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answer as an admission. If the court chooses to treat the answer as an admission, it should thereafter entertain any motion the guarantor might make to withdraw such admission, and the court should exercise its discretion under Rule 36 with regard to such motion.

CONCLUSION

We conclude that the district court abused its discretion when it treated the guarantor's answer regarding the prepayment fee as a denial in contravention of Rule 36. Because the answer in evidence should have been treated under Rule 36 as an admission that the guarantor owed a prepayment fee, the court erred when it ignored the admission, considered the terms of the note, and determined that the guarantor did not owe a prepayment fee and was entitled as a matter of law to partial summary judgment on the prepayment fee issue. We therefore reverse the order sustaining the guarantor's motion for partial summary judgment, and we remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. ELISE M., APPELLANT, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

825 N.W.2d 173

Filed December 14, 2012. Nos. S-11-659, S-11-660.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court under the Indian Child Welfare Act is reviewed for an abuse of discretion.
2. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

3. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
4. **Indian Child Welfare Act: Parental Rights: Case Disapproved.** To the extent *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), can be read as holding that a foster placement proceeding and a subsequent termination of parental rights proceeding involving an Indian child are not separate and distinct under the federal Indian Child Welfare Act of 1978 and the Nebraska Indian Child Welfare Act, it is disapproved.
5. **Indian Child Welfare Act: Jurisdiction: Case Overruled.** To the extent that *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), permits a state court to consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court, it is overruled.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, ROGER J. HEIDEMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Norman Langemach for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Christopher M. Turner for appellee.

Rita Grimm and Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for intervenor-appellee.

Hazell G. Rodriguez, guardian ad litem.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Zylena R. and Adrionna R. are Indian children who were adjudicated by the separate juvenile court of Lancaster County under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placed in foster care. When the State filed motions to terminate parental rights, the Omaha Tribe of Nebraska (the Tribe) sought to transfer the proceedings to the Omaha Tribal Court pursuant to the federal Indian Child Welfare Act of

1978 (ICWA)[1] and the Nebraska Indian Child Welfare Act (NICWA).[2] The juvenile court denied the requested transfers based upon its finding that the motions were filed at an "advanced stage" of the juvenile proceedings. The Nebraska Court of Appeals affirmed in a memorandum opinion, rejecting the argument of the mother and the Tribe that under ICWA and NICWA, a court should treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether a juvenile case pending in state court has reached an advanced stage at the time a motion is made to transfer the case to tribal court.[3] We granted the mother's petition for further review, in which the Tribe has joined, to consider this question.

BACKGROUND

Elise M. and Francisco R. are the biological parents of Zylena, born in June 2007, and Adrionna, born in December 2008. Elise has been an enrolled member of the Tribe since 1991. Francisco is not an enrolled member and is not eligible for enrollment. This appeal involves two separate cases which were filed in the separate juvenile court and eventually consolidated.

In the case which is before us as No. S-11-659, the State filed a petition on June 20, 2008, alleging that Zylena was a child as defined by § 43-247(3)(a) as a result of the fault or habits of Elise. An amended petition filed on July 1 alleged that Zylena was a child as defined by § 43-247(3)(a) by reason of the fault or habits of both Elise and Francisco. On or about July 9, the State mailed a copy of the amended petition and a notice to the Omaha Tribal Council. The notice stated that Zylena was a member of or may be eligible for membership in the Tribe. The notice further stated that the Tribe could intervene in the case and that the action "may result in restriction of

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[1] 25 U.S.C. § 1901 et seq. (2006).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

[3] *In re Interest of Zylena R. & Adrionna R.*, Nos. A-11-659, A-11-660, 2012 WL 1020275 (Neb. App. Mar. 27, 2012) (selected for posting to court Web site).

parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." On July 16, the Tribe informed the State that Zylena was not an enrolled member and was not eligible for enrollment. Zylena was adjudicated on September 22, 2008.

