

IN THE SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF K.B., A CHILD
 IN THE INTEREST OF K.B., A CHILD

Meagan Dahl, L.B.S.W., Cass County)	
and the State of North Dakota,)	
)	Cass Co. Case Nos.:
)	
Petitioner and Appellee,)	09-2020-JV-254
)	09-2020-JV-268
)	
vs.)	
)	
K.B., a child; K.B., a child; M.N., father;)	Supreme Ct. No.:
Janette Olsen, Guardian ad Litem; and)	
Turtle Mountain Band of Chippewa, Tribe,)	
)	
Respondents,)	
and)	
)	
J.B., mother,)	
)	
)	
Respondent/Appellant.)	

BRIEF OF APPELLANT

Appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights,

entered November March 9, 2021

By: Hon. Scott Griffeth, Judicial Referee, Cass County Juvenile Court

Daniel Gast (ND #06139)
 The Law Office of Daniel Gast
 Sole Practitioner
 P.O. Box 1511
 Fargo, ND 58107
 701-730-7408
GastLawOffice@gmail.com
 Attorney for Appellant/Respondent

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JURISDICTIONAL STATEMENT

[¶ 1] "Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. "A judgment or order in a civil action may be removed to the Supreme Court by appeal as provided in this chapter." N.D.C.C., § 28-27-01. A final Judgment terminating parental rights is appealable. N.D.C.C. § 28-27-02(2). This appeal is timely under N.D.R.App.P. 2.2 and N.D.R.App.P. 26.

STATEMENT OF THE ISSUES

[¶ 2] Whether the requirements of the Indian Child Welfare Act were fulfilled in terminating the parental rights of the Respondent/Appellant.

STATEMENT OF THE CASE

[¶ 3] J.B. is the natural mother to 2 daughters both with the initials K.B. At the time of trial the older child, K.B.1, was 1 year old. The younger child, K.B.2, was not yet one year old at the time of trial.

[¶ 4] K.B.1 was adjudicated a deprived child on February 11, 2020. K.B. was placed into the custody of the Director of Cass County Human Service zone for a period of nine months. During that period J.B. gave birth to K.B.2.

[¶ 5] A petition to terminate parental rights as to both children was filed in these cases on July 2, 2020. Trial on the matter was held on January 14 and 22, 2021. The Court issued its findings and order terminating parental rights on March 9 2021. This appeal follows.

STATEMENT OF THE FACTS

[¶5a] K.B.1 was removed from the care of J.B. in November of 2019. K.B.1 was removed over concerns of drug use by the mother both during and after the pregnancy, concerns of domestic violence in J.B.'s relationships, and concerns of a pending probation revocation and likely upcoming incarceration. J.B. made admissions that K.B.1 was a deprived child. K.B.1 was placed into Social Services custody for up to 9 months.

[¶6] During the period of time while K.B.1 was in Social Services custody, J.B. gave birth to K.B.2. During this period J.B. also had her probation revoked and was sentenced to serve a period of incarceration. J.B.'s sentence goes until April of 2022, however she is expected to be released with various conditions in May of 2021. J.B. was unable to complete the requirements of social services to achieve reunification with her children during this period.

[¶7] Both K.B.1 and K.B.2 are enrollable in a Native American Tribe, specifically the Turtle Mountain Band of Chippewa. At trial the ICWA representative for the Tribe, Marilyn Poitra, testified as required by the Indian Child Welfare Act. Ms. Poitra made it clear in her testimony that the Tribe did not support termination in this case. At issue in this appeal is whether or not the testimony of Ms. Poitra fulfilled the requirements of ICWA.

[¶8] The relevant testimony of Ms. Poitra is reproduced here for consideration. This testimony can be found in the audio transcript of the trial at 11:02 AM January 22, 2021.

[¶9] Direct examination of Marilyn Poitra. SA = State's Attorney, MP= Marilyn Poitra.

SA Could you please say and spell your last name?

MP Marilyn It's M.A.R.I.L.Y.N. My last name is Poitra and it's P.O.I.T.R.A.

SA And what is your profession Ms. Poitra?

MP I'm the ICWA coordinator Turtle Mountain band of Chippewa.

SA How long have you been in that position?

MP About nineteen years.

SA Are you a member of the turtle Mountain Band of Chippewa as well?

MP Yes I am.

ex- SA And have you been appointed by the Tribe to serve as a QEW, qualified
pert witness. as it relates to child protection matters?

MP Yes I am.

