No. _____

In The

Supreme Court of the United States

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R. CHILDREN UNDER 18 YEARS OF AGE, STATE OF NEBRASKA,

Petitioner,

v.

ELISE M. AND OMAHA TRIBE OF NEBRASKA,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Innumerable child welfare cases are brought in state courts each year. In those cases involving an Indian child domiciled off-reservation, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63 allows the tribe to request the case be transferred to tribal court. The state court must then transfer the case unless a parent objects or "good cause" is shown to deny the transfer. These transfer provisions apply throughout the life of a child welfare case and often only come into play after the child has been in foster care for years. But even at such late stages, a court must grapple with uncertain jurisdiction due to the open division involving at least seventeen states on two crucial issues:

(1) Whether ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case.

(2) Whether ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for purposes of determining whether "good cause" exists to deny the transfer of an ongoing child welfare case.

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court is reported at 284 Neb. 834, 825 N.W.2d 173 (2012). App. 1a. The decision of the Nebraska Court of Appeals is unpublished. *Id.* at 32a. The decisions of the Separate Juvenile Court of Lancaster County, Nebraska are unpublished. *Id.* at 50a, 53a.

JURISDICTION

On December 14, 2012, the Nebraska Supreme Court reversed the decision of the Nebraska Court of Appeals which had affirmed the decisions of the Separate Juvenile Court. Petitioner timely filed motions for rehearing on December 26, 2012, which the court denied on January 23, 2013. App. 56a, 58a. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2006).

STATUTORY PROVISIONS INVOLVED

Section 1911(b) of Title 25, U.S.C., states:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or

the Indian child's tribe: *Provided*, That, such transfer shall be subject to declination by the tribal court of such tribe.

STATEMENT

Almost five years ago, the Omaha Tribe was notified that a child welfare case involving Zylena R. was pending in state court. App. 3a. The tribe determined that Zylena had insufficient blood quantum to even be eligible for enrollment in the tribe. *Id.* Consequently, the tribe neither intervened nor requested transfer of the case. Adrionna was born. *Id.* Six months after Adrionna's birth, both Zylena and Adrionna had to be placed in foster care. *Id.* The state court proceedings continued for years without the tribe's involvement. It was only on the eve of the filing of the motion for termination of the parents' parental rights that the tribe requested transfer of the cases. *Id.* at 4a. By then, the girls were bonded to their foster parents with whom they had lived for almost two years. *Id.* at 41a, 47a. By then, the girls' parents had made little to no progress in their cases. *Id.* at 4a. By then, the court-ordered permanency goal in the cases had been changed from reunification to adoption. *Id.* By then, Zylena and Adrionna deserved permanency. *Id.* at 47a.

It was a mistake. The tribe had miscalculated the blood quantum for Zylena back in 2008. *Id.* at 5a. When the recalculation was made, Zylena and Adrionna were both eligible for membership in the

Omaha Tribe. *Id.* When the recalculation was made, the tribe requested transfer of the cases to the tribal court. *Id.* at 4a, 5a. But, by then, it was too late, the state court held. The cases were at an advanced stage and needed to remain in the state court. *Id.* at 51a, 54a. The Court of Appeals agreed. *Id.* at 46a. And it did not leave it at that. It added that the cases needed to stay in state court because it was in the girls' best interests to move toward permanency. *Id.* at 47a.

Not so, said the Nebraska Supreme Court. Despite its long-standing precedent to the contrary, "best interests of the child" have no role in tribal transfer requests. *Id.* at 26a. And, a motion to terminate parental rights is a "new" proceeding so the tribe wasn't too late. *Id.* at 21a. The Indian Child Welfare Act dictated this result, said the majority. *Id.* at 21a, 26a. Not so, said the Chief Justice in dissent. The majority's holding emphasized the tribe's interests at the expense of the children's interest in permanency. *Id.* at 29a.

The two issues which caused so much disagreement in these cases have also contentiously divided state courts for years. This petition brings to this Court those two issues at an ideal time and in an ideal posture. This petition brings to this Court the opportunity to provide uniformity and clarity in the Indian Child Welfare Act's transfer provisions.

A. Statutory Framework

In 1978, Congress enacted the Indian Child Welfare Act (ICWA). Nebraska followed in 1985 with its enactment of the Nebraska Indian Child Welfare Act which mirrors ICWA. Neb. Rev. Stat. §§ 43-1501-1516 (Reissue 2008). When Congress enacted ICWA, it formed a system which was designed to appropriately balance the interests of at least three separate entities – Indian children, their families, and the tribes. Congress addressed this specifically in § 1902, which states the purpose of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." This balancing of interests is evident throughout ICWA, but perhaps most obviously in its removal, tribal notice, and jurisdictional provisions.

Section 1912(e) of ICWA provides protections to parents by requiring active efforts be made to prevent removal of Indian children and prohibiting their continued removal without testimony from a qualified expert that continued custody by the parent is likely to result in serious emotional or physical harm to the child. Section 1911(a) provides protections to the tribe by mandating that tribal courts have exclusive jurisdiction over Indian children domiciled on the reservation. Section 1912 enhances these protections by mandating notice to the tribe when Indian children are placed out of their home, and by permitting the tribe to intervene in the state child custody proceeding. Section 1911 protects both the tribe and parents by providing that either can request transfer of the

proceeding to the tribal court. But, § 1911(b) also balances this dual protection in its transfer refusal provisions – that is, a tribe can refuse to accept the transfer of a case requested by a parent and a parent can refuse to let a case be transferred to the tribal court. Section 1911(b) of ICWA also incorporates protection for the rights of Indian children by permitting a state court to refuse to transfer a proceeding to tribal court where there is good cause to deny the transfer. It is this "good cause" provision that stands at the heart of this petition.

B. Factual Background

Zylena R. was born in June of 2007 and Adrionna R. was born in December of 2008, both to Elise M. and Francisco R. App. 2a. An amended petition was filed on July 1, 2008, in state court alleging that Zylena was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the fault and habits of both Elise M. and Francisco R. *Id.* Since Elise is an enrolled member of the Omaha Tribe, proper notice of the proceeding was sent to the Omaha Tribe on July 1, 2008. *Id.* On July 16, 2008, the Omaha Tribe responded that Zylena was neither enrolled nor eligible for tribal enrollment. *Id.* Zylena was adjudicated on September 22, 2008. *Id.*

On May 1, 2009, a similar case was commenced in state court involving both Zylena and Adrionna. *Id.* It was adjudicated on May 12, 2009. *Id.* The girls

were placed with their current foster family on May 29, 2009. *Id.*

Even though the girls share the same parents, in October of 2010, notice was sent to the Omaha Tribe by an employee of the Nebraska Department of Health and Human Services (Department), inquiring whether Adrionna was either enrolled or eligible for enrollment with the tribe. App. 4a. The notice included an advisement that the case could result in removal of the child from the home or termination of parental rights and adoption. *Id.* The Department received no response from the tribe. *Id.*

Both Elise and Francisco were provided various services in an attempt to correct the conditions of neglect, but neither made any real progress. *Id.* In November of 2009, the court changed the permanency objective from reunification to adoption. *Id.* At that same time, as provided in Neb. Rev. Stat. § 43-292.02 (Reissue 2008), the court found that no exception existed to eliminate the requirement for the filing of motions to terminate parental rights with respect to Zylena. App. 35a. On February 4, 2011, motions to terminate parental rights of both parents were filed. *Id.* at 4a. On February 14, 2011, and February 22, 2011, respectively, the Omaha Tribe filed Notices of Intervention and Transfer in Zylena's case. *Id.* The tribe filed similar motions in the second case on March 1, 2011. *Id.*

C. Proceedings Below

1. Hearings were held on the transfer requests. App. 4a-5a, 36a. At those hearings, both the petitioner and the girls' guardian ad litem objected to the transfer. *Id.* at 4a-5a. A Department representative testified that the girls are bonded to their foster home. *Id.* at 41a. She further testified that she believed termination of parental rights should occur and adoption should be pursued with the current foster parents because the girls needed permanency. *Id.* at 41a, 47a. When the rulings were entered, Zylena was almost four years old and Adrionna was two and one-half years old. *Id.* at 2a, 5a. They had both been living with their foster parents for over two years. *Id.* at 3a, 5a.

A representative of the Omaha Tribe testified that, because the tribe understated Elise's blood quantum in 1991, the tribe concluded in 2008 that Zylena was ineligible for membership in the tribe. *Id.* at 5a. The tribe first realized the mistake in late January or early February of 2011, which was when the termination of parental rights motions were filed. *Id.* The tribal representative testified that, if the transfer was granted, the tribal court would work to reunify the family, but would not terminate parental rights. *Id.* A long-term guardianship could be established for the girls by the tribal court if the efforts at reunification were to fail. *Id.* The tribal representative also testified that it would be her recommendation that the children stay in their current placement,

but that there was no guarantee the tribal court would follow her recommendation. *Id.* at 40a.

On June 29, 2011, the juvenile court denied the transfer requests. *Id.* at 51a. In the case involving Zylena, the court concluded that "good cause" existed to deny the transfer because the "proceeding was at an advanced stage" and the "Tribe did not file its Notice to Transfer for 32 months after receiving original notice." *Id.* In the case involving both girls, the court also found that notice was sent to the tribe in October of 2010 for Adrionna; the tribe had received notice in July of 2008 for Zylena; on November 4, 2010, a permanency plan of adoption was approved by the court; on November 4, 2010, the court had found that no exception existed to eliminate the requirement that a motion for termination of parental rights be filed; and the motion for termination of parental rights was filed and was now pending. *Id.* at 54a. Based on those facts, the court concluded: "Given the proceeding is at an advanced stage and given the Omaha Tribe did not promptly file its Notice to Transfer, good cause has been shown to deny the transfer." *Id.* The juvenile court made no finding in either case concerning whether the transfer was in the children's best interests. *Id.* at 6a.

2. Elise M. appealed the denial of the motions to transfer. *Id.* The tribe filed a cross-appeal. *Id.* The guardian ad litem and the petitioner defended the juvenile court decisions. The father and the Department did not participate. *Id.* at 32a. The appeals were consolidated by the Court of Appeals. *Id.* at 33a.

The Nebraska Court of Appeals affirmed the decisions of the juvenile court. *Id.* Based on the court's reading of prior Nebraska precedent, it concluded that there was "good cause" to deny the transfer of the cases to the tribal court because the cases were at an "advanced stage" when the tribe made its motions to transfer. The court noted that it has been the "policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage." *Id.* at 46a. The court further held that ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *Id.* It found that, "if the case were transferred, the children could remain in limbo indefinitely while they waited for Elise to complete drug and alcohol treatment – something which she has not been able to do in past attempts." *Id.* at 47a. It also found that "the children have been out of their parents' home for more than 2 years, that they are now being well cared for, and that they are in a home that appears to be committed to fostering their Native American heritage." *Id.* The court then concluded that "the present situation is currently in the children's best interests," and affirmed the juvenile court's denial of the transfer motions. *Id.* at 47a, 49a.

