IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ABBIGAIL A., et al. Persons Coming Within the Juvenile Court Law.	**Supreme Case No. S220187** Court of Appeal No. C074264 Juvenile Court No.JD232871-2
Sacramento County Department of Health & Human Services Plaintiff and Appellant, vs. J.A. Defendant and Respondent.	

ON APPEAL FROM THE JUVENILE COURT OF SACRAMENTO

HONORABLE PAUL L. SEAVE, JUDGE PRESIDING

MOTHER'S ANSWER TO RESPONDENT FATHER'S BRIEF ON THE MERITS

M. Elizabeth Handy
State Bar No. 134190
1286 University Avenue, Ste 257
San Diego, California 92103
(619) 280-6055

Attorney for Respondent, J. A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ABBIGAIL A., et al. Persons Coming Within the Juvenile Court Law. Sacramento County Department of Health & Human Services Plaintiff and Appellant, vs. J.A. Defendant and Respondent.	**Supreme Case No. S220187** Court of Appeal No. C074264 Juvenile Court No.JD232871-2

ON APPEAL FROM THE JUVENILE COURT OF SACRAMENTO

HONORABLE PAUL L. SEAVE, JUDGE PRESIDING

MOTHER'S ANSWER TO RESPONDENT FATHER'S BRIEF ON THE MERITS

M. Elizabeth Handy
State Bar No. 134190
1286 University Avenue, Ste 257
San Diego, California 92103
(619) 280-6055

Attorney for Respondent, J. A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States

California

Statutes:

United States

California Rules of Ct,

INTRODUCTION

This answer by respondent mother Jaime joins in and adopts by reference all of the brief filed by the Department pursuant to California Rules of Court, rule 8.200, 8.204 and 8.520 (b) (1). The Department's brief addresses each of the respondent father's arguments laid out in its brief on the merits as to Jaime's children, Abbigail and Justin A., dependents of the Superior Court of California, County of Sacramento, sitting as the Juvenile court ("juvenile court".)

STATEMENT OF ISSUES PRESENTED

Mother, Jaime joins in and adopts the statement of issues laid out in the Department's briefing.

STATEMENT OF THE CASE AND FACTS
(California Rules of Ct, rule 8.204(a)(2)(c)

Mother, Jaime and Father, Joseph are the parents for Abbigail and Justin.

Both Jaime and Father struggled with substance abuse issues long-term, and the Father was also under the care of a psychiatrist for bipolar and anxiety issues. In 2010, Jaime was granted custody of the children and a protective order was issued against Father due to several serious incidences of physical violence and threats against her and a criminal conviction. (1 C.T. 20, 140-141, 149-150, 223-228, 230.) In 2012, Justin and Abbigail, ages five and four, were residing voluntarily with their maternal grandmother, Linda B. (1 C.T. 23.)

On December 4, 2012, the Sacramento Department of Health and Human Services ("the Department") filed petitions on behalf of Justin and Abbigail pursuant to section 300,

subdivision (b) after the voluntary services in place for over six months proved unsuccessful, and Jaime was arrested for violating her probation. (1 C.T. 12-17.) Jaime expressed feeling overwhelmed and depressed. (C.T. 16.) She desired to engage in reunification services, and to have her children cared for while she did so with her mother (grandmother). (a C.T. 16.) She did not know Father's whereabouts; Father had not seen the children since 2011 and he had told her he wanted to have his rights terminated so he did not have to pay child support. (C. T 20, 133.)

Jaime denied having any America Indian ancestry. Father appeared at the January 4, 2013 continued detention hearing. (R.T. 2.) He told the court he believed he had Cherokee Indian ancestry, and named his aunt, Linda Hampton as knowing the most about his native ancestry. (R.T. 6.) On January 9, 2013, the Department's paralegal, Hans Gregerson, completed a Declaration as to Indian status, and reported that the paternal aunt, Linda Hampton stated that she was an enrolled member of the Cherokee Nation tribe and provided Hans G. with an enrollment number. (1 C.T. 95-97.)

Justin and Abbigail were placed with their grandmother. Grandmother shared having a strong and significant relationship with the children and a strong desire to care for them. (1 C.T. 154, 158.)

On January 25, 2013, the court found Father Joseph A. to be the presumed father for Abbigail and Justin. (2 C.T. 311.)

On January 29, 2013, the Cherokee Nation wrote that based on the history provided the tribe as to extended family members with the name of Eva Reynolds, paternal great-

grandmother highlighted, the children were "eligible for enrollment and affiliation with Cherokee Nation by having direct lineage to an enrolled member." (2 C.T. 333.)