SA As it relates to the children [K.B. and K.B.] previously or early on in the
cases the information was that these children were not subject to the In
dian Child Welfare Act, is that correct.?

MP Yes it was.

SA And that has now changed with regard ... as a result of some additional
documentation and connections to the tribe and so the Turtle Mountain
Band has determined that these children are eligible for enrollment and the
enrollment process has taken place is that correct?

MP I don't know if they're actually enrolled, but they're eligible now because
of Mom's enrollment has changed.

SA And so the Turtle Mountain Band has determined that they are enrollable
in the Turtle Mountain Band of Chippewa. Is that correct?

MP That's correct.

SA Despite the fact that early on or previously the children were not deter-
mined to be enrollable, Turtle Mountain has received appropriate notice of
these proceedings consistent with ICWA is that correct?

MP That's correct.

SA And has made a determin- has the Turtle Mountain Band determined that they have not or it does not wish to exercise jurisdiction of the child protection matters concerning [K.B. and K.B.]?

MP Not at this time.

SA Are you aware that Cass County Human Service Zone has filed a termination of parental rights petition with regard to these children?

MP Yes I have.

SA And are you aware that the children have been in out-of-home placement with Cass County Human Service Zone during - for an extended period of time?

MP Yes.

SA You participated in the permanency planning meetings and provided alternatives and suggestions with regard to the placement of children. Is that correct?

MP That's correct.

SA And are you satisfied that the placement priorities are being honored by Cass County Human Services Zone?

MP Yes.

SA You've indicated that the children at this time fall under the Indian Child Welfare Act because of their eligibility for enrollment with Turtle Mountain. Are you- and you've previously been qualified to provide expert testimony with regard to the Indian Child Welfare Act. Are you knowledgeable of the tribal customs as they relate to family organization and child-rearing practices as they relate to the Turtle Mountain Band of Chippewa?

MP Yes I am.

SA Is the conduct of the parents specifically, and I'll ask you each one, [J.B.] as demonstrated by sporadic or - excuse me - ongoing chemical usage and incarceration and is that consistent with acceptable Native American practices of the Turtle Mountain Band of Chippewa?

MP No it isn't.

SA As it relates to John Doe and [M.N.] are lack of contact with the children, abuse of the children's mother, and failure to establish legal relationships with the children consistent with the accepted child-rearing practices of the Turtle Mountain Band of Chippewa?

MP No it isn't.

SA At this time, is custody of the children [K.B. and K.B.] by a parent likely to cause serious emotional or physical damage to the children?

MP I believe that because Mom's incarcerated she can't care for her children-

SA Sorry I didn't mean to interrupt you Marilyn.

MP That's all right. I was just gonna say that I believe it would have been a different situation if she wasn't incarcerated.

SA The tribe has also been involved with [J.B.'s] eldest child is that correct?

MP That's correct

SA And that has been for, as I understand it, a period of approximately or over 5 years is that correct?

MP That's correct.

SA And the Child Welfare Department from Turtle Mountain has opted to make a permanent or what is meaning to be a permanent placement with [Maternal Uncle] with regard to that child instead.

MP Yes.

SA So that would mean that Child Welfare is no longer providing services to the family for reunification with the parent. Is that correct?

MP That is correct.

SA Based on your - the notice that's been provided regarding [K.B. and K.B.], the participation that you've had in the permanency planning meetings, The information that has been provided to you, is it your position that appropriate services or active efforts have been provided to the family to prevent placement of the children out of home?

MP Yes, because they are in a place with a family member, [maternal uncle].

SA And [Maternal Uncle] has indicated that he is willing to adopt the children if that's the - if that is the outcome of this case is that correct?

MP That's correct.

SA Just to be clear, as it relates to termination of parental rights, it's my understanding that the tribe doesn't take a position (inaudible) your testimony isn't to be determined to be supporting or seeking determination on behalf of the tribe but the question as it relates to qualified expert witness was the purpose of your testimony is that correct?

MP Yes.

SA As it relates to termination of parental rights generally Turtle Mountain doesn't support or take a position I should say with regard to termination of parental rights is that accurate?

MP That's accurate.

SA And that would be the case here is that correct?

MP The tribe is not in agreement with a termination of parental rights, yes.

SA And recognizing that that is what is being sought by the County, the Tribe has opted to not transfer jurisdiction of this case. Is that correct?

MP That's correct.

SA And has filed no opposition as it relates to the petition for termination. Is that correct?

MP Could you restate that?

