IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 22-787



State of West Virginia ex rel.
THE DELAWARE TRIBE OF INDIANS,
Intervenor below,
Petitioner,

v.

HON. STACY NOWICKI-ELDRIDGE,
Judge of the Circuit Court of Boone County,

and

K.A., Intervenor and Foster Parent of I.R.,

and

A.S., Intervenor and Prospective Kinship Placement of I.R.,

and

M.J.-1, and M.J.-2, Proposed Intervenors and Prospective Kinship Placement of I.R.

and

B.D., Respondent Father of I.R.,

and

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondents.

(An original jurisdiction action pertaining to an order of the Circuit Court of Boone County, Civil Action No.: 20-JA-1)

# RESPONDENT A.S. RESPONSE BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

Joseph H. Spano, Jr.
Pritt & Spano, PLLC

714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No.: 11373
jspano@yourwvlawfirm.com

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## INTRODUCTION

The Intervenor, A.S. (the paternal aunt of I.R.), by counsel, Joseph H. Spano, Jr., responds in support of the Petitioner's petition to this Honorable Court pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, and W. Va. Code §53-1-1, *et seq.*, for a Writ of Prohibition, prohibiting the Hon. Stacy Nowicki-Eldridge, Judge of the Circuit Court of Boone County, West Virginia, from effectuating her order of September 30, 2022, which denied the Motion to Transfer to Tribal Court, which was filed by the Tribe pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901-1923 ("ICWA"), and which was supported by the Respondent Father and both prospective kinship placements (including this Respondent A.S.); and a remand with directions to enter an order transferring Boone County Civil Action No. 20-JA-1 to the District Court of the Delaware Tribe ("Tribal Court").

## STATEMENT OF THE CASE

A.S. agrees and submits the statement of the case that was submitted in the Writ of Prohibition from the Tribe and states as follows:

The original petition was filed on January 10, 2020 against the respondent mother and any unknown putative father. (Appendix ["App."], at 20). The rights of the respondent mother were terminated at a hearing on August 5, 2020, following the Court's acceptance of her voluntary relinquishment. (App., at 47-50). Respondent Father, B.D., first appeared at a hearing in this matter on July 2, 2020, then as a putative father. (App., at 37-39). A paternity test was entered on the docket on November 6, 2020, indicating a 99.999996% probability that B.D. is the father of the minor child. (App., at 41-46). There was a gap of approximately one year beginning January of 2021 during which no hearing was held, and the case was not active on the

docket. (App., at 62-54, 98, 99). However, it is clear that MDTs occurred, ICPC home studies were ordered, and visitations were offered during that period. (App., at 89-93). The petition was amended against B.D. alleging abandonment on January 14, 2022. (App., at 65-79). The petition was amended a second time on March 1, 2022. (App., at 106-122).

A.S. filed a Motion to Intervene on December 28, 2021. No hearing had been held in the case since January of 2021. (App., at 62-54, 98, 99). A.S. was originally told by DHHR that she would be the preferred placement and to begin the ICPC process through her home state, which she did. DHHR changed its opinion on kinship placement sometime around the first hearing after the one-year period the case was not placed on the docket.

B.D. is a member of the Delaware Tribe of Indians, and the child, I.R., is also eligible for membership. The Tribe was not given any information, formal or otherwise about the pendency of this case until approximately December of 2021. Nothing on the docket sheet indicates that any sort of formal notice was provided by or on behalf of the DHHR. The non-kinship foster parents, K.A. and E.A., have been granted intervention status. A.S., paternal aunt, and proposed kinship placement, has been granted intervention status. A motion to intervene was filed by paternal cousins M.J.-1 and M.J.-2 on April 18, 2022 and remains pending.

