribe or b) eligible to become a member of an Indian tribe and the biological child of a member of an Indian tribe. Therefore, there was no reason for the court to believe that Jeremiah fell within either subsection (a) or (b) of 25 USC §1903(4).

#### **E. Conclusion**

An overbroad construction does not serve the ICWA's goal to promote the security and stability of Indian tribes<sup>88</sup> or the child's interest in a prompt resolution of his custody status.<sup>89</sup> In fact an overbroad construction delays intervention that may be urgently needed. Though both the Department and the court opted to proceed proactively and send out notifications, when the record does not reveal that Jeremiah was a tribe member or eligible for membership or that respondent herself was a tribe member, and when respondent indicated affirmatively that both she and her son were not tribe members and there was nothing contradicting this statement, the court did not have reason to know that Jeremiah was an Indian child. Therefore, respondent failed to meet her burden to show that the notice provisions of the ICWA were triggered. Furthermore, especially when respondent never claimed that either she or her son were tribe members she has failed to demonstrate that a miscarriage of justice occurred.

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<sup>88</sup> 25 USC §1902.

<sup>89</sup> *State ex rel MJ, supra* (our decision to require more than a mere assertion of Indian ancestry is also influenced by the strict statutory timelines for child permanency proceedings.)

## ARGUMENT

III.<sup>90</sup> RESPONDENT WAIVED HER CLAIM THAT THE COURT HAD REASON TO KNOW THAT JEREMIAH WAS AN INDIAN CHILD WHEN SHE STATED THAT SHE AND HER SON WERE NOT TRIBE MEMBERS.

### *Standard of Review and Issue Preservation:*

Not only did respondent not meet her burden to demonstrate that Jeremiah qualified as an Indian child, but she waived her right to later claim that the court had reason to know that Jeremiah was an Indian child when she stated that the tribe had indicated that neither she nor her son qualified as tribe members. “When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal.”<sup>91</sup>

ICWA modifies case law and Michigan statutes concerning child custody. “However, we find nothing in ICWA which expressly or impliedly preempts a state’s error preservation rules. To have our procedural rules preempted by federal law, would serve no greater purpose under ICWA. Error preservation is part of this state’s rules of trial and appellate procedure, contributing to an orderly and timely disposition of controversies. Our rules requiring litigants to preserve error for appeal do not conflict with any provision of ICWA or frustrate congressional policy.”<sup>92</sup> Furthermore, the interest in the swift resolution of child custody cases is consistent

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<sup>90</sup> Petitioner is addressing this Court’s question 3 before question 2 since both questions 1 and 3 address whether the record supports respondent’s claim that the court had reason to know that Jeremiah was an Indian child.

<sup>91</sup> *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

<sup>92</sup> *In the Interest of J.D.B.*, 584 NW2d 577, 581 (Iowa App, 1998). In accord: *In re A.B.*, 245 P3d 711 (Utah, 2010)( indicating, “We hold that ICWA does not preempt Utah’s notice of appeal requirements and that those requirements apply to Indian tribes. Our answers to these questions compel us to dismiss the Nation’s appeal because we have no jurisdiction over it” since the appeal was not timely filed.)

with Congress's intention that the ICWA "protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families."<sup>93</sup>

*Discussion:*

The court did not further pursue the issue of whether Jeremiah qualified as Indian child, after respondent indicated that neither she nor her son qualified as tribe members. She is estopped from now claiming that the court erroneously relied on her own statement.

If the record showed that Jeremiah qualified as an Indian child, respondent could not waive compliance with the ICWA because "[t]he ICWA provides rights to the Indian child, the child's parents, and the child's tribe."<sup>94</sup> Furthermore, the ICWA specifically provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 USCS §§ 1911, 1912, and 1913].<sup>95</sup>

Therefore, any Indian child or the Indian child's tribe has an independent right to move to invalidate the action in the court of competent jurisdiction separate from that of the parent.<sup>96</sup>

In this case, however, it is neither the tribe nor the child who has appealed claiming noncompliance with the ICWA, but instead a parent who previously indicated that neither she

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<sup>93</sup> 245 P3d at 721.