SA There has been no filings or, other than the position that the Tribe doesn't support termination, there is no other efforts to transfer to tribal court or to take other steps with regard to the petition that the Cass County Human Service Zone has filed. Is that correct?

MP That's correct.

SA And these children would be subject to tribal jurisdiction if the tribe chose to exercise that. Is that correct?

MP That's correct.

SA I don't have any further questions. . .

[¶10] Cross-examination of Marilyn Poitra. DG= Daniel Gast, MP= Marlyn Poitra.

DG Ms. Poitra does the Tribe support termination of parental rights in this case?

MP No.

DG The tribe does not want the parents' rights terminated in this case?

MP That's correct.

DG What does the tribe want?

MP What the tribe wants is, I already know that [J.B.'s] programming in prison right now should be up in May. And we are hoping to reunify with [J.B.] in May.

DG The tribe wants [J.B.] to have the chance to reunify as the mother of these children?

MP Yes.

DG And the tribe does not want her legal position as their mother to be terminated. Is that correct?

MP No, no we don't.

DG Do you think that a termination - absent a termination will the children - would that result in serious emotional damage to the children?

MP If the termination took place, yes.

DG If the termination took place it would result in serious emotional damage to the children?

MP That's correct.

DG So the Tribe - okay so what about serious physical damage? Is a termination required to avoid serious physical damage to the children?

MP I would believe so, I guess.

DG Wait, so you think that the Court has to terminate to avoid serious physical damage?

MP No.

DG It is not necessary?

MP No, it isn't.

DG Do you think that its- , those- There wouldn't be any damage to the children if the court does not terminate at this time?

MP That's correct.

DG Why is that?

MP What I believe is that they can - Mom can finish programming, getting all her services done. And the children would remain with their current, well they're gonna placed with their uncle here probably in about two weeks. And they would be placed with him so during that time there would- she would be programming and hopefully, she'll be out in May she can finish her services and regain custody of her children.

DG My understanding of your questions to Ms. Cleveland was that you said the Tribe is not taking a position on the termination in this case. Is that correct?

MP No, we are- we do have a position-

DG You do have a position?

MP I had not understood that. Yes, we do not want a termination of parental rights.

DG And is that from the tribe, through you?

MP Yes.

DG Thank you, I don't have anything further. . .

[¶11] The second cross examination by M.N.'s attorney is not reproduced here as it relates mostly to M.N.

[¶12] Re-direct examination of Marilyn Poitra. SA = State's Attorney MP= Marlyin Poitra.

SA You've indicated that one of the reasons the tribe does not support termination is that the mother will be out- or released from her incarceration in May of 2021. Where did you receive that information?

MP From Mom.

SA Are you aware that her sentence goes until May of 2022?

MP No. I wasn't.

SA If the children continue to- and you're aware that the anticipated release or her anticipation with regard to release is based upon a number of factors including completing treatment and successfully appearing before the parole board?

MP Yes. I understand that.

SA So you're aware that that is not her actual release date. Her actual release date as it stands today is May 2022.

MP I didn't know that.

SA With regard to, you anticipate that she'll be finishing programming, are you aware that [J.B.] previously completed chemical dependency treatment in Tompkins prior to her release from prison on a prior occasion?

MP Yes. I knew she had completed treatment.

SA And she was unable to continue programming once she returned to the community?

MP Yes.

SA And there was involvement by Tribal Social Services to facilitate and support her and safety plan with [Maternal Uncle] during that period of time. but that was not sufficient to support maintaining stability and sobriety. You're aware of that?

MP Yes I am.

SA The- with regard to the oldest child [older sibling] in light of the fact that it's the position of the Tribe to not permanently alter parental rights concerning [K.B. and K.B.] why did the tribe then establish a permanent relationship in September of 2020 with regard to the older child [older sibling]?

MP What I was told- I asked case manager that and she never pursued the termination because the child was with the Uncle.

SA So it didn't have to do with the efforts of the mother or the progress that the mother was making but the placement of the child?

MP Yes.

SA For what period of time then with regard to [K.B. and K.B.] what period of time do you anticipate [J.B.] would need to establish . . . she needs to finish programming or continue programming once she's out of incarceration. What period of time after incarceration when she's no longer in a protective and restrictive environment would [J.B.] need to demonstrate stability and sobriety for you to believe the children should be returned to her care?

MP I believe it would have to be sometime in late summer you know. We're are looking at her if she can get paroled in May. I would believe it would be sometime in August that she would have everything where she would be able to start having overnights and where she would have placement certain times of the week until she has completed everything and has demonstrated to Cass County that she can maintain.

SA And what about with regard to [M.N.] you have had no contact with [M.N.] you are aware or based on [J.B.'s] statements that he was incarcerated. Are you familiar with the history of domestic violence as it relates to [J.B.] and [M.N.]?

MP Yes, I was told about that domestic violence.

SA And is that consistent with Native American parenting practices, subjecting children to domestic violence?

MP No, it isn't.

SA If the mother is continuing a relationship with [M.N.] and demonstrating and intent to do so, would that pose a concern for you?

MP Yes, it would.

SA Why?

MP I would be scared that the domestic violence continue and the drug use would continue then.

SA You stated that you anticipated overnights starting in August, but my real question was to- what period of time do you anticipate before the children are fully back with [J.B.] not just staying overnight with involvement of an other agency an external agency. But what period of time do you think stability, sobriety and safety would need to be demonstrated?

MP At least six months. And what I'm doing is I actually have a counterpart now that they're called IFPs. And I made contact with that lady, and she is going to start working with [J.B.] to help [J.B.] succeed.

SA Was that previously provided to her when she was working with Turtle Mountain tribal services as a result of [older sibling] being out of her care?

MP I can't really tell you what took place. I don't get involved with case management in our office so I really don't know what was offered to her.

SA What period of time- at what point does the children's permanency take priority in these cases? And I ask that because at some point the decision was that [older sibling] was in a permanent relationship with [maternal uncle]. [K.B.1] has been in care for 14 months, out of the mother's care for 14 months. At what point does permanency for the children become a priority as it relates to the Tribal interest?

MP Well I would hope that in the next six months that [J.B.] is able to demonstrate that she is able to care for her children. I would say after- at that point if she's not able to maintain then the tribe would have to be in agreement with a termination.

SA And [K.B.2]'s never been in her care because of her behaviors so that- so you're still 6 months regardless of whether it's [K.B.1] or [K.B.2]

MP Yes.

[¶13] Re-cross examination of Marilyn Poitra. DG = Daniel Gast, MP= Marlyin Poitra.

DG Ms. Poitra, you've testified in many of these types of cases in the past. Is that correct

MP Yes.

DG And you often do testify that the tribe would support a termination. Is that correct?

MP That's correct.

DG So it's not just that the tribe never supports termination, its that [J.B.] is doing specific things that offer you encouragement in this case. Is that correct?

MP That's correct.

MP She's been working with the tribe. Is that correct?

DG That's correct.

MP And you seen evidence that you- that the tribe feels she could successfully reunite with these kids.

DG That's a hopeful thought, yes.

MP And that's why the tribe doesn't support termination at this time.

DG That's correct.

MP And nothing in your discussions with Miss Cleveland just now has changed your position or the tribe's position on that?

DG No, we are still in agreement with the termination, I mean not terminating [J.B.'s] rights.

[¶14] The second re-cross examination by M.N.'s attorney is not reproduced here as it relates mostly to M.N.

[¶15] Third direct examination of Marilyn Poitra. SA = State's Attorney MP= Marlyin Poitra.

SA Ms. Poitra, I- just to caption something here that the- that reunification and [J.B.'s] efforts while she's incarcerated, that reunification is a hopeful thought. So far, with regard to [J.B.'s] behavior when she's out in the community, she hasn't been able to demonstrate after significant incarceration, intensive treatment at Tompkins, services, active efforts from the tribe, active efforts from Cass County, still has been unable to establish stability in order to regain custody of her oldest child, or her next child, and then never had custody of her youngest child. Is that consistent with having hopeful thoughts about reunification?

MP Yes. I was hoping that she can maintain and as I -inaudible- said I'm putting what's called an IFP and an ICWA worker that will help [J.B.] with anything she needs so I'm hoping for that in place and working with Cass

County and her brother. Because her brother by then will have placement of the girls. I am hoping all that will help [J.B.] succeed.

SA How will that be different from what's been done in the past?
I'm thinking that the IFP placed in there will give her a little more support because, her name is Sloan the IFP, and Sloan really is intense when she's working with the family. So I'm hoping that that just being involved with her almost daily will help her.

[¶16] The Indian heritage of the children was never an issue at or before trial. The Court and all parties accepted that the Indian Child Welfare Act applied to these children. The Court included such a statement in its findings. No party disputed Ms. Poitra's qualifications as a Qualified Expert Witness. No person other than Ms. Poitra was presented as a Qualified Expert Witness for compliance with the Indian Child Welfare Act.