The case which is before us as No. S-11-660 was commenced by the filing of a petition in the separate juvenile court on May 1, 2009. In this petition, the State alleged that both Zylena and Adrionna were minor children as defined by § 43-247(3)(a) by reason of the fault or habits of Elise and Francisco. Both children were adjudicated on May 12. They were placed with their current foster family on May 29. At that time, the permanency objective for both children was reunification with their parents.

In October 2010, an employee of the Nebraska Department of Health and Human Services realized that notice had not been sent to the Tribe with respect to Adrionna. She then sent a notice to the Tribe and inquired whether Adrionna was an enrolled member or eligible for membership. The notice included a statement that the pending action could result in removal of the child from the home or termination of parental rights and adoption. The department did not receive a response from the Tribe.

From and after May 29, 2009, various services were provided to Elise and Francisco by the State of Nebraska. Neither Elise nor Francisco made measurable progress toward rehabilitation. In November 2010, the permanency objective was changed from reunification to adoption. And on February 7, 2011, the State filed motions in each case seeking to terminate the parental rights of Elise and Francisco to both children.

In case No. S-11-660, the case involving both children, the Tribe filed a notice of intervention on February 14, 2011, and a notice of intent to transfer on February 22. The latter motion asserted that Zylena and Adrionna were eligible for enrollment in the Tribe and requested that the case be transferred to tribal court pursuant to § 43-1503(4). The Tribe filed similar documents in case No. S-11-659 on March 1.

At a hearing on the Tribe's motions, the State and the guardian ad litem orally objected to the requested transfers

without specifically stating the grounds for their objection. A representative of the Tribe testified that, due to a mathematical error, it had incorrectly determined in July 2008 that Zylena was not eligible for enrollment. The Tribe presented evidence that both children are eligible for enrollment through Elise. The Tribe first realized its error in late January or early February 2011. A tribal representative testified that but for the mistake, the Tribe likely would have moved to intervene sooner. A representative also testified that a tribal court would work to reunify the family, but would not terminate parental rights. She explained that a long-term guardianship could be established for the children by the tribal court. The representative further testified that if the cases were transferred, the Tribe intended to keep the children in their current foster care placement.

The State presented evidence that it was in the best interests of the children to remain in their current foster care placement. In addition, the foster mother testified that she and her husband were willing to adopt the children and that if they did so they intended to integrate the children's cultural traditions into their lives. A state caseworker reviewed the proposed case plan prepared by the Tribe and opined that it was essentially the same case plan the State had been implementing since the proceedings began 2 years prior.

In orders entered on June 30, 2011, the juvenile court denied the Tribe's motions to transfer to tribal court. In case No. S-11-659, the case involving only Zylena, the juvenile court found that the case had been pending since June 2008, that Zylena was adjudicated in September 2008, that the permanency plan of adoption was approved in November 2010, that a motion to terminate parental rights was filed, and that the Tribe had not filed its notice of intent to transfer until March 1, 2011, despite receiving notice in July 2008. The court concluded that the proceeding was at an advanced stage and that because the Tribe had not filed its motion to transfer "for 32 months after receiving original notice, good cause has been shown to deny the transfer." In case No. S-11-660, the case involving both children, the juvenile court noted that the petition was filed in May 2009; that numerous hearings

had been held; that a permanency plan of adoption had been approved on November 4, 2010; that a motion to terminate parental rights was filed; and that the Tribe had not filed its notice of intent to transfer until February 22, 2011. The court concluded that because the proceeding was at an advanced stage when the Tribe requested transfer, "good cause has been shown to deny the transfer." The juvenile court did not make findings in either case as to whether transfer was in the best interests of the children.

Elise filed a timely appeal in each case, and the Tribe cross-appealed. Elise assigned that the juvenile court erred in denying the motion to transfer, arguing that in determining whether the proceedings were at an "advanced stage" when the motions to transfer were filed, the court should have considered only the time after the filing of the petitions to terminate parental rights, and not the preceding period when the children were placed in foster care.

