IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28479

GUARDIANSHIP OF I.L.J.E., MINOR CHILD

Appeal from the Circuit Court, Third Judicial Circuit
Brookings County, South Dakota

The Honorable Gregory J. Stoltenburg
Circuit Court Judge

BRIEF OF APPELLANT

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Notice of Appeal filed on the 15th day of December 2017

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JURISDICTIONAL STATEMENT

Irving D. Jumping Eagle appeals from the Interim Order entered on July 21, 2017, appointing co-guardians and co-conservators of I.L.J.E.; and the Order entered on November 15, 2017, appointing permanent co-guardians and co-conservators. Irving D. Jumping Eagle filed a Notice of Appeal on December 15, 2017. Irving D. Jumping Eagle respectfully submits that jurisdiction exists in accordance with SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right).[1]

STATEMENT OF ISSUES

I. Whether the Circuit Court committed error when it transferred custody from a parent to a non-parent under the South Dakota Guardianship Act

The trial court allowed the matter to proceed under SDCL 29A-5, inclusive.

Relevant Cases and Statutes:

In re Guardianship of S.M.N., 2010 S.D. 31, 781 N.W.2d 213

In re Guardianship of T.H.M., 2002 SD 13, 640 N.W.2d 68

SDCL 26-7A-30

SDCL ch. 25-5

II. Whether the order transferring custody of I.L.J.E. to a non-parent and failure to following SDCL § 26-7A violated Irving's Fourteenth Amendment rights.

The trial court allowed the matter to proceed under SDCL 29A-5, inclusive.

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "MH1" designates the Hearing Transcript from July 17, 2017; (3) "MH2" designates the Hearing Transcript from October 6, 2017; "App." designates Appellant's Appendix.

Relevant Cases and Statutes:

In re Guardianship of S.M.N., 2010 S.D. 31, 781 N.W.2d 213

In re Guardianship of T.H.M., 2002 SD 13, 640 N.W.2d 68

SDCL 26-7A-30

SDCL ch. 25-5

III. Whether the circuit court's affirmance of the permanent guardianship violated the provisions of ICWA.

The circuit court held that it did not.

Relevant Cases and Statutes:

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

25 U.S.C. § 1902

25 U.S.C. § 1922

STATEMENT OF THE CASE

Lloyd and Katie Warren, the maternal aunt and uncle, brought Guardianship proceedings to gain custody of I.L.J.E., the minor child of Irving D. Jumping Eagle on grounds of abuse and neglect. The trial court determined the child to be abandoned, terminated the father's custodial rights, and granted custody to the Warrens.

Father filed a notice of appeal on December 15, 2017, following the Court's order granting a permanent guardianship and conservatorship over I.L.J.E. to the Warrens.

STATEMENT OF FACTS

I. L.J. E. was born on December 22, 2014, to Irving D. Jumping Eagle ("Irving") and Alicia Jumping Eagle ("Alicia"). Alicia Jumping Eagle was addicted to methamphetamine, abusing the drug for I. L. J. E's entire life. Her actions left Irving as I.L. J. E's primary caretaker.

Through Irving's bloodlines, both Irving and I.L.J.E are enrolled members of the Oglala Sioux Tribe. C.R. 202. Alicia was not Native American, although she was active in her support for the Oglala tribe and her son's heritage. MH2, 206.

Irving and his older sister, Dr. Sara Jumping Eagle, were born eleven months apart. MH2, 212. Following their parents' death, both Irving and Sara were raised by their grandmother. *Id.* They bonded together to survive an abusive up-bringing, during which Dr. Jumping Eagle emotionally and culturally supported her brother, many times encouraging him to go to counseling and treatment. *Id.*

Despite a difficult childhood, Dr. Jumping Eagle received a bachelor's degree from the University of North Dakota in psychology. MH2, 189. She then obtained a medical degree from Stanford University and completed a residency at the University of Colorado. *Id.* Dr. Jumping Eagle served as an instructor in psychiatry and pediatrics at the University of Colorado, and is now the clinical director of the Standing Rock Service Unit at Fort Yates Hospital. *Id.* at 190.

Dr. Jumping Eagle and I.L.J.E. shared a close bond following his birth. MH2, 193-194. Dr. Jumping Eagle and I.L.J.E. spent time together every two months and on every holiday. MH2, 191. When he was born, Dr. Jumping Eagle brought I.L.J.E. his first pair of moccasins and wrapped him in a star quilt. MH2, 211.

In the fall of 2016, when Irving and Alicia's relationship began to deteriorate, I.L.J.E. lived with Dr. Jumping and her husband Chase Iron Eyes on the Standing Rock reservation for approximately six to seven weeks. MH2, 194.

In contrast with I.L.J.E.'s extensive history and close bond with Dr. Jumping Eagle, I.L.J.E. had never spent the night with the Warrens until March 31, 2017. C.R. 45.

On April 3, 2017, Alicia died in an altercation with Irving. Irving was arrested on or about April 4, 2017, in connection with Alicia's death.

At the time of Irving's arrest, Dr. Jumping Eagle was traveling abroad, but stayed in contact with law enforcement and cooperated with the investigation. MH2, 184. On April 6, 2017, Dr. Jumping was in contact with Lloyd Warren's sister Katie Lovstad and reached out to the Warrens giving them her cell phone number. MH2, 185. Dr. Jumping Eagle also told the Warrens that she wanted to be involved in I.L.J.E.'s care. MH2, 185.

Despite the Warrens familiarity with Dr. Jumping Eagle and despite having her contact information, on April 6, 2017, Lloyd and Katie Warren petitioned for temporary guardianship of I.L.J.E. under SDCL § 29A-5-210, alleging abuse and neglect. C.R. 6. The petition did not list Dr. Sara Jumping Eagle as a known relative, nor was she provided notice of the filing. *Id.* The Petition for Appointment of Temporary Co-Guardian and Co-Conservator listed Dr. Jumping Eagle as "Unknown Sisters and aunts of Irving D. Jumping Eagle." C.R. 1. An Order Appointing Temporary Guardian and Conservators pursuant to SDCL § 29A-5-210 was entered on April 7, 2017. C.R. 11. Counsel for the Warrens waited three days after the Petition was granted to mail notice to Irving. C.R. 16. Irving was not allowed to be heard on the Petition, nor was he appointed counsel as required by SDCL § 26–7A–30 and 31.

The Warrens petitioned for permanent guardianship on June 16, 2017. C.R. 18. Again, counsel for the Warrens waited three days to mail proof of notice to Irving at the Minnehaha County Jail. On June 20, 2017, Irving signed guardianship of I.L.J.E. over to Dr. Jumping Eagle. C.R. 26; C.R. 209.

Irving retained counsel in the guardianship proceedings on June 27, 2017. C.R. 39. Counsel for the Warrens sent notice of the Petition of Co-Guardians and Co-Conservators to Oglala Sioux Tribe on July 6, 2017. C.R. 47.

On July 12, 2017, Irving filed an opposition to the Petition for Permanent Guardianship and sought an Order appointing Dr. Sara Jumping Eagle as I.L.J.E.'s temporary guardian. C.R. 43. On that same date Dr. Jumping Eagle filed an affidavit seeking guardianship and conservatorship in Brookings County. C.R. 50.

A hearing was held on July 17, 2017, regarding the Warren's Petition for permanent guardianship. C.R. 219. Irving was not in attendance either personally or telephonically. MH1, 3. During the hearing, the Court extended the temporary guardianship, did not order DSS to intervene in the case, and restricted any visitation with I.L.J.E. to Brookings, Moody and Minnehaha County. MH1, 14. As a result, I.L.J.E. was prohibited from visiting the Oglala Sioux tribe. MH1, 14. On July 25, 2017, the Oglala Sioux Tribe intervened in the case. C.R. 67.

Following the July 17, 2017, hearing, the Warrens encouraged I.L.J.E. to call them "mom" and "dad". MH2, 22, 26, 35, 38, 79, 125-126, 135, 169. The Warrens took minimal steps to keep I.L.J.E. in contact with extended family members and took no steps to provide visitation with Irving. MH2 25, 26, 78, 95. They also took no steps to preserve and incorporate his Oglala heritage or encourage any contact with the tribe. MH2, 26, 35, 78, 79, 94, 134, 140.

The State originally charged Irving with first-degree murder. Irving maintained his innocence on that charge. Eventually he pled guilty to voluntary manslaughter. MH2, 237.

A hearing regarding the permanent guardianship over I.L.J.E. was held on October 6, 2017. C.R. 241. Irving was restricted to an ITV appearance, preventing him from conferring with counsel throughout the hearing. MH2, 6-7. Over the objection of counsel the Court ruled that it "could have under the circumstances denied his right to appear due to the fact that the defendant is in custody as to an intentional criminal act. So it is his intentional act that prevents him being here regarding this matter and under the circumstances and including court safety regarding the Court as well as all individuals here, reasonable accommodations have been made and the objection is overruled." MH2, 9.

During the hearing, the parties stipulated that the guardianship proceedings met the definition of a "foster care" placement and that the ICWA requirements governed the hearing. MH2, 180-181.

The Warrens testified at the hearing that I.L.J.E's Oglala heritage would be a burden to assimilate into his life. MH2, 172. At the hearing, Lloyd Warren testified as follows:

Q: Lloyd, you testified that you've done little to nothing to maintain Irving's heritage as a Lakota child?

A: I did.

Q: And that it would be too much of a burden to assimilate his culture into his lifestyle?

A: The burden wouldn't be on us. It would be to facilitate that to such a young child putting the burden onto him.

MH2, 172. Lloyd Warren further testified that despite having custody of I.L.J.E. for more than six months, they had not undertaken any efforts to contact the Oglala tribe, to encourage I.L.J.E.'s heritage, nor did they feel that it was necessary to enroll I.L.J.E. in counseling. MH2, 173-74.

When discussing the Lakota culture and influence in Elkton where the Warrens live, Lloyd Warren testified that Mexicans and Guatemalan families live there. MH2, 25. On redirect, Mr. Warren's counsel highlighted that there is tribal land near Flandreau, which is Lakota land near Elkton. MH2, 28. This is a completely separate tribal nation from the Oglala Lakota tribe, of which I.L.J.E. belongs. MH2, 28. Mr. Warren's counsel further highlighted that Elkton has a number of Hispanics being Mexican, Guatemalans and other working near the Lakota Native Americans and that there are powwows and other things in the area. MH2, 28.

During his testimony, Mr. Warren stated that they had not taken an affirmative steps to seek out I.L.J.E's extended family, and had not discouraged I.L.J.E. from calling Mr. Warren, "dad". *Id.* at 174-175. Mr. Warren referred to I.L.J.E.'s Oglala heritage as "other social stuff" that would eventually need to be dealt with. *Id.* at 176.

Dr. Sara Jumping Eagle told the Court about her close bond with I.L.J.E. and how she had helped raise him. MH2, 207. Dr. Jumping Eagle informed the Court about the traditions and culture of the Oglala Lakota Nation and the importance of I.L.J.E. being part of the tribe. MH2, 202, 204, 205, 207. Dr. Jumping Eagle had concerns about I.L.J.E's need for medical care which were not being addressed by the Warrens. MH2, 207-209.

