

# IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals  
Whitbeck, P.J., O'Connell, and Wilder, JJ

IN THE MATTER OF C.I. MORRIS  
Minor child

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Appellee

Lower Court No.: 08-483987-NA  
Court of Appeals No.: 299471  
Supreme Court No.: 142759

v.

DAVID MORRIS  
Respondent-Appellant

---

Vivek S. Sankaran (P68538)  
Child Advocacy Law Clinic  
University of Michigan Law School  
625 S. State Street  
Ann Arbor, MI 48109

---

Arthur Bowman Jr. (P37206)  
Juvenile Law Group  
1025 E. Forest, Suite 124  
Detroit, MI 48207

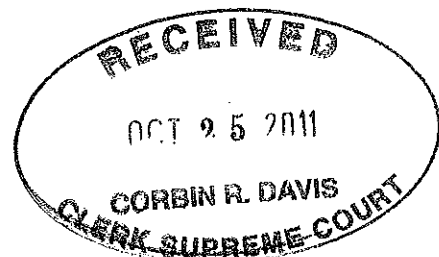
John J. Bursch (P57679)  
Solicitor General  
Attorney for the Dep't of Human Services  
3030 W. Grand Blvd  
Suite 10-200  
Detroit, MI 48202

---

## RESPONDENT-APPELLANT'S REPLY BRIEF ORAL ARGUMENT REQUESTED

Vivek S. Sankaran (P68538)  
Erin Cass, Student-Attorney on Brief  
Counsel for Appellant David Morris  
Child Advocacy Law Clinic  
University of Michigan Law School  
625 S. State Street  
Ann Arbor, MI 48109-1215  
(734) 763-5000

Dated: October 24, 2011



## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
ARGUMENT.....	1
I.    25 USC 1912(a) Explicitly Barred The Juvenile Court From Proceeding In This Case Until Notice Had Been Provided To The Tribe. ....	2
II.   The Isolated And Immaterial Legislative History Relied Upon By The DHS Does Not Controvert The Plain Language Of 25 USC 1912(a). ....	5
III.  25 USC 1914 Does Not Prevent A State Court On Direct Appeal From Invalidating A TPR Order Issued In Violation of 25 USC 1912(a). ....	6
IV.  This Court Should Not Rewrite 25 USC 1912(a) Based On The DHS' Policy Arguments. ....	8
CONCLUSION.....	11

## INDEX OF AUTHORITIES

### FEDERAL STATUTES AND REGULATIONS

25 USC 1911 .....	6
25 USC 1912 .....	1, 2, 3, 4, 5, 6, 7, 11
25 USC 1913 .....	6
25 USC 1914 .....	2, 6, 7
25 USC 1922 .....	4
25 CFR 23.11 .....	9
44 Fed Reg No 228.....	3

### FEDERAL CASES

<i>Doe v Mann</i> , 415 F3d 1038 (CA 9, 2005).....	6
<i>United States v Nice</i> , 241 US 591; 36 S Ct 696; 60 L Ed 1192 (1916).....	2
<i>United States v Wheeler</i> , 435 US 313; 98 S Ct 1079; 55 L Ed 2d 303 (1978) .....	2, 3

### STATE CASES

<i>In re Budd</i> , unpublished decision per curiam of the Court of Appeals, issued September 29, 2011 (Docket No 301995).....	11
<i>In re Certified Questions from US Court of Appeals for Sixth Circuit</i> , 468 Mich 109; 659 NW2d 597 (2003) .....	5
<i>Golden v Baghdoian</i> , 222 Mich App 220; 564 NW2d 505 (1997) .....	8
<i>In re Hatcher</i> , 443 Mich 426; 505 NW2d 834 (1993) .....	7
<i>In re IEM</i> , 233 Mich App 438; 592 NW2d 751 (1999).....	11
<i>People v McIntire</i> , 461 Mich 147; 599 NW2d 102 (1999) .....	8

## ARGUMENT

The sole question in this appeal is whether a juvenile court has the statutory authority to issue a termination of parental rights (“TPR”) order after the Department of Human Services (“DHS”) fails to provide notice to an Indian tribe as required by 25 USC 1912(a). The statute’s plain language provides the answer. If a court knows or has reason to know that an Indian child is involved in the case, the statute explicitly provides that “[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the . . . tribe.” 25 USC 1912(a). Here, although the trial court made a specific finding that Christina Morris was an Indian child, no notice was ever given to the tribe. Instead of halting the proceeding as required by the statute, the court ignored its own finding, never inquired as to whether DHS provided notice to the tribe – which the agency concedes it did not – and issued a series of invalid orders despite lacking the statutory authority to proceed. This Court should automatically reverse the TPR order because the plain language of 25 USC 1912(a) deprived the juvenile court of the authority to act without first providing notice to the tribe.