3. Elise petitioned for further review to the Nebraska Supreme Court, in which the tribe joined. *Id.* at 2a. The Nebraska Supreme Court granted the petition and reversed the Court of Appeals. *Id.* at 2a, 27a. In so doing, it disapproved in part and overruled in part a long-standing Nebraska case which had

interpreted ICWA. The Chief Justice wrote a terse dissent. *Id.* at 21a, 26a, 27a-31a. The majority held that ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. *Id.* at 29a. It also held that ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for that "good cause" analysis. *Id.* at 21a. Chief Justice Heavican, in dissent, concluded that the filing of a termination of parental rights motion does not commence a new "proceeding" for purposes of the "good cause" analysis. *Id.* at 29a. He reasoned that the notice and intervention provisions of ICWA provide adequate protection of the tribe's rights, but when a case reaches a certain point, the children's interests in permanency should be paramount. *Id.* at 29a-30a.

On January 23, 2013, the Nebraska Supreme Court denied the petitioner's timely requests for rehearing. App. 56a, 58a.

REASONS FOR GRANTING THE PETITION

The highest court in Nebraska has now held that ICWA prohibits its state courts from considering the "best interests of the child" when making transfer decisions in an ICWA case. App. 26a. This reversed the court's long-standing precedent, *id.*, and further complicated a split between as many as sixteen states on that issue. The court also held that ICWA requires

state courts to treat a motion for termination of parental rights as a "new proceeding," thereby requiring state courts to reset the "timeliness of request" clock on a motion to transfer jurisdiction to the tribal court. *Id.* at 21a. This holding solidified a burgeoning split on that issue between as many as eight states.

The uncertainties created by these splits between state courts on issues surrounding jurisdictional disputes over Indian children are intolerable. Because tribal members are found in all fifty states, tribes currently must know the interpretation each of those states has made of ICWA's transfer provisions. Tribes, parents, and state courts must predict how an undecided appellate court will align itself along the divisive issues. Tribes, parents, and state courts must attempt to predict whether an appellate court will suddenly switch sides, as happened in Nebraska, on one of the divisive issues. And, most importantly, while all the adults are trying to figure out what to do, the Indian children are waiting. As one commentator pointed out, when jurisdiction remains unclear, courts must "hammer out" ad hoc jurisdictional rules, which prolongs the process unnecessarily. Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 59 (2010).

This Court has itself recognized that the jurisdictional provisions lie "[a]t the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Yet with only one interpretation from this Court concerning jurisdiction in ICWA's

thirty-five year history, these jurisdictional provisions have fallen into disarray. Moreover, *Holyfield* dealt with the definition of domicile and exclusive jurisdiction, therefore not addressing the issues at hand.

Courts on both sides of these splits acknowledge the core importance of the jurisdictional questions at issue. *People in Interest of J.L.P.*, 870 P.2d 1252, 1256 (Colo. App. 1994); *In re J.W.C.*, 265 P.3d 1265, 1269 (Mont. 2011); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995). But independently they can do little to remedy the problem. Similarly, academics point to this as an area of confusion and concern. And with "migration across reservation boundaries on the rise and intermarriage between Indians and non-Indians at an all-time high," tension between concurrent state and tribal jurisdiction will only increase. Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010). Children, parents, tribes, and state courts have little option other than to look to this Court to provide uniformity and clarity to these jurisdictional determinations.

I. STATE COURTS DIVERGE DRAMATICALLY ON TWO CORE COMPONENTS OF THE EXERCISE OF JURISDICTION OVER INDIAN CHILDREN

A. State Courts Are Divided Over Whether "Best Interests of the Child" Is a Factor for the Court to Consider When Determining Whether "Good Cause" Exists to Deny Transfer to the Tribal Court

When an Indian child resides off-reservation, the tribe or parents can request transfer of jurisdiction from state court to tribal court. That request must be granted except where the parent objects or there exists "good cause to the contrary." 25 U.S.C. § 1911(b) (2006). ICWA does not define "good cause." The Bureau of Indian Affairs (BIA) has released nonbinding guidelines for denying transfer including reasons like untimeliness of the request and "inconvenient forum." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-95 (Nov. 26, 1979). However, as many as sixteen states contentiously divide as to whether the court may also consider the child's best interests.

Courts in at least nine states have addressed the issue in favor of "best interests," finding it a relevant consideration in assessing "good cause." Where ICWA left the meaning of "good cause" unexplained, these courts found the statute's stated purpose and legislative history suggest the relevance of the child's best interests. *E.g.*, *In re T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989) and

In re T.S., 801 P.2d 77, 80 (Mont. 1990). These courts often refer to the child's best interests as a "primary," "paramount," or "necessary" concern. *See, e.g.*, *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. Ct. App. 1988); *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 304 (Minn. Ct. App. 2009). As described by one New Jersey appellate court, the "best interests of the child test is the backbone of American family law and we would be very loathe to ignore that standard in the context of determining whether retention of jurisdiction in the [state court] is warranted." *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. App. Div. 2000). Accordingly, courts in Arizona, California, Indiana, Iowa, Minnesota, Montana, Oklahoma, South Carolina, and South Dakota have all given weight to the child's best interests. *In re Maricopa County Juv. Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. Ct. App. 1988); *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 424 (Cal. Ct. App. 1997); *In re T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re P.E.M.*, No. 06-1895, 2007 WL 914185, at *3 (Iowa Ct. App. March 28, 2007); *In Interest of B.M.*, 532 N.W.2d 504, 506-07 (Iowa Ct. App. 1995); *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 304 (Minn. Ct. App. 2009); *In re J.W.C.*, 265 P.3d 1265, 1271 (Mont. 2011); *In re T.S.*, 801 P.2d 77, 80 (Mont. 1990); *Matter of M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *Matter of N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re Adoption of S.W.*, 41 P.3d 1003, 1010 (Okla. Ct. App. 2001); *Chester Cty. Dept. of Social S. v. Coleman*, 372 S.E.2d 912, 915

(S.C. Ct. App. 1988); *In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990).

On the other hand, courts in seven states have rejected the relevance of "best interests." These courts also cite to the goals of the act, reasoning any best interests consideration "defeats the very purpose for which the ICWA was enacted." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169-70 (Tex. App. 1995). Under their reasoning, the determination of best interests "lies with the Tribe." *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994). At last count, courts in Colorado, Illinois, Minnesota, Missouri, New Mexico, North Dakota, and Texas have rejected the relevance of best interests. *People in Interest of J.L.P.*, 870 P.2d 1252, 1258-59 (Colo. App. 1994); *In re Armell*, 550 N.E.2d 1060, 1065 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 498 U.S. 940 (1990); *In re Welfare of R.L.Z.*, No. A09-0509, 2009 WL 2853281, at *5 (Minn. Ct. App. Sept. 8, 2009); *In re C.E.H.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 456 (N.M. Ct. App. 1993); *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169-70 (Tex. App. 1995). Nebraska's recent switch to this side of the debate brings the state total to eight.[1]

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[1] Minnesota appellate courts are split on the "best interests" issue, thus sixteen states are involved in the nine to eight split.

Courts both neutral to and on either side of the debate have recognized the split. *E.g.*, *In the Matter of C.R.H.*, 29 P.3d 849, 854 n.24 (Alaska 2001); *Ex parte C.L.J.*, 946 So. 2d 880, 893-94 (Ala. Civ. App. 2006); *In re Guardianship of J.O.*, 743 A.2d 341, 348 (N.J. Super. App. Div. 2000); *In re Adoption of S.W.*, 41 P.3d 1003, 1009 (Okla. Ct. App. 2001); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168 (Tex. App. 1995). And at least a few have noted the difficulty of the question. *E.g.*, *In re Guardianship of J.O.*, 743 A.2d 341, 348 (N.J. Super. App. Div. 2000); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168 (Tex. App. 1995).

Academics have recognized this issue as a "source of confusion" for courts. Note, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in In re S.S. and R.S.*, 28 LOY. U. CHI. L.J. 839, 850 (1997). They have criticized the statute's lack of guidance on the issue as having led to confusion "not only in terms of whether the test is appropriate, but also in the determination of what is in the best interest of an Indian child." Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 444 (1998). It remains one of plainest and most polarizing splits in ICWA. *See* B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 398 (1997).

This case presents a unique opportunity for this Court to address the applicability of the "best interests

of the child" doctrine in light of ICWA's transfer provisions. The Nebraska Court of Appeals made specific findings concerning the best interests of Zylena and Adrionna, app. 47a, and those findings were not disputed by the Nebraska Supreme Court. *Id.* at 1a-27a. Instead, the Nebraska Supreme Court determined that ICWA prohibited courts from considering whether a transfer of the proceeding would be in the best interest of the child. *Id.* at 16a. Thus, this case represents a rare opportunity for this Court to determine whether "best interests of the child" should be considered by a state court in an ICWA transfer request without, at the same time, being required to make factual determinations of "best interests."

B. State Courts Are Divided Over What Constitutes an "Advanced State of the Proceeding" When Determining Whether "Good Cause" Exists to Deny Transfer of a Motion to Terminate Parental Rights to the Tribal Court

The BIA Guidelines explain that "good cause" to deny transfer exists where "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,591 (Nov. 26, 1979). The Guidelines, however, are silent as to how to measure the timeline of a child welfare case. As such, courts are divided over what constitutes an "advanced

stage." Essentially, the question is whether filing a motion to terminate parental rights turns the case into a new proceeding, thereby "resetting the transfer clock."

Several courts have looked to a case's history and the length of time a child has been exposed to litigation rather than to metaphysical concepts of the beginning of a "proceeding." Several courts have noted that the "advanced stage" justification for denying transfer serves the child's welfare by protecting the child from endless litigation and uncertainty. *E.g.*, *In re Robert T.*, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988); *In re Welfare of Children of C.V.*, A04-441, 2004 WL 2523127, at *5 (Minn. Ct. App. Nov. 9, 2004). Apparently inspired by such a reading, courts like *In re M.H.*, 956 N.E.2d 510 (Ill. App. Ct. 2011) reject a concept of "proceeding" which resets upon a motion to terminate parental rights. Others have recognized that "[Child in Need of Assistance] and 'termination proceedings are not separate and distinct actions, but are interdependent and interwoven.'" *In re M.M.*, Nos. 1999-235, 98-1944, 1999 WL 1157441, at *2 (Iowa Ct. App. Dec. 13, 1999). Still others view successive child welfare cases "as a continuum," focusing on the uncertainty and delay already imposed on the child by litigation rather than on the date at which termination became a goal. *In re Termination of Parental Rights to Branden F.*, No. 04-2560, ¶11 (Wis. Ct. App. 2005) (Westlaw). Indeed, many courts seem to look at the child's underlying welfare actions as a whole, despite a change in the action's goals. *E.g.*,

In re A.T.W.S., 899 P.2d 223, 226 (Colo. App. 1994); *In re J.J.*, 454 N.W.2d 317, 319 (S.D. 1990).

Courts in other states have explicitly rejected this view, and instead regard a case as a legally distinct "proceeding" where the goals have shifted to include termination of parental rights. The Supreme Court of North Dakota endorsed this view, reasoning that foster care placement and termination of parental rights proceedings serve different purposes, thereby creating separate rights of transfer. *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003). The court in *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007) similarly admonished the district court for "conflating" these proceedings in its determination of advanced stage. When the Nebraska Supreme Court followed suit in this case, the division between states as to the proper test for untimeliness has solidified this open question into a full-fledged split.

The present cases provide the perfect vehicle for this issue to be addressed by this Court. The Nebraska Supreme Court clearly determined that the statutory language of ICWA required the conclusion that a termination of parental rights filing constitutes a new proceeding. App. at 21a. There are no factual disputes about the timing of the tribe's motion to transfer. *Id.* at 4a. Rather, the only dispute is one of statutory construction – does ICWA compel the conclusion that a motion to terminate parental rights is a new proceeding for purposes of ICWA's transfer provisions?

