IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____

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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., and E.A., Intervening Foster Parents 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

I.R., Subject Child of the Petition Below,

and

THE WEST VIRGINIA DHHR,
Respondents.

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

PETITION FOR WRIT OF PROHIBITION

DELAWARE TRIBE OF INDIANS,
Petitioner, by counsel,

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PETITION FOR WRIT OF PROHIBITION

The Petitioner, the Delaware Tribe of Indians ("the Tribe"), by counsel, Jeremy B. Cooper, petitions 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; 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").

QUESTIONS PRESENTED

1. Did the Circuit Court exceed its legitimate powers by adopting the "Existing Indian Family" doctrine when that doctrine has never been recognized in West Virginia, when it is only maintained by a small and shrinking number of other states, and when that doctrine is wholly contrary to the principles of federal law underlying ICWA?

2. Did the the Circuit Court exceed its legitimate powers by finding the applicable provisions of ICWA, which apply to Indian Children but which do not apply to other children, to be invidious racial discrimination contrary to decades of precedent of the Supreme Court of the United States?

3. Did the Circuit Court exceed its legitimate powers by denying the Motion to Transfer to Tribal Court in the absence of a record supporting a finding of good cause to deny the transfer?

STATEMENT OF THE CASE

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).

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 none of 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 ARGUMENT

The Tribe has 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 a 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. If the Tribe 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, 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. It is straightforward that the Circuit Court clearly erred. On the first question, 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. More importantly, 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 (or more) 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 is a true aberration, is clear error, and demands relief in prohibition.

On the third question, it is clear from the record that there is no support for the Circuit Court's finding of "good cause" to 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 other reasons adopted by the Circuit Court – apart from its holdings regarding the EIF doctrine and racial discrimination – center on the supposedly advanced stage of proceedings, in a case in which the Respondent

Father is yet to be adjudicated. The Circuit Court laments that the case has been going on well in excess of two years regarding this child, but the fault cannot be attributed to the Tribe or to any other party moving in support of transfer.

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 only 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. In short, 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.

The fifth and final *Hoover* factor concerns whether an issue involves a legal issue of first

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.

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.

The Tribe respectfully request 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

The Petitioners 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. The prospective kinship placements' requests for custody have not yet been adjudicated by the Circuit Court, and various ICPC paperwork has been undertaken as the prospective kinship placements are out of state.

ARGUMENT

A. THE UNDERLYING ORDER WAS CLEARLY 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:

> 11. The existing family doctrine has been adopted in Tennessee (In Re: Morgan, 1997 WL 716880 (Tenn.Ct.App.) (1997)) and Kentucky (Rye v Weasel, 934 S.W.2d 257 (1996)), sister states to West Virginia and has not been rejected by Ohio or Virginia, also sister states. Similarly to the case before this Court, these Courts found that:
>
> > Rather than preserving an existing Indian family, application of the ICWA under these circumstances would disrupt the adoptive family unit to place in an Indian environment a child who has had no contact with the reservation. We agree with courts finding that the ICWA was not meant to apply to such situations. See In re S.C., supra; Rye v. Weasel, supra; Crews, supra; Bridget R., supra; Adoption of S.S., supra (Heiple, J., concurring); In re T.S., supra; In re C.E.H., supra; Hampton v. J.A.L., supra; Alexandria Y., supra.
>
> 12. The United States Supreme Court of Appeals has spoken to these issues as well in Adoptive Couple v. Baby Girl, 570 U.S. 637

(2013), holding that:

> 25 U. S. C. §1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that §1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child.

> 13. Upon review of the factual circumstances in this case, the Court FINDS that the Indian Child Welfare Act is inapplicable given that the minor child was never removed from the respondent father nor an intact Indian family and that the Act by its purpose was never intended to apply to this type of situation.

(App., at 228-229) (citation missing at conclusion of paragraph 11 in original).

The doctrine has never been widely embraced, and is in decline. The Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), implicitly rejected the EIF exception by interpreting ICWA to apply to Indian children who had been placed for adoption without ever having physically lived in an Indian home or on an Indian reservation prior to placement with a non-Indian prospective adoptive family. *Id*. at 54. The *Holyfield* Court found that the state court proceeding at issue was an adoptive placement as defined by Section 1903(1)(iv), and that the children involved were Indian children as defined by Section 1903(4), despite never living in an Indian home or reservation.