At the hearing on March 7, 2022, the Court and parties first discussed a communication that had been received from the Tribe in which it had signaled its interest in the case. (App., at 123-124). However, the Circuit Court required the Tribe to obtain local counsel before permitting it to intervene in the case. (App., at 125). No one from the tribe is listed in the participants at that hearing. (App., at 123). The Court made no written order concerning the necessity of compliance with ICWA in the event that the Tribe did not intervene. (App., at 123-

129).

At the hearing held on June 13, 2022, the Court instructed all counsel to brief the implications of the Indian Child Welfare Act on this case, and briefs were thereafter submitted. (App., at 140-168). The Tribe was not permitted to appear of record in the Circuit Court without local counsel. On July 21, 2022, the Delaware Tribe Department of Indian Child Welfare moved the District Court of the Delaware Tribe (Tribal Court) to accept the transfer of jurisdiction from the Circuit Court to the Tribal Court. (App., at 187-188). On that same date, the Tribal Court granted the motion to accept the transfer of jurisdiction, and entered an order accepting jurisdiction, contingent upon an order from the Circuit Court transferring jurisdiction. (App., at 185-186).

On August 5, 2022, the Tribe, by counsel, Jeremy B. Cooper, filed a Motion to Intervene, a Motion to Transfer to Tribal Court, and a Motion to Invalidate Proceedings. (A.R., at 175-188). As set forth in briefing following the August 15, 2022, hearing, the Guardian ad Litem, the Department of Health and Human Resources, and the Foster Parents all opposed the Motion to Transfer. Conversely, the Respondent Father, both sets of intervening potential kinship placements, and the Tribe all supported the Motion to Transfer. (App., at 203-225).

The Circuit Court heard argument on the applicability of ICWA at the August 15, 2022 hearing, granted the Tribe's motion to intervene, and requested that the parties submit proposed findings of fact and conclusions of law on the aforementioned questions. The parties opposed to the Motion to Transfer offered several reasons why the Motion to Transfer should not be granted: (1) that ICWA may be invalidated by a case presently pending before the Supreme Court of the United States; (2) that this Court should adopt the "Existing Indian Family" exception, a state

common law doctrine pertaining to ICWA that has been accepted by a minority of states, and which has not been previously addressed in West Virginia case law; (3) that ICWA is unconstitutional based upon invidious racial discrimination; and (4) that the transfer would be prejudicial in light of the advanced stage of the proceedings and, relatedly, that the DHHR had not been unduly dilatory in ascertaining whether this case involved an Indian Child. (App., at 216-219).

The parties in favor of the motion to transfer argued that noneof the parties empowered to veto a transfer to tribal court opposed it, and that there was no good cause to oppose the transfer. They argued that (1) the current litigation at the United States Supreme Court did not result in any judicial stay of the enforcement of the provision of ICWA; (2) the EIF exception is contrary to federal law, was only ever adopted by a minority of jurisdictions, and is recently falling more out of favor within the adopting jurisdictions; (3) that disparate treatment based upon tribal affiliation is not, under established federal precedent, comparable to racial discrimination; and (4) that the proceedings are still in the pre-adjudicatory phase, and therefore not advanced, and furthermore that the primary delay in involving the Delaware Tribe was attributable to the DHHR's failure to exercise due diligence in determining whether the Respondent Father possessed a tribal membership that would result in the child being classified as an Indian Child under ICWA. (App., at 203-213, 221-225).

Following the submission of these documents, the Court offered an opportunity for additional responsive argument at the hearing on September 26, 2022. The Circuit Court issued the order that is the subject of this Petition for Writ of Prohibition on September 30, 2022, adopting the Existing Indian Family doctrine, finding that ICWA is discriminatory on the basis of

race, determining that ICWA does not apply to these proceedings, and denying the motion to transfer. (App., at 226-230). The Circuit Court did not explicitly rule on the Tribe's motion to invalidate proceedings.