In its brief, the DHS concedes that it violated 25 USC 1912(a) by failing to provide notice to the tribe. See Appellee’s Brief at 1. Instead, it asks this Court to rewrite the Indian Child Welfare Act (“ICWA”) to invent a remedy – the conditional affirmance – that does not exist in the statute. To persuade this Court to legislate from the bench, the DHS relies on four principal arguments. First, it attempts to read ambiguity into the plain language of 25 USC 1912(a) and argues that the section does not limit a juvenile

court's authority in any way. Second, despite explicit statutory language to the contrary, the DHS relies on isolated and immaterial legislative history to persuade this Court that Congress did not actually intend to prevent juvenile courts from proceeding in a case after the court suspects that an Indian child is involved. Third, the Department argues that 25 USC 1914 - which creates a collateral state and federal cause of action for ICWA violations - somehow prevents a court on direct appeal from automatically reversing a TPR order issued in clear violation of 25 USC 1912(a). And finally, the DHS asks this Court to disregard ICWA's plain statutory language because in its subjective judgment, it would be in the best interests of children to do so. They attempt to buttress this argument by inappropriately alleging facts procured by inadequate procedures that are outside the scope of the record. Each of these arguments is discussed below.

**I. 25 USC 1912(a) Explicitly Barred The Juvenile Court From Proceeding In This Case Until Notice Had Been Provided To The Tribe.**

The United States Supreme Court has consistently upheld the sweeping power of the federal government over matters involving Indian families. See, e.g., *United States v Wheeler*, 435 US 313, 319; 98 S Ct 1079; 55 L Ed 2d 303 (1978) (recognizing that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."). That power is rooted in the Commerce Clause of the Federal Constitution and has been interpreted to extend to issues involving Indians who live both on and off a reservation. See, e.g., *United States v Nice*, 241 US 591, 597; 36 S Ct 696; 60 L Ed 1192 (1916) (observing Congress' power to regulate Indian activity "whether

upon or off an Indian reservation.”). The Indian Child Welfare Act (“ICWA”) was enacted pursuant to this broad and express grant of congressional authority.

Although laws governing children and families have traditionally been left to the discretion of state governments, the ICWA represents a rare example of the federal government legislating substantive child welfare standards. As noted in both the Appellant and Appellee’s Briefs, the ICWA mandates strict requirements when Indian children are involved in child protective proceedings or when a court suspects that an Indian child may be involved. Appellant’s Br. at 8-11; Appellee’s Br. at 3-4. To the extent that these federal laws conflict with state or local practices, juvenile courts must apply federal law. *Wheeler, supra* at 320 (noting that “the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States.”).

The strict and unambiguous notice requirement contained in 25 USC 1912(a) serves an integral role in the stringent procedures imposed by the ICWA on juvenile courts when the court has reason to know that an Indian child may be involved. Section 1912(a) prevents the juvenile court from holding any hearings in a case involving the foster care placement of the child or the termination of parental rights until at least ten days after notice has been served on the tribe. 25 USC 1912(a); see also Bureau of Indian Affairs Indian Child Welfare Act Guidelines, 44 Fed Reg No 228, 67589 (1979) (“The

proceedings may not begin until the waiting periods . . . have passed.”). In other words, the mandate strips the court of the ability to act until this step has been executed.<sup>1</sup>

The DHS ignores the plain language of the statute and instead offers a novel interpretation of the provision without citing any legal support. It attempts to transform a limiting provision on the court’s authority into a limitless provision that allows the court to ignore the notice provision. The DHS states that the “10-day provision serves a wholly different purpose, allowing the trial court to proceed without a response from the tribe, preventing the protracted delay that could otherwise result from a tribe’s failure to timely respond to the ICWA notification.” Appellee’s Br. at 14.

