**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| In re ISAIAH W., | Civil No. S221263 |
| A Person Coming Under The Juvenile Court Law. | |
| LOS ANGELES COUNTY DEP'T OF CHILDREN AND FAMILY SERVICES, | Court of Appeal No. B250231<br>Superior Court No. CK91018 |
| Respondent, | |
| v. | |
| ASHLEE R. (Mother), | |
| Petitioner and Appellant. | |



REVIEW FROM THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION TWO

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# REPLY BRIEF ON THE MERITS

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by appointment of the California Supreme Court

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## Introduction

In this reply brief, Appellant Ashlee R. addresses only those points and arguments needing reply or further explanation. That a reply is not made to a particular issue or argument raised in the briefing submitted by Respondent Los Angeles County Department of Children and Family Services is not intended to be a waiver or concession of the point, as the point was adequately briefed in the opening brief on the merits.

## Argument

## FEDERAL PREEMPTION PRECLUDES CALIFORNIA FROM EVADING COMPLIANCE WITH ICWA NOTICE REQUIREMENTS, AS DIVISION THREE'S DECISION WOULD ALLOW, SIMPLY BECAUSE ITS NONCOMPLIANCE IS NOT EXPOSED UNTIL A PARENT RAISES THE ISSUE FOR THE FIRST TIME IN AN APPEAL FROM AN ORDER TERMINATING PARENTAL RIGHTS

Federal preemption precludes California from evading compliance with ICWA notice requirements, as Division Three's decision would allow, simply because its noncompliance is not exposed until a parent raises the issue for the first time in an appeal from an order terminating parental rights. Respondents arguments to the contrary are unavailing.

A. Mother's Appeal of ICWA Error was Not Untimely

In this case, the juvenile court erred in finding it had no reason to know that Isaiah was an Indian child as defined under ICWA and declined to order the department to provide notice. (1CT 127, 2CT 317; RT 10, Aug. RT 18.) Respondent does not deny that error occurred. Instead, respondent argues Division Three is correct that there is no recourse for that error because the parent did not appeal this issue until the order terminating parental rights. (RB 10.)

However, as respondent acknowledges, the application of ICWA is an issue that can be revisited "at any time in the case." (RB 25.) California

Welfare and Institutions Code section 224.2 provides that notice shall be sent *whenever* it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that ICWA does not apply.

The first time the juvenile court violated ICWA was at the jurisdiction/disposition hearing in January 2012. (1CT 127; Aug. RT 18.) However, respondent ignores the fact that, at the section 366.26 hearing in April 2013, the court *once again* found it had no reason to know the child would fall under ICWA. (2CT 317; RT 10.) Thus, the issue was revisited by the juvenile court and, once again, the court erred. Under the facts of this case, given that the issue may be revisited at any time, mother's raising of the ICWA notice violation in her appeal from the order terminating her parental rights was not untimely and was not forfeited.

B. The Spirit and Letter of ICWA Notice Provisions Preempt California's Forfeiture Doctrine and a Court Rule Setting Appellate Time Limits

Here, appellant timely appealed the erroneous finding at the section 366.26 hearing that the juvenile court had no reason to believe this child fell under ICWA. Nevertheless, even if a parent delays in raising the ICWA violation until the appeal from the order terminating parental rights and the violation occurred earlier in the proceedings, federal preemption precludes

the application of California's time limits and forfeiture doctrine to bar review.

Respondent argues case law permitting delayed appellate review, and appellant, "never indicate exactly what provision of federal law invalidates the California judicial system, at least as far as the ICWA is concerned." (RB 17.) Respondent claims no Court of Appeal has "determined that the right to appeal ICWA issues is not bound by any time frame. (RB 21.) Respondent must have overlooked most of appellant's brief and the great weight of statutory and case authority upon which it relies.