Luke Yellow Robe testified on behalf of Irving as an ICWA expert. MH2, 239. Mr. Yellow Robe testified about the detrimental impact of removing a child from a native home and from the Lakota culture. MH2, 248. He explained that it is critical for any of I.L.J.E.'s caretakers to maintain active efforts to prevent the break-up of the Indian family. MH2, 253. Under ICWA, he testified that aunts and uncles should be equally considered to support and raise I.L.J.E., but that an emphasis should be placed on the relationship with the Native family members. MH2, 262-63. He emphasized to the Court that any barrier to visiting the tribe would damage I.L.J.E's emotional and physical health. MH2, 263.

At the end of the October 6, 2017, hearing, the Court found that the proceedings were governed by the South Dakota Guardianship Act, and found Irving's right to custody was governed by SDCL § 25-5-29. MH2, 268. The Court held that under SDCL § 25-5-29 Irving had forfeited or surrendered his parental rights over the child. *Id.* He further held that Irving had no legal presumption to custody or visitation on April 20, 2017, when Irving transferred his parental rights to Dr. Jumping Eagle. *Id.* The Court denied Irving's request that his sister Dr. Jumping Eagle be appointing the permanent guardian, granted the Permanent Guardianship to Lloyd and Katie Warren and denied any visitation with for I.L.J.E. with Irving or Dr. Sara Jumping Eagle. *Id.* 263-270.

STANDARD OF REVIEW

This case involves several matters of statutory interpretation. "Statutory interpretation is a question of law, reviewed de novo." *In re Guardianship of S.M.N.,* 2010 S.D. 31, ¶ 11, 781 N.W.2d 213, 217 (internal citations omitted).

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the

> statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and [this] Court's only function is to declare the meaning of the statute as clearly expressed.

Id.

This case also raises questions about the proper application of constitutional standards. "An appeal asserting an infringement of a constitutional right is also an issue of law to be reviewed under the de novo standard of review." *Id*. at ¶ 10 (internal citations omitted).

The "circuit court's factual findings are reviewed under the clearly erroneous standard." *Id*. On appeal, the Court is to "give due regard to the opportunity of the [circuit] court to judge the credibility of witnesses and to weigh their testimony properly." *Meldrum II*, 2002 SD 15, ¶ 18, 640 N.W.2d at 463 (citing *Langerman v. Langerman*, 336 N.W.2d 669, 670 (S.D.1983)). Findings of fact are clearly erroneous when a complete review of the evidence leaves this Court with a "definite and firm conviction that a mistake has been made." *Id.* "Whether the facts of the case constitute extraordinary circumstances of serious detriment to the welfare of the children, however, is a conclusion of law that we review de novo." *Id.*

Evidentiary rulings made by the circuit court are presumed correct and are reviewed under an abuse of discretion standard. *Id.* If error is found, it must be prejudicial before this Court will overturn the circuit court's evidentiary ruling. *Id.*

ARGUMENT

I. The Circuit Court improperly transferred custody from Father, the natural parent, to the maternal aunt and uncle, non-parents, utilizing the South Dakota Guardianship Act (SDCL ch. 29A-5) and SDCL ch. 25-5.

a. The Circuit Court lacked jurisdiction to transfer custody of I.L.J.E. under the South Dakota Guardianship Act

"A void judgment derives from, among other things, a court that had no personal or no subject matter jurisdiction." *Wells v. Wells* 2005 S.D. 67, ¶ 14, 698 N.W. 2d 504, 507. "If the circuit court lacks jurisdiction over a defendant's person, a judgment or order entered against such defendant is void." *Id.*

In South Dakota, a child may only be removed from the custody of the parent by the state and placed into the care of the Department of Social Services. *See* SDCL § 26-7A-14; *see also T.H.M.*, 2002 SD 13, ¶ 9, 640 N.W.2d 68, 71; *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp.3d 749 (D.S.D. 2015). Where allegations of abuse and neglect serve as the basis for the proceeding, "the statutory provisions specifically relating to abuse and neglect proceedings, as well as the provisions relating to juvenile court, must control" and the Department of Social Services cannot be bypassed. *T.H.M.*, 2002 SD 13, ¶ 9-11, 640 N.W.2d 68, 71.

Immediately following Irving's arrest, and prior to any indictment on the charges against him, the Warrens petitioned for guardianship of I.L.J.E. C.R. 1. The Petition was granted without a hearing on April 7, 2017, without any notice to Irving, and without any involvement by DSS. C.R. 13. The Warrens failed to provide notice to Dr. Jumping

Eagle, thereby keeping her in the dark about the proceedings and further separating I.L.J.E. from Irving. C.R. 6.

The Petition filed in this matter was based upon the South Dakota Guardianship statutes. The South Dakota Supreme Court held that the South Dakota Guardianship Act cannot transfer custody from a parent to a non-parent. *In re Guardianship and Conservatorship for T.H.M.*, 2002 S.D. 13, 640 N.W.2d 68; *In re Guardianship of S.M.N.,* 2010 S.D. 31, 781 N.W.2d 213. Thus, the Court did not have the authority to grant the Petition. The Order appointing temporary guardians and conservators signed on April 7, 2017, and the Order appointing permanent guardians and conservators signed November 21, 2017, are therefore invalid and should be vacated.

b. The guardianship documents signed by Irving to Dr. Jumping Eagle are valid.

As custody cannot be involuntarily transferred from a parent to a non-parent under the Guardianship Act, the Petition and subsequent order appointing the Warrens as I.L.J.E.'s legal guardians are invalid. Thus, Irving fundamental rights to custody and control of I.L.J.E. were intact on April 20, 2017, when he gave guardianship of I.L.J.E. to his sister, Dr. Jumping Eagle.

In April 2017, Irving maintained his innocence Alicia's death. He was not appointed counsel in the guardianship proceedings and was unaware of his rights and the allegations against him. There was no hearing to determine that in April 2017, Irving had abdicated his parental rights or abandoned I.L.J.E., who remained in the temporary care of the Warrens.

Dr. Jumping Eagle has a degree in psychology and medicine. MH2, 189-90. She, like Irving and I.L.J.E. is also an enrolled member of the Oglala tribe. Dr. Jumping Eagle filed an affidavit with the Court that she was willing and able to take care of I.L.J.E. until the charges against Irving were resolved one way or another. C.R. 50.

"To constitute abandonment under our code it must appear by clear and convincing evidence that there has been by the parents a giving-up or total desertion of the minor child." *In re Adoption of C.D.B.*, 2005 SD 115, ¶ 12, 706 N.W.2d 809, 814 (internal citations and quotations omitted). "In addition, there must be a showing of an intent on the part of the parent to abandon and to relinquish parental obligations; this intent may be inferred from conduct. When examining intent, the court should consider a parent's presence, love, care, affection, and monetary support." *Id.*

The guardianship paperwork signed by Irving on April 20, 2017, indicates that he had no intention of abandoning or relinquishing his parental obligations.

II. The order transferring custody of I.L.J.E. to a non-parent and failure to following SDCL § 26-7A violated Irving's Fourteenth Amendment rights.

It is a violation of the constitutional rights of the natural parents and their children to transfer custody to a non-parent under the South Dakota Guardianship Act. *Id.* In *T.H.M.* the Court held that the "revocation of custodial rights is not another party's self-help proposition, no matter how sincere their intentions." 2002 S.D. 13, ¶ 11-12.

The statutory scheme for abuse and neglect proceedings under SDCL ch. 26–7A and SDCL ch. 26–8A "exist[s] for the protection of the children, the parents, and the family unit." *In re Guardianship of S.M.N.*, 2010 S.D. 31, ¶ 18, 781 N.W. 2d 213, 221. "Those chapters employ multiple constitutional safeguards that are not present in the

South Dakota Guardianship Act (SDCL ch. 29A–5) because they involve the fundamental right of natural parents to the care, custody, and control of their children." *Id.*

Every constitutionally protected liberty interest is safeguarded against arbitrary loss by the Due Process Clause. *See Board of Pardons v. Allen*, 482 U.S. 369, 371, 381 (1987). That Clause requires the state to afford certain procedural protections whenever the state seeks to deny or curtail a liberty interest. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Swipies v. Kofka*, 419 F.3d 709, 713-14; *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). Consequently, the state may not deny or curtail the right of a parent to retain custody of his or her child without affording both the parent and the child the protections required by the Due Process Clause. *Swipies*, 419 F.3d at 715; *Whisman,* 119 F.3d at 1310.

a. Irving was not provided with Adequate Notice

In South Dakota, a child may be taken into state custody by a law enforcement or court services officer without a court order when there is an "imminent danger to the child's life or safety" and there is insufficient time to apply for a court order. SDCL § 26-7A-12(4). Alternatively, a court may order temporary custody of a child upon application by the state's attorney, social worker of DSS, or law enforcement officer, if there is good cause to believe that "[t]here exists an imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child." *Id.*, SDCL § 26-7A-13(1)(b).

Under these provisions, no child may be held in custody longer than 48 hours (except weekends) "unless a temporary custody petition for an apparent abuse or neglect case or other petition has been filed." *Id.*; SDCL§ 26-7A-14. As such, the court must

convene a hearing within 48 hours after the child is taken into custody (except weekends) "unless extended by the court." *Id.*, SDCL§ 26-7A-15. Whoever takes a child into state custody must immediately inform the child's parents or custodians, orally or in writing, that they have "the right to a prompt hearing by the court to determine whether temporary custody should be continued." *Id.*

If the child is an Indian child, as in this case, an effort must also be made to notify the child's tribe. *Id*. The purpose of South Dakota's temporary custody (or "48-hour") hearing is "to determine whether temporary custody should be continued" or whether the child may safely be returned to the parents. *Id.* If the court decides to continue custody, the court has the option under South Dakota law of giving legal custody of the child to DSS for a maximum of sixty days, after which the status of that custody must be reviewed by the court. *Id.*, SDCL § 26-7A-16.3.

It is undisputed that I.L.J.E. was not taken into state custody in this case. He had been staying with the Warrens and was in no imminent or immediate danger that required the Warrens to seek a transfer of custody in April 2017. The Warrens obtained custody of I.L.J.E. by keeping Irving in the dark about the petition and the allegations against him. Despite statutory notice requirements, the Warrens filed the Petition without immediate notice to Irving and a hearing was not held until July 17, 2017. *See* II(c) supra. His rights were further violated when he was denied the right to be present at the July 17, 2017. *Id.*

More than 60 days passed during the July 17, 2017, hearing and the October 6, 2017, hearing without any review of the proceedings. During that time there was an immediate and drastic breakdown in the bond between Irving and I.L.J.E. as a result of the Warren's influence. I.L.J.E. began calling Lloyd and Katie Warren "mom" and "dad".

The Warrens sought to prevent I.L.J.E. from visiting the Oglala tribe and took no affirmative steps to incorporate and preserve his heritage.

Despite his request, Irving was denied the right to be present at the October 6, 2017, hearing. This deprivation prevented him from being able to confer with counsel as witnesses testified against him and the Court terminated his parental rights.

b. Irving was not afforded a hearing to cross-examine witnesses for more than six months.