<sup>94</sup> *Nielson v Ketchum*, 640 F3d at 1119-11120.

<sup>95</sup> 25 USC §1914.

<sup>96</sup> For instance, if Jeremiah became a tribe member before his adoption, the attorney for the child could raise a new claim that the child was an Indian child and the provisions of ICWA would govern the adoption proceeding. See: MCR 3.807. Furthermore, if the child had appealed or the tribe had intervened and appealed, respondent's waiver could not bind either of these parties, though, even absent the waiver, there was insufficient information on the record to determine that the family court had reason to know that Jeremiah was an Indian child. Respondent appears to acknowledge that neither she nor Jeremiah were tribe members, however.

nor her son were tribe members. A parent is defined under the ICWA, as “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 . . .”<sup>97</sup> In this case, as has been argued in Argument I, the existing record does not show the child is an Indian child and therefore, respondent is not a parent of an Indian child.<sup>98</sup>

Furthermore, not only does respondent fail to show that she met her burden to demonstrate that an Indian child was involved (See: Argument I) but she specifically asserted on the record that the tribe indicated that neither she nor her son were tribe members. This Court has disapproved of the procedure whereby a party may “harbor error to be used as an appellate parachute.”<sup>99</sup> Furthermore, the doctrine of judicial estoppel bars “a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.”<sup>100</sup> In this case, ultimately it was respondent’s own statement that she and the child did not qualify as tribe members, that induced the court to stop further pursuit of the issue of Indian heritage.

In *In re S.B.*, 130 Cal App 4th 1148; 30 Cal Rptr 3d 726 (2005), the court also found that the parent waived her right to claim in the earlier proceedings that the court had reason to know

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<sup>97</sup> 25 USC §1903(9).

<sup>98</sup> See: *Nielson v Ketchum*, *supra* at 1122-1124 (indicating that because the child was not an Indian child, the mother could not invalidate the voluntary termination of her parental rights under §1914).

<sup>99</sup> *People v Shahideh*, 482 Mich 1156; 758 NW2d 536, 537 (2009); *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322; 365 NW2d 101 (1984).

<sup>100</sup> Black's Law Dictionary (9th ed. 2009). See also: *Paschke v Retool Indus.*, 445 Mich 502, 509-510; 519 NW2d 441 (1994)(indicating that under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding if the court accepted that position as true.)

that the child was an Indian child. In *In re S.B. supra*, Indian child status was established just prior to the final hearing in a termination of parental rights case and the court applied ICWA to that proceeding. However, the court rejected the biological mother's claim that prior orders entered in the case should be invalidated on the ground of noncompliance with notice provisions of the ICWA. The court determined that the mother had waived the right to claim the protection of the statute by failing to assert and establish the children's Indian child status earlier despite her "superior access to this information."<sup>101</sup> The court noted, "although a parent cannot waive an Indian tribe's rights under the ICWA, the parent can waive his or her own rights."<sup>102</sup>

The court further stated:

- "As a general rule, a party is precluded from urging on appeal any point not raised in the trial court. Any other rule would permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware."
- Similar principles apply to a belated attempt to raise a point in the trial court. For example, "[t]he rule is well settled that when at any time during trial a party or his counsel becomes aware of facts constituting misconduct or irregularity in the proceedings of the jury, he must promptly bring such matters to the attention of the court, if he desires to object to it, or he will be deemed to have waived the point as a ground for a motion for a new trial."<sup>103</sup>

In *In re S.B.*, up until the time the mother filed a motion to invalidate prior orders pursuant to the enforcement provision of the ICWA, previously, she had appeared (or waived her appearance) at every hearing that she later claimed was held without the notice required by the ICWA. Nevertheless, she failed to object on ICWA grounds until those hearings were over. She did not offer any excuse for her previous failure to object. The court concluded, though the

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<sup>101</sup> 130 Cal App 4<sup>th</sup> at 1160.