II. THE ISSUES PRESENTED ARE CRUCIAL TO A LARGE NUMBER OF INDIAN CHILDREN, THEIR PARENTS AND THEIR TRIBES

A. Unresolved Jurisdictional Rules Are Harmful for Indian Children, Their Parents and Their Tribes

Under both state law and ICWA, the welfare of the child is foundational. 25 U.S.C. § 1902 (2006) (including "best interests" as one of the policy justifications behind the ICWA); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995) (noting "best interest" as the "backbone" of state child custody law). Yet it is the child whose interests are most disrupted by continued jurisdictional controversy. Indian children can be placed in foster care for years before a transfer request can be made. Only then will the "best interests" and "advanced stage of the proceeding" issues be implicated, at which time issues of attachment disruption, permanency, and finality may have become paramount concerns for the children.

Congress has recognized how harmful it can be to children when they lack permanency in their lives. Thus, when Congress enacted the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, (ASFA), it required state welfare systems to act swiftly to provide children with permanent homes, whether that be with their biological parents or with adoptive parents when the biological parents are not able or willing to correct the problems that caused the children to come into foster care initially. In recognition of the harm that a lack of permanency causes

children, ASFA provides that the state is required to initiate or join proceedings to terminate parental rights when the child has remained in an out-of-home placement for fifteen out of the most recent twenty-two months. Adoption and Safe Families Act, Pub. L. No. 105-89, sec. 103, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675 (2006)).

Given ASFA's accelerated timelines for the establishment of permanency, the clock is always ticking for children. Any time spent navigating split jurisdictional divides is a potentially harmful waste of time in that child's young life. "Nothing is more basic to a child's well-being during the formative years than a stable and loving home environment." *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 424 (Cal. App. 1997). Prolonged litigation surrounding jurisdictional issues adds instability and uncertainty, thereby undermining the court's task of assuring children that stability. "Uncertainty as to the outcome of protracted litigation can be detrimental to children, and can interfere with the ability of the child's custodians and caregivers to assist the child." *In re Thomas H.*, 889 A.2d 297, 309 (Me. 2005). *See also,* Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 391 (1992) ("[t]he result of the jurisdictional battles which occur in state courts in Indian child custody cases is a debilitating disruption in the child's life caused by the seemingly endless litigation process.").

But it is not only children who need certainty and stability around transfer issues. Tribes and parents

also need that certainty. Since tribes can have members in all fifty states, they must know each state's jurisdictional interpretations in order to make good decisions about when and if to request transfer. This is especially difficult when there are splits between jurisdictions, and when some state courts have yet to weigh in on the issues. Parents are in the same position as tribes if their case is in a state which has not yet weighed in on the issue. But, even if their state has declared clear rules, parents must still attempt to guess whether their appellate courts might jump the jurisdictional divide, as just happened in Nebraska.

This Court has recognized the central importance of jurisdiction in ICWA's scheme of protection. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), this Court went so far as to describe the jurisdictional provisions in 25 U.S.C. § 1911(a) and (b) as "the heart of the ICWA." Given the central importance of jurisdiction to ICWA, uniformity throughout the fifty states surrounding the factors a state court can take into account in a transfer decision is essential. Uniformity will provide Indian children, their parents, and their tribe with the ability to more accurately predict the consequences which will flow from the timing of their decisions to pursue, or not, transfer of a case.

B. These Issues Recur Often in ICWA Cases

These concerns are all the more potent when one considers that Indian children are involved in child welfare proceedings in much higher proportions than other groups and that a large and growing number live off-reservation, where they are subject to concurrent state jurisdiction. As of 2010, the United States was home to over four million American Indians and Alaska Natives, representing a little over 1% of the United States population. *See* Joyce A. Martin et al., *Births: Final Data for 2010*, 60 Nat'l Vital Statistics Reports 69 tbl.II (2012). Yet they represent over 2% of the national population involved in the child welfare system, a near doubling in proportionate representation. Center for the Study of Soc. Policy, Disparities and Disproportionality in Child Welfare: Analysis of the Research 37 (2011); Children's Bureau, U.S. Dep't of Health & Human Services, Addressing Racial Disproportionality in Child Welfare 3 (2011). While statistical limitations always exist in such studies, the disproportionality of their representation in the child welfare system is apparent, and seems clearly higher than any other racial group. Confirming this point are the disproportionate numbers of neglect and abuse cases. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 23 (2010). Moreover, by the year 2000, almost two-thirds of American Natives lived off-reservation. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 21

(2010). And that number is on the rise. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010). From this, it is reasonable to conclude that of the already high proportion of child custody cases involving an Indian child, a majority of those are subject to concurrent state jurisdiction, and therefore to the open questions of transfer jurisdiction. Indeed, "[t]he fact that a majority of Indian families do not reside on Indian lands is of core significance in jurisdictional disputes over custody, adoption, and child welfare placements of Indian children." *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 21 (2010).

That is to say, jurisdictional questions, particularly over transfer jurisdiction, are occurring more frequently in these cases. "With migration across reservation boundaries on the rise and intermarriage between Indians and non-Indians at an all-time high, contentious tribal-state conflicts over child custody regularly surface in tribal court, state court, and occasionally federal court." Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010).

C. This Case Pairs Well with *Adoptive Couple v. Baby Girl*

By the time this petition is filed, this Court will have heard oral arguments in a case arising from the

South Carolina Supreme Court. In *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399), the two issues of the "existing Indian family doctrine" and the ICWA's definition of "parent" are being litigated. Both of those issues have contributed significant tension and confusion in ICWA adoption cases. Indeed, the "existing Indian family doctrine" has drawn substantial attention as one of the few major open questions in ICWA cases. *E.g.*, B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395 (1997). Alongside these discussions of the existing Indian family doctrine, commentators have often focused heavily on the court confusion as to "good cause" for denying transfer to tribal court. *E.g.*, Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 380-82, 384-90 (1992); B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 397-98 (1997); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 427-36, 439-44 (1998).

Thus, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399) and this petition present this Court with a unique opportunity to resolve in tandem a majority

of ICWA's most contentious questions – two in the adoption setting and two in the child welfare setting. This would certainly prove to be an effective use of judicial resources, given that the Court would not have to retread the same statutory ground years from now when the child welfare issues raised in this petition appear again before this Court.

III. THE STATE COURT DECISION IS WRONG

A. ICWA Does Not Eliminate "Best Interests of the Child" in Transfer Decisions

The Nebraska Supreme Court held that ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. App. at 16a. The court came to this conclusion by finding that the tribal court can protect the best interests of the child. *Id.* That reasoning, however, obviates the reality that the passage of time has a clear impact on a child and on that child's valid interest in achieving permanency in a reasonable period of time. As noted in the BIA Guidelines, "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591-92 (Nov. 26, 1979).

Early in a foster care case, the tribal court would quite likely be in the same position as a state court as far as its ability to provide for the best interests of the

child. It would therefore be rare, but not inconceivable, at that stage for a "best interests of the child" argument to defeat tribal transfer. This is because, at the beginning of a foster care case, the tribal court is in the same position as the state court as far as placement of the children.

While the "best interests of the child" may not counsel strongly against transfer at the beginning of a foster care case, it becomes increasingly important as the case progresses, and at no point should it be absolutely irrelevant. Indeed, "best interests of the child" is the backbone of family law. *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. App. Div. 2000). The Nebraska Supreme Court's outright dismissal of the child's best interests as a factor to consider is quite troubling.

This is especially true given that ICWA's first-stated purpose is to "protect the best interests of Indian children," particularly where two of the other interested parties – the parents and the tribe – already receive a measure of control over transfer, since they both have explicit power to "veto" a transfer request. Could it really be possible that Congress meant for children to have no voice and for their best interests to be given no consideration in such a critical decision about their very lives? Indeed, when the Iowa legislature attempted to eliminate "best interests of the child" as a consideration in transfer decisions, its court system stepped in to hold that a "narrow definition of good cause prohibiting the children from objecting to the motion to transfer based

upon their best interests and introducing evidence of best interests violates their substantive due process rights." *In re J.L.*, 779 N.W.2d 481, 486 (Iowa Ct. App. 2009).

Congress undoubtedly included "good cause" in the formula for several reasons. One of those reasons is to provide children the relief they deserve from the wrongs that adherence to a rigid rule would otherwise inflict. When the Nebraska Supreme Court held that "best interests of the child" has no place in the "good cause" mix, it totally eliminated the child's individualized voice on a potentially life-altering decision. Nothing in ICWA demanded this result. Nothing in ICWA permits this result. This Court has the power to give back to the children their individual voices.

Zylena is almost six years old. App. 2a. She has spent over half of her life in foster care. *Id.* Adrionna is almost four and one-half years old. She has spent all but approximately six months of her life in foster care. *Id.* It is undeniable that these girls deserve permanency. *Id.* For Zylena and Adrionna, a transfer will mean another delay in permanency while their mother tries to complete drug and alcohol treatment – something which she has not been able to do in previous attempts. *Id.* at 47a.

B. ICWA Does Not Mandate that a Termination of Parental Rights Motion Is a "New Proceeding"

The Nebraska Supreme Court held that ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for purposes of determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. App. 21a. In so doing, the court placed unnecessary and unwarranted emphasis on the use of the word "or" in § 1911(b). *Id.* at 16a-17a, 19a-20a.

ICWA says that in a state court proceeding for "the foster care placement of, or termination of parental rights to, an Indian child" living off-reservation must be transferred to the tribe "in absence of good cause to the contrary." 25 U.S.C. § 1911(b) (2006). Given the stringent proof requirements of ICWA,[2] it can reasonably be concluded that most termination of parental rights motions are filed in cases in which Indian children have been in foster care for years. Therefore, the most natural reading of § 1911(b)'s transfer provisions is that cases involving at least one of these two types of hearings are subject to § 1911(b)'s transfer provisions. Indeed, termination of

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[2] "No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (2006).

parental rights filings can occur without a foster care placement, such as those filed in adoption cases. *See, e.g., Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399).

Instead of employing this more natural reading, the Nebraska Supreme Court rigidly compartmentalized the on-going foster care case from the termination motion that arose within it. App. 16a-17a, 19a-20a. In so doing, the court ignored both the reality of how termination of parental rights motions emerge within foster care cases and the human toll that its misinterpretation produces.

The BIA Guidelines state that "good cause" to deny a transfer can exist where "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (not codified). At least three considerations support this guideline. First is the reality that children naturally form bonds with their foster care providers, and those bonds should not be disrupted unnecessarily. Second, this guideline acknowledges that late transfer requests can cause unacceptable delays which are, in and of themselves, harmful to children. As previously noted, "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591-92

(Nov. 26, 1979). Third, this guideline acknowledges that late transfer requests cause unwarranted delays in the progress of the case itself.

The Nebraska Supreme Court's artificial interpretation of "proceeding" makes a request for transfer which would be unreasonably late in the case as a whole, suddenly timely once the state files a motion to terminate parental rights. To permit a late transfer is to place the rights of the parent or the tribe over those of the child at a time when the child's rights should receive the utmost consideration and emphasis.