**SUMMARY OF REPLY ARGUMENT OF THE TRIBE SUPPORTED BY A.S.**

A.S. supports the Tribe which filed this Petition for Writ of Prohibition because the Tribe lacks any other method of redress of the Circuit Court's unlawful order denying the transfer to Tribal Court. The first of the five factors for determining a right to seek relief in prohibition under Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) is whether there is another avenue for redress, such as appellate relief. The second factor is whether the Tribe has been damaged in a way not correctable on direct appeal. Because the order denying transfer is not a final order disposing of the case, it is not amenable to direct appeal. The Tribe has stated that if it waits until the case is resolved in Boone County Circuit Court to seek redress of the affront to its right to a transfer of the case to Tribal Court pursuant to ICWA, the matter will become moot. Thus, A.S. supports the fact that the Tribe cannot wait until the conclusion of the case without forfeiting review of this issue.

The third, and most important *Hoover* factor is whether the lower court committed clear errors of law. A.S. supports the Tribe's position that it is straightforward that the Circuit Court clearly erred.

On the first question presented, the Circuit Court effectively modified West Virginia's common law by adopting the "Existing Indian Family" exception, which is a state-judge authored rule, which has been rejected by the jurisdiction that invented it, and only remains active in a small handful of states. This doctrine conflicts with the plain language of ICWA and

is not in accordance with the decisions of the Supreme Court of the United States, which has repeatedly declined to strike down the application of ICWA in fact patterns that would be expected to fall into the exception.

The Circuit Court, in legislating from the bench, has gone out on a very weak limb. Its adoption of this doctrine is unsustainable, contradicts federal authority, and discounts the law of West Virginia on the respect owed to unambiguous statutory language.

On the second question presented, the Circuit Court has apparently determined that, contrary to decades of federal constitutional law, that ICWA discriminates unconstitutionally on the basis of race, rather than lawfully on the basis of tribal affiliation. This is not the law of the United States, unless and until the Supreme Court of the United States says so. They have not said so to this point, and the Circuit Court has failed to offer any authority in support of this idea. This holding, as stated by the Tribe, is clear error, and demands relief in prohibition.

On the third question, as stated by the Tribe, it is clear from the record that there is no support for the Circuit Court's finding of "good cause" to deny the Motion for Transfer to Tribal Court. The Circuit Court notes the grant of certiorari in *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), but there is no injunction or stay resulting from that case that would implicate the validity of ICWA in Boone County, West Virginia in the summer and fall of 2022.

The Circuit Court states that the case has been going on well in excess of two years regarding this child. The issue with this statement is that the case has not been going on for this long due to the Tribe, the respondent father, A.S., or M.J.-1 and M.J.-2. The case was actually held off the docket for over one year due to the previous Judge taking a new position as U.S. Attorney and the case was only placed back on the docket when A.S., through undersigned

counsel, filed a Motion to Intervene on December 28, 2021. The fault of the delay is not on any party supporting this Writ.

As the Tribe has previously stated, the Department allowed 14 months to pass between a positive paternity test and the filing of an amended petition naming the Respondent Father as an abusing parent, and the Circuit Court allowed a year to pass with no hearings taking place despite the child remaining in foster care. The current version of the Amended Petition has only been pending since March of 2022, around five months before the Tribe filed its motion to transfer. The Department allowed nearly a year and a half to go by without ever inquiring of the Respondent Father whether he had a tribal affiliation that would implicate ICWA. Once the Department learned of the affiliation, it declined to provide formal notice to the Tribe as it was obligated to do under federal law. The Circuit Court attempts to excuse this dereliction on the basis that the Respondent Father once checked "Caucasian" as his race on a form, but this position is further indicative of the Circuit Court's legally unsound conflation of race and tribal affiliation. As the Tribe states, there is no record to support the finding of good cause to deny the transfer. In the absence of good cause to deny it, the transfer is not discretionary.

The fourth *Hoover* factor is whether the case involves an oft-repeated error. Although the Petitioner is only aware of one other instance[1] in which a party sought transfer to tribal court pursuant to ICWA in West Virginia, this case is nevertheless indicative of the lack of care in the state courts of West Virginia toward ascertaining whether ICWA applies in a given case.