ARGUMENT

[¶17] The juvenile court may terminate parental rights, providing: (1) the child is a deprived child; (2) the conditions and causes of the deprivation are likely to continue; and (3) the child is suffering, or will in the future probably suffer serious physical, mental, moral, or emotional harm. N.D.C.C. § 27-20-44(1)(b); In re C.R., 1999 ND 221, ¶ 4, 602 N.W.2d 520. The party seeking parental termination must prove all elements by clear and convincing evidence. Id. In addition state law requirements for parental termination, the requirements of the Indian Child Welfare Act, 25 U.S.C. § 1912 must be met, in cases involving an Indian child as defined by the Act. 25 U.S.C. § 1903(4); see also B.R.T. v. Executive Director of the Social Service Board of North Dakota, 391 N.W.2d 594, 598 (N.D. 1986). 25 U.S.C. § 1912(f) provides: No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the con-

tinued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. These state and federal provisions create a dual burden of proof for the party seeking parental termination of the parent of an Indian child, whereby the elements of state law must be proven by clear and convincing evidence and the federal requirement, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, must be satisfied with proof beyond a reasonable doubt. See Matter of Bluebird, 411 S.E.2d 820, 823 (N.C. App. 1992).

[¶18] On appeal, the Supreme Court reviews the juvenile court's decision regarding termination of parental rights and examine the evidence in a manner similar to a trial de novo. In re A.M., 1999 ND 195, ¶ 7, 601 N.W.2d 253. The Supreme Court is not bound by the juvenile court's findings, but gives them appreciable weight and gives deference to the juvenile court's decision, because that court had an opportunity to observe the candor and demeanor of the witnesses. Id.

[¶19] Rule 52(a) N.D.R.Civ.P provides that finds of fact in juvenile matters shall not be set aside unless they are clearly erroneous. In the Interest of T.F., 2004 ND 126, ¶ 8, 681 N.W.2d 786. The juvenile court's conclusions of law are fully reviewable. Id.

[¶20] The Indian Child Welfare Act (ICWA) was enacted in 1978 in response to a crisis affecting American Indian and Alaska Native children, families, and tribes.

www.nicwa.org. Studies revealed that large numbers of Native children were being separated from their parents, extended families, and communities by state child welfare and private adoption agencies. Id. In fact, research found that 25%–35% of all Native children

were being removed; of these, 85% were placed outside of their families and communities—even when fit and willing relatives were available. Id. At the time, not only was ICWA vitally needed, but it was crafted to address some of the most longstanding and egregious removal practices specifically targeting Native children. Id. Because these added protections address not only specific systems abuses directed at Native children—but also their unique political status and cultural considerations—ICWA has been labeled “the gold standard” of child welfare policy by experts and national leading child advocacy organizations far beyond Indian Country. Id.

[¶21] In the case at hand, the only issue presented is whether the Qualified Expert Witness’s testimony satisfied the requirements of the Indian Child Welfare Act. The following exchange is at issue:

SA At this time, is custody of the children [K.B. and K.B.] by a parent likely to cause serious emotional or physical damage to the children?

MP I believe that because Mom's incarcerated she can't care for her children-

SA Sorry I didn't mean to interrupt you Marilyn.

MP That's all right. I was just gonna say that I believe it would have been a different situation if she wasn't incarcerated.

Undoubtedly, the State will assert that this exchange alone satisfies the requirements of ICWA. However, this exchange is not a clear answer to the question presented. Ms. Poitra states that “because Mom’s incarcerated, she can’t care for her children.” She does not say that continued custody will result in serious emotional or physical harm. Furthermore, Ms. Poitra in her later testimony states that a termination will result in serious emotional harm to the children. She also provides the following testimony:

DG Do you think that its- , those- There wouldn't be any damage to the children if the court does not terminate at this time?

MP That's correct.

While this exchange may not be eloquent, it is clear that Ms. Poitra's testimony does not fulfill the requirements of ICWA. Throughout her testimony, Ms. Poitra makes it clear that the tribe does not support termination in this case.

[¶22] The standard of proof here is beyond a reasonable doubt. Not only does Ms. Poitra state that the Tribe opposes termination and that a termination will result in serious emotional harm, she also states that she did not understand one of the State's questions when it was clarified on cross examination.

DG My understanding of your questions to Ms. Cleveland was that you said the Tribe is not taking a position on the termination in this case. Is that correct?

MP No, we are- we do have a position-

DG You do have a position?

MP I had not understood that. Yes, we do not want a termination of parental rights.