The only evidence presented to the Court to justify removal were the allegations contained in the Petition filed by the Warrens. Following the grant of guardianship, Irving was forced to wait more than six months for the opportunity to cross examine the witnesses against him.

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *see also Morrissey*, 408 U.S. at 489. "It is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)); *see also Smith v. Edmiston*, 431 F. Supp. 941, 945 (W.D. Tenn. 1977) (finding that where parents were not allowed to cross-examine witnesses in dependency and neglect proceedings, those proceedings "did not meet the minimal standards of due process").

c. Irving was denied access to counsel for more than 80 days and meaningful access to counsel during all hearings.

SDCL § 26–7A–30 requires the trial court to advise the child and the child's parents of the constitutional rights, including the right to be represented by an attorney. "[A] fundamental requisite of due process of law is the opportunity to be heard ... [and] [t]he right to be heard would be ... of little avail if it did not comprehend the right to be heard by counsel." *Goldberg*, 397 U.S. at 267.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Lassiter v. Department of Social Services of Durham County, N.C.,* 452 U.S. 18, 27, 101 S.Ct. 2153.

> If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

Id. at 28.

Irving was unable to discuss his rights with counsel until June 27, 2017. He was denied the ability to be present during the July 17, 2017, hearing. During this hearing, the Court extended the temporary guardianship until October 2017 and restricted the location of I.L.J.E.'s visits to Brookings, Moody and Minnehaha County. Irving was again denied adequate access to counsel when his request to attend the October 6, 2017, hearing was denied.

Prior to receiving any evidence at the October 6, 2017, the Court denied counsel's request for Irving to be personally present. The Court allowed Irving to be present via ITV, but held he did not have a right to be personally present in the courtroom. MH2, 8-9.

Without being present, counsel was unable to confer with Irving during the hearing, thus debilitating his defense and his constitutional rights.

"While the Guardianship Act merely provides for notice and an opportunity to be heard, proceedings under the abuse and neglect statutes are much more rigorous." *T.H.M.*, 2002 S.D. 13, ¶ 15. For example, the protective sections that are at issue in this case include: (1) SDCL § 26–7A–30, providing the parent be advised of her constitutional rights, including the right to a court appointed attorney; (2) SDCL § 26–7A–34, providing for separate adjudicatory and dispositional hearings; (3) SDCL § 26–7A–39, providing for compulsory process for the attendance of witnesses; (4) SDCL § 26–7A–57–81, providing for discovery, especially the requirements for the manner and scope of examination, as well as the right of the parent to be present at the examination; (5) SDCL § 26–7A–82, placing an elevated "clear and convincing" burden of proof upon the party alleging abuse and neglect instead of a preponderance burden in a guardianship proceeding; (6) SDCL § 26–7A–83, providing the party who prepares reports or material to be admitted at trial shall be present at trial as a witness for examination and cross-examination; and (7) SDCL § 26–8A–21, providing reasonable efforts be made to eliminate the need for removal and to return the child after removal. By allowing the custody action to proceed under the Guardianship Act, the trial court deprived Irving, and his son, of all of these constitutional safeguards. *See id.*

III. THE CIRCUIT COURT'S AFFIRMANCE OF THE PERMANENT GUARDIANSHIP FAILED TO PROPERLY APPLY ICWA

The Indian Child Welfare Act ("ICWA") protects the stability and security of Indian tribes and families by establishing minimum federal standards for removing Indian children from their families. 25 U.S.C. § 1902 (2006). It was the product of rising concern over the consequences to Indian children, families, and tribes of "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 104 L.Ed.2d 29(1989). Senate hearings on the statute document what one witness called "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Id.*

ICWA applies to any child custody proceeding involving an Indian child, including one in which the state seeks to place an Indian child in foster care or the state seeks to terminate parental rights. *See* 25 U.S.C. §§ 1911, 1912 (2006). ICWA is based upon the presumption that the protection of an Indian child's relationship with the tribe is in the child's best interests. *See People ex rel. M.H.*, 2005 S.D. 4, ¶ 14, 691 N.W.2d 622, 627. The parties agreed during the October 6, 2017, motions hearing that the proceedings involved a foster care placement under ICWA. MH2, 180-181.

25 U.S.C.A. § 1915(b) provides:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

ICWA mandates that state officials "insure that the emergency removal ... terminates immediately when such removal ... is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of [ICWA], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." 25 U.S.C. § 1922.

ICWA provides "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." 25 U.S.C. § 1902. [T]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50 n. 24, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

In *Mississippi Band of Choctaw Indians v. Holyfield* the United States Supreme Court stated:

> The ICWA thus, in the words of the House Report accompanying it, seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.

490 U.S. 30, 38 (internal citations omitted). In its decision, the United States Supreme Court described the ICWA's placement preferences as "[t]he most important substantive requirement imposed on state courts." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36–37, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (discussing similar preferences for adoption placement). "More than any other substantive requirement, it reflects the underlying assumption of [the] ICWA that Indian children have a strong interest in preserving their tribal ties, and their best interests coincide with their tribes." *Id.* Thus, "[p]roceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to the[ ] preferences." *Id.*

There is no dispute in this case that Dr. Jumping Eagle and her husband Chase Iron Eyes are the paternal aunt and uncle of I.L.J.E., while the Warrens are the maternal aunt and uncle of I.L.J.E. Dr. Jumping Eagle and Mr. Iron Eyes are both enrolled members in Lakota tribes. They have spent I.L.J.E's entire life assimilating him into the Lakota culture and ensuring he is part of his Native heritage. Throughout these proceedings, the Warrens have sought to separate I.L.J.E. from his Native family members and the tribe. On July 17, 2017, over the objection of Irving's counsel, the Warrens requested and were granted an order from the Court limiting I.L.J.E.'s visitation to Brookings, Moody and Minnehaha Counties. MH1, 14.

Counsel for the Warrens specifically requested that I.L.J.E. not be able to visit west river South Dakota. MH1, 14. The Oglala tribe is located in the Oglala Lakota, Jackson and Bennet counties in west river South Dakota.

At the October 6, 2017, hearing the evidence was undisputed that in the time I.L.J.E. was placed into the Warren's care they had not done anything to encourage an ongoing relationship with the tribe. MH2, 40-41, 78, 162. Mr. Warren referred to I.L.J.E.'s relationship with his tribe as "other social stuff" demonstrating that he does not understand the importance of the bond between I.L.J.E. and the tribe. MH2, 176.

Dr. Jumping Eagle testified that as a result of the county visitation restriction, I.L.J.E. was unable to attend tribal ceremonies, especially the healing ceremony. MH2, 195-196. Luke Yellow Robe testified that it was detrimental to I.L.J.E.'s emotional and physical health to be separated from the tribe. MH2, 263.

Despite this testimony, and the Court's own finding that the Warrens have taken no action to understand the Lakota culture or heritage, the Court held that the Warrens were better suited than Dr. Jumping Eagle to raise I.L.J.E. due to Irving's actions toward Alicia. MH2, 266-67.

Under ICWA, the actions of the biological parent are not a consideration. This is especially significant because ICWA was enacted to control the placement of an Indian child when it is removed from its biological parents. The United States Supreme Court has held that the child's relationship with the tribe is of the utmost importance and is in the best interests of the child. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50 n. 24, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Federal standards require that removal of Indian children from their families for placement in foster or adoptive homes should reflect the unique values of Indian culture. *See* 25 U.S.C. § 1902.

Due to the undisputed testimony that the Warrens have done little to nothing to preserve the values of the Lakota culture for I.L.J.E., it is not in his best interests to remain separated from the tribe. The Warrens indifference to the importance of I.L.J.E.'s relationship to the Oglala Lakota and their actions to prevent him from visiting the tribe is highly concerning and detrimental to I.L.J.E. best interests. Dr. Jumping Eagle has the ability to care for I.L.J.E., ensure that he has an ongoing, active relationship with the tribe and to emotionally and physically care for his best interests.

CONCLUSION

Irving Jumping Eagle respectfully requests that the April 7, 2017, Order appointing Temporary Guardian and Conservator Pursuant to SDCL § 29A-5-210 and the November 15, 2017, Appointing Co-Guardians and Co-Conservators be vacated; the matter of custody remanded back to the Circuit Court and custody be entered consistent with father's April 20, 2017, election of Dr. Sara Jumping Eagle as guardian of I.L.J.E.

REQUEST FOR ORAL ARGUMENT

Appellants hereby respectfully request the privilege of appearing for an oral argument before this honorable Court.

Dated this 1st day of February, 2018.

HEIDEPRIEM, PURTELL,
SIEGEL & OLIVIER, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellants' Brief and all appendices were e-mailed and mailed by first class mail, postage prepaid to:

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Attorney for the Oglala Sioux Tribe

Dated this 1st day of February, 2018.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 5790 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 1st day of February, 2018.

HEIDEPRIEM, PURTELL,
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APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
In the matter of the Guardianship and Conservatorship of	)	05GDN.17- 000005
IRVING LARRY JUMPING EAGLE,	)	
A minor child.	)	

ORDER APPOINTING TEMPORARY GUARDIAN AND CONSERVATOR
PURSUANT TO SDCL 29A-5-210

The Petition for Appointment of Temporary co-Guardians and co-Conservators Pursuant to SDCL 29A-5-210 came before the Court through counsel for Petitioners, in Brookings County, South Dakota, the Honorable Vincent A. Foley presiding.

The Court having reviewed the Petition and supporting Affidavit, and being otherwise fully informed in the premises and determining that an immediate need exists for the appointment of a temporary guardian and conservator for the minor child, and that an appointment would be in minor child's best interest,

IT IS HEREBY ORDERED:

1. The Petition for Appointment of Temporary Guardian and Conservator pursuant to SDCL 29A-5-210 is GRANTED; and
2. Letters of Temporary Guardianship and Conservatorship shall be issued to LLOYD V. WARREN and KATIE L. WARREN.

Attest:
Kimberly Eining
Clerk/Deputy

BY THE COURT:
Signed: 4/7/2017 9:15:00 AM

The Honorable Vincent A. Foley
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
In the matter of the Guardianship	)	GDN. 17-000005
And Conservatorship of	)	
IRVING LARRY JUMPING EAGLE,	)	ORDER APPOINTING
	)	CO-GUARDIANS AND CO-CONSERVATORS
A minor child.	)	

A trial on the Petition for the appointment of co-guardians and co-conservators for Irving Larry Jumping Eagle was held on the 6th day of October, 2017. The minor child, Irving Larry Jumping Eagle did not personally appear due to his age; Petitioners, Lloyd V. Warren and Katie L. Warren, appearing through their attorney Tim Hogan of Brookings, SD; the father, Irving D. Jumping Eagle appeared via ITV from the Minnehaha County Detention Center and through his attorneys, Kasey L. Olivier and Ashley Miles of Sioux Falls, SD; and the Oglala Sioux Tribe appeared through its attorney, Dana Hanna of Rapid City, SD. The Court having listened to the testimony and evidence offered by all parties and the Court having reviewed all documents on file now finds that the notice has been properly served upon all interested parties as required by law and the Order of this Court.