As the Tribe states, the fifth and final *Hoover* factor concerns whether an issue involves a

1 The only cases in West Virginia jurisprudence involving ICWA are *In re N.R.*, 242 W.Va. 581, 836 S.E.2d 799 (2019), and two memorandum opinions involving the same underlying case that followed its decision: *In re N.R.*, No. 20-0202, No. 20-0204 (W. Va. Oct 02, 2020), and *In re N.R.*, No. 20-1033 (W. Va. Jun 03, 2021). The latter two memorandum decisions dealt specifically with the litigation of a motion to transfer to tribal court.

legal issue of first impression. This Court, as previously mentioned, has opined generally on the question of a motion to transfer in two memorandum opinions relating to the same circuit court motion. However, this Court has not opined on whether West Virginia should be one of the tiny and shrinking minority of states to adopt the Existing Indian Family doctrine, nor whether West Virginia should embrace the dubious distinction of being the only jurisdiction in the land to hold that ICWA discriminates unconstitutionally on the basis of race.

A.S. requests that this Court prohibit the Circuit Court's from enforcing its order recognizing the EIF doctrine, finding ICWA to be racially discriminatory, and denying transfer. The Tribe further requests that this Court remand the matter for an order transferring the matter below to the Tribal Court or grant any other relief the Court deems just and proper.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A.S. assert that this matter involves questions of first impression, and accordingly that this matter would be suitable for Rule 20 Oral Argument, and for resolution by signed opinion reversing the order of the lower court.

## CURRENT STATUS OF THE CHILD

The child I.R. continues in the custody of the foster parent intervenors. The Respondent Father remains unadjudicated and the proceedings have not advanced to the permanency stage. A.S. continues to receive video calls with the child weekly and the ICPC paperwork has been undertaken as the prospective kinship placements are out of state.

## ARGUMENT

### A. THE UNDERLYING ORDER WAS ERRONEOUS

#### 1. Standard of Review

The final argument section of this brief describes the standard for the granting of a writ of prohibition, as set forth in Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). The most important *Hoover* factor is whether or not the lower court committed a clear error of law. This Court has previously set forth the applicable standard of review when considering the denial of a motion to transfer:

> "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

*In re N.R.*, No. 20-1033 at *3 (W. Va. June 3, 2021) (memorandum decision).

Additionally, concerning a motion to transfer, this Court has observed that:

> Upon receipt of a petition for transfer, the "State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met: (a) Either parent objects to such

> transfer; (b) The Tribal court declines the transfer; or (c) Good cause exists for denying the transfer." 25 C.F.R. § 23.117. Critically, "[i]f the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding" and "[a]ny party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists." 25 C.F.R. §§ 23.118(a) & (b).

*In re N.R.*, No. 20-0202, No. 20-0204, at *4 n.5 (W. Va. Oct 02, 2020).

**2. It was clear error to apply the "Existing Indian Family" doctrine.**

The Circuit Court has effectively modified West Virginia's common law to adopt the "Existing Indian Family" ("EIF") a judicially-authored exception to ICWA, which was invented by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982), and jettisoned by that same Court in *In re A.J.S.*, 204 P.3d 543, 288 Kan. 429 (Kan. 2009), in an effort to defeat the applicability of ICWA to this case.

The Tribe has thoroughly briefed the case law surrounding the EIF and the national decline in use and the language of the ICWA. A.S. would rest on the strengths of the Tribe's Petition case law language.

As the Tribe stated, the Circuit Court's application of the EIF doctrine disregards the plain language of ICWA. It gives short shrift to the Tribe's interest in the upbringing of the children affiliated with the Tribe. It imposes the Circuit Court's value judgment about the child's lack of "Indianness." *Id.* This Court should reject the Circuit Court's effort to evade Congressional intent in protecting the interests of the Tribe by its late adoption of a the EIF which is unfounded in legal doctrine. This Court should reject the Circuit Court's modification of the common law of West Virginia, and specifically rule that the Existing Indian Family exception is not the law of

this state.