While this statement doesn't directly contradict the response to the State's question about serious emotional or physical damage, it does call into question the veracity of that answer. Given Ms. Poitra's testimony as a whole it is clear that she and the Tribe did not support termination. At the very least, the testimony did not support termination "beyond a reasonable doubt."

CONCLUSION

[¶23] For the preceding reasons the Appellant requests that this Court reverse the Order Terminating Parental rights as it relates to the Appellant, J.B. and her children K.B. and K.B.

Respectfully submitted this 8th Day of April, 2020

The Law Office of Daniel Gast

/s/ Daniel Gast
Daniel Gast (ND #01639)
Sole Practitioner
P.O. Box 1511
Fargo, ND 58107
701-730-7408
GastLawOffice@gmail.com
Attorney for Appellant/Respondent

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Turtle Mountain Band of Chippewa, Tribe,)	
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Respondents,)	
and)	
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J.B., mother,)	
)	
Respondent/Appellant.)	CERTIFICATE OF COMPLIANCE

[¶ 1] Daniel Gast hereby certifies that he is the Attorney for the Appellant/Respondent in the above entitled matter. And certifies that the Brief of the Appellant and the Appendix to the Brief of the Appellant comply with the page limitation rules. The Brief contains 19 pages and the appendix contains 25 pages.

Dated this 8th Day of April 2021

The Law Office of Daniel Gast

/s/ Daniel Gast
Daniel Gast (ND #06139)
Sole Practitioner
P.O. Box 1511
Fargo, ND 58107
701-730-7408
GastLawOffice@gmail.com
Attorney for Respondent

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Cass Co. Case Nos.: 09-2020-JV-254
09-2020-JV-268

Supreme Ct. No.:

AFFIDAVIT OF SERVICE

[¶ 1] Daniel Gast hereby certifies that he is the Attorney for the Appellant/Respondent in the above entitled matter.

On April 8, 2021 the following documents

Notice of Appeal and Order for Transcripts, Brief of Appellant, and Appendix to Brief of Appellant
were served electronically on the following:

Constance Cleveland
Assistant State's Attorney
ClevelandC@casscountynd.gov

Jane Sundby
Attorney for Respondent T.V.
jane@sundbylaw.com

Janette Olsen
Lay Guardian ad Litem
jolsen@youthworksnd.org

Christopher Jones
Exec Dir Dep't Human Services
ChrisDJones@nd.gov

And by mail upon the following:

Turtle Mountain Band of Chippewa
PO Box 900
Belcourt, ND 58316

J.B., indigent respondent/appellant
440 McKenzie St.
New England, ND 58647

Dated this 8th Day of April, 2021

/s/ Daniel Gast

Daniel Gast (ND #06139)

Sole Practitioner

P.O. Box 1511

Fargo, ND 58107

701-730-7408

GastLawOffice@gmail.com

Attorney for Respondent

IN THE SUPREME COURT OF NORTH DAKOTA

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Meagan Dahl, L.B.S.W., Cass County and the
 State of North Dakota,

Petitioner and Appellee,

vs.

K.B., a child; K.B., a child; M.N., father;
 Janette Olsen, Guardian ad Litem; and
 Turtle Mountain Band of Chippewa, Tribe,

Respondents,

and

J.B., mother,

Respondent/Appellant.

Cass Co. Case Nos.: 09-2020-JV-254
 09-2020-JV-268

Supreme Ct. No.: 2021-0109
 2021-0110

AFFIDAVIT OF SERVICE

[¶ 1] Daniel Gast hereby certifies that he is the Attorney for the Appellant/Respondent in the above entitled matter.

On April 13, 2021 the following documents

Undated Brief of Appellant

were served electronically on the following:

Constance Cleveland
 Assistant State's Attorney
ClevelandC@casscountynd.gov

Jane Sundby
 Attorney for Respondent T.V.
jane@sundbylaw.com

Janette Olsen
 Lay Guardian ad Litem
jolsen@youthworksnd.org

Christopher Jones
 Exec Dir Dep't Human Services
ChrisDJones@nd.gov

Marilyn Poitra
 Turtle Mountain Band of Chippewa
marilynp@tmcwfs.net

And by mail upon the following:
 J.B., indigent respondent/appellant
 440 McKenzie St.
 New England, ND 58647

Dated this 13th Day of April, 2021

/s/ Daniel Gast

Daniel Gast (ND #06139)

Sole Practitioner

P.O. Box 1511

Fargo, ND 58107

701-730-7408

GastLawOffice@gmail.com

Attorney for Respondent