The letter continues:

> Enclosed you will find a membership application for the child/children that may be completed and signed by the party having custody or their representative. A copy of the custody order should be submitted with the application. [ ]
>
> Cherokee Nation is not empowered to intervene in this matter unless the child/children or eligible parent(s) apply for and receive membership. However, when tribal enrollment of the parent or child/children occurs the tribe must be notified of their right to intervene. Due to the tribal eligibility of the children in question, Cherokee Nation recommends applying all the protections of ICWA to this matter from the beginning of the case. Hopefully, this will prevent any future delays in procedural matters if or when the parents or child/children become enrolled members meeting federal ICWA compliance.
>
> This letter is to make you aware of our position and to remind you if actions are taken by you or the family prior to the completion of your court involvement that make this child/children eligible for membership it could affect placement priorities, procedures and level of evidence required by the court and service providers.

The Cherokee Nation also provided a tribal registration form to be completed for application for citizenship in the tribe. (2 C.T. 340-343.)

On February 22, 2013, Father's counsel informed the court that Father was interested in pursuing membership in the Cherokee Nation tribe. (R.T. 30.) The court commented that it appeared likely that the ICWA will apply, "especially in light of what the father has just said that he intends to apply", and determined that it would proceed as if the ICWA does apply. (R.T. 32.)

On March 1, 2013, the Department filed a motion for reconsideration regarding the applicability of ICWA. (2 C.T. 379-385, 397-398.) On April 5, 2013, the court denied the Department's motion for reconsideration as to ICWA. The court vacated the

jurisdiction/disposition hearing set for March 22, 2013, and continued the case to April 5, 2013. (R.T. 39.)

On April 5, 2013, the court found that the California Rules of Court required it to direct the Department to make reasonable efforts to secure tribal membership for the children, and further requites this Court to proceed as if the children are Indian children, meaning that we proceed under the Indian Child Welfare Act." (R.T. 52.) The court directed the Department to make active or reasonable efforts to secure the children's membership in the Cherokee Nation, and that the children's counsel must pursue the children's membership as well, explaining in this regard,

> Since I believe that the Department is in the better position to secure membership and in fact is required to do so by law, CLC while it has an independent obligation to help secure membership should act to fully assist the Department consistent [ ] with CLC's independent obligation to represent the best interest of the children. [ ] I recognize that both are obligated, the Department and CLC, but the primary responsibility to take these efforts to secure membership has to lie with the Department because of the Rule of Court that requires the Department to do so. [ ] (R.T. 56.)

The court additionally authorized the Department to disclose any of the birth certificates that it received in conjunction with attempts to enroll the children. (R.T. 57.)

On May 23, 2013, the court held the jurisdiction/disposition hearing. (R.T. 64.) ICWA expert, Nanette Gledhill testified at the proceedings as to the issues of active efforts and placement of the children under ICWA The expert opinion offered was that the Department had made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the family and that those efforts were unsuccessful. (R.T. 76.) Nannette G. further offered that the current placement of the children with their maternal grandmother met the placement preferences under ICWA. (R.T. 77.)

The court made true findings on the petitions as amended, and adopted the disposition recommendations of the Department by clear and convincing evidence, including the active effort finding and removal of the children from their parents' physical custody. (1 C.T. 167-175; R.T. 126, 128-130 .) The court further found the children were eligible to enroll in the Cherokee Nation as Indian children. (R.T. 126.) Both Jaime and Father were granted reunification services and. the court made a specific placement order for placement of the children with their maternal grandmother. (R.T. 129.)

On July 11, 2013, the Department filed a notice of appeal requesting review by the Court of Appeal from the findings and orders of the juvenile court regarding the application of ICWA. (C.T. 480-481.) On June 16, 2014, the Third District Court of Appeal in *In re Abbigail A.* (C074264) found California Rules of Ct, rules 5.482(c) and 5.484(c)(2) inconsistent with section 224, subdivision (a) and an unlawful expansion of ICWA's definition of an Indian child. (Typed Opinion at pp. 12-14.)

On July 28, 2014, Father filed a Petition for Review, which this Court granted on September 10, 2104.

ARGUMENT

I.