**3. It was clear error to hold that ICWA is unconstitutionally discriminatory on the basis of race.**

The Circuit Court held as follows in denying transfer:

> 14. Further, to follow the ICWA placement preference solely based upon the minor child's genetic heritage would be to remove her from a stable adoptive home solely on the basis of race. [I.R.] has no history of connection with the tribe or any social, cultural or other affiliations with that genetic heritage. As such, application in this situation would be placing the interests of the tribe over [I.R.]'s actual best interests, violating her rights to continued connection, permanency, and stability raising an equal protection argument.

(App., at 229).

As the Tribe stated in its brief, this paragraph is legally problematic is clear in light of the principles, but the paragraph also evinces the Circuit Court's utter misapprehension of the law in conflating classifications based upon race and tribal affiliation. To the extent that the denial of transfer is predicated on the purportedly unconstitutional nature of discrimination on the basis of tribal affiliation, such a position is not the law of this state nor of the United States.

The Circuit Court has rebuked decades of United States Supreme Court jurisprudence. The Tribe's briefing specifically addressed the state of the law as it regards discrimination on the basis of tribal affiliation, but the legal authorities cited were again disregarded by the Circuit Court. (App., at 211-212). Unless and until the High Court rules otherwise, the Circuit Court's act constitutes clear legal error.

**4. The parties opposing transfer failed to demonstrate "good cause."**

As the Tribe has briefed, the minor child in this case, I.R. is an "Indian Child" as defined by 25 U.S.C. § 1903(4) ("'Indian child' means any unmarried person who is under age eighteen

and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]"). As demonstrated by filings contained in the record in this case, the biological father, B.D., is a registered member of the Delaware Tribe of Indians, and I.R. is eligible for membership. (A.R., at 133, 185). The ICWA applies to this case.

ICWA requires transfer at the request of the Indian child's Tribe, absent objection by the parent or Indian custodian (25 U.S.C. §1903(6)), and absent good cause to the contrary. The relevant portion of ICWA, as it pertains to the question of motions to transfer, is 25 U.S.C. § 1911(b), which reads as follows:

> (b)Transfer of proceedings; declination by tribal court
>
> 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.

*Id.* In accordance with this statutory text, pursuant to 25 C.F.R. 23.117 once a motion to transfer is made, the Court ***must*** transfer said case unless: (a) Either parent objects to the transfer; (b) the Tribal Court declines the transfer; or (c) good cause exists for denying the transfer.

In this case, as the Tribe has briefed, no parent has objected to the transfer. The Respondent Mother has previously been terminated and the Respondent Father has joined in the motion to transfer. Additionally, as previously stated, the Delaware Indians' Tribal Court has explicitly accepted transfer of this case. (App., at 185-186).

As the Tribe has stated, while "good cause" is not defined by U.S. Code or the Code of

Federal Regulations, 25 C.F.R. 23.118 instructs on what *cannot be* considered in making a finding on the issue of "good cause." These factors include:

> (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
> (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
> (3) Whether transfer could affect the placement of the child;
> (4) The Indian child's cultural connections with the Tribe or its reservation; or
> (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

*Id.*

Courts are also guided by the Bureau of Indian Affairs guidelines when making a "good cause" determination. While not binding, 44 Fed. Reg. 67, 590, lists factors that may be good cause to deny a motion to transfer. These factors include:

> (1) 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.
> (2) The Indian child is over twelve years of age and objects to the transfer.
> (3) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
> (4) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

*Id.*

As the Tribe clearly states in its brief, none of these factors are present here. First, the case is not at an advanced stage as the respondent father has not been adjudicated.

A.S. points out, as the Tribe did that the Court labeled the parties in favor of transfer as

"disingenuous." While the case has been going on for significantly more than two years, the delay is attributable to the Circuit Court of Boone County and the West Virginia Department of Health and Human Resources. As the Tribe clearly stated, fourteen months passed between the paternity test being filed indicating that B.D. was the biological father, and an Amended Petition being filed naming him as an offending Respondent (November 6, 2020, to January 14, 2022). (App., at 40-46, 65-79). That fact is not attributable to A.S. or any of the parties who moved in support of the Motion to Transfer. The respondent father, B.D.'s parental rights were not placed in legal peril until two years and four days after the case was initiated. The petition was amended yet again on March 1, 2022 (App., at 106-122), only months before the Motion to Transfer was filed after the Tribe was able to secure local counsel. B.D. has not yet been adjudicated, nor has his adjudication even commenced.

A.S. also joins in the Tribe's argument that the Circuit Court held no hearings in the case whatsoever between January 25, 2021, until January 31, 2022, despite the fact that the child remained in foster care. (App., at 62, 99). This is true despite the fact that a Department Worker emailed former assistant prosecuting attorney Mark Browning on June 4, 2021 to inform him that the case "fell off the docket." (App., at 98). The case was only placed back on the docket because A.S. filed a Motion to Intervene.

As the Tribe points out, the failure to hold a hearing for over a year is also a violation of W. Va. Code §49-4-110 and Rule 44 of the Rules of Procedure for Child Abuse and Neglect Proceedings, each of which require at least quarterly hearings in cases involving a child in foster care.

Even though years have passed since the case was initiated, there is no evidence that the

tribe has actually ever received formal notice as required by Section 1912(a) of ICWA; not even after the Tribe's interest in this case came to the attention of the Circuit Court and the Department (circa Dec. 21' to Jan. '22). (App., at 1-19).

Moreover, the DHHR cannot be excused from failing to inquire as to the Respondent Father's tribal affiliation simply because he checked "Caucasian" on the paternity test intake form, as the law does not recognize the interchangeability of racial identification and tribal affiliation. (App., at 201). *See, Brackeen, supra,* at 337-38. While ICWA cases are not common in West Virginia, it is incumbent upon the state to take care that federal law is complied with by exercising due diligence in ascertaining whether a parent in an abuse and neglect case has tribal affiliation. The Tribe points out that no one ever inquired of him whether he had any tribal affiliation so that the proper notice could be effectuated if he did. Instead, the tribe learned about the case second or third-hand almost a year and a half later, and the Department wholly blew off the requirement to provide notice at that juncture. This is inexcusable neglect.

This Circuit Court's findings regarding the stage of proceedings did not comport with the record and were clearly in legal error.

As the Tribe states, concerning the second of the BIA factors, the child in this case is much younger than twelve years of age. (App., at 43).

On the third factor, it is evident from the record that the tribal court has the ability to hold hearings via video or telephonic means, and the Tribe avers in this Petition that all participants in the case will be permitted to participate in Tribal Court proceedings by video conferencing. (App., at 208-209). Many of the parties in this case have attended previous proceedings via video. (App., at 34, 37, 47, 52, 123, 226). Moreover, the Respondent Father and the proposed

kinship placements do not even reside in West Virginia in the first place and attending hearings via video conferencing in Kansas is no more burdensome than attending them in West Virginia.

Concerning the fourth factor, the Respondent Father is available, and affirmatively seeks transfer to tribal court.

In this case, the three parties in opposition have not demonstrated good cause to prevent transfer, for all the reasons described above.

As the Tribe states, the Circuit Court has misapplied the law to deprive the Tribe, the child, and the Respondent father of their rights under ICWA by ruling that it does not apply in this case. The Circuit Court has denied a transfer to Tribal Court when there is no colorable evidence to support a finding that the parties opposing the transfer met their burden of demonstrating good cause to deny the transfer. The Circuit Court of Boone County has had this case for upwards of three years and has shown through its erroneous application of the law, its unjustified delay, and its procedural errors, that it is not a reliable forum to handle this controversy. Instead, this matter should be transferred to Tribal Court, where it can be expeditiously decided in accordance with the law.

**B. THE PETITIONER IS ENTITLED TO RELIEF IN PROHIBITION**

A.S. joins in the argument of the Tribe and reiterates the Tribes argument concerning W. Va. Code §53-1-1. This code section allows a petitioner to seek a writ of prohibition in the following circumstances:

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

A.S. joins the position that the Petitioner is not asserting an absence of jurisdiction but are rather asserting that the Circuit Court exceeded its legitimate powers.

The first of the five factors for determining a right to seek relief in prohibition is whether there is another avenue for redress, such as appellate relief. The second factor is whether the Tribe has been damaged in a way not correctable on direct appeal. Because the order denying transfer is not a final order disposing of the case, it is not amenable to direct appeal. As the Tribe argues, if the Tribe would have waited until the case is resolved in Boone County Circuit Court to seek redress of the denial of a transfer to Tribal Court, the matter would have become moot.

The third, and most important *Hoover* factor is whether the lower court committed clear errors of law. A.S. joins the Petitioner and states the Petitioner has set forth the three ways in which the Circuit Court has committed clear error in the preceding three subsections of this Petition, which are incorporated herein by reference.

The fourth *Hoover* factor is whether the case involves an oft-repeated error. A.S. is not aware of many, if any at all, cases of ICWA impression in our state.

Finally, as the Tribe states, the fifth and final *Hoover* factor concerns whether an issue involves a legal issue of first impression. This Court, as previously mentioned, has opined generally on the question of a motion to transfer in two memorandum opinions relating to the same circuit court motion. However, this Court has not opined on whether West Virginia should adopt the Existing Indian Family doctrine, nor whether West Virginia should a single, overruled federal district court in the unique and dubious legal position that ICWA discriminates unconstitutionally on the basis of race.

A.S. respectfully requests that this Court prohibit the Circuit Court's from enforcing its

order denying transfer, and remand for entry of an order transferring the matter below to the Tribal Court or grant any other relief the Court deems just and proper.

## CONCLUSION

For the foregoing reasons, A.S. request that this Court grant the following relief:

1. That a writ be granted prohibiting the Circuit Court from effectuating the September 30, 2022, order determining that ICWA does not apply to the proceedings and denying transfer to Tribal court;
2. That this matter be remanded entry of an order transferring the matter to Tribal Court;
3. That the Court grant any other relief the Court deems just and proper.

Respectfully submitted,

A.S.,
Respondent Intervenor,
by Counsel,

*/s/ Joseph H. Spano, Jr.*
Pritt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373
jspano@yourwvlawfirm.com

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**THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,**
**Respondents.**

**(An original jurisdiction action pertaining to an order of the Circuit Court of Boone County, Civil Action No.: 20-JA-1)**

## CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for A.S., do hereby certify that service of the foregoing "***RESPONDENT A.S.'S RESPONSE BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION***" in the above styled case have been made upon the following:

Jeremy B. Cooper, Esquire
jeremy@blackwaterlawpllc.com
*Counsel for Petitioner*

Hon Stacy Nowicki-Eldridge
stacydesq@hotmail.com

Moriah Myers, Esquire
moriahnmyers@gmail.com
*Guardian Ad Litem*

Alison Huson, Esquire
huson.law@gmail.com

Steven Wright, Esquire
stevenmwright1@gmail.com

Adam Campbell, Esq.
acampbell@lawfirmwv.com

Andrew T. Waight, Esq.
Andrew.T.Waight@wvago.gov

this the 30th day of November 2022, via WVSCA E-file and email.

*/s/ Joseph H. Spano, Jr.*
Pritt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373
jspano@yourwvlawfirm.com