As Chief Justice Heavican's dissent notes, tribes have an undeniable interest in protecting the best interests of Indian children. App. 29a. But the stated purpose of ICWA also acknowledges the importance of the child's welfare in these types of cases. 25 U.S.C. § 1902 (2006). Indeed, the mere existence of a "good cause" exemption from mandatory transfer jurisdiction reflects explicit congressional recognition of the other interests which counterbalance those of the tribe. *See In re Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 720 (Cal. App. Ct. 1998). As Chief Justice Heavican states, "the conclusion that a new 'proceeding' is not initiated by the filing of a motion to terminate parental rights is an appropriate balance of the interests of all the stakeholders in a juvenile case." *Id.* The tribe's interests are adequately protected by requiring notice to the tribe and freely permitting intervention. *Id.* At

the same time, the state has an interest in providing permanency for such children. *Id.* "By curtailing the right of transfer after a certain point, the State is allowed to pursue permanency on behalf of children who are not able to be returned to their parental home." *Id.*

One California court perhaps stated it best: "As the tribe's interest in the proceedings weakens, the state's interest in protecting the best interests of the child assumes more importance." *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 720 (Cal. App. Ct. 1998). A rule which prohibits the filing of a termination of parental rights motion to automatically "reset the transfer clock" reflects the appropriate shifting in predominance of interests that naturally occurs over time. Such a rule still provides the tribe and parents with a fair opportunity to transfer a case, but restricts this opportunity once other interests predominate.

In these cases, Zylena's and Adrionna's interest in permanency deserve to predominate. Their cases are at an advanced stage. The Nebraska Supreme Court was wrong when it ordered their cases transferred to the tribal court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the Supreme Court of Nebraska

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. ELISE M., APPELLANT, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

___ N.W.2d ___

Filed December 14, 2012. Nos. S-11-659, S-11-660.

Norman Langemach, Lincoln, for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Christopher M. Turner for appellee.

Rita Grimm and Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for intervenor-appellee.

Hazell G. Rodriguez, guardian ad litem.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Zylena R. and Adrionna R. are Indian children who were adjudicated by the separate juvenile court of Lancaster County under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placed in foster care. When the State filed motions to terminate parental rights, the Omaha Tribe of Nebraska (the Tribe) sought to transfer the proceedings to the Omaha Tribal Court pursuant to the federal Indian Child

Welfare Act of 1978 (ICWA)[1] and the Nebraska Indian Child Welfare Act (NICWA).[2] The juvenile court denied the requested transfers based upon its finding that the motions were filed at an "advanced stage" of the juvenile proceedings. The Nebraska Court of Appeals affirmed in a memorandum opinion, rejecting the argument of the mother and the Tribe that under ICWA and NICWA, a court should treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether a juvenile case pending in state court has reached an advanced stage at the time a motion is made to transfer the case to tribal court.[3] We granted the mother's petition for further review, in which the Tribe has joined, to consider this question.

BACKGROUND

Elise M. and Francisco R. are the biological parents of Zylena, born in June 2007, and Adrionna, born in December 2008. Elise has been an enrolled member of the Tribe since 1991. Francisco is not an enrolled member and is not eligible for enrollment. This appeal involves two separate cases which were

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[1] 25 U.S.C. § 1901 et seq. (2006).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

[3] *In re Interest of Zylena R. & Adrionna R.*, Nos. A-11-659, A-11-660, 2012 WL 1020275 (Neb. App. Mar. 27, 2012) (selected for posting to court Web site).

filed in the separate juvenile court and eventually consolidated.

In the case which is before us as No. S-11-659, the State filed a petition on June 20, 2008, alleging that Zylena was a child as defined by § 43-247(3)(a) as a result of the fault or habits of Elise. An amended petition filed on July 1 alleged that Zylena was a child as defined by § 43-247(3)(a) by reason of the fault or habits of both Elise and Francisco. On or about July 9, the State mailed a copy of the amended petition and a notice to the Omaha Tribal Council. The notice stated that Zylena was a member of or may be eligible for membership in the Tribe. The notice further stated that the Tribe could intervene in the case and that the action "may result in restriction of parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." On July 16, the Tribe informed the State that Zylena was not an enrolled member and was not eligible for enrollment. Zylena was adjudicated on September 22, 2008.

The case which is before us as No. S-11-660 was commenced by the filing of a petition in the separate juvenile court on May 1, 2009. In this petition, the State alleged that both Zylena and Adrionna were minor children as defined by § 43-247(3)(a) by reason of the fault or habits of Elise and Francisco. Both children were adjudicated on May 12. They were placed with their current foster family on May 29. At that time, the permanency objective for both children was reunification with their parents.

In October 2010, an employee of the Nebraska Department of Health and Human Services realized that notice had not been sent to the Tribe with respect to Adrionna. She then sent a notice to the Tribe and inquired whether Adrionna was an enrolled member or eligible for membership. The notice included a statement that the pending action could result in removal of the child from the home or termination of parental rights and adoption. The department did not receive a response from the Tribe.

From and after May 29, 2009, various services were provided to Elise and Francisco by the State of Nebraska. Neither Elise nor Francisco made measurable progress toward rehabilitation. In November 2010, the permanency objective was changed from reunification to adoption. And on February 7, 2011, the State filed motions in each case seeking to terminate the parental rights of Elise and Francisco to both children.

In case No. S-11-660, the case involving both children, the Tribe filed a notice of intervention on February 14, 2011, and a notice of intent to transfer on February 22. The latter motion asserted that Zylena and Adrionna were eligible for enrollment in the Tribe and requested that the case be transferred to tribal court pursuant to § 43-1503(4). The Tribe filed similar documents in case No. S-11-659 on March 1.

At a hearing on the Tribe's motions, the State and the guardian ad litem orally objected to the

requested transfers without specifically stating the grounds for their objection. A representative of the Tribe testified that, due to a mathematical error, it had incorrectly determined in July 2008 that Zylena was not eligible for enrollment. The Tribe presented evidence that both children are eligible for enrollment through Elise. The Tribe first realized its error in late January or early February 2011. A tribal representative testified that but for the mistake, the Tribe likely would have moved to intervene sooner. A representative also testified that a tribal court would work to reunify the family, but would not terminate parental rights. She explained that a long-term guardianship could be established for the children by the tribal court. The representative further testified that if the cases were transferred, the Tribe intended to keep the children in their current foster care placement.

The State presented evidence that it was in the best interests of the children to remain in their current foster care placement. In addition, the foster mother testified that she and her husband were willing to adopt the children and that if they did so they intended to integrate the children's cultural traditions into their lives. A state caseworker reviewed the proposed case plan prepared by the Tribe and opined that it was essentially the same case plan the State had been implementing since the proceedings began 2 years prior.

In orders entered on June 30, 2011, the juvenile court denied the Tribe's motions to transfer to tribal court. In case No. S-11-659, the case involving only

Zylena, the juvenile court found that the case had been pending since June 2008, that Zylena was adjudicated in September 2008, that the permanency plan of adoption was approved in November 2010, that a motion to terminate parental rights was filed, and that the Tribe had not filed its notice of intent to transfer until March 1, 2011, despite receiving notice in July 2008. The court concluded that the proceeding was at an advanced stage and that because the Tribe had not filed its motion to transfer "for 32 months after receiving original notice, good cause has been shown to deny the transfer." In case No. S-11-660, the case involving both children, the juvenile court noted that the petition was filed in May 2009; that numerous hearings had been held; that a permanency plan of adoption had been approved on November 4, 2010; that a motion to terminate parental rights was filed; and that the Tribe had not filed its notice of intent to transfer until February 22, 2011. The court concluded that because the proceeding was at an advanced stage when the Tribe requested transfer, "good cause has been shown to deny the transfer." The juvenile court did not make findings in either case as to whether transfer was in the best interests of the children.

Elise filed a timely appeal in each case, and the Tribe cross-appealed. Elise assigned that the juvenile court erred in denying the motion to transfer, arguing that in determining whether the proceedings were at an "advanced stage" when the motions to transfer were filed, the court should have considered only the

time after the filing of the petitions to terminate parental rights, and not the preceding period when the children were placed in foster care.

In affirming the judgments of the juvenile court, the Court of Appeals relied on three prior Nebraska cases,[4] including one from this court, in concluding that "it is the policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage."[5] Utilizing this standard, the court determined that the Tribe had filed its motion to transfer "1 week after the State filed a motion to terminate parental rights and nearly 2 years after Zylena and Adrionna were placed with their current foster family."[6] Citing our opinion in *In re Interest of Bird Head,*[7] the Court of Appeals noted that "ICWA does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."[8] The court noted that the children were being well cared for in a home that

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[4] *In re Interest of C.W. et al.,* 239 Neb. 817, 479 N.W.2d 105 (1992), *disapproved on other grounds, In re Interest of Walter W.,* 274 Neb. 859, 744 N.W.2d 55 (2008); *In re Interest of Louis S. et al.,* 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.,* 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *6.

[6] *Id.* at *7.

[7] *In re Interest of Bird Head,* 213 Neb. 741, 331 N.W.2d 785 (1983).

[8] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

"appears to be committed to fostering their Native American heritage" and concluded that "the present situation is clearly in the children's best interests."[9] For these reasons, the Court of Appeals concluded that the juvenile court had not abused its discretion in finding that good cause existed to deny the motions to transfer.

ASSIGNMENT OF ERROR

Elise assigns, summarized and consolidated, that the Court of Appeals erred in finding the juvenile court had good cause to deny her motion to transfer to tribal court. The Tribe filed a response to the petition for further review, joining in Elise's assignment of error.

STANDARD OF REVIEW

This court has not specifically articulated a standard for reviewing the order of a juvenile court on a motion to transfer a case to tribal court. But in *In re Interest of C.W. et al.*,[10] we held that a Nebraska juvenile court had discretionary authority to vacate an order transferring a case to a tribal court and that it did not abuse its discretion in doing so. In subsequent cases, the Court of Appeals has stated that a denial of a transfer to tribal court is reviewed for an

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[9] *Id.*

[10] *In re Interest of C.W. et al., supra* note 4.

abuse of discretion.[11] We agree that this is the appropriate standard of review.

ANALYSIS

ICWA was enacted by Congress in 1978. Its stated purpose is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[12]

ICWA is based upon an assumption that protection of an Indian child's relationship to the tribe is in the child's best interests.[13] The Act "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its

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[11] *See, In re Interest of Louis S. et al., supra* note 4; *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007).

[12] § 1902. *See In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[13] *See, Mississippi Choctaw Indian Band v. Holyfield,* 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); *In re Interest of C.W. et al., supra* note 4.

children in its society.'"[14] The U.S. Supreme Court has observed that ICWA does so "by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' . . . and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[15]

NICWA was enacted by the Nebraska Legislature in 1985[16] "to clarify state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act."[17] The Legislature declared that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced."[18]

Under ICWA and NICWA, "Indian child" means any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in a tribe as the biological child of a member of a tribe.[19] Both Zylena and Adrionna meet

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[14] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[15] *Id.*

[16] 1985 Neb. Laws, L.B. 255.

[17] § 43-1502.

[18] *Id.*

[19] § 1903(4); § 43-1503(4).

that definition. If an Indian child resides or is domiciled within the reservation of a tribe, that tribe has exclusive jurisdiction over any child custody proceeding.[20] But when an Indian child does not reside or is not domiciled on his or her tribe's reservation, as is the case here, state courts may exercise jurisdiction over the child concurrently with tribal courts.[21] However, a state court must refer "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child" to a tribal court if the tribe or either parent petitions for transfer, unless "good cause" is shown for the retention of state court jurisdiction.[22] At a hearing on a petition to transfer a proceeding to tribal court, the party opposing the transfer has the burden of establishing that good cause not to transfer exists.[23] The U.S. Supreme Court has characterized these provisions of ICWA as creating "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation."[24]

"Good cause" is not defined in either ICWA or NICWA. However, nonbinding guidelines published by the Bureau of Indian Affairs (BIA Guidelines)

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[20] § 1911(a); § 43-1504(1).