THE DOCTRINE OF FEDERAL PREEMPTION RESTRICTS STATES FROM EXPANDING THE INDIAN CHLD WELFARE ACT'S DEFINITION OF AN INDIAN CHILD SET FORTH IN 25 U.S. C. SECTION 1903 (4) AND INCORPORATED INTO STATE LAW BY WELFARE AND INSTITUTIONS CODE SECTION 224.1, SUBDIVISON (A) TO INCLUDE A NON-MEMBER CHILD WHO IS ELIGIBLE FOR TRIBAL MEMBERSHIP BUT WHOSE APPLICATION FOR MEMBERSHIP IS STILL PENDING.

Jaime S. joins and adopts this argument of the Department in its brief in full.

II.

RULES 5.482 (C) AND 5.484 (C)(2) OF THE CALIFORNIA RULES OF COURT CONFLICT WITH WELFARE AND INSTITUTIONS CODES SECTION 224.1, SUBDIVISION (A), SECTION 224, SUBDIVISION (C) AND SECTION 224.3, SUBDIVISION (E)(1) BY REQUIRING THE JUVENILE COURT TO APPLY THE PROVISIONS OF THE ICWA TO INCLUDE A NON-MEMBER CHILD WHO IS ELIGIBLE FOR TRIBAL MEMBERSHIP BUT WHOSE APPLICATION FOR MEMBERSHIP IS STILL PENDING.

Jaime S. joins and adopts this argument of the Department in its brief in full.

III.

SINCE THE DEFINITION OF AN INDIAN CHILD IS PREMISED ON TRIBAL AFFILIATION, AND BECAUSE THE PROTECTIONS OF THE ICWA ONLY APPLY TO TRIBAL INDIAN CHILDREN, THE CALIFORNIA JUDICIAL COUNCIL EXCEEDED ITS AUTHORITY BY ADOPTING RULES THAT EVISCERATE THE STATUTORY DEFINITION OF AN INDIAN CHILD AS WELL AS OVERRIDE A TRIBE'S DETERMINATION OF MEMBERSHIP.

Jaime S. joins and adopts this argument of the Department in its brief in full.

IV.

THE RESPONDENT FATHER'S INTERPRETATION OF THE INDIAN CHILD WELFARE ACT TO BROADEN ITS APPLICATION IN DEPENDENCY CASES BEYOND ITS PLAIN STATUTORY LANGUAGE AND INTENT FOR THE PREMATURE INCLUSION OF NON-MEMBER CHILDREN (WHOSE PARENT IS ALSO NOT YET A MEMBER) CREATES AN UNWARRANTED RISK TO THE FUNDAMENTAL RIGHTS OF THE "OTHER" PARENT SITUATED AS MOTHER JAIME HERE, TO PRESERVE THE PARENT/CHILD RELATIONSHIP AND ALSO TO THE DEPENDENCY COURT'S FULFILLMENT OF ITS PARAMOUNT GOAL AT THIS VERY EARLY STAGE OF THE PROCEEDINGS FOR FAMILY PRESERVATION.

"Parents have a natural and fundamental interest in the care, custody, and control of their children derived from the common law. The care, custody and control of one's child is a fundamental interest protected by both the United States and California constitution." (*Stanley v. Illinois* (1972) 405 U.S. 645, 753-754 [31 L.Ed.2d 551, 92 S.Ct. 1208.) One aspect of this fundamental interest is the right to rear and retain custody of one's child. (*Ibid*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 308.)

The respondent's interpretation of the Indian Child Welfare Act to broaden its application in dependency cases beyond the plain statutory langue and state and federal intent, creates an unwarranted risk of infringement on the very basic, fundamental rights of a parent who has not claimed having any Native American ancestry, and has a clear right to protecting their parental rights to custody of their children and family preservation at this very early stage of the dependency proceedings.

In this case, children, Justin and Abbigail were detained and removed from their mother's physical custody in December, 2012. (1 C.T. 1-5, 6-10.) As part of its disposition orders, the juvenile court granted reunification services to Jaime in order to facilitate family

reunification. (C.T. 466.) The children, ages five and four, were in their mother's legal and physical custody before their detention, and notwithstanding the neglectful circumstances surrounding the case, had clearly already begun to develop an identity and relationship with Jaime as their "mom." Justin and Abbigail also had already no doubt a developed family relationship with their maternal grandmother, who they were living with voluntarily in 2012 (1 C.T. 23), shared a strong and significant relationship with, and placed with by the juvenile court soon after their detention. (1 C.T. 35, 154.)

For a parent in this situation who does NOT claim any Native American ancestry, is the biological, previously custodial parent for the dependent children, and has been granted reunification services, the father's advocacy for the unlawful expansion of the meaning of an Indian child beyond the plain statutory meaning and legislative intent presents a real and unjustified risk of harm to these fundamental parental rights.