The text of the statute, however, defeats their creative reading of 25 USC 1912(a). The statute plainly provides that “[n]o foster care placement or termination of parental rights proceeding shall be held.” 25 USC 1912(a). This prohibition is plain and simple. “Shall” must be understood as a mandatory command. If Congress had meant to signify the hortatory nature of the command, it could have included alternative language such as “if possible” or “preferably.” However, it did not. As a result, courts cannot hold hearings without first complying with 25 USC 1912(a), and all orders emanating from invalid hearings should be deemed null and void. This is what the law expressly requires.

---

<sup>1</sup> Contrary to the assertions made by the DHS in its brief, a plain reading of 25 USC 1912(a) would not invalidate lawful orders issued prior to the notice violation and would not require the immediate return of a child to the parent. Appellee’s Br. at 16. It would only suspend the court’s ability to issue subsequent orders in the case until notice is properly provided to the tribe. ICWA itself allows courts to act in emergency situations to protect the “imminent physical damage or harm to the child.” 25 USC 1922.

**II. The Isolated And Immaterial Legislative History Relied Upon By The DHS Does Not Controvert The Plain Language Of 25 USC 1912(a).**

The DHS offers additional arguments to convince this Court to read ambiguity into an unambiguous statutory provision. It cites to isolated legislative history and asks the Court to look behind the plain language of the statute. Appellee's Br. at 16-17. The reliance on legislative history to interpret an unambiguous statute is inappropriate. See *In re Certified Questions from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). "Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *Id.* Here, 25 USC 1912(a) contains no ambiguity.

Therefore, this Court should not look to legislative history to interpret the provision.

Even if this Court determines that looking at the legislative history is appropriate, the language cited by the DHS is immaterial to the analysis in this case. The agency cites to an earlier version of the statute that declared invalid all placement orders involving an Indian child "with significant contacts with an Indian tribe" until thirty days after notice had been given to the tribe. Appellee's Br. at 16-17. The final version of the ICWA did not contain this language. However, in many ways, the notice requirement included in the ICWA affords broader protections for the rights of Indian families and tribes than the rejected language. In the final version of the Act, Congress omitted the requirement that the child have "significant contacts" with the tribe, required notice when a court has reason to know that a child may be Indian, and continued to prohibit courts from holding foster care placement or TPR hearings until notice has been provided. 25 USC 1912(a). To adopt the DHS' arguments, this Court

would have to infer that Congress intended for juvenile courts to have the authority to issue valid orders even though it expressly prohibited courts from convening any hearings until the notice requirements had been met. Nothing in ICWA's legislative history suggests that this was the case.

**III. 25 USC 1914 Does Not Prevent A State Court On Direct Appeal From Invalidating A TPR Order Issued In Violation of 25 USC 1912(a).**

In addition to relying on legislative history, the DHS argues that the only way for individuals to enforce ICWA violations is through 25 USC 1914. Appellee's Br. at 12. Because notice was never provided to the tribe (and thus the tribe never made a finding as to whether Christina was a member), the DHS asserts that Mr. Morris lacks standing to raise this issue since he was never found to be a parent of an Indian child. This argument fails for two reasons. First, 25 USC 1914 creates an independent state and federal collateral cause of action for specific individuals to litigate ICWA violations. See *Doe v Mann*, 415 F3d 1038, 1047 (CA 9, 2005) (observing that Congress created an independent federal cause of action in 25 USC 1914 for ICWA violations). The provision, however, does not preclude a party from raising ICWA violations on direct appeal in state court. This provision was cited in the Appellant's Brief to demonstrate the strong remedy Congress prescribed for ICWA violations - the ability to file a collateral suit to invalidate court orders for violating "any provision of sections 1911, 1912 and 1913" of the ICWA. 25 USC 1914. The strength of this remedy reflects Congress' intentional decision to ensure full compliance with the Act.