[21] *See*, § 1911(b); § 43-1504(2).

[22] *Id.*

[23] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13; *In re Interest of C.W. et al., supra* note 4.

[24] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 36.

provide that good cause not to transfer a proceeding may exist if the proceeding is "at an advanced stage" when the petition to transfer was received and the petitioner failed to "file the petition promptly" after receiving notice.[25] We have looked to the BIA Guidelines in the past in determining good cause issues under ICWA and NICWA.[26] Various other courts have done likewise.[27]

To resolve this appeal, we must address two questions. First, what constitutes a "proceeding" within the meaning of ICWA, NICWA, and the BIA Guidelines? And second, should a Nebraska court apply the "best interests of the child" standard of the Nebraska Juvenile Code in deciding whether to transfer a child custody proceeding involving an Indian child to a tribal court for disposition? Our opinion in *In re Interest of C.W. et al.*[28] is pertinent to both questions.

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[25] *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591, C.3(b)(i) (Nov. 26, 1979) (not codified).

[26] *In re Interest of C.W. et al., supra* note 4. *See, also, In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[27] *See, e.g., People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005); *In re Adoption of S.W.*, 41 P.3d 1003 (Okla. Civ. App. 2001); *In re A.P.*, 25 Kan. App. 2d 268, 961 P.2d 706 (1998); *Matter of M.E.M.*, 195 Mont. 329, 635 P.2d 1313 (1981).

[28] *In re Interest of C.W. et al., supra* note 4.

In *In re Interest of C.W. et al.,* the juvenile court sustained a motion to transfer to tribal court filed shortly before trial on a petition to terminate parental rights, but then vacated its transfer order before the trial commenced. After conducting a trial and determining that parental rights of the mother and putative fathers of the children should be terminated, the juvenile court transferred the case to tribal court for "the dispositional phase of the proceeding."[29] On appeal, the mother argued that the juvenile court erred in vacating the pretrial transfer order. In a cross-appeal, the State argued that the juvenile court erred in ordering transfer to tribal court after trial.

In rejecting the mother's argument, we noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[30] While it is not entirely clear from the opinion, it appears that this time period included juvenile court proceedings which occurred both before and after the filing of the motion to terminate parental rights. Thus, although we did not specifically address the issue presented in the instant cases, our reasoning in *In re Interest of C.W. et al.* implicitly supports the State's argument that a "proceeding" includes everything that transpires after the filing of a petition invoking the jurisdiction of the juvenile court under

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[29] *Id.* at 821, 479 N.W.2d at 110.

[30] *Id.* at 830, 479 N.W.2d at 115.

§ 43-247(3)(a). In reversing the posttrial transfer order, we noted with approval decisions by courts in Arizona and Indiana recognizing that the best interests of the child should be considered in determining whether there is good cause to deny a requested transfer to tribal court. We concluded:

> Although we realize that the guidelines deem inappropriate considerations of tribal socioeconomic considerations and the perceived adequacy of the tribal or Bureau of Indian Affairs social services or judicial systems, we also recognize that, in the case of two of the children, those considerations become necessary to a determination of the best interests of the children and, therefore, "good cause" not to transfer the case.[31]

We reasoned that two of the children had special needs and would suffer "if their respective foster homes, the only stability they have ever known, are taken away from them."[32] We now revisit our holdings in *In re Interest of C.W. et al.* to determine whether they are consistent with ICWA and NICWA.

What Constitutes "Proceeding"?

Elise and the Tribe focus on the language of ICWA and NICWA governing transfer to tribal court of a state court proceeding "for the foster care

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[31] *Id.* at 835-36, 479 N.W.2d at 118.

[32] *Id.* at 836, 479 N.W.2d at 118.

placement of, *or* termination of parental rights to," an Indian child not residing on a reservation, in the absence of good cause to the contrary.[33] They argue that the use of the disjunctive "or" demonstrates a foster care proceeding differs from a termination of parental rights proceeding under ICWA and NICWA and that therefore the two should not be lumped together in considering whether a motion to transfer is made at an "advanced stage" of the proceeding. The State and the guardian ad litem argue that under the reasoning of *In re Interest of C.W. et al.,*[34] the juvenile court properly considered everything which had occurred after the initial filing of these cases in determining that the proceedings had reached an advanced stage when the Tribe moved to transfer. They also refer us to two prior opinions of the Court of Appeals[35] and an Illinois appellate court decision supporting this position.[36] In deciding *In re Interest of C.W. et al.,* we did not apply principles of statutory construction to determine whether, under ICWA and NICA [sic], a termination of parental rights proceeding should be regarded as separate and distinct from a foster care placement proceeding which preceded it in the same docketed case. We do so now.

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[33] § 1911(b); § 43-1504(2) (emphases supplied).

[34] *In re Interest of C.W. et al., supra* note 4.

[35] *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[36] *In re M.H.,* 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

Under the definitional sections of ICWA and NICWA, the term "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[37] Foster care placement is specifically defined to mean "any action removing an Indian child from its parent or Indian custodian for temporary placement."[38] Termination of parental rights means "any action resulting in the termination of the parent-child relationship."[39] Preadoptive placement means "temporary placement of an Indian child . . . after the termination of parental rights."[40] And adoptive placement means "the permanent placement of an Indian child for adoption."[41] As we have noted, the statutory provisions governing transfer provide that in any state court "proceeding for the foster care placement of, or termination of parental rights to" an Indian child not domiciled or residing within a reservation, a state court shall grant a motion to transfer to tribal court "in the absence of good cause to the contrary."[42]

A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or

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[37] § 1903(1); 43-1503(1).

[38] § 1903(1)(i); § 43-1503(1)(a).

[39] § 1903(1)(ii); § 43-1503(1)(b).

[40] § 1903(1)(iii); § 43-1503(1)(c).

[41] § 1903(1)(iv); § 43-1503(1)(d).

[42] § 1911(b); § 43-1504(2).

sentence will be rejected as superfluous or meaningless.[43] Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[44] Applying these familiar principles, we conclude that ICWA and NICWA contemplate four different types of child custody proceedings, two of which must be transferred from a state court to a tribal court upon proper motion in the absence of good cause to the contrary. Thus, when the BIA Guidelines state that good cause may exist when "[t]he proceeding was at an advanced stage" at the time a petition to transfer is received, they can only be referring to one of the two proceedings subject to transfer: foster care placement *or* termination of parental rights. The State's argument that a foster care placement proceeding and a termination of parental rights proceeding are a single "proceeding" for purposes of the "advanced stage" analysis is inconsistent with the plain language of ICWA and NICWA, which defines them as separate proceedings. The fact that Nebraska law permits both objectives to be pursued sequentially in a single-docketed case is entirely irrelevant to the question of whether they are separate "proceedings" under the plain statutory language of ICWA and NICWA.

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[43] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010); *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[44] *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009); *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

At least two other state courts have reached this conclusion. The North Dakota Supreme Court in *In re A.B.*[45] held that a juvenile court "correctly interpreted ICWA to measure the relevant time period for a motion to transfer jurisdiction . . . from the filing of the petition to terminate parental rights." This was so even though there was a preceding foster placement in the same docketed case. In *In re A.B.,* the court noted that its holding was based on the plain language of ICWA separately defining termination of parental rights proceedings and foster placement proceedings and the different purposes served by those proceedings under ICWA. Specifically, the court found that the "plain language of 25 U.S.C. § 1911(b) authorizes transfer motions for either foster care placement proceedings or for termination of parental rights proceedings" and that interpreting the two proceedings as one "would subsume an Indian tribe's right to request transfer of a termination proceeding into its right to request transfer of an earlier foster placement proceeding."[46] The court reasoned that doing so was particularly troubling when a foster care placement only temporarily affects an Indian child's relationship with his or her tribe, while a termination proceeding severs that relationship.

A Minnesota appellate court employed similar reasoning in concluding that foster placement

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[45] *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003).

[46] *Id.*

proceedings and termination of parental rights proceedings were separate and distinct under ICWA and should not be "conflated" in determining whether a "proceeding" is at an "advanced stage" within the meaning of the BIA Guidelines.[47] The court noted that whether Minnesota law considered the two types of proceedings to be "continuous or distinct" was not pertinent to the issue of transfer, which was governed by the statutory language of ICWA.[48] It further reasoned that a tribe's interest in maintaining its relationship with an Indian child may not be implicated in a foster care placement proceeding to the same degree as in a termination proceeding.[49]

We acknowledge that an Illinois appellate court reached a contrary conclusion in *In re M.H.*[50] That court rejected an argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court noted that under settled Illinois law, the filing of a petition to terminate parental rights did not initiate an entirely new proceeding within an existing juvenile case and concluded that the plain language of ICWA did not support a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same

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[47] *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007).

[48] *Id.* at 352 n.6.

[49] *In re Welfare of Children of R.M.B.*, *supra* note 47.

[50] *In re M.H.*, *supra* note 36.

docketed case. Accordingly, the court concluded that under the plain language of ICWA, the "proceedings" commenced when the child was placed in foster care and the tribe's motion to transfer more than 2 years later was made at an advanced stage of the proceeding, constituting good cause for denying the motion.[51]

The record in this case vividly demonstrates why the reasoning of the Illinois court is inconsistent with the principles underlying ICWA and NICWA. A representative of the Tribe testified that placement of Indian children with foster parents, relatives, or a long-term guardian is consistent with the Tribe's cultural interests but that termination of parental rights is not. Thus, a Tribe may have no reason to seek transfer of a foster placement proceeding where it agrees with the Indian child's placement and the permanency goal is reunification with the parents. However, once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court. As one court has noted, "[s]upporting the State's reunification efforts should not result in allegations of a Tribe's lack of diligence in requesting transfer" when the proceeding becomes one for the termination of parental rights.[52]

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[51] *Id.* at ¶ 59, 956 N.E.2d at 522, 353 Ill. Dec. at 660.

[52] *In re M.S.*, 237 P.3d 161, 169 (Okla. 2010).

Accordingly, to the extent *In re Interest of C.W. et al.*[53] can be read as holding that a foster placement proceeding and a subsequent termination of parental rights proceeding involving an Indian child are not separate and distinct under ICWA and NICWA, it is disapproved. Here, the relevant proceedings commenced on February 7, 2011, when the State filed its motions to terminate parental rights. The Tribe intervened and requested transfer of both cases by March 1, which was prior to any substantive hearing or adjudication and indeed prior to the parents' appearances and pleas to the termination motions. The commentary to the BIA Guidelines indicates that denial of a requested transfer at an "advanced stage" of a proceeding serves the purpose of preventing a party from waiting "until the case is almost complete to ask that it be transferred to another court and retried."[54] That was clearly not the case here, as the termination of parental rights proceedings had barely begun when the Tribe requested that they be transferred to tribal court.

BEST INTERESTS

The juvenile court made no findings as to whether transfer to tribal court would be in the best interests of these Indian children. But the Court of

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[53] *In re Interest of C.W. et al., supra* note 4.

[54] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,590, C.1, commentary.