In affirming the judgments of the juvenile court, the Court of Appeals relied on three prior Nebraska cases,[4] including one from this court, in concluding that "it is the policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage."[5] Utilizing this standard, the court determined that the Tribe had filed its motion to transfer "1 week after the State filed a motion to terminate parental rights and nearly 2 years after Zylena and Adrionna were placed with their current foster family."[6] Citing our opinion in *In re Interest of Bird Head*,[7] the Court of Appeals noted that "ICWA does not change the cardinal rule that the best interests of the child are

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[4] *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *disapproved on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *6.

[6] *Id.* at *7.

[7] *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983).

paramount, although it may alter its focus."[8] The court noted that the children were being well cared for in a home that "appears to be committed to fostering their Native American heritage" and concluded that "the present situation is clearly in the children's best interests."[9] For these reasons, the Court of Appeals concluded that the juvenile court had not abused its discretion in finding that good cause existed to deny the motions to transfer.

ASSIGNMENT OF ERROR

Elise assigns, summarized and consolidated, that the Court of Appeals erred in finding the juvenile court had good cause to deny her motion to transfer to tribal court. The Tribe filed a response to the petition for further review, joining in Elise's assignment of error.

STANDARD OF REVIEW

[1] This court has not specifically articulated a standard for reviewing the order of a juvenile court on a motion to transfer a case to tribal court. But in *In re Interest of C.W. et al.*,[10] we held that a Nebraska juvenile court had discretionary authority to vacate an order transferring a case to a tribal court and that it did not abuse its discretion in doing so. In subsequent cases, the Court of Appeals has stated that a denial of a transfer to tribal court is reviewed for an abuse of discretion.[11] We agree that this is the appropriate standard of review.

ANALYSIS

ICWA was enacted by Congress in 1978. Its stated purpose is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes

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[8] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

[9] *Id.*

[10] *In re Interest of C.W. et al., supra* note 4.

[11] See, *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007).

> and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[12]

ICWA is based upon an assumption that protection of an Indian child's relationship to the tribe is in the child's best interests.[13] The Act "'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.'"[14] The U.S. Supreme Court has observed that ICWA 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.'"[15]

NICWA was enacted by the Nebraska Legislature in 1985[16] "to clarify state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act."[17] The Legislature declared that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced."[18]

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[12] § 1902. See *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[13] See, *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); *In re Interest of C.W. et al., supra* note 4.

[14] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[15] *Id.*

[16] 1985 Neb. Laws, L.B. 255.

[17] § 43-1502.

[18] *Id.*

Under ICWA and NICWA, "Indian child" means any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in a tribe as the biological child of a member of a tribe.[19] Both Zylena and Adrionna meet that definition. If an Indian child resides or is domiciled within the reservation of a tribe, that tribe has exclusive jurisdiction over any child custody proceeding.[20] But when an Indian child does not reside or is not domiciled on his or her tribe's reservation, as is the case here, state courts may exercise jurisdiction over the child concurrently with tribal courts.[21] However, a state court must refer "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child" to a tribal court if the tribe or either parent petitions for transfer, unless "good cause" is shown for the retention of state court jurisdiction.[22] At a hearing on a petition to transfer a proceeding to tribal court, the party opposing the transfer has the burden of establishing that good cause not to transfer exists.[23] The U.S. Supreme Court has characterized these provisions of ICWA as creating "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation."[24]

"Good cause" is not defined in either ICWA or NICWA. However, nonbinding guidelines published by the Bureau of Indian Affairs (BIA Guidelines) provide that good cause not to transfer a proceeding may exist if the proceeding is "at an advanced stage" when the petition to transfer was received and the petitioner failed to "file the petition promptly" after receiving notice.[25] We have looked to the BIA Guidelines in the past

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[19] § 1903(4); § 43-1503(4).

[20] § 1911(a); § 43-1504(1).

[21] See, § 1911(b); § 43-1504(2).

[22] *Id*.

[23] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13; *In re Interest of C.W. et al., supra* note 4.

[24] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 36.