Second, even if this Court determines that 25 USC 1914 governs the resolution of ICWA issues on direct appeals in state courts, the provision still permits Mr. Morris to seek the invalidation of the TPR order. 25 USC 1914 explicitly permits parents of an Indian child to invalidate an order based on a violation of "any provision" of section 1912. Here, the DHS concedes that it violated 25 USC 1912(a). Additionally, the trial court made a specific finding that Christina was an Indian child in the order it issued after the preliminary hearing. 11a-13a. The DHS never appealed the trial court's finding and is barred from collaterally challenging the finding for the first time in the Michigan Supreme Court - nearly three years after it was issued. See *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993) (severing a party's ability to challenge a probate court's decision years later on a collateral attack). Because 1) the trial court found that Christina was an Indian child and by extension that Mr. Morris was a parent of an Indian child, and 2) the DHS concedes that 25 USC 1912(a) was violated, the requirements set forth in 25 USC 1914 to invalidate an order have been met.

In short, the inclusion of 25 USC 1914 in the ICWA only expanded the ability of parties to litigate ICWA violations by enabling them to file collateral actions, not restricting their ability to raise issues on direct appeals. Regardless, Mr. Morris has standing under the provision to invalidate the TPR decision for violating 25 USC 1912(a) as a result of the DHS' concession that it violated the provision and the trial court's specific finding that Christina was an Indian child.

#### IV. This Court Should Not Rewrite 25 USC 1912(a) Based On The DHS' Policy Arguments.

Finally, the DHS offers a number of policy arguments to convince this Court to adopt the conditional affirmance remedy. It characterizes the remedy as "ideal" and "efficient" and argues that a rule of automatic reversal "makes no sense" and would cause "unnecessary delay." Appellee's Br. at 1, 2, 18, 20. Although these may be valid arguments to make to a democratically-elected legislature, it is not the job of courts to "determine whether there are valid alternative policy choices that the Legislature may or should have chosen." *People v McIntire*, 461 Mich 147, 158; 599 NW2d 102 (1999). Here, Congress has spoken and specifically acted to deprive juvenile courts of the statutory authority to hold hearings until notice has been provided to the tribe. This Court cannot second-guess that judgment.

The DHS also attempts to influence this Court's ruling by inappropriately referring to information outside the scope of the record, specifically citing to allegations that Mr. Morris is not a member of an Indian tribe. See *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997) (noting that appellate courts "cannot evaluate materials not of record."). The DHS mentions in its briefs and includes in its attachments details of alleged efforts it made to ascertain Mr. Morris' tribal status after this Court decided to review this case. Appellee's Br. at 21, n 11.

These tactics are flawed in several respects. First, the issue in this case is whether the juvenile court had the statutory authority to issue the TPR order. Determining whether Mr. Morris was in fact a member of the tribe - after the TPR decision - in no

way affects whether the court had the authority – at the time the TPR decision was made – to issue the order.

Second, the legally insufficient information contained in the notices sent by the DHS to the tribes in this case only demonstrates why a rule of automatic reversal is necessary to ensure full compliance with ICWA's notice provision. The notices sent out by the DHS lack a crucial piece of information needed by the tribes to make their membership determination – information about Mr. Morris' extended family. Here, Mr. Morris specifically stated that his great-grandmother was Indian. 10a. Yet, the notices sent out by the DHS contain no information about his great-grandmother or any of his other relatives – that section of the notice was left blank by the case worker.<sup>2</sup> See Appellee's Br., Attachments 5, 6, 7, 8. There is no evidence as to whether Mr. Morris was even consulted prior to the defective notices being sent out to the tribes. If this type of shoddy notice typifies the notice sent out by the DHS in other ICWA cases, it is hardly surprising that tribes have been unable to determine with accuracy whether children are members of their tribe or eligible for membership on remand in other conditional affirmance cases. At this late stage in a child protective case, the tribe is solely dependent on the information provided to it by the DHS to make this determination but DHS – as is evidenced by the briefing in this case – is only focused on expediting permanency for the child. A finding by the tribe that the child is Indian only

---

<sup>2</sup> 25 CFR 23.11 details what must be included in notice to the tribe. If known, notice must contain "[a]ll names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information."

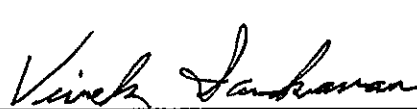
impedes that goal. Unless early notice is given, there is no opportunity for the parent, his or her lawyer, and the child's lawyer-guardian ad litem to work with the tribe to make a comprehensive and accurate determination as to whether a child is Indian as defined in the ICWA.