Appeals did. It noted that the children had been out of their parents' home for 2 years, that they were being well cared for in a home that "appears to be committed to fostering their Native American heritage," and that "the present situation is clearly in the children's best interests."[55] The court included this best interests determination as one of the reasons for its conclusion that the juvenile court did not abuse its discretion in denying the motions to transfer.

As the legal underpinning of its best interests analysis, the Court of Appeals relied on this court's decision in *In re Interest of Bird Head.*[56] In that case, we held that a county court did not err in denying a motion to transfer on grounds that the motion had been abandoned and good cause had been shown. We then turned to a separate issue, whether the county court erred in failing to follow the preferential preadoptive placement provisions of ICWA in the absence of good cause to the contrary. We concluded that it did, noting that the county court had made no findings as to what good cause was shown to warrant failure to place the child with persons or agencies having preference under ICWA.[57] In reaching this conclusion, we stated that ICWA "does not change the cardinal rule that the best interests of the child are

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[55] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

[56] *In re Interest of Bird Head, supra* note 7.

[57] *See* § 1915(b).

paramount, although it may alter its focus."[58] In this case, the Court of Appeals cited that statement as the basis for its best interests findings. But that reliance was misplaced, because in *In re Interest of Bird Head,* that principle was stated in the context of the issue of placement, not transfer to tribal court.

But in *In re Interest of C.W. et al.,* we clearly did determine that the best interests of Indian children was a factor to be considered in deciding whether to transfer a state court proceeding to tribal court. We relied on decisions of Arizona[59] and Indiana[60] courts in reaching this conclusion. But other state courts have taken a contrary and what we now believe to be a better approach. In *In re A.B.,* the North Dakota Supreme Court stated:

> Although one of the goals of ICWA is to protect the best interests of an Indian child, . . . the issue here is the threshold question regarding the proper forum for that decision. . . . We agree with those courts that have concluded the best interest of the child is not a consideration for the threshold

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[58] *In re Interest of Bird Head, supra* note 7, 213 Neb. at 750, 331 N.W.2d at 791.

[59] *Matter of Appeal in Maricopa County,* 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983).

[60] *Matter of Adoption of T.R.M.,* 525 N.E.2d 298 (Ind. 1988).

> determination of whether there is good cause not to transfer jurisdiction to a tribal court.[61]

One of the cases which the North Dakota court found persuasive was *Yavapai-Apache Tribe v. Mejia,*[62] in which a Texas appellate court held that the best interests standard is not an appropriate consideration in a determination of whether good cause exists to deny transfer of jurisdiction for two reasons. First, the court concluded that applying the best interests standard to transfer decisions would defeat the purpose for which ICWA was enacted by allowing "Anglo cultural biases into the analysis."[63] The court reasoned:

> The ICWA precludes the imposition of Anglo standards by creating a broad presumption of jurisdiction in the tribes. Thus, the jurisdictions [sic] provisions in sections 1911(a) and (b) are at the very heart of the ICWA. We decline to embrace a test that would, in our judgment, eviscerate the spirit of the Act.[64]

Second, the Texas court rejected the best interests standard because it deemed it relevant to issues of placement, not jurisdiction. The court stated:

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[61] *In re A.B., supra* note 45, 663 N.W.2d at 633-34 (citations omitted).

[62] *Yavapai-Apache Tribe v. Mejia,* 906 S.W.2d 152 (Tex. App. 1995).

[63] *Id.* at 169.

[64] *Id.* at 170.

> For a court to use this standard when deciding a purely jurisdictional matter, alters the focus of the case, and the issue becomes not what judicial entity should decide custody, but the standard by which the decision itself is made. The utilization of the best interest standard and fact findings made on that basis reflects the Anglo-American legal system's distrust of Indian legal competence by its assuming that an Indian determination would be detrimental to the child.[65]

Other courts have followed similar reasoning in holding that best interests should not be a factor in resolving the issue of whether there is good cause to deny a motion to transfer a case involving an Indian child from state court to tribal court.[66]

We now conclude that these decisions are more consistent with the underlying purpose of ICWA and NICWA than the Indiana and Arizona cases we cited in *In re Interest of C.W. et al.* We further note that the BIA Guidelines do not include the best interests of a child as "good cause" for denying transfer to a tribal court, but instead, specifically state that "[s]ocio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in

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[65] *Id.*

[66] *See, People in Interest of J.L.P,* 870 P.2d 1252 (Colo. App. 1994); *Matter of Ashley Elizabeth R.,* 116 N.M. 416, 863 P.2d 451 (N.M. App. 1993); *In re Armell,* 194 Ill. App. 3d 31, 550 N.E.2d 1060, 141 Ill. Dec. 14 (1990).

a determination that good cause exists."[67] The reality is that both a juvenile court applying Nebraska law and a tribal court proceeding under ICWA must act in the best interests of an Indian child over whom they have jurisdiction. The question before a state court considering a motion to transfer to tribal court is simply which tribunal should make that decision. Permitting a state court to deny a motion to transfer based upon its perception of the best interests of the child negates the concept of "presumptively tribal jurisdiction" over Indian children who do not reside on a reservation and undermines the federal policy established by ICWA of ensuring that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[68] Stated another way, recognizing best interests as "good cause" for denying transfer permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests. By enacting ICWA, Congress clearly stated otherwise. Accordingly, we overrule *In re Interest of C.W. et al.*[69] to the extent that it permits a state court to consider the best interests of an Indian child in deciding whether there is good

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[67] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,591, C.3(c).

[68] *Mississippi Choctaw Indian Band v. Holyfield*, *supra* note 13, 490 U.S. at 36-37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[69] *In re Interest of C.W. et al.*, *supra* note 4.

cause to deny a motion to transfer a proceeding to tribal court.

CONCLUSION

For the reasons discussed, we conclude that there is no basis on the records for a determination that the motions to transfer these cases to tribal court were filed at an advanced stage of the proceedings to terminate parental rights and that the Court of Appeals therefore erred in affirming the separate juvenile court's denial of the motions on this ground. Accordingly, we reverse, and remand to the Court of Appeals with directions to reverse the judgments of the separate juvenile court and direct that court to sustain the motions to transfer the cases to the Omaha Tribal Court.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

HEAVICAN, C.J., dissenting.

I respectfully dissent. I would find that the proceedings in these consolidated cases were at an advanced stage and that good cause existed for the juvenile court to retain jurisdiction and to deny the requests to transfer. As such, I would affirm the decisions of the juvenile court.

As noted by the majority, we addressed, albeit implicitly, the issue presented here in *In re Interest of C.W. et al.*,[1] where this court noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[2] We also noted in *In re Interest of C.W. et al.* that it was appropriate for the juvenile court to consider the best interests of the child in determining good cause to deny a transfer.[3] Since our decision in that case, the Court of Appeals has twice considered the entire pendency of a juvenile abuse and neglect proceeding when affirming the juvenile court's denial of a motion to transfer to tribal courts on the ground that the motion was filed at an advanced stage of the proceeding.[4]

Moreover, this position is consistent with other authority. The Illinois Court of Appeals in *In re M.H.*,[5] rejected an argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court in *In re M.H.* explicitly addressed and rejected the reasoning of the North

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[1] *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

[2] *Id.* at 830, 479 N.W.2d at 115.

[3] *In re Interest of C.W. et al., supra* note 1.

[4] *See, In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re M.H.*, 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

Dakota Supreme Court in *In re A.B.*,[6] which is relied upon by the majority, and concluded it did not find that the plain language of ICWA supported a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same docketed case.

In my view, the conclusion that a new "proceeding" is not initiated by the filing of a motion to terminate parental rights is an appropriate balance of the interests of all the stakeholders in a juvenile case. An Indian tribe unquestionably has an interest in "protect[ing] the best interests of Indian children and [in] promot[ing] the stability and security of Indian tribes,"[7] and Indian children should be placed whenever possible in homes that "will reflect the unique values of Indian culture."[8] But the State also has a parens patriae interest[9] and has a right to protect the welfare of its resident children,[10] which includes establishing permanency for those children.[11] By requiring notice and freely allowing intervention, at least in nonadvanced stages of the proceedings, the Tribe is permitted sufficient opportunity to protect its

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[6] *In re A.B.*, 663 N.W.2d 625 (N.D. 2003).

[7] *See* 25 U.S.C. § 1902 (2006).

[8] *Id.*

[9] *See In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[10] *See id.*

[11] Neb. Rev. Stat. § 43-246(6) (Cum. Supp. 2012). Cf. Neb. Rev. Stat. § 43-1312 (Cum. Supp. 2012).

interest while not interfering with the welfare and best interests of children residing in Nebraska. By curtailing the right of transfer after a certain point, the State is allowed to pursue permanency on behalf of children who are not able to be returned to their parental home.

In this instance, the Tribe was given notice of these proceedings. In Zylena's case, the amended petition to adjudicate was filed on July 1, 2008, and notice was sent to the Tribe on July 9. By July 16, the Tribe responded, indicating that Zylena was not an enrolled member of the Tribe and that she was not eligible for enrollment. With Adrionna, a petition to adjudicate was not filed until May 1, 2009, and notice was admittedly not sent until October 2010. But notice was sent, and the Tribe did not seek to intervene until February 14, 2011, or a week *after* the State filed a motion to terminate the parental rights to both Zylena and Adrionna.

Not only was the Tribe sent notice of these actions, that notice was unambiguous: the action filed on behalf of Zylena, and later Adrionna, "may result in restriction of parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." In Zylena's case, the Tribe actually responded in the negative and allowed the State's proceedings to continue for another 31 months before finally asking to intervene and for transfer.

Nebraska's juvenile code provides that the code should be construed to accomplish, among other goals, "permanent arrangements for children . . . who are unable to return home."[12] But in this case, it is clear that by allowing the transfer, Zylena's and Adrionna's rights to such permanency have been delayed as the futures of these children play out in yet another court.

I would hold that the filing of a petition to terminate parental rights does not commence a new proceeding under ICWA and NICWA and that the Tribe's intervention came at an advanced stage of the proceedings. I would therefore conclude that this late intervention was good cause to deny the Tribe's motions to transfer and that the decision of the Court of Appeals affirming the juvenile court's denial of the motions to transfer should be affirmed.

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[12] § 43-246(6).

APPENDIX B

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ZYLENA R. & ADRIONNA R.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,

V.

ELISE M., APPELLANT, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

Filed March 27, 2012. Nos. A-11-659, A-11-660.

Appeals from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN, Judge. Affirmed.

Norman Langemach for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Christopher M. Turner for appellee.

Rita Grimm and Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for intervenor-appellee.

Hazell G. Rodriguez, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Elise M. is the biological mother of Zylena R., born in June 2007, and Adrionna R., born in December 2008. Francisco R. is the children's biological father. Elise, an enrolled member of the Omaha Tribe (the Tribe), appeals from an order of the separate juvenile court of Lancaster County that denied the Tribe's motion to transfer this juvenile proceeding to the Omaha Tribal Court (the Tribal Court) because the case was at an advanced stage. Allegedly due to an erroneous determination in July 2008 that Zylena was not eligible for enrollment in the Tribe, the transfer motion was not filed until 1 week after the State petitioned to terminate Elise's and Francisco's parental rights and nearly 2 years after Zylena and Adrionna were placed in their current foster home. After our review, we find that the denial of the motion to transfer was not an abuse of discretion, and thus, we affirm.

BACKGROUND

At the outset, we note that we have consolidated Zylena's case, No. A-11-659, with the case of Zylena and Adrionna, No. A-11-660.