The EIF exception has been explicitly rejected in numerous states.[2] As noted by the *en*

2 *S.H. v. Calhoun County Dept of Human Res.*, 798 So. 2d 684 (Ala. Civ. App. 2001); *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *In re T.N.F.*, 781 P.2d 973 (Alaska 1989); *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993) *In re S.S.*, 657 N.E.2d 935 (Ill. 1995); *In re D.S.*, 577 N.E.2d 572 (Ind. 1991); *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005); *In re Elliott*, 554 N.W.2d 32 (Mich. Ct.

banc opinion of the Fifth Circuit in *Brackeen*, "...some courts created an 'existing Indian family' exception to ICWA. But [...] the exception was repudiated by the court that created it, is now recognized by '[o]nly a handful' of courts, and has been rejected by a 'swelling chorus' of others." *Brackeen v. Haaland*, 994 F.3d 249, 428 (5th Cir. 2021) (footnotes and citations omitted). The EIF exception was first recognized by the Supreme Court of Kansas, as noted above, which subsequently abandoned it. Washington, which previously adopted the doctrine, has abrogated it. *See, R.B. v. C.W. (In re Adoption of T.A.W.)*, 186 Wash.2d 828, 383 P.3d 492 (Wash. 2016). Louisiana, which embraced the doctrine, has subsequently declined to apply it. *Owens v. Willock*, 690 So.2d 948 (La. App. 1997). Contrary to the Circuit Court's findings, the Virginia Court of Appeals declined to adopted the Existing Indian Family exception in *Thompson v. Fairfax County Department of Family Services*, 62 Va.App. 350, 747 S.E.2d 838, 847 (Va. App. 2013). (App., at 228). The doctrine apparently remains active in Kentucky, Missouri, and Tennessee.[3] Although California's appellate districts were long split on the subject,[4] the adoption of Family Code section 170 apparently ended the doctrine in that state. The Circuit Court has thus unilaterally modified West Virginia's law to adopt the EIF exception which has been disfavored by federal courts and which fewer than 10% of states apply.

In the Circuit Court's analysis, it purports to rely on *Adoptive Couple v. Baby Girl*, 570

App. 1996); *In re Riffle*, 922 P.2d 510 (Mont. 1996); *In re Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005); *In re A.D.L.*, 612 S.E.2d 639 (N.C. Ct. App. 2005); *In re A.B.*, 2003 ND 98, 663 N.W.2d 625 (N.D. 2003) *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099 (Okla. 2004); *Quinn v. Walters*, 881 P.2d 795 (Or. Ct. App. 1994); *In re Baade*, 462 N.W.2d 485 (S.D. 1990); *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001); *Doty-Jabbaar v. Dallas County Child Protective Servs.*, 19 S.W.3d 870 (Tex. App. 2000); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997).

3 *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

4 *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996) (2d Dist.); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (2d Dist.); *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (2d Dist.); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996) (4th Dist.).

U.S. 637 (2013), a decision of the Supreme Court of the United States, which held that Section 1912(d) and 1912(f) were inapplicable to a case in which the father of an Indian Child had never had custody of that child. (App., at 228). The High Court further held that Section 1915(a) did not apply in cases in which none of the statutorily preferred parties seek permanent custody. However, as it pertains to the Motion to Transfer, neither of the aforementioned subsections of Section 1912 are relevant, as the Motion to Transfer is not predicated on the propriety of either the initial order for foster placement, nor the procedures that may be used in any future hearing to determine whether the Respondent Father's parental rights should be terminated. Moreover, there are two different extended family members seeking custody in this matter, making the Supreme Court's holding regarding Section 1915(a) inapposite to this case. The most important conclusion to draw from *Adoptive Couple v. Baby Girl* as it pertains to the EIF doctrine is that the Supreme Court refrained from holding that a non-custodial Indian father is entitled to none of the protections of ICWA. The result was a restrained interpretation of ICWA in that scenario, not the wholesale gutting ordered by the Circuit Court here.