The Court has duly considered the Petition for Co-Guardianship and Co-Conservatorship of Irving Larry Jumping Eagle and upon being duly advised and upon entry of Findings of Fact and Conclusions of Law hereby

ORDERS:

1. Lloyd V. Warren is appointed as co-Guardian and co-Conservator of Irving Larry Jumping Eagle. The appointment shall continue until resignation by the guardian/conservator, or further order of the Court.

2. Katie L. Warren is appointed as co-Guardian and co-Conservator of Irving Larry Jumping Eagle. The appointment shall continue until resignation by the guardian/conservator, or further order of the Court.

3. Letters of Co-Guardianship and Co-Conservatorship shall be issued to Lloyd V. Warren and Katie L. Warren upon the filing of an Acceptance of Office.

4. The co-guardians shall have the authority to make decisions regarding the minor child's support, care, health, and education, and, if not inconsistent with an order of commitment or custody, determine the minor child's residence.

5. The co-conservators shall have authority regarding the minor child's property and financial affairs, and, shall apply the income and principal as needed for the minor's support, care, health, and education. The co-conservators shall at all times act in the

minor's best interests and shall exercise reasonable care, diligence, and prudence. No bond is required to be posted.

6. The co-conservators shall file an inventory of the real and personal estate of the minor child within ninety (90) days following the appointment. The inventory shall, with reasonable detail, list each item of the estate, its approximate fair market value and the type and amount of encumbrance to which it is subject. Within fourteen days after filing the inventory a copy of the inventory shall be mailed to all individuals and entities listed in the petition or as required by law.

7. The co-conservators shall file an annually report to the Court within sixty (60) days following the anniversary of the appointment and at least annually thereafter, or when the Court orders additional accountings, or when the conservator resigns or when the conservatorship is terminated. Within fourteen days after filing the annual report, a copy of the annual report shall be mailed to all individuals and entities listed in the Petition or as required by law. The report shall state:

   a. A listing of the receipts, disbursements and distributions from the estate under the conservator's control during the period covered by the account;

   b. A listing of the estate;

   c. The compensation requested and the reasonable and necessary expenses incurred by the guardian and conservator;

   d. An annual inventory of any item of tangible personal property with a value of two thousand five hundred dollars or more which has come into the conservator's possession or knowledge for the minor.

Dated this 15 day of November, 2017.

BY THE COURT:

Attest:
Dvoracek, Ashley
Clerk/Deputy

Circuit Court Judge

STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF BROOKINGS)		THIRD JUDICIAL CIRCUIT
IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF	)	05GDN.17-05
IRVING LARRY JUMPING EAGLE,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
A minor child.	)	

The above-entitled matter having come on for hearing before the Honorable Gregory J. Stoltenburg, Circuit Court Judge, in the Brookings County Courthouse in Brookings, South Dakota, on the 6th day of October, 2017, at 09:00 A.M. The hearing was held pursuant to a Notice of Trial dated July 21, 2017, and Petitioners appearing in person and with their attorney, Tim Hogan, of Brookings, South Dakota, and Kasey L. Olivier and Ashley Miles Holtz of Sioux Falls, South Dakota appearing on behalf of the minor child and Dana Hanna, of Rapid City, South Dakota, appearing on behalf of the Oglala Sioux Tribe, and based upon the testimony presented at the time of hearing and based upon the documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the minor child, Irving Larry Jumping Eagle (hereinafter referred to as "Baby Irving" or "minor child"), is an Indian child as defined by the Indian Child Welfare Act (hereinafter referred to as "ICWA").

2. That Baby Irving has been residing with the Petitioners, Katie and Lloyd Warren since April and prior to April he was domiciled in Sioux Falls, Minnehaha County.

3. An ORDER APPOINTING TEMPORARY GUARDIAN AND CONSERVATOR was signed by Judge Vincent A. Foley, Circuit Court Judge, on April 7, 2017, which appointed Lloyd v. Warren and Katie I. Warren as temporary guardians and conservators of Baby Irving.

4. That Baby Irving's father Irving Duane Jumping Eagle is of Indian Race as that term is defined by ICWA.

5. The deceased biological mother Alicia Rhae Jumping Eagle was a non-Indian.

6. Baby Irving is an enrolled member of the Oglala Sioux Tribe.

7. The parties stipulated that ICWA applies in this matter and that this proceeding is a foster care placement under that federal act.

8. There is no Indian custodian as defined by ICWA.

9. Baby Irving's mother is deceased and the child's father is unavailable due to a criminal act that he committed against the mother resulting in the mother being killed.

10. Baby Irving's father plead guilty to first-degree manslaughter in the death of his wife, Alicia Rhae Jumping Eagle, the minor child's mother, and is potentially facing a life sentence.

11. Sentencing on the conviction of first-degree manslaughter is set to occur in Minnehaha County.

12. The father's criminal act was the direct causal effect on the breakup of the family.

13. An ORDER GRANTING OGLALA SIOUX TRIBE'S MOTION TO INTERVENE was signed by this Court on August 4, 2017.

14. The Oglala Sioux Tribe has made no Motion or request to transfer these proceedings to tribal court under the ICWA.

15. Petitioners, Katie and Lloyd Warren, are the biological uncle and aunt through marriage of the minor child and they are the only persons that have filed a petition with the court.

16. The Petitioners are financially able to support Baby Irving.

17. The Petitioners are morally and emotionally fit to be guardians and conservators of Baby Irving.

18. The Petitioners are able to provide a stable, loving home and they have other children living in their home.

19. The Petitioners have been involved in a long-term marriage.

20. The Petitioners have a stable home.

21. The Petitioners are involved in their community in Elkton.

22. The Petitioners are able to provide for the developmental, interpersonal, educational, and medical needs of Baby Irving.

23. Although the Petitioners have taken no direct action to understand the Lakota culture or heritage, they have indicated a desire to raise Baby Irving with knowledge of the Lakota heritage.

24. The parties stipulated that Luke Yellow Robe was qualified to testify as an ICWA expert in this case.

25. Dr. Sara Jumping Eagle and ICWA expert Luke Yellow Robe both testified that a non-Indian can be part of the expended family under the law or custom of the Oglala Sioux Tribe and Lakota heritage, culture and tradition.

26. The Court believes that Petitioners will work with the biological father's extended family and Dr. Sara Jumping Eagle in promoting visitations, that they would promote working with Sara to develop Baby Irving's cultural awareness and his heritage with the Lakota Nation.

27. Although the Petitioners are non-Indians they are part of the extended family of Baby Irving.

28. That the preferences under 25 U.S.C. Section 1915 are applicable and that extended family members are at the top of that preference and the Petitioners are extended family.

29. That in the alternative, if the Petitioners are not extended family members under ICWA for purposes of preference, the Court finds good cause to deviate from the ICWA preference under 25 U.S.C. Section 1915 as the father has killed the child's mother causing the breakup of the family.

30. No member of the paternal extended family has filed a Petition for Guardianship or Conservatorship of Baby Irving.

31. The Father's designation (Exhibit MM) of his sister as guardian of Baby Irving is ineffective under state law and even if considered a preference of a parent under § 1915 (c), the father's criminal act of killing the mother leans heavily against any preference under the federal statute and would circumvent the Congressional declaration of policy under § 1902 of the ICWA.

32. It is in the best interest of the minor child that he be placed with the Petitioners who are the maternal extended family members.

33. The maternal relatives are better suited to deal emotionally with the minor child and the explanation as to how his mother passed away.

34. The father is in custody awaiting sentencing and thus is not capable of having custody of the minor child.

35. The Court finds the expert testimony by Luke Yellow Robe establishes clear and convincing evidence that custody of the child by the father is likely to result in serious emotional or

physical damage to the child and his testimony in this regard was credible.

36. The special power of attorney (Exhibit MM) that the biological father gave to his sister, Dr. Sara Jumping Eagle is ineffective.

37. SDCL 25-5-29 establishes a parent's presumptive right to custody of his or her child, although this presumption may be rebutted by proof that the parent has abandoned the child.

38. The presumption has been rebutted through proof of extraordinary circumstances that the father has forfeited or surrendered his parental rights over the child.

39. The father's criminal act in killing the minor child's mother is substantial evidence that the father has not only abandoned the child, forfeited, or surrendered his parental rights, but he has also created circumstances that result in serious detriment to the child as defined by state law.

40. SDCL 25-4-45.6 provides that a conviction by the father for the death of the mother creates a rebuttable presumption that awarding custody or granting visitation to the father is not in the best interest of the child.

41. To allow the father to effectively designate another person to have his custody and visitation rights to the minor child via a Power of Attorney would circumvent the intent of SDCL 25-4-45.6.

42. The biological father has done nothing to rebut the presumption that he should have custody or visitation rights and consequently, he has no ability to transfer his custody or visitation rights to a third person when he is the one that killed the minor child's mother and is facing a substantial prison sentence.

43. Alternatively, to award custody of Baby Irving to the father's designee circumvents the intent and policy of the ICWA; is not in keeping with the best interests of the child; and does nothing to promote the stability and security of Indian tribes and families.

44. The ICWA did not contemplate a tragic factual scenario as is presented in this matter and to award custody to the convicted father's designee is not in keeping with the overall intent of the Act.

45. The father of Baby Irving is the direct cause of the break-up of this family due to his criminal act and ICWA should not be used as a sword to allow the father, from his prison cell, to direct the placement and care of Baby Irving in contravention of the intent of the Act itself.

46. That any Finding of Fact erroneously designated as a Conclusion of Law is hereby adopted as a Finding of Fact.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this matter and the parties herein and that venue is appropriate in Brookings County, State of South Dakota.

2. A Petition for Appointment of Temporary Co-Guardian and Co-Conservator was filed on April 6, 2017 by Petitioners Lloyd V. Warren and Katie L. Warren.

3. An Order Appointing Temporary Co-Guardian and Co-Conservator and Letters of Temporary Co-Guardian and Co-Conservator was issued by the Honorable Vincent A. Foley, Brookings County Circuit Judge on April 7, 2017.

4. The above referenced Petition for Appointment of Temporary Co-Guardian and Co-Conservator and Order Appointing Temporary Co-Guardian and Co-Conservator and Letters of Temporary Co-Guardian and Co-Conservator was served on the father, Irving Duane Jumping Eagle by the Minnehaha County Sheriff's Office on the 12th day of April, 2017.

5. No objection was filed by the father as to the temporary appointment.

6. A Petition for Appointment of Co-Guardian and Co-Conservator was filed on June 6, 2017 by Petitioners Lloyd V. Warren and Katie L. Warren.

7. The above referenced Petition for Appointment of Co-Guardian and Co-Conservator and a Notice of hearing on petition for Appointment of Co-Guardians and Co-Conservators was served on the father, Irving Duane Jumping Eagle by the Minnehaha County Sheriff's Office on the 22nd day of June, 2017; and by mail on June 20th, 2017 upon Carter Warren, the minor child's brother; Sara Jumping Eagle, the father's sister; and Katie Lovstad, the mother's sister; and by mail on July 6, 2017 to the Oglala Sioux Tribe-ICWA Designated Tribal Agent.

8. The Oglala Sioux Tribe, pursuant to 25 U.S.C. 1911 (c), filed a motion to intervene on the grounds that this Guardianship Petition is a "foster care placement" proceeding involving an Indian child under the Indian Child Welfare Act (ICWA).