Elise has been an enrolled member of the Tribe since April 1, 1991. Elise's application for enrollment, dated the day of her birth, appears in evidence. The application lists Elise's mother as an enrolled Tribe member with 15/16 degree Omaha blood. Elise's biological father is listed on the application, but information regarding his enrollment with the Tribe

and his degree of Omaha blood is lacking – the spaces on the form for such information were left blank. Elise's degree of Omaha blood is listed as 15/32 on the enrollment application, and the same is reflected on her "Certification of Degree of [Omaha] Blood" in evidence dated July 17, 2008.

The record reflects that the Nebraska Department of Health and Human Services (DHHS) inquired into Zylena's eligibility for enrollment with the Tribe on July 1, 2008. A "Tribal Enrollment Inquiry" form for Zylena, dated July 16, 2008, is in evidence. The form is from the Tribe's Child Protective Services department and is signed by an enrollment clerk and an "ICWA" representative – referencing the Nebraska Indian Child Welfare Act (ICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008). The form lists Elise's degree of Omaha blood, 15/32, and provides that Zylena's father, Francisco, is not an enrolled member of the Tribe, nor is he eligible for enrollment. There are checkmarks on the form indicating that Zylena is not an enrolled member of the Tribe and that she is not eligible for enrollment. Because Zylena and Adrionna have the same biological parents, their blood quantum would be the same.

On May 1, 2009, the State filed a petition in the separate juvenile court of Lancaster County alleging in count I that Zylena was previously adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), and her legal custody was placed with DHHS. The record reveals that Zylena was adjudicated on September 22, 2008, due to domestic violence between

Elise and Francisco in the child's presence. The petition further alleges that Elise and Francisco have failed to correct the conditions that led to Zylena's adjudication (i.e., domestic violence) and that the situation and/or the actions of Elise and Francisco place Zylena and Adrionna at risk for harm. Count II of the petition alleges that Zylena and Adrionna lack proper parental care due to the faults or habits of Elise or that they are in a situation dangerous to life and limb or injurious to their health or morals, in that Elise left them in the care of another person without sufficient provisions or means to appropriately care for them and without information on how to contact her.

An adjudication hearing was held, and the allegations alleged in the adjudication petition were found to be true by a preponderance of the evidence, though no record of the hearing appears in evidence. Zylena and Adrionna were placed in temporary DHHS custody with their current foster family on May 29, 2009.

On November 4, 2010, Zylena's permanency objective was changed from reunification to adoption. A hearing was also held on November 4, at which time the court found no exception existed to eliminate the requirements for the filing of a motion for termination of parental rights as set forth in Neb. Rev. Stat. § 43-292.02 (Reissue 2008) with respect to Zylena.

On February 7, 2011, the State filed a motion to terminate the parental rights of Elise and Francisco to Zylena and Adrionna. The grounds for termination listed in the motion are Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2010) with respect to both parents. The motion additionally alleges that termination is proper with respect to Elise pursuant to § 43-292(4). The motion asserts that termination is in the best interests of the children.

The Tribe filed a notice of intervention on February 14, 2011. The notice alleges that Zylena and Adrionna are children as defined by the ICWA in that they are eligible for membership with the Tribe. The Tribe filed an intent to transfer on February 22, and neither Elise nor Francisco objected to such. An acceptance of transfer was filed by the Tribe on March 1.

A hearing was held on March 16, 2011, in which Emerime Sheridan, the aid to tribal government/enrollment director for the Tribe, was the sole witness to testify. The State requested the court to take judicial notice of her testimony at the hearings on May 3 and June 16, and the court agreed to do so. Sheridan's duties include investigating and determining eligibility of persons for enrollment in the Tribe. Sheridan testified that she investigated the eligibility of Zylena and Adrionna for enrollment in February 2011 and that her investigation determined that their degree of Omaha blood is 38/128. Sheridan testified that one-fourth degree Omaha blood is required for

enrollment with the Tribe, and thus, Zylena and Adrionna are both eligible.

Sheridan testified that the reason Zylena was previously determined to be ineligible for enrollment was because there was an error in the determination of Elise's degree of Omaha blood. Specifically, she testified that Elise's father's blood quantum was not incorporated into the calculation, and thus, Elise's degree of Omaha blood was lower than it should have been. In evidence is an acknowledgment of paternity dated December 22, 1988, which provides that Elise's father's race is "American Indian." Testimony at a later hearing revealed that he is part Winnebago and part Omaha. Sheridan testified that incorporating Elise's father's blood increased Elise's degree of Omaha blood "considerably" – from 15/32 to 19/32, which would increase Zylena's degree of Omaha blood to 38/128, as would also be true for Adrionna. Sheridan testified that documentation regarding the Omaha blood of Elise's father was available when Elise's blood quantum was initially calculated and that the failure to take his ancestry into account was an "oversight" by her office.

The State filed an amended motion for termination of parental rights on April 28, 2011, with the additional allegations that (1) continued custody of Zylena and Adrionna by their parents is likely to result in serious emotional or physical damage to said children and (2) active efforts have been made to provide remedial services and rehabilitative programs

designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful.

Formal hearing on the Tribe's motion for transfer was held on May 3 and June 16, 2011. A DHHS children and families outcome monitor, Katie Rawhouser, testified that she began working with Zylena and Adrionna in February 2010 and that she sent documentation inquiring into Adrionna's enrollment in the Tribe on October 27, but that she did not receive a response. Rawhouser did not inquire into Zylena's eligibility because, as stated above, the Tribe had determined in July 2008 that Zylena was ineligible for enrollment. The next action by the Tribe concerning these children was the filing of the notice of intervention 1 week after the motion to terminate Elise's and Francisco's parental rights was filed.

All of the testimony was that it is in Zylena's and Adrionna's best interests to remain in their current foster placement, where they had been living for approximately 2 years (since May 29, 2009) at the time of the hearing. Elise testified that, in the event the court granted the Tribe's motion to transfer, she would like the children to stay in that foster home until she is ready to parent. At the time of the hearing, Elise was not living in a permanent home and she was unemployed. She testified that Zylena had recently expressed concern over where she would be living in the future. There was no evidence that Francisco was capable of parenting or in a position to parent the children.

Elise testified that she has participated in drug treatment three times, twice inpatient and once outpatient. Her testimony was that her most recent recommendation through DHHS was that she needs to address her drug and alcohol problems through long-term inpatient treatment. Rawhouser testified that Elise has struggled with sobriety and that "she has not been able to get [her sobriety] under control, has not completed court ordered services." Marla Spears, a member of the Tribe and director of Child Protective Services for wards of the Tribe, testified that if the case were transferred to the Tribal Court, Elise would be required to complete inpatient drug and alcohol treatment, which could take up to 6 months, at a facility 8 hours' driving distance one way from where the children are now living.

Francisco also testified. His testimony was that he feels the children's current foster home is providing good care. He testified that although he wants the children to stay in their present foster home, he does not want his parental rights to be terminated. The evidence was that Francisco has been unsuccessful in completing court-ordered services and that his visitation with the children has been sporadic at best.

The children's foster mother testified at the hearing that she and her husband have always encouraged Elise's reunification with the children and that thus, it was never their intention to adopt. However, she testified that they would be willing to adopt Zylena and Adrionna and that if they did, they would continue to maintain a relationship with Elise

and the extended family, and provide cultural enrichment for the children. In evidence is a "NATIVE AMERICAN CULTURAL PLAN Foster Care/Adoptive Placement" form. It provides the foster parents' plan for integrating Zylena's and Adrionna's cultural traditions into their lives. One question on the form is, "How will cultural traditions be a part of your way of life (rather than a one-time event)?" The foster parents answered:

> We have participated in many social activities and traditions in the nearly two years the children have been a part of our family, including two pow-wows and a family wedding. The children have had regular contact with their extended family members to celebrate holidays and birthdays. We have also shared Native American foods and stories with all of the children in our family. All of these traditions have been a part of our way of life and will continue.

Spears testified that if the case were transferred, she would recommend that the children stay in their current placement. However, she testified that there is no guarantee the Tribal Court would take her recommendation. Spears testified that termination of parental rights goes against the Tribe's core beliefs and that thus, Elise's parental rights would not be terminated if the case were transferred. Rather, the children would be placed in a guardianship indefinitely until and unless Elise is able to parent. Spears was asked on cross-examination whether the Tribe would have intervened sooner if not for the error in

calculating Elise's blood quantum and she testified, "I believe so."

Rawhouser testified that DHHS is objecting to the Tribe's motion to transfer because the Tribal Court will not terminate Elise's parental rights and because termination is in Zylena's and Adrionna's best interests. She testified that the children are bonded to their foster home and have ties to their Lincoln community through school and medical services. She testified that adoption should be pursued at their current foster home because the children need permanency. The children's guardian ad litem objected to the transfer for the same reasons.

After the hearing, written arguments were submitted to the court. The court entered its order denying transfer to the Tribal Court on June 29, 2011. The court found, "Given the proceeding is at an advanced stage and given the . . . Tribe did not promptly file its Notice to Transfer, good cause has been shown to deny the transfer." Elise now timely appeals, and the Tribe cross-appeals.

ASSIGNMENTS OF ERROR

Elise alleges that the juvenile court erred by finding that good cause was shown to deny the motion to transfer to the Tribal Court.

On cross-appeal, the Tribe assigns that the juvenile court erred by (1) not requiring the objections to the Tribe's request for transfer be put in writing

and made available to the Tribe prior to the hearing and (2) failing to require clear and convincing evidence to support a finding that good cause existed to deny the motion to transfer.

STANDARD OF REVIEW

A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Elise asserts that the juvenile court was incorrect in determining that good cause not to transfer this case to the Tribal Court existed because the proceeding was at an advanced stage. Pursuant to § 43-1504(2):

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary,* shall transfer such proceeding to the jurisdiction of the tribe, absent

> objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

(Emphasis supplied.) "[G]ood cause to the contrary" is not defined in the ICWA statutes, but nonbinding guidelines published by the Bureau of Indian Affairs provide that good cause not to transfer a proceeding may exist if the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified). At a hearing on a petition to transfer a termination of parental rights proceeding to tribal court under the ICWA, the party opposing the transfer has the burden of establishing that good cause not to transfer the matter exists. *In re Interest of C.W. et al.,* 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds, In re Interest of Walter W.,* 274 Neb. 859, 744 N.W.2d 55 (2008).

In this case, the State and the guardian ad litem both opposed transfer, and thus it was their burden to prove that there was good cause not to transfer the case to the Tribal Court. The evidence offered at the hearings was that Zylena and Adrionna have been living in their current foster home since May 29, 2009, following their joint adjudication under § 43-247(3)(a). During that period of time, Elise and

Francisco have been unable to regain physical custody of the children because neither parent has been successful at completing court-ordered services. Francisco has had limited contact with the children, and Elise continues to struggle with maintaining her sobriety and achieving stability in her life. She is currently without a permanent home or employment, and she is undisputedly in need of inpatient drug and alcohol treatment.

The evidence presented was generally that neither parent has done what they were ordered by the court to do so as to avoid this case progressing in the system to a termination of parental rights. Considering how long these children have been out of the family home, and thus without permanency, it can be said that it is in the normal course of events in juvenile proceedings for adjudicated children that a motion to transfer would be denied, particularly given the lack of parental progress in correcting the conditions that gave rise to the adjudications. Spears testified that if the case had started in the Tribal Court, the children would already be in a guardianship by now. Clearly, that assertion carries a significant degree of speculation that the Tribe would have acted, and when it would have done so. Moreover, the fact that the Tribe entered these proceedings late is directly a result of the Tribe's failure to properly determine the children's eligibility for enrollment in the Tribe. Accordingly, given the overall course of this case, as well as the length of the children's out-of-home placement, without resolution (or substantial

improvement) of the parents' issues, we cannot say that the trial court abused its discretion in finding that good cause was shown to deny the transfer because the case was clearly at an advanced stage when the Tribe motioned to transfer.