Under federal preemption, no "exact" provision is required unless preemption is "explicit." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935–936.) Whereas here, obstacle preemption exists because the application of California Rules of Court, rule 8.406, means that a state court rule on appellate jurisdiction and a state doctrine on forfeiture trumps the direct interest of the United States, as trustee, in protecting Indian children, recognized as "vital to the continued existence and integrity of Indian tribes." (25 U.S.C. § 1901(3); Welf. & Inst. Code § 224, subd. (a)(1); *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 35.)

Both the spirit and the letter of ICWA preempt any limitations on the enforcement of its notice provisions and the United States Supreme Court has recognized the timeless reach of ICWA. The court rule and the forfeiture doctrine impermissibly stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress in enacting ICWA. Therefore, those state authorities must yield. (See *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 821-822.)

The impact of Division Three's decision is that, if California is not caught within 60 days of its noncompliance, it is excused from complying. The bad actor here is California - its agencies and courts - in failing to comply with ICWA notice. Division Three has made the parent the proverbial "fall guy" for its noncompliance when, in fact, the parent should be applauded for exposing the state's noncompliance before further violation of the Act occurs and greater damage to the stability and permanence of the child results.

What respondent fails to address anywhere in its brief are the rights of the tribe and the child. Without notice, however, the tribe will never be in a position to know its Indian child is involved in a dependency proceeding and thus never be in a position to intervene or seek invalidation of those findings

and orders. And, denying review of ICWA notice errors gambles with the child's future in a manner abhorent not only to Congressional intent in enacting ICWA but to the overriding objectives of juvenile dependency proceedings - acting in the best interests of the child and providing for stability and permanence for the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Under Division Three's decision, one of two unacceptable outcomes will occur if appellate review on an ICWA notice error is barred. The first outcome is that notice to a known Indian child's tribe never happens and the child is never recognized as an Indian child. The tribe loses one of its children without any fault of its own and without its knowledge. The child loses all the benefits it connection to its tribe would provide. Such an outcome blatantly contradicts clear Congressional intent to cure "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield, supra,* 490 U.S. at p. 32.) It also contradicts the best interests of the child. (Cf. *In re Barbara R.* (2006) 137 Cal.App.4th 941, 947 [referring to the benefits of a "monthly financial stipend, funding for higher education, medical and dental coverage, and a home on the reservation" conferred upon

members of the Sycuan Band of the Kumeyaay Nation].)

The second outcome under Division Three's decision is that notice compliance is evaded and an adoption is finalized, and then the tribe somehow finds out later and the adoption is invalidated. The invalidation may not take place until perhaps years and years later. Is that really an outcome that Congress envisioned as satisfactory? The United Supreme Court has declared it is not and lamented the separation of the children from their adoptive parents which "would doubtless cause considerable pain" but which "might have been avoided" had the mandate of ICWA been followed. (*Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at pp. 53-54.) Such an outcome violates the objective of dependency proceedings in securing the permanence and stability of the child by needlessly jeopardizing a subsequent adoption decree issued when the alternative of allowing review would serve to protect the decree. Nothing in the spirit or letter of the Indian Child Welfare Act (ICWA) provides for such an outcome. As such, a 60-day limit on recourse for noncompliance is absurd under ICWA and must be deemed precluded under this federal act.

Under ICWA, a state court must provide notice to the parent and the tribe that an Indian child is the subject of a custody proceeding. (25 U.S.C. § 1912, subd. (a.) If the tribe is timely noticed at the start of the case, it may

recognize the dependent child as an Indian child and petition to intervene or request the case be transferred to its tribal court if so desired. (25 U.S.C. § 1911.) If the tribe is not timely noticed at the outset and orders involving custodial and/or parental rights are entered, the tribe and others may petition to invalidate those orders. (25 U.S.C. § 1914.)

Respondent argues this is "a remedy" in the trial court for violations of the ICWA notice requirements. (RB 27.) What respondent fails to consider is that the tribe has no meaningful access to this remedy unless and until the tribe receives notice that one of its children is the subject of dependency proceedings. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421 ["Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families"].)

Respondent argues that, should a child actually be an Indian child as defined by ICWA, allowing an appeal on ICWA violations from the order terminating parental rights the child and the family will not have enjoyed any of the protections they are entitled to under the Act. (RB 26.) That argument only supports allowing a review of ICWA noncompliance and any needed correction sooner rather than later. The sooner an Indian child is recognized, the sooner those protections have effect. This result must be considered more favorable than precluding any benefit to the child and the

family until and only if the tribe somehow learns about the proceedings at a later date.

Nowhere in ICWA is there a time when a state need no longer comply with any provision, including the notice provisions, of the Act. Nowhere in California's statutory laws incorporating ICWA is there a time or circumstance when compliance with the Act expires. When the state - its agents and its courts - violate ICWA, there is no other remedy but to appeal unless this Court is willing to shift the burden onto the parent to notify the tribe despite the lack of any provision placing any burden whatsoever upon the parent to ensure ICWA compliance.

Respondent has failed to point to any provision within ICWA which places a time limit on the mandate of state compliance. Rather, the time frame to raise ICWA error is limitless; an order terminating parental rights and any subsequent adoption order lacks finality because ICWA allows an Indian tribe, an Indian child, and the child's parent or Indian custodian, to petition to invalidate an order violating the Act at any time, even after an adoption has been finalized. (25 U.S.C. § 1914; Welf. & Inst. Code § 224.4; *Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at pp. 53-54; *In re Christian P.* (2012) 207 Cal.App.4th 1266, 1281-1282; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 473; *In re Alicia S.* (1998) 65 Cal.App.4th 79, 82.) Congress

just wants compliance with ICWA notice whenever it becomes known it is needed. It does not care how belatedly it becomes apparent.

Respondent argues the rule allowing ICWA issues to be determined in an appeal from a hearing to terminate parental rights "encourages the practice of ignoring ICWA violations for years while a dependency case creeps through the proceedings." (RB 26.) Just the opposite is true. Allowing ICWA issues to be determined in an appeal from a hearing to terminate parental rights ensures compliance with the Act before the order becomes final and a subsequent adoption takes place, only to be invalidated later. While never setting an outside limit, the United States Supreme Court invalidated an adoption decree more than three years after it was issued. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 35.)

Respondent argues the passage of time in foster care for an Indian child that was not afforded the protections of the ICWA cannot be undone. (RB 26.) While the passage of time cannot be undone, the findings and orders entered in violation of ICWA can be undone under ICWA provisions allowing for invalidation of those findings and orders. (25 U.S.C. § 1914.)

The passage of time as an excuse for denying review of ICWA notice error has been rejected by the United States Supreme Court as a justification for limiting the time within to appeal an ICWA notice violation. In *Mississippi*

*Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, the United States Supreme Court invalidated an adoption decree issued three years earlier because it was entered in violation of ICWA. (490 U.S. at p. 53.) The Supreme Court recognized that separation of the children from their adoptive parents "would doubtless cause considerable pain." (*Ibid.*) The Court refused to allow this fact defeat the purposes of ICWA, stating that, had the mandate of the ICWA been followed, "much potential anguish might have been avoided." (*Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at pp. 53-54.)

C. The *Jonathan S.* Case is Inapposite

Respondent relies upon the case of *In re Jonathan S.* (2005) 129 Cal.App.4th 334 as holding that an appellate court is not a "court of competent jurisdiction" within the meaning of the enforcement provisions of the ICWA." (RB 18-19.) This case fails to support respondent's position.

*Jonathan S.* was a decision by Division Two of the Fourth Appellate District which held was that an appellate court lacks jurisdiction to invalidate a juvenile court order based on an ICWA notice violation and any petition under the enforcement provision to invalidate an order in an open dependency must be filed in the juvenile court. (129 Cal.App.4th at p. 342.) The court never held, as respondent suggests, that an appellate court lacks

jurisdiction to review ICWA error.

In *Jonathan S.*, the jurisdictional report noted the child's father stated he had an Black Foot Indian heritage, but he was not part of an Indian Tribe. (129 Cal.App.4th at 337.) At the jurisdictional/dispositional hearing, the juvenile court found that notice had been given "as required by law," but made no findings specifically concerning the ICWA. (*Ibid.*) The department's subsequent reports repeated that ICWA did not apply. At the six-month review hearing, the 12-month review hearing, and the section 366.26 hearing, the juvenile court still made no ICWA findings. (*Ibid.*) The appellate court stated it "assume[d], without deciding, that the issue has been preserved." (*Ibid.*)

The *Jonathan S.* court held that the only order subject to reversal in that appeal was the order terminating parental rights and remanded the case with directions to the juvenile court to order the department to give notice in compliance with the ICWA and related federal and state law. (*Ibid.*) Then, once the juvenile court finds that there has been substantial compliance with the notice requirements of the ICWA, it shall make a finding with respect to whether the dependent child is an Indian child. (*Id.* at p. 343.) If the juvenile court finds that the child is not an Indian child, it shall reinstate the original order terminating parental rights. (*Ibid.*) If the juvenile court finds

that Jonathon is an Indian child, it shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with the ICWA and all related federal and state law. (*Ibid.*)

Thus, *Jonathan S.* merely stated that an appellate court lacks authority to adjudicate a petition to invalidate. It fails to support respondent's argument that a parent has forfeited the ICWA error issue by failing to raise it prior to the order terminating parental rights. In that case, the parent never raised the issue before the juvenile court and never appealed on ICWA noncompliance grounds until the order terminating parental rights. The *Jonathan S.* court reviewed the issue and reversed the order terminating parental rights and remanded the matter for ICWA notice to be provided. That is exactly the relief appellant is seeking in this case. As such, it fails to support respondent's argument in this appeal.

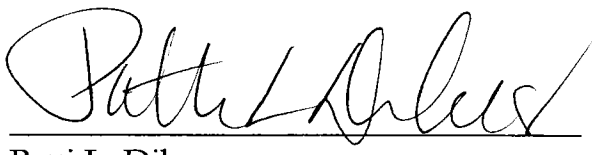
## Conclusion

For the reasons stated herein and in the opening brief on the merits, this Court should reverse the Court of Appeal's decision because it is precluded by federal preemption and it fails to protect the interests of Indian children and tribes. Alternatively, this Court should hold the forfeiture doctrine does not apply especially where, as here, this is mother's first appeal.

Appellant respectfully requests that this Court reverse the decision and remand this case with directions that the order terminating her parental rights be reversed, at least conditionally, until the court ensures notice under ICWA has been provided, before determining whether other ICWA provisions apply and conducting a new section 366.26 hearing.

DATED: March 9, 2015

Respectfully submitted,



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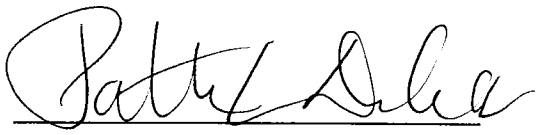
## Certification of Word Count

I certify that the foregoing brief on the merits complies with California Rules of Court, rule 8.204(c) and contains 2863 words, including footnotes, according to the word count feature of Word Perfect X4, the computer program used to prepare the brief.

Executed on March 9, 2015, at Spokane Valley, California.



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**Declaration of Service by Mail**

I, Patti L. Dikes, declare that: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 9116 E. Sprague Avenue #473, Spokane Valley, Washington. I served Reply Brief on the Merits in Case No. S221263 of which a true and correct copy of the document filed in the cause is affixed, by e-submission on this Court's website: http://www.courts.ca.gov, and by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Spokane Valley, Washington, on March 9, 2015.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 9, 2015, at Spokane Valley, Washington.

Patti L. Dikes