The wisdom of the Kansas Supreme Court, in reconsidering its own prior invention and application of the EIF exception, should provide guidance to this Court:

> From this point in ICWA interpretation and the development of common law, we are persuaded that abandonment of the existing Indian family doctrine is the wisest future course. Although we do not lightly overrule precedent, neither are we inextricably bound by it. See *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004). *Baby Boy L.* is ready to be retired.
>
> First, the existing family doctrine appears to be at odds with the clear language of ICWA, which makes no exception for children such as A.J.S. See 25 U.S.C. § 1903(4); Jaffke, The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children, 66

La. L.Rev. 733, 745-51 (2006).

Further, as recognized by the *Holyfield* decision, 490 U.S. at 36-37, 109 S.Ct. 1597 tribal interests in preservation of their most precious resource, their children, drove passage of ICWA; and its expressly declared policy 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." 25 U.S.C. § 1902.

As counsel for the Cherokee Nation emphasized at oral argument before us, a child removed now from the tribe cannot later be a voice for the tribe.

[…]

We are also influenced by our sister states' and commentators' widespread and well-reasoned criticism of the doctrine. For example, in *Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313, in which an unmarried Indian mother and non-Indian father attempted to relinquish their parental rights to facilitate their infant's adoption by non-Indian parents, the court convincingly detailed inconsistencies between the existing Indian family doctrine and the plain language of ICWA, as well as the doctrine's deviation from ICWA's core purpose of "preserving and protecting the interests of Indian tribes in their children." 27 A.D.3d at 47, 805 N.Y.S.2d 313. The court said:

> "Because Congress has clearly delineated the nature of the relationship between an Indian child and tribe necessary to trigger application of the Act, judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress and must be rejected. . . .
>
> "Another problem with the [doctrine] is that its acceptance would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*. The Supreme Court

made it clear in *Holyfield* that Indian tribes have an interest in applying ICWA that is distinct from that of the child's parents, and that such parents may not unilaterally defeat its application by deliberately avoiding any contact with the tribe or reservation (490 U.S. at 51-52 [109 S.Ct. 1597]). In many respects, that is what occurred in this case. By divorcing herself from tribal life and by putting her child up for adoption away from the reservation immediately after birth, [the mother] singlehandedly destroyed the notion of an "existing Indian family." If the [doctrine] were applied in this instance, [the mother] would have succeeded in nullifying ICWA's purpose at the expense of the interests of the Tribe. However, as *Holyfield* recognized, Congress intended otherwise by specifically mandating that tribal interests be considered [`protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents']; see also *Matter of Baby Boy Doe*, 123 Idaho [464, 470-71, 849 P.2d 925, 931-32 (1993)]; *In re A.B.*, 663 N.W.2d [625, 636 (N.D.2003)].

"Nor can we agree . . . that `relinquishing control over a child born to parents uninvolved in Indian life costs the tribe nothing.' [Citation omitted.] Where, as here, [the mother] has rejected Indian life and culture and then, voluntarily relinquished her newborn Indian child to be adopted by a non-Indian couple, the detriment to the Tribe is quite significant—the loss of two generations of Indian children instead of just one.

"The [doctrine] also conflicts with the Congressional policy underlying ICWA that certain child custody determinations be made in accordance with Indian cultural or community standards (see *Holyfield*, 490 U.S. at 34-35 [109 S.Ct. 1597] [one of the most serious failings of the present system is that Indian children are removed from natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing]; 25 U.S.C. § 1915(d) [applicable standards `shall be the prevailing social and cultural standards of the Indian community']).

"The [doctrine] is clearly at odds with this policy because it requires state subjective factual determination as to the

> `Indianness' of a particular Indian child or parent, a determination that state courts `are ill-equipped to make' (*In re Alicia S.*, 65 Cal.App.4th at 90, 76 Cal.Rptr.2d at 128). Since ICWA was passed, in part, to curtail state authorities from making child custody determinations based on misconceptions of Indian family life, the [doctrine], which necessitates such an inquiry, clearly frustrates this purpose (*Holyfield* [,490 U.S. at 34-35, 109 S.Ct. 1597]; *Quinn,[v. Walters*,117 Or.App. 579, 584 n. 2, 845 P.2d 206 (1993)]; *[State in Interest of D.A.C.*, 933 P.2d 993, 999 (Utah App.1997)])." *Baby Boy C.*, 27 A.D.3d at 48-49, 805 N.Y.S.2d 313. […]
>
> Given all of the foregoing, we hereby overrule *Baby Boy L.*,231 Kan. 199, 643 P.2d 168, and abandon its existing Indian family doctrine.

In re A.J.S., 204 P.3d at 549-51 (page numbers and some citations omitted).

Similarly, the Court of Appeals of Virginia stated its reason for rejecting the doctrine:

> We decline to recognize the Existing Indian Family Exception for a number of reasons. First, the plain text of the statute does not recognize the application of this exception. There is no threshold requirement in the Act that the child must have been born into or must be living with an existing Indian family, or that the child must have some particular type of relationship with the tribe or his or her Indian heritage. "Because Congress has clearly delineated the nature of the relationship between an Indian child and tribe necessary to trigger application of the Act, judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress and must be rejected." *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313, 323 (N.Y.App.Div.2005) (citations omitted).
>
> Second, cases recognizing the exception ignore Congress's intent "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (emphasis added). As the Supreme Court recognized in *Holyfield*, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." 490 U.S. at 49, 109 S.Ct. at 1608–09. The Existing Indian Family Exception takes an unnecessarily restrictive approach to ICWA, one that would frustrate Congress's intent to

> protect tribal interests.
>
> Finally, in its findings, Congress stated "that the States ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The Existing Indian Family Exception requires courts to assess the "Indianness" of a particular Indian child, parent, or family, a subjective determination that courts " 'are ill-equipped to make.' " *Baby Boy C.*, 805 N.Y.S.2d at 324 (quoting *In re Alicia S.*, 65 Cal.App.4th 79, 76 Cal.Rptr.2d 121, 128 (1998)). "Since ICWA was passed, in part, to curtail state authorities from making child custody determinations based on misconceptions of Indian family life, the [Existing Indian Family] exception, which necessitates such an inquiry, clearly frustrates this purpose." *Id*. (citations omitted).
>
> We thus join the growing chorus of courts that have rejected the Existing Indian Family Exception.

Thompson, 747 S.E.2d at 847.

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 fading and unfounded judicially-authored legal doctrine that flies in the face of the text of the statute.[5] The Tribe's briefing in this matter addressed the infirmity of the EIF doctrine, but was disregarded by the Circuit Court. (App., at 209-210). 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.

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5 8. "'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, *State v. Epperly*,135 W.Va. 877, 65 S.E.2d 488 (1951)." Syl. Pt. 6, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016). Syl. Pt. 8, *State ex rel. St. Clair v. Howard*, 856 S.E.2d 638 (W. Va. 2021).

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).

That this paragraph is legally problematic is clear in light of the principles described in the previous section, 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 *Brackeen* Court explicitly rejected this conclusion of the lower court, and explained at length the constitutional provenance of statutory schemes predicated on the sovereignty of Indian Tribes. *Brackeen*, at 332-340. The Fifth Circuit noted that:

> Congress has exercised plenary power "over the tribal relations of the Indians ... from the beginning." *Lone Wolf*, 187 U.S. at 565, 23 S.Ct. 216. The Supreme Court's decisions "leave no doubt that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).

Brackeen, at 333.

> … [W]e cannot say that simply because ICWA's definition of "Indian child" includes minors eligible for tribal membership (who

> have a biological parent who is a tribal member), the classification is drawn along racial lines. Tribal eligibility does not inherently turn on race, but rather on the criteria set by the tribes, which are present-day political entities. Just as the United States or any other sovereign may choose to whom it extends citizenship, so too may the Indian tribes. That tribes may use ancestry as part of their criteria for determining membership eligibility does not change that ICWA does not classify in this way; instead, ICWA's Indian child designation classifies on the basis of a child's connection to a political entity based on whatever criteria that political entity may prescribe.

Brackeen, at 337-38 (footnotes omitted). The Circuit Court, as did the District Court in *Brackeen*, 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."

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). Accordingly, 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, 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.[6] Additionally, as previously stated, the Delaware Indians' Tribal Court has explicitly accepted transfer of this case. (App., at 185-186).

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;

6 App., at 240-241. The positions of the parties were more thoroughly set forth at the August 15, 2022 hearing. It is the Tribe's intent to submit the transcript of that hearings in a supplemental appendix as soon as possible.

> (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.

None of these factors are present in this case. First, the case is not at an advanced stage. In fact, the Respondent Father, who is a tribal member, has yet to be adjudicated. For all intents and purposes, the case is precisely where it was procedurally when the Respondent Father was first named as a respondent in the Amended Petition. The Circuit Court found as follows in the order that is the subject of this Petition:

> 8. Parties argue that the matter is not at an advanced stage. The Court disagrees. This matter has been pending for this child for over two years. To argue that this is not at an advanced stage is disingenuous.

(App., at 227).

The Tribe would note that the Circuit Court, while labeling the parties in favor of transfer "disingenuous,"[7] has put its own convenient gloss on the truth of this case's procedural history. While the case has been going on for significantly more than two years, the bulk of the delay is attributable to the dereliction of the Circuit Court of Boone County and the West Virginia Department of Health and Human Resources. One would not know from the order below that *over 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 any of the parties who moved in support of the Motion to Transfer. This means that 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.

Nor was the Circuit Court candid in its order that it *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). This is a serious violation of this Court's repeated admonitions:

> We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement.

7 "Disingenuous" is defined by the Oxford English Dictionary as "not candid or sincere, typically by pretending that one knows less about something than one really does."

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 257-58, 470 S.E.2d 205, 211-12 (1996).

> The procedural and substantive requirements of West Virginia Code § 49-4-601 et seq. , the Rules of Procedure for Child Abuse and Neglect, and our extensive body of caselaw are not mere guidelines. The requirements contained therein are not simply window dressing for orders which substantively fail to reach the issues and detail the findings and conclusions necessary to substantiate a court's actions. The time limitations and standards contained therein are mandatory and may not be casually disregarded or enlarged without detailed findings demonstrating exercise of clear-cut statutory authority. Discretion granted to the circuit court within this framework is intended to allow the court to fashion appropriate measures and remedies to highly complex familial and inter-personal issues—it does not serve as a blanket of immunity for the circuit court to manage abuse and neglect cases as its whim, personal desire, or docket may fancy.

In re J. G., II, 240 W. Va. 194, 809 S.E.2d 453, 463 (2018).

> Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.

Syl. Pt. 1, in part, *In Re: Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). 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). The requirement to provide notice is no secret to West Virginia practitioners or to the DHHR; consider the following excerpt in the 2016 edition of this Court's Abuse and Neglect Benchbook:

> In cases where there is no exclusive tribal jurisdiction, the petitioner in the circuit court proceeding must provide written notice to the Indian child's parent or Indian custodian, and the child's tribe. The notice must be served by certified mail, return receipt requested and must include a statement that the notified party has a right to intervene in the proceedings. If the identity or location of the parent or custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior. The proceeding cannot proceed until at least ten days have passed after receipt of notice. Even after such ten days has passed, the parent, custodian, or tribe, must be granted an additional 20 days to prepare for the proceeding if a request is made for such additional time. 25 U.S.C. § 1912.

Abuse and Neglect Benchbook, Chapter 4, p. 30.

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 2016 Benchbook has two different checklists that include ascertaining whether the child is an Indian child. *Id.*, at Chapter 2, p. 3; Chapter 2, p. 6. The Court and the Department have been aware of the identity of B.D. since at least as early as July 1, 2020. (App., at 37). 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 case is also entirely distinguishable from the factual scenario in *In Re: N.R.*, in which the tribe in that case learned of the proceedings

from the earliest stages, and had been permitted to actively participate during the pendency of all the proceedings. *Id.*, 836 S.E.2d at 807-08.

