IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0516

IN THE MATTER OF:

J.B.,

A Youth in Need of Care.

REPLY BRIEF OF APPELLANT MOTHER

On Appeal from the Montana Seventeenth Judicial District Court, Blaine County, The Honorable Yvonne Laird, Presiding, DN-15-04

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Appellant respectfully submits the following Reply Brief in response to the State's principal brief.

ARGUMENT

The State offers only a "plain language" statutory construction argument in support of its position that Father's objection to transfer ended the inquiry, despite the fact the same was only asserted through a voicemail to his counsel and then he failed to attend the contested hearing on his purported objection. In this regard, the State argues (in a footnote), that Mother's counsel's failure to argue that Father's withdrew and/or waived his objection is on no consequence, and does not constitute ineffective assistance of counsel, because an attorney does not render deficient performance for failing to raise an issue not supported by established law.

However, the State does not even address the established Montana cases regarding waiver and/or the legal principle that failure to attend a hearing waives an objection on an issue. *C.f. City of Missoula v. Girard*, 2013 MT 168, ¶ 14, 370 Mont. 443, 303 P.3d 1283. Montana law provides that a party can waive a statutory right through his course of conduct which manifests the intention to forego the statutory benefit. *Collection Bureau Services, Inc. v. Morrow*, 2004 MT 84, ¶¶ 9-11, 320 Mont. 478, 87 P.3d 1024. Specifically, under § 1-3-204, MCA, provides that "[a]ny person may waive the advantage of a law intended solely for that person's benefit."

Mother's counsel should have been aware of these Montana authorities and the principle of "waiver" and counsel should have advanced arguments asserting the same to the district court, especially when the judge specifically asked him if he was aware of any legal authority which would support transferring the case to tribal court despite Father's apparent objection. Father was clearly aware of his right to object to the tribal court transfer, acted inconsistent with that right by failing to discuss the basis for his objection with his counsel and failed to attend the hearing on his objection, resulting in prejudice to Mother. *McKay v. Wilderness Development LLC*, 2009 MT 410, ¶ 28, 353 Mont. 471, 221 P.3d 1184. Specifically, Mother is a tribal member and mother of an Indian child, who was entitled to have tribe determine the child's best interests according to their own law, customs, and norms.

In addition to Montana authority regarding waiver, there is also federal authority that ICWA statutory requirements may be waived. *In re Riva M.*, 235 Cal. App. 3d 403, 412-413 (1991). In *Riva M.*, the children were enrolled tribal members, but the tribe decided not to intervene. The lower court failed to apply the heightened standards of proof in making its findings terminating the father's parental rights, but the California Court of Appeal found the error was either waived or harmless because the father raised no objection at the termination proceedings even though he knew ICWA applied and had previously stipulated to

waive its requirements—"[w]e can only presume he did not care whether the ICWA standards were applied, or was attempting to sandbag the issue for appeal." *In re Riva M.*, 235 Cal. App. 3d at 412-413. Thus, in the context of ICWA, a parent can waive statutory language intended for his benefit.

The State did not offer this Court any contrary authority and did not even address the case cited by Mother in support of her argument which establishes that an objection to transfer may be abandoned or withdrawn. *People v. Demerle S. (In re Cal. E.)*, 235 N.E.3d 700 (Ill. App. 2023). And while the State did briefly cite the South Dakota Supreme Court's decision, *In re K.D.*, 630 N.W.2d 492, 494 (S.D. 2001), it did not address the court's language in that opinion noting that a parent's objection to tribal court transfer can be "challenged as being defective or improperly procured" and/or shown that that the objecting parent "changed her mind and withdrew her objection." Father's objection was akin to a withdrawn objection when he failed to attend the hearing the district court scheduled to hear his position.

In addition to failing to challenge Father's objection, Mother's counsel rendered deficient performance in various other regards. In its response brief, the State blames Mother for failing to keep in contact with her attorney, but a review of the record reveals the opposite is true, at least on the majority of occasions—he failed to keep in contact with her, one of the basic duties owed to a client.

Mother's appointed counsel was absent from numerous hearings and when he did appear, he attended them via Zoom almost exclusively, including the termination hearing where he took no position and barely asked any questions of the State's witnesses. The trial court should not have to delay a hearing so that a client can speak with her attorney, yet that is what happened in this case on at least one occasion.

The prejudice to Mother cannot be overstated. She was not adequately represented at any stage of the proceedings and specific to the termination hearing, her attorney did not object to the State's lack of evidence and/or witnesses to meet its burden of proof beyond a reasonable doubt under § 41-3-609(1)(f), MCA, *In re K.L.N.*, 2021 MT 56, ¶ 19, 403 Mont. 342, 482 P.3d 650, let alone the statutory ICWA requirements imposed by 25 U.S.C. § 1912 and § 41-3-609(5), MCA.

As expected, the State relies on the CPS's affidavit to argue that sufficient evidence existed to establish the requisite "beyond a reasonable doubt" termination standard. ICWA prerequisites, however, cannot be established vis-à-vis inadmissible hearsay, such as an affidavit. *Quinn v. Walters (In re Quinn)*, 881 P.2d 795, 801 (Ore. 1994) (affidavit could not establish child's status as Indian child within the meaning of 25 U.S.C. § 1903(4)).

The State also relies on the general conclusory opinions of the State's witnesses (the CPS worker and ICWA expert) regarding the statutory elements and

Mother's previous CPS involvement, despite a lack of actual factual evidence or testimony introduced during the termination hearing, let alone any implied "judicial notice" of the facts of the previous CPS cases.

A termination order cannot merely recite the statutory language without making findings of fact to support them. *In re D.B.*, 2007 MT 246, ¶ 26, 339 Mont. 240, 168 P.3d 691. Indeed, a "court must make specific factual findings" explaining how the statutory elements for termination have been satisfied, and in this case, satisfied beyond a reasonable doubt. *In re K.J.B.*, 2007 MT 216, ¶ 23, 339 Mont. 28, 168 P.3d 629. This did not occur in this case, which is especially troublesome and prejudicial to Mother when her counsel did not question these witnesses or challenge the lack of evidence.

CONCLUSION

Based on the foregoing, Mother's parental rights to her daughter J.B., were wrongfully terminated in violation of ICWA and her due process right to effective assistance of counsel. She therefore respectfully requests reversal and remand.

Respectfully submitted this 2nd day of June, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is less than 5,000 words (1,174), excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Robin A. Meguire
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CERTIFICATE OF SERVICE

I, Robin Amber Meguire, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-02-2025:

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