9. Irving Duane Jumping Eagle, the father of the minor child, filed a motion in opposition to Lloyd V. Warren and Katie L. Warren's Petition for co-guardianship and co-conservatorship on July 12, 2017.

10. Petitioners are Baby Irving's extended family under 25 U.S.C. § 1915.

11. In the alternative, if the Petitioners are not extended family members under ICWA for purposes of preference, this Court finds that there is good cause to deviate from the ICWA preference under 25 U.S.C. § 1915 as the father killed the minor child's mother and therefore, he is the direct cause as to the breakup of the family.

12. The father's criminal act of killing the minor child's mother creates a presumption under State Law that awarding custody or visitation to the convicted parent is not in the best interest of the child.

13. There has been expert testimony supported by clear and convincing evidence that custody of the minor child by the father is likely to result in serious emotional or physical damage to the minor child and therefore it is in the best interest of the minor child that the minor child be placed with the Petitioners who are the maternal extended family members.

14. The special power of attorney document (Exhibit MM) from the biological father to Dr. Sara Jumping Eagle, in which he purportedly transferred custody rights of the minor child to Dr. Jumping Eagle, is ineffective in accordance with SDCL 25-5-29.

15. The presumption under SDCL 25-5-29 has been rebutted by proof that the father has abandoned the child, has forfeited or surrendered his or her parental right over the child, and proven through extraordinary circumstances that placement with the father would result in serious detriment to the child.

16. That in accordance with SDCL 25-4-45.6, a conviction of the biological father for the death of the minor child's biological mother creates a rebuttable presumption that awarding custody or granting visitation to the biological father, is not in the best interest of the child.

17. That since the biological father has a legal presumption that he has no custody or visitation rights to Baby Irving, he has no right to transfer these rights to a third party as he has essentially given up those rights, making the purported special power of attorney in Exhibit MM void under SDCL 25-4-45.6.

18. It is clear from the biological father's criminal act that he has not only abandoned his child, forfeited, or surrendered his parental rights, but he has also created circumstances that result in "serious detriment" to the child as that term is identified by State Law.

19. Alternatively , the father's nomination, dated April 20, 2017 is ineffective pursuant to SDCL 29A-5-202, in that the parental nomination cannot supersede the Order of the Court dated April 7, 2017, appointing Petitioners as Temporary Co-Guardians/Conservators.

20. The Court grants the Petition and appoints Petitioners Lloyd V. Warren and Katie L. Warren as Co-Guardians and Co-Conservators of the minor child, and Letters of Co-Guardianship and Co-Conservatorship shall be issued.

21. That any Conclusion of Law erroneously designated as a Finding of Fact is hereby adopted as a Conclusion of Law.

Dated this 15 day of November, 2017.

BY THE COURT:

Attest:
Dvoracek, Ashley
Clerk/Deputy

Gregory J. Stoltenburg – Circuit Court Judge

GDN.17-5

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28479

GUARDIANSHIP OF I.L.J.E, MINOR CHILD

APPEAL FROM THE CIRCUIT COURT
OF THE
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge of the Third Judicial Circuit

APPELLEE'S BRIEF

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Notice of Appeal Filed December 15, 2017

Table of Contents

Table of Authorities

Cases

Statutes and Regulations

JURISDICTIONAL STATEMENT

Appellees do not dispute the Jurisdictional Statement in Father's brief.

References to documents in the Record will be "R___". All transcript references are to the October 6, 2017 final guardianship hearing, unless otherwise identified.

LEGAL ISSUES PRESENTED

(1) The trial court had jurisdiction over this guardianship proceeding. Therefore, Father's assignment of his custody rights to his sister is not binding.

-- The trial court exercised jurisdiction and held that the assignment of custody rights was not binding.

Guardianship of S.M.N., 2010 S.D. 31, 781 N.W.2d 213
In re Guardianship of Nelson, 2013 S.D. 12, 827 N.W.2d 72
Ridley v. Lawrence Cty. Comm'n., 2000 S.D. 143, 619 N.W.2d 254

SDCL 29A-5-106
SDCL 29A-5-202
SDCL 29A-5-210

(2) Were there procedural deficiencies in the guardianship proceedings, which violated Father's rights?

-- The trial court felt that its actions and procedure were proper.

Pfuhl v. Pfuhl, 2014 S.D. 25, 846 N.W.2d 778

25 C.F.R. §23.133

(3) Was the Indian Child Welfare Act ("ICWA") violated?

-- The trial court ruled that ICWA's standards were properly met.

Aguilar v. Aguilar, 2016 S.D. 20, 877 N.W.2d 333
In re Guardianship of Blare, 1999 S.D. 3, 589 N.W.2d 211
In re N.S., 474 N.W.2d 96 (S.D. 1991)

SDCL 29A-5-202
25 U.S.C. §1903(2)
25 U.S.C. §1915(b)
25 C.F.R. §131(1, 3)

STATEMENT OF THE CASE AND FACTS

This is an appeal by Irving D. Jumping Eagle ("Father") from an Order Appointing Co-Guardians and Co-Conservators (R 579), concerning Father's minor child I.L.J.E. (hereafter, "Child").

Alicia Jumping Eagle (deceased Mother) arranged with Katie Warren (maternal aunt, wife of Mother's brother Lloyd Warren) to take Alicia's two children for the weekend of March 31, 2017 through April 2. (TR 100) Those two children were I.L.J.E. (the Child at issue in this proceeding), who was 2 years old, and Child's half-brother C.W. (who was around 9 years old). Katie was not able to get hold of Mother that weekend, and reported her missing (TR 102). Child was taken to Mother's sister on Sunday evening, and returned to Katie and Lloyd on Monday, April 3. (TR 146-148) Child has been living with the Warrens ever since (TR 102-103). Katie and Lloyd learned of Mother's death later on Monday, April 3 (TR 103-104).

Mother was stabbed to death by Father, during this weekend. Father was in custody on a murder charge at least as of April 6, when the temporary guardianship paperwork was filed. See R 1 (Petition) and R 6 (supporting affidavit). Father has remained incarcerated ever since. He entered a guilty plea to first degree manslaughter in September, 2017, before the final guardianship hearing herein. He was sentenced in January, 2018 to 100 years in prison, a sentence he is now serving. See Judgment (Appendix to this brief)[1]. He will be incarcerated for at least the duration of Child's

[1] Pursuant to SDCL 19-19-201, Appellees request this Court to take judicial notice of the Father's Judgment and Sentence. It is not subject to reasonable dispute, as it is accurately and readily determined from a source whose accuracy cannot reasonably be questioned (SDCL 19-19-201(b)). See *State v. Cody*, 322 N.W.2d 11, 12 n. 2 (S.D. 1982) (courts may generally take judicial notice of previous or ancillary court records).

minority, as he must serve at least 50% of his sentence prior to parole release per SDCL 24-15A-32.

The Warrens sought temporary guardianship pursuant to SDCL 29A-5-210 (R 1). It was granted by Order dated April 7 (R 11). This was followed by the Warrens' Petition for permanent guardianship, filed on June 16 (R 18). Father's attorneys filed their Notice of Appearance on June 27, and filed a Motion in Opposition to the guardianship Petition (R 43) on July 12, along with supporting affidavits of Father (R 45) and his sister, Sara Jumping Eagle (R 50). Father's Motion asked that his sister Sara be appointed as guardian (R 43).

A status hearing was held on July 17, which resulted in an Order (R 54) extending the temporary guardianship until the final hearing. The final hearing was held on October 6. In the interim between the hearings, the Oglala Sioux Tribe was allowed to intervene, and its attorney participated in the final hearing. The Tribe did not oppose or object to the Warrens' petition for guardianship.

Katie and Lloyd Warren (appellees) have been married since 2005 (R 99) and have three children – ages 12, 9, and 7 at the time of the October hearing (R 97). They come from a large extended family, all of whom live in the Elkton area (R 98). Neighbors of the Warrens testified that appellees were well respected, model parents and citizens of the community (see TR 11-40). Once the temporary guardianship was in place, Katie Warren immediately put Child on her employee health plan (R 106). In the six months between the April 6 temporary guardianship and the October hearing, she'd taken Child for checkups three times (R 110). She was actively treating Child's eczema (TR 134). Other facts will be discussed where appropriate in the Argument section of this brief, when relevant to Father's specific appeal arguments.

The trial court (Hon. Gregory J. Stoltenburg) made several factual findings, upholding the Warrens' fitness as guardians for Child (Findings #16-22). The court issued its Findings and Conclusions (R 581), and final Order granting the guardianship Petition (R 579), on November 15, 2017. Father now appeals this ruling.

ARGUMENT

(1) Background and Standard of Review.

Deceased Mother was Caucasian; Father is Native American, as is his sister Sara Jumping Eagle. Child is an Indian child under the Indian Child Welfare Act (hereafter, "ICWA"), as Child is an enrolled member of the Oglala Sioux Tribe. The guardianship petitioners (appellees) are the Mother's brother and his wife (Child's maternal uncle); they are Caucasian. Child was born on Dec. 22, 2014, and was two years old during the pendency of this proceeding below. Prior to Mother's death, Child lived with her in Sioux Falls, along with Mother's other son (Child's half-brother, also a Caucasian). Child has never lived on an Indian reservation.

During the lower court proceedings, Father was in custody in the Minnehaha County Jail, awaiting sentencing upon his plea to first degree manslaughter, for killing Child's mother on or about April 1, 2017. Father was later sentenced to 100 years on the manslaughter plea. Therefore, there is no possibility that either of Child's natural parents can have custody of Child. Mother is deceased, having been killed by Father. Father will be incarcerated for the next half century. The issue in this Guardianship proceeding is not whether a non-parent should have custody vis-à-vis a parent. Still, the circuit court conducted the analysis under SDCL 25-5-29 and 25-5-30, regarding a parent's

presumptive right to custody of his child. The court ruled that Father's presumptive rights were rebutted by proof that he had killed Mother and broken up the family, which constituted extraordinary circumstances that would result in serious detriment to the child. Findings of Fact #37-40; Conclusions of Law #15-16, 18. Father does not challenge this ruling on appeal.

Appellees agree with Father's brief (at p. 9) that the circuit court's factual findings are reviewed for clear error, giving deference to the circuit court's ability to judge witness credibility, and that legal questions are reviewed de novo. Father's brief does not address the standard of review which applies to the circuit court's decision itself. This Court applies the "abuse of discretion" standard here:

> "We review a circuit court's appointment of a guardian under an abuse of discretion standard. *In re* Guardianship of Jacobsen, 482 N.W.2d 634, 636 (S.D. 1992). "Abuse of discretion refers to an end or purpose not justified by and clearly against reason and the evidence." *In re* Guardianship of Rich, 520 N.W.2d 63, 66 (S.D. 1994) (citations omitted). "The determination is not 'whether we would have made the same ruling, but whether a judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion.'" Pellegrin v. Pellegrin, 1998 S.D. 19, ¶10, 574 N.W.2d 644, 647 (quoting DeVries v. DeVries, 519 N.W.2d 73, 75 (S.D. 1994)). Further, "only a 'clear' abuse of discretion warrants reversal." *Jacobsen*, 482 NW.2d at 636 (citing Rykhus v. Rykhus, 319 N.W.2d 167, 170 (S.D. 1982))."