<sup>102</sup> *Id.* at 1154.

<sup>103</sup> *Id.* at 1158-1159.

tribe would have an independent right to move in the lower court to invalidate the proceeding, she forfeited any right she might otherwise have had to invoke the enforcement provision:<sup>104</sup>

- *The parent has an independent right to invalidate prior actions, but there is every reason to hold that this can be waived.* As in other cases, "... [i]t would seem ... intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'"<sup>105</sup> (emphasis provided)

The court noted that while the social worker and the trial court had a duty to inquire into the child's Indian ancestry under the California court rules,<sup>106</sup> a parent has superior access to this information. Moreover, the court noted, a parent has a right to counsel, including appointed counsel, if necessary who has not only the ability but also the duty to protect the parent's rights under the ICWA. The court noted that the trial court cogently observed that, "I would think as officers [of] the court, counsel for parents would have [a] similar interest [in] bring[ing] that information forward at the earliest possible time."<sup>107</sup> The court concluded by indicating:

- We recognize that, in a proceeding for foster care placement of, or termination of parental rights to, an Indian child, a parent's failure to object does not waive the substantive provisions (as opposed to the notice provisions) of the ICWA unless "the court is satisfied that the [parent] has been fully advised of the requirements of the Act, and has knowingly, intelligently, and voluntarily waived them." Here, however, S.B. was not yet an Indian child. The substantive provisions of the ICWA did not yet

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<sup>104</sup> *Id.* at 1159.

<sup>105</sup> *Id.* at 1159-1160.

<sup>106</sup> Though Michigan has a court rule placing responsibility on the court to ask whether the child or parent was a tribe member and the Department's responsibility was to list in the petition whether the child was in fact a tribe member or eligible for membership, if known (MCR 3.961(B)(5)( in existence at the time of the issuance of the petition)) there is no court rule requiring proactive investigation on the part of the court or the Department. However the Department's internal policy is to proactively investigate the issue of tribe membership. Department of Human Services Manual, Native American Affairs, NAA 200.

<sup>107</sup> *Id.* at 1160

apply. There is no state rule of court similarly restricting waiver of the notice provisions, which are the source of the duty of inquiry.

- Accordingly, the mother could and did waive the supposed failure to inquire concerning S.B.'s Indian ancestry. (citations omitted)(emphasis added)<sup>108</sup>

In *In Re Interest of J.D.B.*, 584 NW2d 577 (Iowa App, 1998) for example, the court also found that to raise challenges under the ICWA, the parent had to comply with the state's procedural rules. In Iowa a parent's failure to object operated as a waiver.<sup>109</sup> The court concluded,

Having failed to come forward with evidence the children qualified as "Indian," Amanda and the Rosebud Sioux cannot now complain the juvenile court did not apply ICWA in the CINA proceedings. Until it is established on the record the child meets one or both of the definitional criteria, a parent or tribe does not qualify for protection under ICWA.<sup>110</sup>

In *In re Kenten H*, 272 Neb 846; 725 NW2d 548 (2007), though the court ultimately reversed the adoption decree on other grounds, the court held that, applying issue preservation rules, the provisions of the ICWA only applied prospectively from the date Indian status was established on the record. The court found that if the parent did not indicate that her son was a member of the tribe before the date the adoption was final, she could not later have the adoption set aside on the basis that she herself did not reveal this information.<sup>111</sup>

Similarly, the court in *State ex rel Juv Dept v Tucker*, 76 Or App 673, 710 P2d 793 (1985), held that where Indian child status was not established until 2 years after the child was placed in foster care and the court had no reason to know that the child was an Indian child at the

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<sup>108</sup> *Id.*

<sup>109</sup> 584 NW2d at 581.

<sup>110</sup> *Id.* at 582.