[25] See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591, C.3(b)(i) (Nov. 26, 1979) (not codified).

in determining good cause issues under ICWA and NICWA.[26] Various other courts have done likewise.[27]

To resolve this appeal, we must address two questions. First, what constitutes a "proceeding" within the meaning of ICWA, NICWA, and the BIA Guidelines? And second, should a Nebraska court apply the "best interests of the child" standard of the Nebraska Juvenile Code in deciding whether to transfer a child custody proceeding involving an Indian child to a tribal court for disposition? Our opinion in *In re Interest of C.W. et al.*[28] is pertinent to both questions.

In *In re Interest of C.W. et al.*, the juvenile court sustained a motion to transfer to tribal court filed shortly before trial on a petition to terminate parental rights, but then vacated its transfer order before the trial commenced. After conducting a trial and determining that parental rights of the mother and putative fathers of the children should be terminated, the juvenile court transferred the case to tribal court for "the dispositional phase of the proceeding."[29] On appeal, the mother argued that the juvenile court erred in vacating the pretrial transfer order. In a cross-appeal, the State argued that the juvenile court erred in ordering transfer to tribal court after trial.

In rejecting the mother's argument, we noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[30] While it is not entirely clear from the opinion, it appears that this time period included juvenile court proceedings which occurred both before and after the filing of the motion to terminate parental rights. Thus, although we did not specifically address the issue presented in the instant

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[26] *In re Interest of C.W. et al., supra* note 4. See, also, *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[27] See, e.g., *People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005); *In re Adoption of S.W.*, 41 P.3d 1003 (Okla. Civ. App. 2001); *In re A.P.*, 25 Kan. App. 2d 268, 961 P.2d 706 (1998); *Matter of M.E.M.*, 195 Mont. 329, 635 P.2d 1313 (1981).

[28] *In re Interest of C.W. et al., supra* note 4.

[29] *Id.* at 821, 479 N.W.2d at 110.

[30] *Id.* at 830, 479 N.W.2d at 115.

cases, our reasoning in *In re Interest of C.W. et al.* implicitly supports the State's argument that a "proceeding" includes everything that transpires after the filing of a petition invoking the jurisdiction of the juvenile court under § 43-247(3)(a). In reversing the posttrial transfer order, we noted with approval decisions by courts in Arizona and Indiana recognizing that the best interests of the child should be considered in determining whether there is good cause to deny a requested transfer to tribal court. We concluded:

> Although we realize that the guidelines deem inappropriate considerations of tribal socioeconomic considerations and the perceived adequacy of the tribal or Bureau of Indian Affairs social services or judicial systems, we also recognize that, in the case of two of the children, those considerations become necessary to a determination of the best interests of the children and, therefore, "good cause" not to transfer the case.[31]

We reasoned that two of the children had special needs and would suffer "if their respective foster homes, the only stability they have ever known, are taken away from them."[32] We now revisit our holdings in *In re Interest of C.W. et al.* to determine whether they are consistent with ICWA and NICWA.

What Constitutes "Proceeding"?

Elise and the Tribe focus on the language of ICWA and NICWA governing transfer to tribal court of a state court proceeding "for the foster care placement of, *or* termination of parental rights to," an Indian child not residing on a reservation, in the absence of good cause to the contrary.[33] They argue that the use of the disjunctive "or" demonstrates a foster care proceeding differs from a termination of parental rights proceeding under ICWA and NICWA and that therefore the two should not be lumped together in considering whether a motion to transfer is made at an "advanced stage" of the proceeding. The State and the guardian ad litem argue that under the

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[31] *Id.* at 835-36, 479 N.W.2d at 118.

[32] *Id.* at 836, 479 N.W.2d at 118.

[33] § 1911(b); § 43-1504(2) (emphases supplied).

reasoning of *In re Interest of C.W. et al.*,[34] the juvenile court properly considered everything which had occurred after the initial filing of these cases in determining that the proceedings had reached an advanced stage when the Tribe moved to transfer. They also refer us to two prior opinions of the Court of Appeals[35] and an Illinois appellate court decision supporting this position.[36] In deciding *In re Interest of C.W. et al.*, we did not apply principles of statutory construction to determine whether, under ICWA and NICA, a termination of parental rights proceeding should be regarded as separate and distinct from a foster care placement proceeding which preceded it in the same docketed case. We do so now.