In re Guardianship of Blare, 1999 S.D. 3 ¶9, 589 N.W.2d 211. "As this Court has stated, "[s]ubject to statutory restrictions, the selection of the person to be appointed guardian is a matter which is committed largely to the discretion of the appointing court." *Jacobsen*, 482 N.W.2d at 636 (citing 30 Am.Jur.2d *Guardian and Ward* §27 (1969))." (*Id*. at ¶29).

(2) Issue One: The trial court had jurisdiction over this guardianship proceeding, and Father's assignment of custody rights to his sister is not binding.

Father, in writing, assigned his custody rights over to his sister Sara. It was dated

June 20, two weeks after the temporary guardianship Order was entered, and appears as Exhibit MM at the final guardianship hearing (R 209). In this appeal issue, Father claims that his assignment is legally binding, because the guardianship court lacked jurisdiction. Father asks for reversal on this jurisdictional ground, which would lead to custody of Child with Sara pursuant to Father's assignment.

Father's argument is entirely dependent on his "no jurisdiction" claim. Father argues that the guardianship was sought on "abuse and neglect" grounds, and that South Dakota law prohibits a private guardianship on those grounds. According to Father, only a formal abuse and neglect proceeding may be used (under SDCL Ch. 26-7A and Ch. 26-8A). Father is mistaken, both legally and factually.

This Court did hold, in 2002, that private litigants may not seek custody of a Child from its parent on abuse and neglect grounds. *In re Guardianship and Conservatorship for T.H.M.*, 2002 S.D. 13, 640 N.W.2d 68. However, after that decision, the Legislature passed a statutory scheme which addressed the Court's concerns. As a consequence, this Court revisited the issue in 2010. *Guardianship of S.M.N.*, 2010 S.D. 31, 781 N.W.2d 213. This Court held that, in light of the legislative changes,

> "the Legislature made clear that a non-parent may seek a transfer of custody from a natural parent under the South Dakota Guardianship Act (SDCL ch. 29A-5) and SDCL ch. 25-5, even where allegations of abuse and neglect serve as the grounds for the petition, thus bypassing the Department of Social Services. The statutory amendments overruled *T.H.M*. to that extent. Therefore, the circuit court did not err by utilizing the South Dakota Guardianship Act (SDCL ch. 29A-5) and SDCL ch. 25-5 to transfer custody from Mother to Grandmother."

Id. at ¶16. Father's argument is no longer legally correct.

A court's subject matter jurisdiction is conferred by statute or by Constitutional provisions. *In re Guardianship of Nelson*, 2013 S.D. 12 ¶16, 827 N.W.2d 72. The circuit court had express subject matter jurisdiction over this guardianship proceeding, by virtue

of SDCL 29A-5-201 et seq. (guardianship over minors) and SDCL 29A-5-106 ("Custody of a child may be sought by a person other than a parent under this chapter and the substantive law of this state.") Because the circuit court had subject matter jurisdiction, there is no valid argument that its actions are void for lack of jurisdiction. Rather, Father's appellate arguments go to the correctness of the trial court's rulings, rather than its power to act. See *Guardianship of Nelson*, *supra*, at ¶¶ 16-17, rejecting this same "lack of jurisdiction" claim despite multiple procedural and legal errors and omissions in that case. Because this circuit court had proper subject matter jurisdiction, the "void for lack of jurisdiction" principle is not implicated. See *Ridley v. Lawrence Cty. Comm'n.*, 2000 S.D. 143 ¶10, 619 N.W.2d 254.

In addition, Father's argument is factually mistaken. This guardianship proceeding did not allege abuse and neglect as its grounds, but rather the immediate need for someone to have legal custody over this two year old Child, since both parents were unavailable to care for him and he had no home to return to. The paperwork for the temporary guardianship expressly set out SDCL 29A-5-210 as its authority, and alleged that statute's requisites, in the language of the statute: "an immediate need" and that the appointment would be in Child's best interests. See R 1 (Petition) and R 6 (Affidavit in support). The Order granting temporary guardianship (R 11) also cited SDCL 29A-5-210 as its authority. The words "abuse and neglect", and any reference to the A&N statutes, are completely absent from these documents. Similarly, the later Petition for appointment of guardian, filed in June, lacked any reference to abuse and neglect. It cited as its reason for relief that Child "is a two and a half year old child who cannot care for his health, care, safety, habitation or therapeutic needs and he cannot make financial decisions." Petition (R 18) at ¶7.

Therefore, the temporary guardianship entered below, on April 7, 2017, was not void for lack of jurisdiction. It was founded on its cited jurisdictional authority (the guardianship statutes) rather than upon the A&N code. Because the factual and legal predicates for Father's appeal argument are erroneous, his conclusion (that his assignment of custody is binding) is also wrong.

Father was personally served with this Temporary Guardianship paperwork on April 12 (R 16). Father's handwritten assignment of custody is dated April 20. Father cites no authority that this handwritten document is self-executing and binding upon the guardianship court, or that it somehow trumps the court's guardianship Order. In fact, the law is just the opposite. As the circuit court ruled, Father's assignment cannot supersede the previous temporary guardianship Order (Conclusion of Law #19, citing SDCL 29A-5-202). In addition, Father's preference as to custody is given no special weight or deference, once extraordinary circumstances have been found under SDCL 25-5-29 and 25-5-30 (a determination which Father does not challenge on appeal). *Aguilar v. Aguilar*, 2016 S.D. 20 ¶14, 877 N.W.2d 333.

(3) Issue Two: Alleged procedural deficiencies in trial court proceedings.

Again, Father's appellate argument is incorrectly founded on the mistaken assumption that the more rigorous procedural provisions in the abuse and neglect code (SDCL ch. 26-7A and 26-8A) control, and were not followed below. See Father's brief at pp. 12-17. As pointed out above, this was not an A&N proceeding, but rather a guardianship proceeding, and the A&N statutes simply do not apply here. See *Pfuhl v. Pfuhl*, 2014 S.D. 25 ¶11, 846 N.W.2d 778, where this Court disapproved of applying A&N statutes "outside the context of abuse and neglect proceedings". In fact, counsel for

Father specifically told the court that this was not an abuse or neglect case (7/17 TR at 7 and at 11, also recognized by the circuit court at p. 13).

Father's analytical mistake is exemplified by his argument concerning emergency removal of children from their parental homes, in A&N proceedings. Here, however, there was no "removal" of this Child at all, from his parental home. Child was spending the weekend with appellees, at Mother's request, and it was during this weekend that Father stabbed Mother to death. Father's brief cannot be read to argue that he should have obtained custody of Child in the short time between the homicide and Father's arrest. By the time that the Temporary Guardianship papers were filed, some six days after the weekend visit began, Father was in custody, never to be released. Both of Child's parents were permanently unavailable to care for Child, and Child had no home to return to (or to be "removed" from). Father's attempt to piggyback the A&N statutes onto this guardianship proceeding is nonsensical.

Some of Father's arguments might be read to apply to this guardianship procedure, rather than solely to A&N procedures. Father complains that he was given no advance notice that a temporary guardianship would be sought or obtained. However, Father was at large during part of these six days, in custody during the rest, and in the meantime this toddler was left to fend for himself, without the protection of a legal guardianship. Father does not argue, nor can he, that there was any prejudice from the lack of advance notice, which in any case is authorized by SDCL 29A-5-210. Father was promptly served with the guardianship Order and paperwork once it was entered, and made no formal attempt to seek to modify or revoke it. Moreover, any defects in the temporary guardianship Order became moot once the permanent Order was entered. Father has shown neither error nor prejudice.

Father also complains that he was not allowed to be present at the July, 2017 status hearing and the October, 2017 final hearing. At the July hearing, after the filing of the permanent guardianship petition, the court noted that only procedural matters were to be discussed and that Father's presence was not required. July TR at 4-5. Father's counsel indicated that Father could be reached by telephone "if the Court would like him", and after the court said that his presence was not required, no objection or further request was made by counsel. Any appellate claim here is non-preserved, and no error or prejudice is shown by the record.

As for the final October hearing, Father appeared via ITV from the Minnehaha County Jail. Father's counsel objected to this procedure, claiming that Father's personal presence was necessary (Oct. TR 6-7). This hearing was held after Father had entered a guilty plea to manslaughter, and was facing a potential life sentence. The court ruled that due to safety concerns, Father's appearance via ITV was a "reasonable accommodation". Oct. TR at 8-9.[2] Two-way communication was possible with ITV – the court communicated with the jail deputy in Sioux Falls (TR 84-85). At no time did counsel request a recess so that they could communicate with their client, although the ITV setup made that possible. There is no indication in the transcript that the ITV arrangement interfered in any way with counsel's ability to cross-examine any of the witnesses at the hearing. The manner of Father's appearance, under the circumstances of his

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[2] The federal regulations regarding ICWA encourage use of ITV and other alternative modes of appearance. See 25 CFR §23.133:

> "If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods."

incarceration, is clearly a matter of sound judicial discretion, and no abuse of discretion has been shown.

Father also complains of the visitation restrictions which were imposed at the July hearing, and contained in the Order Extending Temporary Guardianship (R 54): "That if the temporary Co-Guardians agree to visits with the minor child by paternal relatives, said visits shall be limited to Brookings, Moody and Minnehaha County, unless ordered by the Court." This Order was filed on July 21; the final hearing occurred on October 6. There is nothing in the record to show that any request was made, by Father or his sister, to modify that ruling, or to allow one or more special visits outside of that geographical area. At the close of the October hearing, the court declined to address this visitation restriction one way or the other (Oct. TR 269-270), and it is not contained in the final guardianship documents.

The temporary guardianship Order ceased to be effective upon issuance of the final Order. There is no longer any effective visitation ruling to be appealed from. The visitation ruling did not affect Appellant Father's rights, but only the ability of other relatives to see Child outside of the three-county geographical area. The court expressly left open the possibility of amending the ruling, but no request to do so was made. Father's brief cites no authority to support his argument, and makes no claim of prejudice. Father's claim affords no reason to reverse the court's final Order of guardianship.

Finally, some context is necessary to evaluate Father's appellate arguments. This Child, due to Father's own actions, had no parents who were available to care for him. He had no home to return to. A guardianship was necessary to provide legal protection and a custodial home for this Child. There simply was no live issue whether the Child

would be returned to Father's custody. In other words, Father's appellate arguments here are completely irrelevant, because Father's own custodial rights were factually nonexistent irrespective of any claimed procedural error. Since none of these arguments provide a reason for reversal, Father cannot prevail on this appeal Issue.

(4) Issue Three: Application of ICWA.

At issue here are the placement preferences which are required by ICWA. 25 U.S.C. §1915(b) sets out the applicable preferences:

> "Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with –
>
> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs."

The "extended family" which is entitled to placement preference is defined in 25 U.S.C. §1903(2):

> "[E]xtended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent".