<sup>111</sup> 272 Neb at 855.

time of placement, the placement could not be invalidated for failure to comply with the ICWA.

In this case it is respondent who is raising the claim of noncompliance with the ICWA, neither a tribe nor the child. Respondent specifically asserted on the record that the tribe had indicated that neither she nor her son qualified as tribal members. She now has waived *her right*, to claim that the court erroneously relied on her own statements when the court ceased any further investigation into Indian heritage.

### ARGUMENT

II. THE EXISTING RECORD SHOWS THAT THE TRIBE HAD ACTUAL NOTICE AND THEREFORE EVEN IF THE FAMILY COURT HAD A REASON TO KNOW AT SOME POINT IN THE PROCEEDINGS THAT THE CHILD WAS AN INDIAN CHILD, THE ICWA WAS SATISFIED AND RESPONDENT HAS FAILED TO SHOW PLAIN ERROR RESULTING IN A MISCARRIAGE OF JUSTICE.

#### *Standard of Review and Issue Preservation:*

Respondent did not object in the lower court indicating that the notice provisions of the ICWA had not been satisfied. Therefore, respondent must show plain error resulting in a miscarriage of justice.<sup>112</sup>

#### *Discussion:*

The existing record shows that the tribe had actual notice and therefore the ICWA was satisfied and respondent has failed to show plain error resulting in a miscarriage of justice.

One of the requirements imposed by the ICWA is that a tribe of an Indian child receive notice of termination proceedings involving Indian children:

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

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<sup>112</sup> *Carines, supra.*

parent or Indian custodian and the Indian child's tribe, by registered mail<sup>113</sup> 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 [Indian Welfare Bureau of the] Secretary [of Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [ 25 USC §1912(a).]<sup>114</sup>

If the tribe is unspecified, the Department can fulfill its responsibility merely by providing notice to the Secretary of Interior or appropriate regional office of the Bureau of Indian Affairs.<sup>115</sup> MCR 3.965(B)(2) also requires that such notice be given to the Indian tribe.

The Michigan Court of Appeals along with a number of other jurisdictions has found that as long as substantial compliance is made concerning the notice requirements of the ICWA, meaning actual notice to the tribe, the proceedings in the family court will be affirmed.<sup>116</sup> As stated by *In re I.W.*, 180 Cal App 4<sup>th</sup> 1517, 1532; 103 Cal Rptr 3d 538 (2009), "Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way." (citation omitted).

For instance in *In re L.B.*, 110 Cal App 4<sup>th</sup> 1420, 1425; 3 Cal Rptr 16 (2003) the court held that when there is evidence notice has been received and the only omission is the failure to file the proof of service, there had been substantial compliance with the notice requirements. The court indicated, "when a social worker's report or other documentation indicates that ICWA

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<sup>113</sup> Service by certified mail is allowed. 25 CFR 23.11(a)(d).

<sup>114</sup> *In re Fried*, 266 Mich App 535, 538-539; 702 NW2d 192 (2005).

<sup>115</sup> *In re NEGP*, *supra* at 132, n 2; *In re TM*, *supra* at 189;

<sup>116</sup> *In Re TM*, *supra* at 190-191. See also: *In re Dependency and Neglect of A.L.* 442 NW2d 233, 236 (SD, 1989); *Dependency of E.S.*, 92 Wn App 762, 771; 964 P2d 404 (1998); *In re I.W.*, 180 Cal App 4<sup>th</sup> 1517, 1531-1532; 103 Cal Rptr 3d 538 (2009); *In the Interest of J.J.G.*, 32 Kan App 2d 448, 451; 83 P3d 1264 (2004)[*overruled on other grounds*, 286 Kan 686; 187 P3d 594 (2008)]; *In re S.Z.*, 325 NW2d 53, 55-56 (SD, 1982).

