

91921-6

No. 32490-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



DIVISION THREE

In re the Termination of K.J.B.

STATE OF WASHINGTON/DSHS,

Respondent,

v.

J.B. (Father),

Appellant

FILED

Nov 24, 2014

Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable David Elofson

FATHER'S REPLY BRIEF

JILL S. REUTER, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

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A. INTRODUCTION

Mr. J.B., father of K.J.B., accepts this opportunity to reply to the State's brief. Mr. J.B. requests that the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. DSHS did not satisfy the notice requirements of the federal and state Indian Child Welfare Acts.

Mr. J.B. filed declaration in the trial court indicating he had Blackfoot ancestry. (CP 177; RP 191). The Department of Social and Health Services (DSHS) did not submit notice to the Blackfoot tribe. (CP 41-174, 284-289, 305-311; RP 191-192). The Department of Social and Health Services (DSHS) argues that it satisfied the notice requirements of the Federal Indian Child Welfare Act (federal ICWA) and the Washington State Indian Child Welfare Act (state ICWA) because the Blackfoot tribe is not a federally recognized tribe, and therefore, was not entitled to notice under either Act. State's Brief pgs. 16-21.

Mr. J.B. agrees with the State that only federally recognized tribes are entitled to notice of termination proceedings. *See* State's Brief pg. 16; *see also In re Dependency of J.A.F.*, 168 Wn. App. 653, 666, 278 P.3d 673 (2012) (stating that "[i]f a tribe is not federally recognized, ICWA's notice requirements do not apply."). However, Mr. J.B. disagrees with the State's assertion that "[s]ince the Blackfoot tribe is not a federally recognized tribe, it was not entitled to notice of the termination proceeding." State's brief pg. 171. DSHS had a duty to notify the Blackfoot tribe of the termination

proceeding. *See In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 239, 237 P.3d 944 (2010); *see also* 25 U.S.C. § 1912(a); RCW 13.38.070(1); RCW 13.34.070(10).

In *L.N.B.-L.*, the father described his heritage to include “Black Foot out of the Algonquin Nation[.]” *L.N.B.-L.*, 157 Wn. App. at 225. The dependency petition also listed this heritage. *Id.* The appellate court found there was insufficient evidence in the record to determine whether the father’s “Black Foot” ancestry “refers to the federally-recognized Blackfoot Tribe of the Blackfeet Indian Reservation of Montana.” *Id.* at 225, 238 n.20.

The appellate court held that DSHS was required to notify the Black Foot tribe of the termination proceeding, and remanded the case for such notice to be given. *Id.* at 238, 242. Because there was insufficient evidence to demonstrate that “Black Foot” referred to the federally recognized Blackfeet Tribe, DSHS was instructed to notify the Bureau of Indian Affairs (BIA) of the termination orders. *Id.* at 238 n.20.

Here, as in *L.N.B.-L.*, after Mr. J.B. indicated he had Blackfoot ancestry, DSHS was required to notify the Blackfoot tribe. *See L.N.B.-L.*, 157 Wn. App. at 238; (CP 177; RP 191). DSHS argues it already complied with the notice requirements of the federal ICWA and state ICWA by sending notice of Mr. J.B.’s claimed ancestry to the BIA. State’s brief pgs. 20-21. However, the notices sent to the BIA listed other Indian tribes; the notices did not identify the Blackfoot tribe. (CP 46, 58, 74, 86, 98, 110, 122, 134, 146, 158, 170). Therefore, the case should be remanded to the trial

court so DSHS can notify the Blackfoot tribe of the termination proceeding and its right to intervene.

2. The trial court erred by finding that continuation of the parent-child relationship diminished K.J.B.'s prospects for early integration into a stable and permanent home, because the trial court did not consider the factors set forth in RCW 13.38.180(1)(f) concerning the parental rights of an incarcerated parent.

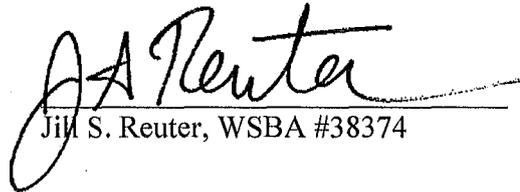
DSHS argues the trial court considered the factors set forth in RCW 13.34.180(1)(f) concerning the rights of an incarcerated parent, and that if any further findings are required, they can be inferred. State's Brief pgs. 29-44. To the contrary, the trial court's findings of fact and conclusions of law on termination did not address the provision of RCW 13.34.180(f) applicable to an incarcerated parent. (CP 17-24; RP 245-251). Furthermore, because the trial court made no mention of the provision of RCW 13.34.180(f) applicable to an incarcerated parent or the six factors contained in RCW 13.34.145(5)(b), the omitted findings cannot be inferred. *See In re Dependency of A.M.M.*, 332 P.3d 500, 506-07 (Wash. Ct. App. 2014).

The court erred by finding that RCW 13.34.180(1)(f) had been met when it failed to consider the factors set forth in RCW 13.38.180(1)(f) concerning the parental rights of an incarcerated parent. DSHS "was required to satisfy its burden of proof as to all of the termination factors, and the trial court was required to apply the law in effect at the time of its ruling." *A.M.M.*, 332 P.3d at 507. This court should reverse and remand the case for the trial court to consider the factors set forth in RCW 13.38.180(1)(f) concerning the parental rights of an incarcerated parent.

C. CONCLUSION

The case should be remanded to the trial court so DSHS can notify the Blackfoot tribe of the termination proceeding and its right to intervene. This court should also reverse and remand the case for consideration of the factors set forth in RCW 13.38.180(1)(f) concerning the parental rights of an incarcerated parent. The State's remaining arguments in response have been addressed in the father's opening brief. Mr. J.B. respectfully requests that this Court, based on the arguments in his opening brief and in this reply, reverse the termination of his parental rights and remand for further proceedings.

Respectfully submitted this 24th day of November, 2014.


Jim S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorneys for Appellant Mother

COURT OF APPEALS
DIVISION III
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In re Termination of K.J.B.)
(K.J.B. DOB: 04/20/2012)) COA No. 32490-7-III
)
) PROOF OF SERVICE
)

I, Kristina M. Nichols, assigned counsel for the Appellant father herein, do hereby certify as follows:

On November 24, 2014, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant father's reply brief, addressed to:

Mr. J.B. (Address Confidential)

Having obtained prior permission from the Office of the Attorney General, I also served State's Assistant Attorney General Carissa Greenburg by electronic email service at the following addresses: CarissaG@atg.wa.gov, CollienN@atg.wa.gov, and rsdyakappeals@atg.wa.gov, with a true and correct copy of the same.

Dated this 24th day of November, 2014.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com

NICHOLS LAW FIRM PLLC

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Transmittal Letter

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Case Name: In re the Termination of K.J.B.

Court of Appeals Case Number: 32490-7

Party Represented: Appellant Father

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Trial Court County: Yakima - Superior Court # 13-7-00477-9

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Reply Brief

Proof of service is attached and an email service by agreement has been made to CarissaG@atg.wa.gov, CollienN@atg.wa.gov, rsdyakappeals@atg.wa.gov, and wa.appeals@gmail.com.

Sender Name: Jill S Reuter - Email: jillreuterlaw@gmail.com