ICWA's placement provisions have been further fleshed out by official, binding Bureau of Indian Affairs federal regulations. Regarding the requirement that the placement "most approximates a family", the Regulations provide that "sibling

attachment" must be considered. 25 CFR §23.131(1). Regarding the requirement that the Child's placement must be "within reasonable proximity to his … home", the Regulations add the requirement that the "reasonable proximity" be to the Child's "home, extended family, or siblings." 25 CFR §23.131(3).

ICWA was meant to set out "minimum federal standards" in custody matters involving Indian children. 25 U.S.C. §1902. ICWA establishes a placement preference for "extended family members", including the Child's aunt or uncle. The guardianship petitioners (appellees) are Child's aunt and uncle. Father's sister Sara, to whom Father wants to give custody, is also Child's aunt. All of these potential custodians are situated within the identical placement preference category. If just the "minimum federal standards" required by ICWA are considered, the trial court's guardianship Order did not violate ICWA.[3]

Father, however, claims in this appeal that they are not equally situated under ICWA, because one (Father's sister) is an Indian, and the other (Mother's brother, appellee herein) is not. Father does not point to any of ICWA's "minimum federal standards" to justify this conclusion, nor can he. Under ICWA's standards, both claimants are equally situated, without respect to race. Father's expert witness regarding ICWA, Luke Yellow Robe, agreed with this. Under ICWA, inclusion in the "extended family" category does not depend on Indian blood (TR 260).[4] Instead, Father points to

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[3] Under Native American culture (irrespective of ICWA), the Warrens are considered to be a part of this Child's extended family. TR 255-56 (Luke Yellow Robe); 218-219 (Sara Jumping Eagle).

[4] Father's expert witness regarding ICWA, Luke Yellow Robe, testified that the Oglala Sioux Tribe had not passed any resolution to change the ICWA preferences (TR at 260).

the Congressional findings and policy statements in 25 U.S.C. §§ 1901 and 1902, to extrapolate Father's additional preference category – that Indian family members have preference over non-Indian family members. Father seeks to use his view of Congressional policy, to have this Court judicially split a unitary Congressional placement preference into two preferences. Such judicial action would be an improper encroachment into Congress' legislative prerogative.

This Court has recognized just this principle when it comes to ICWA. At one time, this Court limited ICWA's application to "Indian families", using policy grounds as its rationale. However, this Court later abandoned this doctrine, because it was an unwarranted judicial encroachment into ICWA's plain language. See *In re N.S.*, 474 N.W.2d 96, 100-101 n.* (S.D. 1991) (Sabers, J., concurring, discussing this line of cases). Other courts as well have held that ICWA's policy language cannot be used to add to, or detract from, the specific standards which ICWA sets out. See *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill.App.1993), reversed on other grounds, 657 N.E.2d 935 (Ill. 1995) ("The policy section [of ICWA] is available for clarification of ambiguous provisions of the statute, but may not be used for the creation of ambiguity.").

Certainly, Congress could have split the "family member" placement preference as Father wishes, but Congress chose not to do so. It is not for the judiciary to speculate as to Congressional reasoning, or to judicially modify the plain language of the preference provisions. Congress may well have had a case like this in mind – where the Child was the offspring of one Indian parent and one non-Indian parent, never lived on a reservation, and trial court discretion in placement (among competing "family members") was being preserved. If the statute is to be altered, it is for Congress, rather than a State court, to do so.

In addition, the trial court found and concluded that, if Petitioners did not have preference as extended family members, good cause existed to deviate from ICWA's preference scheme, under 25 U.S.C. §1915(b), so as to allow placement with Petitioners. See Finding of Fact #29 and Conclusion of Law #11. The court reached this conclusion not just because Father's own act in killing Mother caused the breakup of the family (*id.*), but because "[t]he maternal relatives are better suited to deal emotionally with the minor child and the explanation as to how his mother passed away." Finding of Fact #33. Therefore, even if Father's appellate claim had some merit (that Indian extended family members have preference over identically situated, but non-Indian, family members), good cause has been found to deviate from that placement in this case. Father does not address or question the trial court's ruling in this regard.

Accordingly, there is no ICWA-based error in this case. ICWA defines its own placement preferences, and appellees fit within the preferred placement category. Father's claim that there is, or should be, some extra-preferred subcategory, is not supported by the plain language of the statute and is defeated by the circuit court's alternate finding of good cause to deviate.

It is unclear whether the balance of Father's argument is based upon ICWA (as Father interprets it), or whether it is based upon South Dakota guardianship law. In any event, the central question on appeal is whether the trial court's ultimate decision (granting guardianship to appellees) was proper. Father does not argue that appellees are unfit to act as guardians. Rather, Father's sole argument is that his choice of custodian (his sister) is better equipped to raise Child within the Indian culture.

The trial court's choice of guardian is governed by SDCL 29A-5-202, which provides in relevant part:

> "Absent an effective nomination by a minor, age fourteen or older, or deceased parent, the court shall appoint as guardian or conservator the individual or entity that will act in the minor's best interests. In making that appointment, the court shall consider the proposed guardian's or conservator's geographic location, familial or other relationship with the minor, ability to carry out the powers and duties of the office, commitment to promoting the minor's welfare, any potential conflicts of interest, the recommendations of the parents or other interested relatives, and the wishes of the minor if the minor is of sufficient age to form an intelligent preference."

The court's primary consideration under this statute is what is "in the minor's best interests." Here, the trial court made extensive findings as to appellees' fitness to have custody of Child. See Findings of Fact #16-22, all of which are supported by the evidence and none of which are challenged on appeal. The court also specifically found (Finding #32) and concluded (Conclusion #13) that the Child's best interests were met by placement with appellees.

In making its decision, the court considered the Father's proposed alternate placement with his sister. See TR 192-193, 196-197.[5] The circuit court also made findings which compared the two potential custodians (the Petitioner appellees, on the one hand, and Father's nominee Sara on the other hand) and which expressly favored appellees. The court found that appellees "are better suited to deal emotionally with the minor child and the explanation as to how his mother passed away" (Finding #33), and that the proposed placement with Father's sister "is not in keeping with the best interests of the child" (Finding #43).

The court's decision is also supported by the consideration, required by ICWA

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[5] In both instances, appellees' counsel objected that the suitability of Sara as potential custodian was irrelevant, because Sara had not formally petitioned for guardianship. The trial court, in both cases, overruled the objection, ruling that this area of inquiry was proper. As mentioned in the Statement of the Case, *supra*, Father's formal response to the Guardianship Petition included a request that Sara be appointed as guardian. See discussion, *supra*, at p. 3.

and its interpretive regulations, of keeping Child close to his half-sibling C.W., with whom he had lived while with his Mother. See 25 C.F.R. §23.131 (1, 3), discussed *supra*. Testimony was presented that it was "very important" that the brother remained in Child's life (TR 92), and appellees try to get the brother as much as they can, so that Child's relationship with him can continue (R 126, see also R 170). Upon Mother's death, that sibling's father had taken custody of him, and they lived in Sioux Falls (TR 93-94; see service of notice, at R 14, 26). Father's sister lived in North Dakota, far from Child's sibling, which is a factor favoring the trial court's decision.

In addition, Father's own preference, while listed as a factor for the court's consideration in SDCL 29A-5-202, is not to be given any special weight or deference by the trial court. Once extraordinary circumstances have been found under SDCL 25-5-29 and 25-5-30 (a determination which Father does not challenge on appeal), no deference is given to Father's custody recommendation. *Aguilar v. Aguilar*, 2016 S.D. 20 ¶14, 877 N.W.2d 333.

The court addressed appellees' ability and willingness to address Child's cultural heritage. The court found that appellees desired to raise Child with knowledge of his Lakota heritage (Finding #23), and that appellees would work with Father's sister and extended family "to develop [Child's] cultural awareness and his heritage with the Lakota Nation" (Finding #26). These findings are supported by the testimony of both Katie and Lloyd Warren (appellees). See TR 109, 118, 158, 162, 172. Appellees had already made the decision not to cut Child's hair, because that is what Child's parents would want and because of Native American cultural tradition. See TR 82, 108, 157-58.

As the court recognized (Finding #26), the issue of Child's cultural heritage is not an all-or-nothing proposition. Father's sister is not being shut out of Child's life, simply

because appellees are given guardianship. In evaluating Father's appellate claim, it also must be remembered that, at the time of the October hearing, this two year old Child had been in appellees' custody for only six months, and their primary efforts during that time went toward incorporating him into their family and caring for his immediate needs. See TR at 162. Father points to nothing in the record to show that appellees were refusing to acknowledge Child's Native American heritage, or refusing to allow Child's Native American extended family the opportunity to do so.

None of Father's appellate complaints rise to the level of abuse of discretion. The trial court found that the Warrens were suitable custodians for Child. Those findings are supported by the evidence and are not disputed on appeal. The trial court found that the Child's best interests were served by this guardianship appointment, and would not be served by the appointment of Sara instead. Under the appropriate review standard, this Court does not inquire whether it would have made the same decision, but "whether a judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Guardianship of Blare*, *supra*, 1999 S.D. 3 at ¶29 (citation omitted). When a child custody court is faced with two satisfactory options, its choice between them is not an abuse of discretion. *Simunek v. Auwerter*, 2011 S.D. 56 ¶17, 803 N.W.2d 835. For all of these reasons, applying the appropriate standard of review, this guardianship Order must be affirmed.

CONCLUSION

The trial court's guardianship Order should be affirmed in all respects.

DATED this 29th day of March, 2018.

/S/ Timothy T. Hogan_____
Timothy T. Hogan
Ribstein & Hogan Law Firm
(605) 692-1818
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Timothy T. Hogan, attorney for Appellees herein, certifies that this Appellee's Brief, excluding introductory tables and Appendix contents, contains 5,621 words and 29,463 characters, according to the word processing program (Microsoft Word 2007) used to prepare this brief, complying with the limitations in SDCL 15-26A-66(b)(2).

/S/ Timothy T. Hogan
Timothy T. Hogan

APPENDIX TABLE OF CONTENTS

Pages

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ICC-2C-SAO
ICC-JAIL
DOC

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
		SFPD 201724163
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI17002636
vs.	+	JUDGMENT & SENTENCE
IRVING DUANE JUMPINGEAGLE, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on April 13, 2017, charging the defendant with the crimes of Count 1 Murder-1st Degree-Premeditated Murder on or about April 1, 2017; Count 2 Murder-2nd Degree-Depraved Mind on or about April 1, 2017; Count 3 Manslaughter-1st Degree-Comm of Felony on or about April 1, 2017; Count 4 Manslaughter-1st Degree-Heat of Passion on or about April 1, 2017; Count 5 Manslaughter-1st Degree-Dangerous Weapon on or about April 1, 2017; Count 6 Manslaughter-1st Degree-Killed While Committing Crime on or about April 1, 2017 and a Part II Habitual Criminal Offender Information was filed. The defendant was arraigned upon the Indictment and Information on April 17, 2017, Aaron Fox appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The defendant, with counsel, Aaron Fox, was re-arraigned upon the Indictment and Information (including maximum penalty on each Count) on April 21, 2017, and the defendant continued with his not guilty plea. Defendant with co-counsel, Beau Blouin and Traci Smith, returned to Court on September 12, 2017, the State appeared by Mandi Mowery and Rhett Bye, Deputy State's Attorneys. The defendant thereafter changed his plea to guilty to Count 5 Manslaughter-1st Degree-Dangerous Weapon (SDCL 22-16-15(3)) with sentencing continued to January 8, 2018, after completion of a presentence report.