notice has been provided, it can properly be presumed that such notice complied with the requirements of the ICWA in the absence of any evidence in the record to the contrary or any challenge to this representation in juvenile court.” The court continued by indicating, “Neither the ICWA nor [California court] rule 1439 requires copies of the notices be made part of the record. Thus, although the information in the record is minimal, we find it sufficient to establish that notice in compliance with the ICWA was provided to all possible tribes.”<sup>117</sup>

Also *In re Levi U.*, 78 Cal App 4th 191, 195; 92 Cal Rptr 648 (2000), the court rejected the mother’s claim that “[a] conclusory statement in the social worker’s report” that notice had been sent to the Bureau of Indian Affairs (BIA) was insufficient to establish compliance with the ICWA. In that case, the mother suggested DSS was required to submit evidence of the actual notice, a proof of service, and the responses received. The court held “[c]ontrary to appellant’s assertion, there is no requirement that [the social services agency] demonstrate it did anything more than send notice .... ”<sup>118</sup>

In this case, though it is preferable that copies of all correspondence be made part of the court file with explicit information regarding the nature of the tribal contacts, reversal in this case is not required.<sup>119</sup> Especially when respondent must show that there was plain error in the lower court, she failed to show that the notice requirements were insufficiently met.

After the second preliminary hearing date, though appellant apparently did not order

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<sup>117</sup> *In re L.B.*, 110 Cal App 4th 1425-1426; 3 Cal Rptr 16 (2003).

<sup>118</sup> 78 Cal App 4th at 198.

<sup>119</sup> Though respondent claims that the initial removal and foster care placement should not have been made before notice was provided, respondent did not appeal these initial proceedings but instead the court’s termination of parental rights. See: *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). Furthermore, clearly the court did not have reason to know that the child was an Indian child prior to removal.

transcription of the proceeding,<sup>120</sup> the court noted that “ICWA has been notified.”<sup>121</sup> In this case, there was no doubt regarding the tribe, the Saginaw Chippewa Indian tribe so, though the court indicated “ICWA”, the Department was placed on notice regarding which tribe notice should be sent.

On the next hearing date, July 21, 2008, Protective Services Worker Nina Bailey confirmed that the agencies had received the letter (she received the certification back from the certified letter which had been sent) but they had not yet gotten back to the Department.<sup>122</sup> Clearly the implication is that not only did the Department send notification to the tribe, but also sent an additional notice to the Department of the Interior.<sup>123</sup>

At the disposition, in September of 2008, the assistant prosecutor again reiterated that the

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<sup>120</sup> As stated cogently by a California court:

Initially, we note that appellants have failed to provide us a sufficient record to determine whether the juvenile court engaged in additional inquiry regarding the ICWA notice provided. Following the filing of the social worker’s report containing the relevant information concerning the minor’s possible Indian heritage, three hearings took place, yet the record on appeal includes a reporter’s transcript from only the last of these hearings. It is certainly possible that, in response to inquiry from the court, additional information was provided concerning the manner and content of the ICWA notice that was provided to the tribes. *It is appellants’ responsibility to provide a record that is adequate for appellate review of their claims as they have failed to do so, we are unable to fully evaluate what measures the juvenile court may have taken in regard to the claimed errors.* (citations omitted)(emphasis provided)

*In Re L.B.*, 110 Cal App 4<sup>th</sup> at 1424. See also: MCR 7.210(B)(1)(a).

<sup>121</sup> Appendix C

<sup>122</sup> 7/21/08 T at 4

<sup>123</sup> *Id.* See: NA 200 indicating that the Department of Human Services policy is to send the notice to the tribe and the Midwest Bureau of Indian Affairs and includes a form that notifies the tribe of the hearing date, includes the petition, the right to intervene, and as much information regarding the child’s relatives as possible. See: RFF 120, referred to by NA 200 [Again Petitioner acknowledges that this is current policy but notes that notification form was in effect in 2008, since the current form was revised in April of 2008.]