In the absence of statutory notice, the Circuit Court was not permitted per 25 C.F.R. 23.118(1), *supra*, to consider the supposedly "advanced" stage of the proceedings in finding good cause to deny a transfer. Even if it did properly consider the question, the proceedings clearly are not "advanced," having not gotten beyond the adjudicatory pre-hearing conference stage described in Rule 24 of the West Virginia Rules of Procedure for Abuse and Neglect Proceedings. This Circuit Court's findings regarding the stage of proceedings did not comport with the record, and were clearly in legal error.

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.

Although the specific issue has not been decided in West Virginia, the case law of other jurisdictions confirms that parties in opposition to a motion to transfer bear the burden of demonstrating good cause to prevent it. *In re T.I.*, 2005 SD 125, 707 N.W.2d 826, 834 (S.D.,

2005); *In re A.B.*, 2003 ND 98, 663 N.W.2d 625, 631 (N.D., 2003); and *In re C.R.H.*, 29 P.3d 849, 854 (Alaska, 2001). As the Iowa Supreme Court recently observed, in holding that the burden is on the party opposing transfer:

> According to the BIA guidelines, the burden of establishing good cause to deny transfer is upon the party opposing transfer. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67591. While it is true that BIA guidelines are not binding, they are persuasive. *Batterton v. Francis*, 432 U.S. 416, 425–26, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977) (noting guidelines are accorded great weight); *In re N.V.*, 744 N.W.2d at 638 ; see also *In re Junious M.*, 144 Cal.App.3d 786, 193 Cal. Rptr. 40, 43 n.7 (1983) (noting guidelines are entitled to "great weight"); *In re H.D.*, 11 Kan.App.2d 531, 729 P.2d 1234, 1238 (1986) (noting guidelines establish pretrial requirements); *In re Dependency & Neglect of N.A.H.*, 418 N.W.2d 310, 311 (S.D. 1988) (per curiam) (holding "better practice" to follow the guidelines).
>
> Here, the guardian ad litem as the party opposing the transfer of jurisdiction to the Tribe bears the burden of overcoming the Tribe's presumptive jurisdiction and establishing good cause not to transfer the matter. *In re Armell*, 550 N.E.2d at 1064.

In re Interest of T.F., 972 N.W.2d 1, 17 (Iowa 2022).

In this case, the three parties in opposition have not demonstrated good cause to prevent transfer, for all the reasons described above. To the extent that the opposition to transfer is predicated on the pending *Brackeen v. Haaland* certiorari proceedings, it is misplaced, because there is no nationwide stay of enforcement of ICWA that arose from that ongoing litigation. Finally, the Circuit Court has apparently decided to consider the best interests of the child in its determination of this motion to transfer. The Supreme Court of Iowa considered this question as well, and found that it constitutes error to conduct a best interests analysis on what is essentially just a question of forum. *In re Interest of T.F.*, at 15-17.

In short, 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

W. Va. Code §53-1-1 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." The Petitioner is not asserting an absence of jurisdiction, but are rather asserting that the Circuit Court exceeded its legitimate powers.

This Court's threshold standard for the consideration of a petition for writ of prohibition in cases alleging that a court exceeded its legitimate powers is well established:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either

> procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

The first of the five factors for determining a right to seek relief in prohibition is whether there is a 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. If the Tribe waits until the case is resolved in Boone County Circuit Court to seek redress of the denial of a transfer to Tribal Court, the matter will have become moot. Thus, the Tribe cannot wait until the conclusion of the case without forfeiting review of this issue. Any other remedy, such as appeal, is clearly inadequate to address the Tribe's interests.

> 1. In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The third, and most important *Hoover* factor is whether the lower court committed clear errors of law. The Petitioner has set forth at length 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. Although the Petitioner is only aware of the *In Re: N.R., supra,* series of appeals 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.

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. *See*, *Brackeen*, *supra.*

The Petitioners respectfully request 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, the Petitioners 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 trial 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,

THE DELAWARE TRIBE OF INDIANS,
Petitioners,
by Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. _____

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)

VERIFICATION

I, Shelby Facey, hereby swear or affirm that I have reviewed the foregoing Petition for Writ of Prohibition, and that the factual assertions contained therein are true, and that to the extent that any factual assertions are based upon information and belief, that I believe them to be true.

10/18/2022
Date

Signature

Director of Family + Children Services
Title Delaware Tribe of Indians