Thereupon on January 8, 2018, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 5 MANSLAUGHTER-1ST DEGREE-DANGEROUS WEAPON : IRVING DUANE JUMPINGEAGLE shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for one hundred (100) years with credit for two hundred forty-three (243) days previously served.

It is ordered that the defendant is adjudicated liable to pay restitution in the amount of $2,840.73 through the Minnehaha County Clerk of Courts, which shall be collected by the board of Pardons and Paroles.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that Counts 1, 2, 3, 4 and 6 charging IRVING DUANE JUMPINGEAGLE with Murder-1st Degree-Premeditated; Murder-2nd Degree-Depraved Mind; three counts of Manslaughter-1st Degree and the Part II Habitual Criminal Offender Information be and hereby are dismissed.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 30th day of January, 2017.

BY THE COURT:

JUDGE MARK SALTER
Circuit Court Judge

FILED
JAN 30 2018
Minnehaha County, S.D.
Clerk Circuit Court

ATTEST:
ANGELIA M. GRIES, Clerk

By: M. Miles
Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28479

GUARDIANSHIP OF I.L.J.E., MINOR CHILD

Appeal from the Circuit Court, Third Judicial Circuit
Brookings County, South Dakota

The Honorable Gregory J. Stoltenburg
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on the 15th day of December 2017

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I. AS A CHILD IN NEED OF SUPERVISION, I.L.J.E.'S STATUS FALLS WITHIN THE ABUSE AND NEGLECT STATUTES.

The Warrens arguments are based upon I.L.J.E.'s need for supervision. This brings the case under the abuse and neglect statutes. SDCL 26-7A-2. If a report is made that a child is in need of supervision, the State's Attorney must perform an investigation under SDCL 26-7A-10. The State's Attorney must then decide how the case shall proceed forward. *Id.* If the child is taken into temporary custody, a hearing shall be conducted under SDCL 26-7A-13.1.

The Court held in *In re Guardianship of S.M.N.*, 2010 S.D. 213, 781 N.W.2d 213 that the Legislature's amendments to South Dakota Guardianship Act did not overrule the constitutional holding in *In re Guardianship and Conservatorship for T.H.M.*, 2002 S.D. 13, 640 N.W.2d 68. *In re Guardianship of S.M.N.*, 2010 S.D. 213, ¶ 19, 781 N.W.2d. at 222. In *S.M.N.*, this Court declined "to decide the extent to which the constitutional safeguards this Court alluded to in *T.H.M.* are encompassed by SDCL 25-5-29." *Id.* at ¶ 20. The Court specifically limited the scope of its decision to the facts present in *S.M.N. Id.*

In *T.H.M.* the Court held the use of the Guardianship Act to transfer custody from a parent to a non-parent was not merely a procedural flaw, but that a transfer of custody based upon abuse and neglect must follow the constitutional safeguards. *T.H.M.*, 2002 S.D. 13 at ¶ 2. The Warrens state that they sought a transfer of custody as I.L.J.E. had no home to return to. SDCL § 26-8A-2 defines ten different situations when a child is deemed to fall under the abuse and neglect statutes. Subsection (2) provides that the term

abused or neglected child means a child: "(2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian, or custodian." Subsection (4) provides that the term abused or neglected child means a child: "(4) Whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child's health, guidance, or well-being."

Both subsections pertain to I.L.J.E's status when the Warrens filed for temporary guardianship. The Department of Social Services had not yet intervened in the matter, and I.L.J.E. was physically being cared for by the Warrens. There was no need for the Warrens to seek a change of legal custody mere days after Irving's arrest when he was in the process of securing legal representation as to the criminal charges. Irving at that time was also presumed innocent.

The transfer of custody through the South Dakota Guardianship Act violated both Irving and I.L.J.E.'s constitutional rights, including the right to an advisement, the right to a court appointed attorney, separate adjudicatory and dispositional hearings, compulsory process of witnesses, discovery, the right of the parent to be present at the examination, and a clear and convincing burden of proof. *See In re Guardianship and Conservatorship for T.H.M.*, 202 S.D. 13 at ¶15. These constitutional safeguards do not dissipate simply because a guardianship petition did not state the words abuse and neglect in the pleadings.

In support of their position that this is not an abuse and neglect proceeding, the Warrens reply upon *Pfuhl v. Pfuhl*, 2014 S.D. 25, 846 N.W.2d 778. *Pfuhl*, however, does not factually or legally apply in this case.

In *Pfuhl*, the natural mother obtained a temporary protection order against her husband alleging that he physically or sexually assault two of their minor children three years prior to the petition. *Id.* at ¶ 1. The Department of Social Services investigated the allegations, but found no evidence of child abuse. *Id.* Despite no findings of abuse and neglect, the trial court appointed counsel for the children at the County's expense under the abuse and neglect statutes. *Id.* at ¶ 3. Minnehaha County filed an appeal of the trial court's order appointing counsel in a protection order case. *Id.*

On appeal, the Supreme Court held that abuse and neglect is a determination of the child's status, which has substantial legal consequences. *Id*. at ¶11. The Court held that the abuse and neglect statutes apply to the child's status or condition, which was not the subject of the protection order proceeding. *Id.* at 14. As such, the trial court lacked authority to appoint an attorney at the County's expense under the abuse and neglect statutes. *Id.*

Unlike the children in *Puhl*, I.L.J.E.'s status was the sole purpose of the temporary guardianship proceedings. Thus, factually and legally it does not apply to this case. Instead, the constitutional provisions of SDCL ch. 26-7A and 26-8A do apply. These statutes directly contradict the Warrens' arguments that Irving did not have the right to appear at the July and October 2017 hearings.

Further, under SDCL ch. 26-7A and 26-8A, Irving was not given adequate ability to communicate privately with counsel. An officer was required to be present in the ITV room with Irving and counsel was not able to speak with him during the examination of witnesses.

II. IRVING'S DUE PROCESS RIGHTS WERE VIOLATED DUE TO THE LACK OF NOTICE

The Warrens contend that because Irving was incarcerated in the Minnehaha County jail at the time they filed their petition that they were unable to give him proper notice. The Warrens fail to state that the petition they filed for temporary guardianship lists the Minnehaha County jail address.

Under SDCL 26-7A-15 when a child is taken into temporary custody, the officer or person who takes the child into temporary custody, with or without a court order, must, without unnecessary delay, inform the child's parents. Further, any party that takes a child into temporary custody shall notify the state's attorney of the temporary custody and location of the child. SDCL-7A-17. The Warrens waited six days to serve Irving at the Minnehaha County jail. C.R. 16[1].

The Petition for Temporary Guardianship was filed one day after Irving's initial appearance. C.R. 6. The Warrens contend this was because I.L.J.E. was left to physically fend for himself. The Warrens fail to address the fact that I.L.J.E. was in their physical custody at the time of Irving's arrest. Further, Dr. Jumping Eagle had contacted the Warrens to let them know she wanted to help with I.L.J.E.'s care. The Warrens instead rushed to file for guardianship to secure immediate custody of I.L.J.E. in violation of SDCL ch. 26-7A and 26-8A.

The Warrens contend that the lack of notice to Irving did not prejudice him in this case. Due to the Warrens actions, both Irving and I.L.J.E.'s due proceed rights were

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record.

violated. Irving was unable to obtain counsel and properly and timely object to the guardianship proceedings. The Warrens filed their petition on April 6, 2017, one day after Irving's initial appearance. C.R. 6. The petition was granted the following day. C.R. 11. The Warrens then waited six days to serve Irving at the jail. C.R. 16.

Had the proceedings followed the statutes in SDCL ch. 26-7A and 26-8A, Irving would have been immediately served with notice of the proceedings, he would have been advised under SDCL 26-7A-54 as to the nature of the proceedings and the right to be represented by counsel. Irving would have been able to work with the department of social services regarding placement of I.L.J.E. during the pendency of the criminal proceedings. The parties would have had status hearings to determine the proper procedure of the case and the placement and wellbeing of I.L.J.E.

III. IT IS IN I.L.J.E.'S BEST INTERESTS TO PROTECT THE RELATIONSHIP WITH HIS TRIBE

The Warrens' argument undermines the entire purpose of ICWA, which is to protect the unity of Indian tribes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 104 L.Ed.2d 29(1989). ICWA is based upon the presumption that the protection of an Indian child's relationship with the tribe is in the child's best interests and that there is a fundamental assumption that it is in the child's best interests that its relationship to the tribe be protected. *See People ex rel. M.H.*, 2005 S.D. 4, ¶ 14, 691 N.W.2d 622, 627.

The Warrens took affirmative actions to alienate I.L.J.E. from his tribe. Counsel for the Warrens specifically requested that I.L.J.E. not be able to visit west river South Dakota. MH1, 14.

At the October 6, 2017, hearing the evidence was undisputed that in the time I.L.J.E. was placed into the Warren's care they had not done anything to encourage an ongoing relationship with the tribe. MH2, 40-41, 78, 162.

Mr. Warren referred to I.L.J.E.'s relationship with his tribe as "other social stuff" demonstrating that he does not understand the importance of the bond between I.L.J.E. and the tribe. MH2, 176.

Dr. Jumping Eagle testified that as a result of the county visitation restriction, I.L.J.E. was unable to attend tribal ceremonies, especially the healing ceremony. MH2, 195-196. Luke Yellow Robe testified that it was detrimental to I.L.J.E.'s emotional and physical health to be separated from the tribe. MH2, 263.

Under ICWA, the actions of the biological parent are not a consideration, despite the Warrens' argument that the break of the family was due to Irving's action. This is especially significant because ICWA was enacted to control the placement of an Indian child when it is removed from its biological parents.

The United States Supreme Court has held that the child's relationship with the tribe is of the utmost importance and is in the best interests of the child. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50 n. 24, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Federal standards require that removal of Indian children from their families for placement in foster or adoptive homes should reflect the unique values of Indian culture. *See* 25 U.S.C. § 1902.

Thus, placement with the family member most suitable to maintain the child's relationship with the tribe is of the utmost importance and in the child's best interests. Thus, in this case it is in I.L.J.E.'s best interests to be placed with his Indian relatives. This is especially significant as the Warrens testified they have done little to nothing to foster I.L.J.E.'s relationship with the tribe and have taken affirmative steps to alienate him from the tribe.

CONCLUSION

Irving Jumping Eagle respectfully requests that the April 7, 2017, Order appointing Temporary Guardian and Conservator Pursuant to SDCL § 29A-5-210 and the November 15, 2017, Appointing Co-Guardians and Co-Conservators be vacated; the matter of custody remanded back to the Circuit Court and custody be entered consistent with father's April 20, 2017, election of Dr. Sara Jumping Eagle as guardian of I.L.J.E.

Dated this 12th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellants' Reply Brief were e-mailed and mailed by first class mail, postage prepaid to:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 1779 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 12th day of April, 2018.

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