Department had received a certification back indicating that the agencies had been notified and notices had been sent but there had been no response.<sup>124</sup> Again the implication is that not only did the Department send notification to the tribe, but also sent an additional notice to the Department of the Interior.<sup>125</sup>

During the next hearing, the January 5, 2009 review, Lisa Smith, the foster care worker, indicated that the ICWA representative sent back an inquiry requesting further information regarding respondent's background. That questionnaire was completed by respondent and returned to the representative.<sup>126</sup> The Department was awaiting the response.<sup>127</sup>

In this case the obligation of the Department was to provide notice to the tribe. The reasonable deduction from the record was that this purpose was accomplished. Both Protective Services Worker Nina Bailey and Foster Care Worker Lisa Smith indicated that notification was sent by certified mail and that the Department received the certification indicating that the notices had been received by the agencies. The tribe never moved to intervene. Furthermore, there is a presumption of regularity accorded the acts of governmental actors which was not challenged by the parties in the family court.<sup>128</sup> The existing record is sufficient to show that actual notice was given to the tribe.

However, if this Court finds that there was sufficient evidence on the record to trigger the notice requirements and that the record was insufficient to demonstrate that the notice requirements were met or if any parties present further information regarding the notices, the

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<sup>124</sup> 9/22/08 at 10

<sup>125</sup> *Id.*

<sup>126</sup> 1/5/09 T at 3-4 See: 25 CRF 23.11.

<sup>127</sup> 1/5/09 T at 4

<sup>128</sup> *People v White*, 208 Mich App 126, 132; 527 NW2d 32 (1994). See: MCL 16.550; MCL 400.226.

appropriate remedy would be a remand to allow supplementation of the record (See: MCR 7.316(A)(5)<sup>129</sup>) or conditional affirmance.<sup>130</sup>

### CONCLUSION

Though the Department opted to proceed cautiously and send out notifications, when there was no information on the record that Jeremiah was a tribe member or eligible for membership, no information that respondent herself was a tribe member, respondent indicated affirmatively that both she and her son were not tribe members, and there was nothing on the record contradicting her statement, the court did not have reason to know that Jeremiah was an Indian child. Therefore, not only did respondent fail to meet her burden to show that the notice provisions of the ICWA were triggered but failed to show plain error occurred especially when she appears to concede that neither respondent nor Jeremiah were tribe members.

In this case also, the court did not further pursue the issue of whether Jeremiah qualified as an Indian child after respondent indicated that neither she nor her son qualified as tribe members. Respondent is estopped from now claiming that the court erroneously relied on her own statement, and it is respondent-mother, neither the child nor the tribe, who raised noncompliance with the ICWA on appeal.

Furthermore, though it is absolutely preferable to compile a complete record of compliance with ICWA notice requirements, the existing record shows that the Department

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<sup>129</sup> A conditional affirmance presumes a violation. Supplementation of the record would be for the purpose of showing that there was no violation.

<sup>130</sup> See: *In re IEM, supra* at 450; *In re NEGP, supra* at 133-134. Petitioner adopts the position of the Attorney General in *In re Morris*, Supreme Court No. 142759, and asserts that a conditional affirmance is a viable remedy.

ensured that the tribe had actual notice and therefore the ICWA was satisfied and respondent has failed to show plain error resulting in a miscarriage of justice.

However, if this Court finds that there was sufficient evidence on the record to trigger the notice requirements and that the record was insufficient to demonstrate that the notice requirements were met, the appropriate remedy would be a remand to allow supplementation of the record or conditional affirmance.

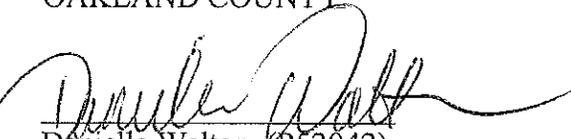
RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Danielle Walton, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court DENY respondent's application for leave to appeal.

Respectfully Submitted,

JESSICA R. COOPER  
PROSECUTING ATTORNEY  
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By:



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