Under the definitional sections of ICWA and NICWA, the term "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[37] Foster care placement is specifically defined to mean "any action removing an Indian child from its parent or Indian custodian for temporary placement."[38] Termination of parental rights means "any action resulting in the termination of the parent-child relationship."[39] Preadoptive placement means "temporary placement of an Indian child . . . after the termination of parental rights."[40] And adoptive placement means "the permanent placement of an Indian child for adoption."[41] As we have noted, the statutory provisions governing transfer provide that in any state court "proceeding for the foster care placement of, or termination of parental rights to" an Indian child not domiciled

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[34] *In re Interest of C.W. et al., supra* note 4.

[35] *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[36] *In re M.H.*, 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

[37] § 1903(1); 43-1503(1).

[38] § 1903(1)(i); § 43-1503(1)(a).

[39] § 1903(1)(ii); § 43-1503(1)(b).

[40] § 1903(1)(iii); § 43-1503(1)(c).

[41] § 1903(1)(iv); § 43-1503(1)(d).

or residing within a reservation, a state court shall grant a motion to transfer to tribal court "in the absence of good cause to the contrary."[42]

[2,3] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[43] Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[44] Applying these familiar principles, we conclude that ICWA and NICWA contemplate four different types of child custody proceedings, two of which must be transferred from a state court to a tribal court upon proper motion in the absence of good cause to the contrary. Thus, when the BIA Guidelines state that good cause may exist when "[t]he proceeding was at an advanced stage" at the time a petition to transfer is received, they can only be referring to one of the two proceedings subject to transfer: foster care placement *or* termination of parental rights. The State's argument that a foster care placement proceeding and a termination of parental rights proceeding are a single "proceeding" for purposes of the "advanced stage" analysis is inconsistent with the plain language of ICWA and NICWA, which defines them as separate proceedings. The fact that Nebraska law permits both objectives to be pursued sequentially in a single-docketed case is entirely irrelevant to the question of whether they are separate "proceedings" under the plain statutory language of ICWA and NICWA.

At least two other state courts have reached this conclusion. The North Dakota Supreme Court in *In re A.B.*[45] held that a juvenile court "correctly interpreted ICWA to measure the

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[42] § 1911(b); § 43-1504(2).

[43] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010); *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[44] *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009); *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

[45] *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003).

relevant time period for a motion to transfer jurisdiction . . . from the filing of the petition to terminate parental rights." This was so even though there was a preceding foster placement in the same docketed case. In *In re A.B.*, the court noted that its holding was based on the plain language of ICWA separately defining termination of parental rights proceedings and foster placement proceedings and the different purposes served by those proceedings under ICWA. Specifically, the court found that the "plain language of 25 U.S.C. § 1911(b) authorizes transfer motions for either foster care placement proceedings or for termination of parental rights proceedings" and that interpreting the two proceedings as one "would subsume an Indian tribe's right to request transfer of a termination proceeding into its right to request transfer of an earlier foster placement proceeding."[46] The court reasoned that doing so was particularly troubling when a foster care placement only temporarily affects an Indian child's relationship with his or her tribe, while a termination proceeding severs that relationship.

A Minnesota appellate court employed similar reasoning in concluding that foster placement proceedings and termination of parental rights proceedings were separate and distinct under ICWA and should not be "conflated" in determining whether a "proceeding" is at an "advanced stage" within the meaning of the BIA Guidelines.[47] The court noted that whether Minnesota law considered the two types of proceedings to be "continuous or distinct" was not pertinent to the issue of transfer, which was governed by the statutory language of ICWA.[48] It further reasoned that a tribe's interest in maintaining its relationship with an Indian child may not be implicated in a foster care placement proceeding to the same degree as in a termination proceeding.[49]

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[46] *Id.*

[47] *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007).

[48] *Id.* at 352 n.6.

[49] *In re Welfare of Children of R.M.B.*, *supra* note 47.

We acknowledge that an Illinois appellate court reached a contrary conclusion in *In re M.H.*[50] That court rejected an argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court noted that under settled Illinois law, the filing of a petition to terminate parental rights did not initiate an entirely new proceeding within an existing juvenile case and concluded that the plain language of ICWA did not support a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same docketed case. Accordingly, the court concluded that under the plain language of ICWA, the "proceedings" commenced when the child was placed in foster care and the tribe's motion to transfer more than 2 years later was made at an advanced stage of the proceeding, constituting good cause for denying the motion.[51]

The record in this case vividly demonstrates why the reasoning of the Illinois court is inconsistent with the principles underlying ICWA and NICWA. A representative of the Tribe testified that placement of Indian children with foster parents, relatives, or a long-term guardian is consistent with the Tribe's cultural interests but that termination of parental rights is not. Thus, a Tribe may have no reason to seek transfer of a foster placement proceeding where it agrees with the Indian child's placement and the permanency goal is reunification with the parents. However, once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court. As one court has noted, "[s]upporting the State's reunification efforts should not result in allegations of a Tribe's lack of diligence in requesting transfer" when the proceeding becomes one for the termination of parental rights.[52]

[4] Accordingly, to the extent *In re Interest of C.W. et al.*[53] can be read as holding that a foster placement proceeding and a

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[50] *In re M.H., supra* note 36.

[51] *Id.* at ¶ 59, 956 N.E.2d at 522, 353 Ill. Dec. at 660.

[52] *In re M.S.*, 237 P.3d 161, 169 (Okla. 2010).

[53] *In re Interest of C.W. et al., supra* note 4.

subsequent termination of parental rights proceeding involving an Indian child are not separate and distinct under ICWA and NICWA, it is disapproved. Here, the relevant proceedings commenced on February 7, 2011, when the State filed its motions to terminate parental rights. The Tribe intervened and requested transfer of both cases by March 1, which was prior to any substantive hearing or adjudication and indeed prior to the parents' appearances and pleas to the termination motions. The commentary to the BIA Guidelines indicates that denial of a requested transfer at an "advanced stage" of a proceeding serves the purpose of preventing a party from waiting "until the case is almost complete to ask that it be transferred to another court and retried."[54] That was clearly not the case here, as the termination of parental rights proceedings had barely begun when the Tribe requested that they be transferred to tribal court.

Best Interests

The juvenile court made no findings as to whether transfer to tribal court would be in the best interests of these Indian children. But the Court of Appeals did. It noted that the children had been out of their parents' home for 2 years, that they were being well cared for in a home that "appears to be committed to fostering their Native American heritage," and that "the present situation is clearly in the children's best interests."[55] The court included this best interests determination as one of the reasons for its conclusion that the juvenile court did not abuse its discretion in denying the motions to transfer.

As the legal underpinning of its best interests analysis, the Court of Appeals relied on this court's decision in *In re Interest of Bird Head*.[56] In that case, we held that a county court did not err in denying a motion to transfer on grounds that the motion had been abandoned and good cause had been shown. We then turned to a separate issue, whether the county

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[54] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,590, C.1, commentary.

[55] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

[56] *In re Interest of Bird Head, supra* note 7.

court erred in failing to follow the preferential preadoptive placement provisions of ICWA in the absence of good cause to the contrary. We concluded that it did, noting that the county court had made no findings as to what good cause was shown to warrant failure to place the child with persons or agencies having preference under ICWA.[57] In reaching this conclusion, we stated that ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."[58] In this case, the Court of Appeals cited that statement as the basis for its best interests findings. But that reliance was misplaced, because in *In re Interest of Bird Head*, that principle was stated in the context of the issue of placement, not transfer to tribal court.

But in *In re Interest of C.W. et al.*, we clearly did determine that the best interests of Indian children was a factor to be considered in deciding whether to transfer a state court proceeding to tribal court. We relied on decisions of Arizona[59] and Indiana[60] courts in reaching this conclusion. But other state courts have taken a contrary and what we now believe to be a better approach. In *In re A.B.*, the North Dakota Supreme Court stated:

> Although one of the goals of ICWA is to protect the best interests of an Indian child, . . . the issue here is the threshold question regarding the proper forum for that decision. . . . We agree with those courts that have concluded the best interest of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court.[61]

One of the cases which the North Dakota court found persuasive was *Yavapai-Apache Tribe v. Mejia*,[62] in which a Texas

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[57] See § 1915(b).

[58] *In re Interest of Bird Head, supra* note 7, 213 Neb. at 750, 331 N.W.2d at 791.

[59] *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983).

[60] *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

[61] *In re A.B., supra* note 45, 663 N.W.2d at 633-34 (citations omitted).

[62] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995).

appellate court held that the best interests standard is not an appropriate consideration in a determination of whether good cause exists to deny transfer of jurisdiction for two reasons. First, the court concluded that applying the best interests standard to transfer decisions would defeat the purpose for which ICWA was enacted by allowing "Anglo cultural biases into the analysis."[63] The court reasoned:

> The ICWA precludes the imposition of Anglo standards by creating a broad presumption of jurisdiction in the tribes. Thus, the jurisdictions [sic] provisions in sections 1911(a) and (b) are at the very heart of the ICWA. We decline to embrace a test that would, in our judgment, eviscerate the spirit of the Act.[64]

Second, the Texas court rejected the best interests standard because it deemed it relevant to issues of placement, not jurisdiction. The court stated:

> For a court to use this standard when deciding a purely jurisdictional matter, alters the focus of the case, and the issue becomes not what judicial entity should decide custody, but the standard by which the decision itself is made. The utilization of the best interest standard and fact findings made on that basis reflects the Anglo-American legal system's distrust of Indian legal competence by its assuming that an Indian determination would be detrimental to the child.[65]

Other courts have followed similar reasoning in holding that best interests should not be a factor in resolving the issue of whether there is good cause to deny a motion to transfer a case involving an Indian child from state court to tribal court.[66]

[5] We now conclude that these decisions are more consistent with the underlying purpose of ICWA and NICWA than the Indiana and Arizona cases we cited in *In re Interest*

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[63] *Id.* at 169.

[64] *Id.* at 170.

[65] *Id.*

[66] See, *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994); *Matter of Ashley Elizabeth R.*, 116 N.M. 416, 863 P.2d 451 (N.M. App. 1993); *In re Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060, 141 Ill. Dec. 14 (1990).

of C.W. et al. We further note that the BIA Guidelines do not include the best interests of a child as "good cause" for denying transfer to a tribal court, but instead, specifically state that "[s]ocio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."[67] The reality is that both a juvenile court applying Nebraska law and a tribal court proceeding under ICWA must act in the best interests of an Indian child over whom they have jurisdiction. The question before a state court considering a motion to transfer to tribal court is simply which tribunal should make that decision. Permitting a state court to deny a motion to transfer based upon its perception of the best interests of the child negates the concept of "presumptively tribal jurisdiction" over Indian children who do not reside on a reservation and undermines the federal policy established by ICWA of ensuring that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[68] Stated another way, recognizing best interests as "good cause" for denying transfer permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests. By enacting ICWA, Congress clearly stated otherwise. Accordingly, we overrule *In re Interest of C.W. et al*.[69] to the extent that it permits a state court to consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court.

CONCLUSION

For the reasons discussed, we conclude that there is no basis on the records for a determination that the motions to transfer these cases to tribal court were filed at an advanced stage of

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[67] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,591, C.3(c).

[68] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 36-37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[69] *In re Interest of C.W. et al., supra* note 4.

the proceedings to terminate parental rights and that the Court of Appeals therefore erred in affirming the separate juvenile court's denial of the motions on this ground. Accordingly, we reverse, and remand to the Court of Appeals with directions to reverse the judgments of the separate juvenile court and direct that court to sustain the motions to transfer the cases to the Omaha Tribal Court.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

HEAVICAN, C.J., dissenting.

I respectfully dissent. I would find that the proceedings in these consolidated cases were at an advanced stage and that good cause existed for the juvenile court to retain jurisdiction and to deny the requests to transfer. As such, I would affirm the decisions of the juvenile court.

As noted by the majority, we addressed, albeit implicitly, the issue presented here in *In re Interest of C.W. et al.*,[1] where this court noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[2] We also noted in *In re Interest of C.W. et al.* that it was appropriate for the juvenile court to consider the best interests of the child in determining good cause to deny a transfer.[3] Since our decision in that case, the Court of Appeals has twice considered the entire pendency of a juvenile abuse and neglect proceeding when affirming the juvenile court's denial of a motion to transfer to tribal courts on the ground that the motion was filed at an advanced stage of the proceeding.[4]

Moreover, this position is consistent with other authority. The Illinois Court of Appeals in *In re M.H.*,[5] rejected an

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[1] *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

[2] *Id.* at 830, 479 N.W.2d at 115.

[3] *In re Interest of C.W. et al., supra* note 1.

[4] See, *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re M.H.*, 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court in *In re M.H.* explicitly addressed and rejected the reasoning of the North Dakota Supreme Court in *In re A.B.*,[6] which is relied upon by the majority, and concluded it did not find that the plain language of ICWA supported a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same docketed case.

In my view, the conclusion that a new "proceeding" is not initiated by the filing of a motion to terminate parental rights is an appropriate balance of the interests of all the stakeholders in a juvenile case. An Indian tribe unquestionably has an interest in "protect[ing] the best interests of Indian children and [in] promot[ing] the stability and security of Indian tribes,"[7] and Indian children should be placed whenever possible in homes that "will reflect the unique values of Indian culture."[8] But the State also has a parens patriae interest[9] and has a right to protect the welfare of its resident children,[10] which includes establishing permanency for those children.[11] By requiring notice and freely allowing intervention, at least in nonadvanced stages of the proceedings, the Tribe is permitted sufficient opportunity to protect its interest while not interfering with the welfare and best interests of children residing in Nebraska. By curtailing the right of transfer after a certain point, the State is allowed to pursue permanency on behalf of children who are not able to be returned to their parental home.

In this instance, the Tribe was given notice of these proceedings. In Zylena's case, the amended petition to adjudicate was filed on July 1, 2008, and notice was sent to the Tribe on

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[6] *In re A.B.*, 663 N.W.2d 625 (N.D. 2003).

[7] See 25 U.S.C. § 1902 (2006).

[8] *Id.*

[9] See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[10] See *id.*

[11] Neb. Rev. Stat. § 43-246(6) (Cum. Supp. 2012). Cf. Neb. Rev. Stat. § 43-1312 (Cum. Supp. 2012).

July 9. By July 16, the Tribe responded, indicating that Zylena was not an enrolled member of the Tribe and that she was not eligible for enrollment. With Adrionna, a petition to adjudicate was not filed until May 1, 2009, and notice was admittedly not sent until October 2010. But notice was sent, and the Tribe did not seek to intervene until February 14, 2011, or a week *after* the State filed a motion to terminate the parental rights to both Zylena and Adrionna.

Not only was the Tribe sent notice of these actions, that notice was unambiguous: the action filed on behalf of Zylena, and later Adrionna, "may result in restriction of parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." In Zylena's case, the Tribe actually responded in the negative and allowed the State's proceedings to continue for another 31 months before finally asking to intervene and for transfer.

Nebraska's juvenile code provides that the code should be construed to accomplish, among other goals, "permanent arrangements for children . . . who are unable to return home."[12] But in this case, it is clear that by allowing the transfer, Zylena's and Adrionna's rights to such permanency have been delayed as the futures of these children play out in yet another court.

I would hold that the filing of a petition to terminate parental rights does not commence a new proceeding under ICWA and NICWA and that the Tribe's intervention came at an advanced stage of the proceedings. I would therefore conclude that this late intervention was good cause to deny the Tribe's motions to transfer and that the decision of the Court of Appeals affirming the juvenile court's denial of the motions to transfer should be affirmed.

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[12] § 43-246(6).