Family preservation is broadly interpreted under California dependency law to include efforts to aid the parent in reunifying with their child; it also encompasses efforts to place the children with relatives who arguably will best facilitate this family reunification, and protect not only the parents, but the children's paramount interest in family reunification when possible. (Section 361.3 (a)(1)-(8); *In re Stephanie M.* (1994) 7 Cal.4th 295, 320.) This includes the facilitation of regular visits while the children's parent(s) work on their service plans, and protection OF developed relationships with their relative when it is in their best interests. (Sect. 361.3, subd. (d), *In re Antonio G.* (2008) 159 Cal.App.4th 369, 377, ["section 361.3 promotes a preference for foster placements with relative caregivers as set forth in Family Code section 7950 and helps meet 'the statutory requirement of section 16000 of the

[ ] Code that a child live the least restrictive and most family-like setting possible.'].)
The goal of reunification encompasses, then, but is not restricted to, actual physical custody. Rather, it "encompasses the larger purpose of exploring ways of protecting the parents' interest in the companionship, care, custody, and management of their children." (*In re Monica C.* (1995) 31 Cal.App.4th 296, 309-310.)

Jaime stated at detention her desire that her children remain with their maternal grandmother while she worked on her reunification service plan, and grandmother very much wanted to care for them while Jaime completed her serviced components. (1 C.T. 18.)

Father champions in its briefing for the Department that making efforts to facilitate enrollment of a child in a particular tribe or nation whenever a child is eligible for enrollment as supportive of the parent's rights who "is attempting to complete numerous family reunification case plan tasks, to have the time, skills and resources necessary to promptly secure tribal enrollment for a child." (R.B. p. 31.) Father fails to address, however, whether a juvenile court finding that a child comes within ICWA in the situation presented here, and the thus premature triggering of the Indian Child Welfare Act procedures and mandates to issues of placement and reunification efforts can pass constitutional muster as to a parent situated as Jaime.

To trigger the Indian Child Welfare Act procedures prematurely is contrary to the Indian Child Welfare Act as fully argued by the Department in its briefing and joined and adopted by Jaime, and fails to further any goal of ICWA. Such juvenile court action also appears to create an unnecessary and unjustified risk to these basic parental rights in dependency cases for a parent in Jaime's situation.

CONCLUSION

For all of the reasons stated above and in the Department's briefing, respondent, Jamie S. respectfully requests that this Court affirm the decision of the Third District Court of Appeal is hits case.

Dated: February 10, 2015 Respectfully submitted,

M. Elizabeth Handy, appellate counsel
For Appellant, Jaime S.

CERTIFICATION AS TO WORD COUNT

Counsel for Jaime S. declares under penalty of perjury that according to my Word 2010 program text, the word count for this brief is 3,290 words.

Dated: February 10 , 2015 M. Elizabeth Handy

PROOF OF SERVICE DECLARATION OF SERVICE ON THE PARTIES

I, the undersigned, declare: I am over the age of eighteen years and not a party to the action; I am employed in, or a resident of, the County of San Diego, California where the mailing occurs; and my business address is 1286 University Ave, Ste 257 San Diego, California 92103.

I declare that on February 10, 2015, I served the respondent brief for mother, Jaime S. by placing copies in a separate envelope addressed to each addressee in the attached service list. I then sealed each envelope and with the postage fully prepaid, placed each for deposit in the United States mail, at San Diego, California on February 10, 2015, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 10, 2015 at San Diego, California.

Elizabeth Handy

Service List

Jamie S. (respondent) Address of Record

Third District Court of Appeal
621 Capitol Mall, 10th Floor, Sacramento Ca 95814

Central California Appellate Project
2407 J Street, Ste 301 Sacramento Ca 95816

Konrad S. Lee, Esq
23441 Golden Springs Drive, Diamond Bar Ca 91765-2030

Sacramento County Counsel
Lilly C Frawley, 3331 Power Inn Road, Ste 350, Sacramento Ca 95826

Darlene Azeveddo Kelly
PO Box 2169, Oakhurst Ca 93644

Kimball Sargeant
429 F Street, Ste 8B, Davis Ca 95616 (minors counsel in Supreme Court

Caleb Couchman
Parent Advocates of Sacramento, 2001 21st Street, #100, Sacramento Ca 95818

Cherokee Nation of Oklahoma
Att: Indian Child Welfare Act, P.O. Box 948, Tahlequah Ok 74465