However, in her brief, Elise argues that we should treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether a juvenile case is at an advanced stage. In support of this position, she points to § 43-1503 on the basis that such statute, in her view, provides distinct definitions for each:

> (1) Child custody proceeding shall mean and include:
>
> (a) Foster care placement which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (b) Termination of parental rights which shall mean any action resulting in the termination of the parent-child relationship.

Thus, she submits, in deciding whether the case was at an advanced stage when the Tribe filed its motion to transfer, we should not look back to when Zylena and Adrionna were placed in foster care, but, rather,

when the motion for termination was filed – which occurred in this case 1 week before the Tribe petitioned to transfer. She contends that this view is consistent with the Tribe's cultural norm disfavoring termination of parental rights and favoring guardianships.

Elise argues that this is an issue of first impression in Nebraska and directs us in her brief to a North Dakota case, *In re A.B.*, 663 N.W.2d 625 (N.D. 2003), which followed the path she now urges we take – which is that a motion to terminate starts the clock over for the purpose of deciding the timeliness of a motion to transfer under the ICWA. However, our review of Nebraska case law indicates that it is the policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage. *See, In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *overruled on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Consequently, we adhere to established Nebraska precedent and determine how "advanced" the case is based on its complete history from inception to the time of the Tribe's request to transfer.

Furthermore, the ICWA does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus. *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983). The testimony at the hearing on the Tribe's

motion to transfer was undisputed that it is in the children's best interests to remain in their current foster home. Rawhouser testified that termination of parental rights was in the children's best interests in part because they need permanency. The evidence was that, if the case were transferred, the children could remain in limbo indefinitely while they waited for Elise to complete drug and alcohol treatment – something she has not been able to do in past attempts. And it was altogether uncertain where the children would live, and the conditions there, if the case were to be transferred to the Tribal Court. The State asserts that from a child's perspective, there is no distinction at all between the foster care placement proceeding and the termination of parental rights. While from a legal standpoint, we would not fully embrace that claim, it is true that central undeniable facts are that the children have been out of their parents' home for more than 2 years, that they are now being well cared for, and that they are in a home that appears to be committed to fostering their Native American heritage. Thus, the present situation is clearly in the children's best interests.

For these reasons, the trial court did not abuse its discretion when it found that good cause existed to deny the motion to transfer for the reason that the juvenile proceeding was at an advanced stage. The Tribe filed its motion to transfer 1 week after the State filed a motion to terminate parental rights and nearly 2 years after Zylena and Adrionna were placed with their current foster family, where they are safe,

secure, and loved. This assignment of error is without merit.

On cross-appeal, the Tribe first contends that the State failed to follow the Bureau of Indian Affairs guideline that "'[i]f the court believes or any party asserts that good cause to the contrary exists, the reason for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer.'" Brief for cross-appellant at 26, quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,590 (1979) (not codified). The Tribe asserts that such failure by the State "should be resolved in favor of a result that is consistent with the ICWA's preference of transfer." Brief for cross-appellant at 26. However, the Tribe failed to object or otherwise raise this issue at trial and thus waived its right to assert such as error on appeal. *See State v. Riley,* 281 Neb. 394, 796 N.W.2d 371 (2011). And, due to the fact that the Bureau of Indian Affairs guidelines are "nonbinding," *see In re Interest of C.W. et al.,* 239 Neb. 817, 826, 479 N.W.2d 105, 113 (1992), *overruled on other grounds, In re Interest of Walter W.,* 274 Neb. 859, 744 N.W.2d 55 (2008), and the fact that the Tribe has not explained precisely how this failure compromised their "opportunity to respond and to present alternatives that would negate the objections," brief for cross-appellant at 26, we decline to consider this as plain error.

Next, the Tribe argues that the burden of proof for a party objecting to a transfer request to the Tribal Court should be clear and convincing evidence

and that the State did not prove good cause to that standard. However, the Tribe concedes that the ICWA does not specify a burden of proof in this context and neither do Nebraska statutes. Rather, Nebraska case law is clear that our review of the trial court's denial of a motion to transfer an ICWA case is for an abuse of discretion, which requires us to decide whether a decision is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition. As we already determined above, the trial court did not abuse its discretion in denying the transfer. The errors assigned by the Tribe in its cross-appeal are without merit.

CONCLUSION

For the aforementioned reasons, we find that the juvenile court did not abuse its discretion in finding good cause existed to deny the Tribe's motion to transfer to the Tribal Court, and thus, we affirm.

AFFIRMED.

[Clerk's Certification Omitted In Printing]

APPENDIX C

IN THE SEPARATE JUVENILE COURT OF
LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA IN THE INTEREST OF	:	ORDER DENYING NOTICE OF INTENT TO TRANSFER TO OMAHA TRIBAL COURT; ORDER SETTING AMENDED MOTION FOR TERMINATION OF PARENTAL RIGHTS OF ELISE M. AND FRANCISCO R. FOR FORMAL HEARING
ZYLENA R.,* A CHILD UNDER EIGHTEEN YEARS OF AGE	:	Jvl. Doc. 08 Page 911 (Filed Jun. 30, 2011)

This matter came on for hearing on May 3, 2011 and June 16, 2011 on the Notice of Intent to Transfer to the Omaha Tribal Court. Evidence was adduced and written arguments were submitted to the Court.

Given no parent has objected to the Notice of Intent to Transfer to Omaha Tribal Court, the Court is required to transfer these proceedings, absent a showing of good cause to deny the motion. In this case both the State and the Guardian ad Litem have objected to the transfer.

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* Full names of the parents and children have been changed to first name and last initial to protect their privacy.

Good cause is not defined within the Indian Child Welfare Act. Non-binding guidelines published by the Bureau of Indian Affairs provide that good cause not to transfer the proceeding may exist if the proceeding is at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice.

This case was originally filed in June of 2008. Notice of the proceeding was received by the Omaha Tribe in July of 2008. The matter was adjudicated on September 22, 2008. Numerous review hearings have been held throughout the course of the case. Permanency planning hearings have been held including one on November 4, 2010, at which time the permanency plan of adoption was approved. No appeal was taken from that order. An exception hearing was held on November 4, 2010, as well, at which time the Court found no exception existed to eliminate the requirement of a motion for termination of parental rights being filed on behalf of the State. That motion was filed and is now pending before the Court. The Omaha Tribe filed its Notice of Intent to Transfer on March 1, 2011. Given the proceeding is at an advanced state and given the Omaha Tribe did not file its Notice to Transfer for 32 months after receiving original notice, good cause has been shown to deny the transfer.

The Court finds that Amended Motion for Termination of Parental Rights of Elise M. and Francisco R. should be scheduled for a Formal Hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Notice of Intent to Transfer to Omaha Tribal Court is hereby denied for good cause shown.

IT IS FURTHER ORDERED that the Amended Motion for Termination of Parental Rights of Elise M. and Francisco R. is scheduled for a Formal Hearing the week of **July 21, 2011, beginning at 9:00 a.m.** at which time all parties and counsel shall appear.

Dated this 29th day of June, 2011.

BY THE COURT:

/s/ [Illegible]
Roger J. Heideman
Juvenile Court Judge

[List Of Service Addresses Omitted In Printing]

APPENDIX D

IN THE SEPARATE JUVENILE COURT OF LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA IN THE INTEREST OF	:	ORDER DENYING TRANSFER TO OMAHA TRIBAL COURT; ORDER SETTING AMENDED MOTION FOR TERMINATION OF PARENTAL RIGHTS OF ELISE M. AND FRANCISCO R. FOR FORMAL HEARING
ZYLENA R.,* ADRIONNA R., CHILDREN UNDER EIGHTEEN YEARS OF AGE	:	Jvl. Doc. 09 Page 510
	:	(Filed Jun. 30, 2011)

This matter came on for hearing on May 3, 2011 and June 16, 2011 on the Notice of Intent to Transfer to the Omaha Tribal Court. Evidence was adduced and written arguments were submitted to the Court.

Given no parent has objected to the Notice of Intent to Transfer to Omaha Tribal Court, the Court is required to transfer these proceedings, absent a showing of good cause to deny the motion. In this case both the State and the Guardian ad Litem have objected to the transfer.

Good cause is not defined within the Indian Child Welfare Act. Non-binding guidelines published by the

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* Full names of the parents and children have been changed to first name and last initial to protect their privacy.

Bureau of Indian Affairs provide that good cause not to transfer the proceeding may exist if the proceeding is at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice.

This case was originally filed in May of 2009. The matter was adjudicated on May 12, 2009. Numerous review hearings have been held throughout the course of the case. Notice of this proceeding was sent to the Omaha Tribe in October of 2010. The Omaha Tribe had however been given notice of another proceeding involving Zylena in July of 2008. Permanency planning hearings have been held including one on November 4, 2010 at which time the permanency plan of adoption was approved. No appeal was taken from that order. An exception hearing was held on November 4, 2010 as well, at which time the Court found no exception existed to eliminate the requirement of a motion for termination of parental rights being filed on behalf of the State. That motion was filed and is now pending before the Court. The Omaha Tribe filed its Notice of Intent to Transfer on February 22, 2011. Given the proceeding is at an advanced stage and given the Omaha Tribe did not promptly file its Notice to Transfer, good cause has been shown to deny the transfer.

The Court finds that Amended Motion for Termination of Parental Rights of Elise M. and Francisco R. should be scheduled for a Formal Hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Notice of Intent to Transfer to Omaha Tribal Court is hereby denied for good cause shown.

IT IS FURTHER ORDERED that the Amended Motion for Termination of Parental Rights of Elise M. and Francisco R. is scheduled for a Formal Hearing the week of **July 21, 2011, beginning at 9:00 a.m.** at which time all parties and counsel shall appear.

Dated this 29th day of June, 2011.

BY THE COURT:

/s/ [Illegible]
Roger J. Heideman
Juvenile Court Judge

[List Of Service Addresses Omitted In Printing]

APPENDIX E

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

January 23, 2013

Alicia B. Henderson
LANCASTER COUNTY ATTORNEY
Justice & Law Enforcement Ctr.
575 S. 10th Street*
Lincoln, NE 68508

IN CASE OF: S-11-000659, In re Interest of Zylena R.

The following internal procedural submission or filing by a party:

Appellee/Motion Rehearing & Brf-St &GDLC **submitted or filed** 12/26/12 **has been reviewed by the court and the following order entered:**

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized.** *See* Neb. Ct. R. App. P. §§ 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED.

APPENDIX F

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

January 23, 2013

Alicia B. Henderson
LANCASTER COUNTY ATTORNEY
Justice & Law Enforcement Ctr.
575 S. 10th Street*
Lincoln, NE 68508

IN CASE OF: S-11-000660, In re Interest of Zylena R.

The following internal procedural submission or filing by a party:

Appellee/Motion Rehearing & Brf-St &GDLC **submitted or filed** 12/26/12 **has been reviewed by the court and the following order entered:**

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized.** *See* Neb. Ct. R. App. P. §§ 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED.