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TTY: (800) 947-3529
Facsimile (608) 267-0640
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DISTRICT IV

February 2, 2018

To:

Hon. Todd P. Wolf
Circuit Court Judge
Br. 3
400 Market St
Wisconsin Rapids, WI 54494

Cindy Joosten
Clerk of Circuit Court
Wood County Courthouse
400 Market Street, PO Box 8095
Wisconsin Rapids, WI 54494

Anthony Russomanno
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mary B. Houghton
9210 County Z
Nekoosa, WI 54457

Children and Family Services
Attn: ICW Worker
808 Red Iron road
Black River Falls, WI 54615

You are hereby notified that the Court has entered the following opinion and order:

2017AP373 Mary B. Houghton v. Eloise Anderson, Secretary, Department of Children and Families and Department of Children and Families (L.C. # 2016CV13)

Before Lundsten, P.J., Sherman, and Blanchard, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mary Houghton, pro se, appeals a circuit court order dismissing her petition for review of a decision of the Division of Hearing and Appeals (DHA) regarding the removal of her nephew, E.O., from Houghton's home. Houghton argues that the Department of Children and Families (the department) erred in removing E.O. without a hearing and in declining to approve her application to adopt E.O. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2015-16).[1] Because the circuit court could not grant any relief to Houghton beyond the relief that she received from DHA, we affirm.

E.O. was placed in the temporary care of his paternal aunt, Houghton, after suffering a skull fracture and rib fractures as an infant. An investigation substantiated that E.O.'s father physically abused E.O. and also sexually abused another child in the home. The parental rights of E.O.'s parents were terminated based on abandonment.

Caseworkers tasked with monitoring E.O.'s placement told Houghton about the allegations against E.O.'s father and the need to protect E.O. However, they became concerned that Houghton was minimizing the allegations against E.O.'s father. Moreover, because Houghton lived in a house that was owned by E.O.'s father, caseworkers were concerned that E.O.'s father might return at any time.

Meanwhile, Houghton began the process to adopt E.O., which started with submitting an application to request a home study as a precursor to applying for a foster care license.[2] Some of the answers in Houghton's home study application were incomplete or inaccurate. Among other things, Houghton stated that she had never been convicted of "any crimes anywhere," when she in fact had been convicted of driving without a license, as a second offense. Houghton also failed to accurately report her history with alcohol, despite past problems. Finally, Houghton answered "no" to the question of whether anyone in her family had "ever been suspected of, investigated for, … or convicted of physical, emotional, or sexual child abuse," even though she

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Because E.O.'s adoption would be a special needs adoption, Houghton needed to go through the process of foster care licensing. *See* WIS. STAT. § 48.84.

was aware of the allegations against E.O.'s father as well as the fact that criminal charges were pending against him for child sexual abuse. When confronted with the discrepancies, Houghton was evasive and again downplayed the significance of the accusations against E.O.'s father. Accordingly, the department had concerns about whether Houghton could be relied upon to create a safe environment for E.O. and to protect him from his father.

Less than a year after E.O. had been placed with Houghton, the department decided to conduct an emergency removal. The department told Houghton by written notice that E.O. was being removed for safety reasons because Houghton did not show that she was able to protect the child from his father. Although the department typically offers a hearing before a non-emergency removal, the department further determined that Houghton did not show the ability to give E.O. proper care if she was under the stress of a longer removal period. The notice further stated that the department was denying Houghton's request for an adoptive home study because she did not meet the qualifications for adoption or foster care licensing.

Houghton sought administrative review of the department's decision to conduct an emergency removal. The department forwarded Houghton's petition to DHA. DHA conducted a hearing, at which Houghton was represented by counsel. The ALJ determined that the department was not justified in removing E.O. from Houghton's home on an emergency basis, because the physical home was safe and appropriate. Separately, the ALJ determined that the department correctly declined to accept Houghton's adoption application because Houghton gave

the department false information and also demonstrated that she was not prepared to protect E.O. from his father.[3]

Houghton then filed a Chapter 227 petition for review of DHA's decision, through counsel. The circuit court dismissed her petition, concluding that Houghton was ineligible for any relief because she had prevailed on the emergency removal issue and because E.O. was no longer available for adoption.

"The right to judicial review of an agency's decision is entirely statutory, and such decisions are not reviewable unless made so by statute." *See* ***Madison Landfills, Inc. v. State Dep't of Nat. Res.***, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993) (citation omitted). In a Chapter 227 proceeding, the elements for judicial review are:

> (1) a final decision, (2) made in writing accompanied by findings of fact and conclusions of law, (3) adversely affecting the substantial interest of any person and (4) review is sought by a person aggrieved by the decision.

Id. "'An issue is moot when its resolution will have no practical effect on the underlying controversy.'" ***McFarland State Bank v. Sherry***, 2012 WI App 4, ¶9, 338 Wis. 2d 462, 809

[3] The department now argues that the ALJ erred in addressing Houghton's application to adopt E.O. It contends that this decision was subject to separate review by officials in the Division of Safety and Permanence, and that the decision of these officials to uphold the denial was a final administrative decision that could not be appealed. However, the record reflects significant confusion regarding this issue. The department tells us that decisions regarding foster care licensing under WIS. ADMIN. CODE § DCF 56 (through July 2017) can be appealed to DHA. The initial notice that Houghton received stated that she did not meet the qualifications for foster care licensing under § DCF 56. Yet the department tells us that Houghton did not complete an application for foster care licensing, which makes this portion of the notice confusing at best. Given the apparent confusion in the department's notice, we are not convinced that DHA acted outside its authority in addressing this aspect of the department's decision. However, we need not resolve this issue because, as we explain below, we agree with the circuit court that the department's decision not to allow Houghton to proceed with E.O.'s adoption has been mooted by E.O.'s adoption elsewhere.

N.W.2d 58 (Ct. App. 2011) (quoted source omitted). "Conversely, a case is not moot when 'a decision in [a litigant's] favor … would afford him some relief that he has not already achieved.'" ***Id.*** (quoted source omitted). Whether a case is moot is a question of law that we review de novo. ***Id.***

Here, the ALJ concluded that emergency removal was not warranted. However, the ALJ explained that DHA lacked any authority to order the department to return E.O. to Houghton's home. Instead, the proper remedies sought by Houghton at the hearing were to clear Houghton's name, to protect her interest in equitable treatment, or to defend against mistaken, negligent, or arbitrary agency allegations. *See* ***Bingenheimer v. Wisconsin Dep't of Health & Soc. Servs.***, 129 Wis. 2d 100, 109-11, 383 N.W.2d 898 (1986) (explaining that foster parents have reputational interests that may be vindicated by a hearing, even though the hearing will not affect the child placement decision). The ALJ found in Houghton's favor, finding that Houghton provided a safe and clean home, and adequate physical care for E.O. Because emergency removal was not warranted, the ALJ concluded that E.O. could have remained in Houghton's home until an adoptive placement was ready. Accordingly, this determination cannot be a basis for a Chapter 227 petition, because Houghton was not aggrieved by it.

Houghton argues that E.O.'s removal is still reviewable, because it was intertwined with the department's decision not to allow her to proceed with the adoption of E.O. and, ultimately, to E.O.'s placement and adoption elsewhere. The problem for Houghton is that the department's decision not to allow her to proceed with adoption of E.O. appears to be moot now that E.O. has

been adopted. The adoption means that E.O. is now legally the child of the adoptive parent or parents, and they have all the rights of natural parents. *See* WIS. STAT. § 48.92(1).[4]

Houghton further argues that issues are not moot if they raise constitutional questions. Houghton contends that she was denied due process by the manner in which E.O. was removed from her home. But a fundamental problem with these arguments is that Houghton has not shown that she has a constitutionally protected interest at stake. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 473, 565 N.W.2d 521 (1997) (a claim for procedural due process requires "a deprivation by state action of a constitutionally protected interest"). Houghton repeatedly refers to her rights as a "foster parent" and as E.O.'s "foster mother." While Houghton's confusion on this issue is understandable, given that the ALJ's decision relied on statutes governing foster parents, Houghton's arguments go nowhere because Houghton never completed her foster parent application and was therefore never licensed as a foster parent.[5]

Moreover, in this appeal, Houghton fails to file a reply brief to respond to the department's explanation for why Houghton cannot advance a due process claim on these facts. Accordingly, we deem Houghton to have conceded that the department is correct. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

[4] Houghton suggests that she was blindsided by E.O.'s adoption, arguing that she learned that there was an approved adoption at a circuit court scheduling conference in April 2016. This assertion is misleading at best, because the ALJ's decision dated December 2015 states that the department had approved E.O.'s adoption. This finding was drawn from testimony at the hearing in July 2015 that established that E.O. had adapted successfully to his new foster home, had been approved for adoption, and would be eligible for adoption in one more month.

[5] The ALJ found that Houghton had applied for a foster care license with Wood County, but no final decision was made.

Houghton further argues that the adoption of E.O. should not have proceeded in light of her pending petition for review. *See* ***Styczynski v. Department of Health & Soc. Servs.***, 65 Wis. 2d 190, 222 N.W.2d 139 (1974). That case involved a petitioner who had been caring for a child who was subsequently removed from the home. The petitioner challenged the action by filing both a petition to review the removal and a petition to adopt the child. The supreme court determined that the petitioner was impermissibly seeking to use the adoption proceedings to attack the removal order. It wrote:

> It is absurd to believe that the legislature intended that a finding by the Department of Health and Social Services that a removal was in the best interests of the child—a finding that is final unless the appeal procedure is followed—could be ignored by simultaneously invoking the jurisdiction of the county court for the purpose of making a contrary finding.

Id. at 197. On that basis, the court held, "once administrative proceedings have commenced under sec. 48.64, Stats., and the person with whom the child had been placed is seeking a review of the removal order, a children's court has no jurisdiction of the adoption." ***Id.*** In this context, we understand "the adoption" referred to by the court to be an adoption petition filed by the same person seeking review of the removal order. Houghton concedes as much when she quotes language from the annotated statutes, which clarifies that when a "person with whom the child had been placed is seeking a review of the removal order, a children's court has no jurisdiction over an adoption petition filed by the person." Thus, ***Styczynski*** does not stand for the broader proposition that, as applied here, the court lacked jurisdiction over an adoption by a third person while Houghton was seeking review of the removal order. Houghton has presented no authority for that broader proposition.

We therefore agree with the circuit court's determination that the department's denial of Houghton's application to adopt E.O. was moot. But even if this issue presented a justiciable controversy, the department argues that the ALJ's decision was supported by substantial evidence. By failing to file a reply brief, Houghton has conceded these arguments as well. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109.

We have addressed all of the developed arguments that Houghton makes with respect to her Chapter 227 petition for review. We reject Houghton's remaining arguments as undeveloped or lacking any merit in the context of this appeal. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention"); ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[a]rguments unsupported by legal authority will not be considered"); ***Dieck v. Unified Sch. Dist. of Antigo***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (we need not address arguments unsupported by record citations).

We now turn to the arguments raised by the dissent regarding the Indian Child Welfare Act (ICWA) and the Wisconsin Indian Child Welfare Act (WICWA). We conclude that these statutes do not affect our decision, for two reasons.

First, and highly significant, we have no reason to think that the ICWA or WICWA applies to Houghton's Chapter 227 petition, which, as we have explained, does not implicate the propriety of the termination of parental rights with regard to E.O. or the adoption of E.O. No party has raised this issue and, thus, we lack briefing as to whether either act even applies to the decision we review here, that is, the decision to remove E.O. from Houghton's temporary care.

It follows that we fail to understand the reasoning in the dissent that seemingly assumes that this case could have been a vehicle for challenging the validity of E.O.'s adoption. So far as we can tell, if there was a jurisdictional problem implicating the adoption, that problem would have to be addressed in the context of the adoption action, with an interested party moving to reopen that action.

Second, we question whether there is a good reason to think that E.O.'s adoption implicates these statutory protections. These statutes apply only where the court "knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a). In turn, "Indian child" is defined as either a member of an Indian tribe or eligible to be a member. 25 U.S.C. § 1903(4). In that regard, we have no briefing on the meaning of the phrase "has reason to know." The dissent seemingly equates this phrase with "reason to suspect." Further, we are hard pressed to fault the circuit court for not making an inquiry on the topic. A social services case report in the record states that "[t]here is no tribal affiliation, therefore ICWA does not apply." The dissent points out that Houghton identifies as white and Native American, and that the ALJ found that she and her immediate family were members of the Ho-Chunk Tribe. At the same time, we observe, Houghton does not specify who she is referring to when she speaks of her "immediate family." We find no clear assertion by Houghton that her brother, E.O.'s father, is a tribal member, and we find no information about E.O.'s mother in that regard. We further point out, based on the Ho-Chunk Constitution, that it appears E.O. would have to have at least one quarter Ho-Chunk blood to be eligible for tribal membership. *See* Ho-Chunk Constitution, Art. II, § 1(a-b), available at http://ho-chunknation.com/Constitution.htm (last visited January 31, 2018).

We acknowledge that the dissent raises an important point about the role of courts in protecting the rights of Indian children and families. However, in light of the fact that no party,

including Houghton, has ever asserted that E.O. is a tribal member or eligible to be a tribal member, that the social services report before the circuit court states that there is a lack of tribal affiliation (an apparent reference to E.O. in particular), and the fact that even if Houghton, E.O.'s paternal aunt, is one-quarter or more Ho-Chunk by blood, E.O., who is another generation removed, may easily not be, we decline to cast the finality of the adoption in doubt by remanding for further proceedings. Instead, we forward a copy of this decision to the Ho-Chunk Nation. If the Nation determines that E.O. is eligible for membership, the Nation is free to pursue whatever steps it may think appropriate to vindicate E.O.'s and the Nation's interests under the ICWA and WICWA. We make no comment on what form those procedural steps might take, or any view on the likelihood of success.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

SHERMAN, J. (*dissenting*).

PREAMBLE

The United States Supreme Court has explained the significance of the Indian Child Welfare Act (ICWA, or the Act):

> The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, was the product of rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Senate oversight hearings in 1974

yielded numerous examples, statistical data, and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes, ... the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings). Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. ***Id.*** at 15; *see also* H.R. Rep. No. 95-1386, p.9 (1978) (hereinafter House Report), U.S. Code Cong. & Admin. News 1978, pp. 7530, 7531. Adoptive placements counted significantly in this total: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. 1974 Hearings, at 75–83. A number of witnesses also testified to the serious adjustment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves. *See generally* 1974 Hearings.

Further hearings, covering much the same ground, were held during 1977 and 1978 on the bill that became the ICWA. While much of the testimony again focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children. For example, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows:

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." 1978 Hearings, at 193. *See also* ***id***. at 62. Chief Isaac also summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children:

> "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." Id. at 191–192.

The congressional findings that were incorporated into the ICWA reflect these sentiments. The Congress found:

> "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children ...;
>
> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> "(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court. The procedural safeguards include

> requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions. *See* §§ 1901-1914. The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent "good cause" to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.
>
> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S. Code Cong. & Admin. News 1978, at 7546. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, 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." ***Id.*** at 24, U.S. Code Cong. & Admin. News 1978, at 7546.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (footnotes omitted).

In order to carry out the jurisdictional provisions of the ICWA, the Act mandates:

> In any involuntary proceeding in a State court, where the court knows *or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention…. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided,* That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a) (emphasis added). The key language in the ICWA, for our purposes, is "has reason to know."

When a child that is subject to the ICWA is placed for adoption, preference is to be given, in the absence of a finding of good cause to the contrary, to placement of the child with a

member of the child's extended family, to other members of the Indian child's tribe, or to other Indian families. 25 U.S.C. § 1915 (a).

If an action violates any provision of 25 U.S.C. §§ 1911, 1912 or 1913, the action is voidable upon the petition to any court of competent jurisdiction by any parent, Indian custodian, or the child's tribe. 25 U.S.C. § 1914.

In 2009,[1] Wisconsin enacted WIS. STAT. § 48.028, the Wisconsin Indian Child Welfare Act (WICWA), which parallels the protections provided under the ICWA, but provides additional protections and stricter standards in some respects. For example, where the ICWA states that it applies to foster care placement, pre-adoptive placement, adoptive placement or termination of parental rights, *see* 25 U.S.C. § 1903(1), the WICWA covers all of those actions plus out-of-home care placement and any delegation of powers by a parent regarding the care and custody of an Indian child for longer than one year. *See* § 48.028(2)(d). The WICWA includes similar provisions for notice, intervention and transfer of jurisdiction to tribal court. In particular, the WICWA requires notice when the court "has reason to know" that the child is an Indian child, just as the federal ICWA does. Sec. 48.028(4)(a).

DISCUSSION

This case demonstrates that the provisions of the ICWA are not self-administering and that diligence is required if the very conditions documented by Congress in the 1974 hearings are

[1] 2009 Wis. Act 94.

not to recur. It is our job as a court[2] to make sure that does not happen. We have been given both the mandate and the tools by both federal and state law to perform that function.

There is no reason to go into the issues raised by the parties.[3] If the ICWA/WICWA applies, then those issues are beside the point. The entire jurisdictional stature of the case would be thrown into doubt. If the subsequent adoption is voidable, then the State's argument that the case is moot is deprived of its supporting foundation. What counts here are only those facts bearing on whether the proceedings are subject to the ICWA/WICWA. Those facts are simple and straightforward in this case:

1. Mary Houghton is Native American, a member of the Ho-Chunk Nation. This is uncontested, but it is useful to note that it appears repeatedly in the record. For example, in her application for adoption she identifies herself as both Indian and White. Likewise, the Wisconsin Criminal History report in the record states that Mary is Native American. The administrative law judge in the administrative

[2] The Weimar Republic had a well developed legal system composed of well trained and experienced jurists, many of whom were regarded as eminent. The Nazis, as a minority government, did not take over quickly and simply abolish the Weimar Republic and declare the Third Reich. They took small steps to dismantle the legal and governmental structure of the Weimar Republic through legislation in the Reichstag, a process that took years. At each such step, the courts had the opportunity to halt the onward march of totalitarianism, but did not, whether through fear or a cultural tendency of courts not to interfere with the other branches of government. Either our court system must do a better job of performing its constitutional function than the courts in the Weimar Republic or we will also inevitably watch as our republic is replaced by a more authoritarian system of government.

[3] I do not concede the State's arguments. It is simply not necessary to address the State's arguments to resolve this case. For centuries, Jewish babies were kidnapped from their families by Christians, even Popes, and baptized. Once baptized, they were never returned to their biological parents because it would have been unseemly for a baptized Christian baby to be raised by Jewish parents. And, this is not ancient history; cases recurred up through and following the Holocaust, when babies who were baptized to save them from the Nazis were not voluntarily returned to their families. The slow-motion genocide of taking babies from their minority families keeps recurring, as is the clothing of it in legalistic sophistry.

proceeding found that "[t]he petitioner and her immediate family, [] are members of the Ho-Chunk tribe." It is logical to assume that her brother is included within the meaning of "her immediate family" in that statement.

2. The father of the child, E.O., is the brother of Mary Houghton. The State admits this fact in its Responsive Brief.

3. The child, E.O., is referred to in the record as white, and the parties assume that the child has "no tribal affiliation," but no investigation to determine if this is true appears in the record.

The majority here argues that there is no point to raising the issue of the ICWA/WICWA because the parties do not raise the issue. That is a total misconstruction of the ICWA/WICWA. Under the ICWA/WICWA, it is the obligation of any court handling the proceedings to see to it that the appropriate notices are given under the ICWA/WICWA, "where the court knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a); WIS. STAT. § 48.028(4)(a). Thus, it is not the obligation of the parties to raise the issue.

That is inherent in the nature of the problem, because too often it is the parties themselves who consent to a non-Indian adoption. *See* ***Holyfield,*** 490 U.S. at 50 ("Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents."). To require that the parties raise the issue would defeat the entire purpose of the ICWA/WICWA. The rights involved also belong to the tribe itself, not just the individual members involved. *See* ***id.*** at 37 ("The ICWA thus, in the words of the House Report accompanying it, 'seeks to protect the rights of the Indian child as an Indian and the rights of the

Indian community and tribe in retaining its children in its society.'"). And the tribe can only assert those rights if the tribe receives notice of the proceeding. *See* 25 U.S.C. § 1911(a), (b) or (c); WIS. STAT. § 48.028(3)(b), (c), or (e).

The question before this court is, therefore, only whether the circuit court "kn[ew] or ha[d] reason to know" that E.O. is either a member of the Ho-Chunk Nation or eligible for membership in the Ho-Chunk Nation. I assume that the court did not know the answer to that question. On this record, neither can this court. However, there is ample evidence to suggest that the circuit court, "ha[d] reason to know" of E.O.'s potential membership.

Mary Houghton is a member of the Ho-Chunk Nation and E.O. is the son of Mary's brother. There is also repeated reference in the record to Mary Houghton's supportive Ho-Chunk family. It is possible for E.O. to be of different ethnicity than his father's sister, but it is so unlikely that it cannot be said that a court would not have reason to know. The administrative law judge determined that E.O. was improperly removed from Mary Houghton's home, a determination not contested by the State on appeal. Under the ICWA/WICWA, preference is to be given to placement with a member of the child's extended family, another member of the child's tribe, or another Indian family. 25 U.S.C. § 1915(a); WIS. STAT. § 48.028(7). Mary Houghton is a member of E.O.'s extended family. And E.O.'s father is a member of Mary Houghton's extended family. If it turns out that E.O. is indeed subject to the ICWA/WICWA, then E.O. was improperly removed from a home entitled to preference under the ICWA/WICWA. This is precisely the outcome that the ICWA/WICWA were enacted to avoid.

The State bases its entire argument in its Respondent's Brief on a claim that the matter is moot because the adoption of E.O. is complete. However, if the provisions of the ICWA/WICWA were not complied with, then the adoption of E.O. is voidable. 25 U.S.C. § 1914; WIS. STAT. § 48.028(6). The choice of whether to assert such an outcome must be left to the sovereign decision of the Ho-Chunk Nation.

For the above reasons, I dissent. I would remand to the circuit court for further proceedings consistent with the ICWA/WICWA. The Ho-Chunk Nation and the other entitled parties should be given notice under 25 U.S.C. § 1912(a) and WIS. STAT. § 48.028(4)(a). What happens after that is up to the Ho-Chunk Nation or the other entitled parties. They could petition a court of competent jurisdiction, they could do nothing, or they could do any of several things in between. That is a matter for the Ho-Chunk Nation's, or other entitled parties,' sole discretion. The ICWA and the WICWA are addressed to the necessity of the tribes maintaining their sovereignty, indeed their very existence, and it is not within our competence to decide for them what they ought to do in exercise of that sovereignty. I agree with the majority's decision to send a copy of the majority's decision and my dissent to the Ho-Chunk Nation. It should be sent directly to the ICWA worker in the Children and Family Services office in Black River Falls, WI.

Diane M. Fremgen
Acting Clerk of Court of Appeals