## Conclusion

Because the ICWA plainly states that juvenile courts have no authority to hold hearings until the notice provision in 25 USC 1912(a) has been fully executed, all orders issued in violation of this mandate should be deemed void. Thus, in this case, because the TPR order was entered in clear violation of section 1912(a), it must be reversed.

This approach is necessary to enforce the strong, mandatory language included by Congress in the ICWA and to prevent the DHS from violating the notice provision contained in 25 USC 1912(a), as it has done repeatedly since the Court of Appeals' decision in *In re IEM*, 233 Mich App 438; 592 NW2d 751 (1999).<sup>3</sup> A rule of automatic reversal is the only way to honor the unambiguous text of the statute.

Respectfully submitted,

 *Vivek Sankaran* by Joshua Kay  
with permission

Vivek S. Sankaran (P68538)  
Erin Cass, Student-Attorney on Brief  
Counsel for Appellant David Morris  
Child Advocacy Law Clinic  
University of Michigan Law School  
625 S. State Street  
Ann Arbor, MI 48109-1215  
(734) 763-5000

Dated: October 24, 2011

---

<sup>3</sup> After the filing of the Appellant's Brief, the Court of Appeals issued yet another decision in which it determined that the DHS violated the notice provisions in 25 USC 1912(a). See *In re Budd*, unpublished decision per curiam of the Court of Appeals, issued September 29, 2011 (Docket No 301995), Attachment A.

# IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals  
Whitbeck, P.J., O'Connell, and Wilder, JJ

IN THE MATTER OF C.I. MORRIS  
Minor child

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Appellee

Lower Court No.: 08-483987-NA  
Court of Appeals No.: 299471  
Supreme Court No.: 142759

v.

DAVID MORRIS  
Respondent-Appellant

---

Vivek S. Sankaran (P68538)  
Child Advocacy Law Clinic  
University of Michigan Law School  
625 S. State Street  
Ann Arbor, MI 48109

---

Arthur Bowman Jr. (P37206)  
Juvenile Law Group  
1025 E. Forest, Suite 124  
Detroit, MI 48207

John J. Bursch (P57679)  
Solicitor General  
Attorney for the Dep't of Human Services  
3030 W. Grand Blvd  
Suite 10-200  
Detroit, MI 48202

---

## ATTACHMENT A

*In re Budd*, unpublished decision per curiam of the Court of Appeals,  
Issued September 29, 2011  
(Docket No 301995)

STATE OF MICHIGAN  
COURT OF APPEALS

---

UNPUBLISHED  
September 29, 2011

In the Matter of BUDD/BUDD-  
DONAHUE/DONAHUE, Minors.

No. 301995  
Wayne Circuit Court  
Family Division  
LC No. 08-483774

---

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Respondent A. Donahue appeals as of right from the trial court's order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). For the reasons set forth in this opinion, we conditionally affirm and remand for further proceedings.

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

With respect to § 19b(3)(c)(i), the trial court was permitted to apprise itself of all relevant circumstances when evaluating the conditions that led to the adjudication. *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993). Here, the trial court obtained jurisdiction over the children pursuant to respondent's plea of admission to allegations that she was unable to provide a stable and suitable home for the children, and that she exercised poor judgment by exposing the children to domestic violence with her husband and by associating with a known sex offender of children. Although respondent made some progress in rectifying these conditions while the children were placed outside her home, the evidence showed that she continued to maintain contact with the sex offender and lied about doing so. We find no merit to respondent's argument that she was placed in a position of having to choose between violating a court order prohibiting contact with the sex offender or violating a different court order for drug testing. Not only did respondent lie under oath about her contact with the sex offender, the trial court previously informed her that she should contact her caseworker if she believed that the sex offender was the only person who could help her. Because the children were not in respondent's custody, her parental fitness could only be judged in other ways, such as her work on the court-ordered treatment plan. *In re Sours*, 459 Mich 624, 638; 593 NW2d 520 (1999). The evidence that respondent was unable or unwilling to cease her contact with the sex offender demonstrated that she continued to lack the ability or capacity to understand how to make choices to safeguard the children from a risk of harm. Considering respondent's lack of progress and the length of

time the children had been temporary court wards, the trial court did not clearly err in finding that there was no reasonable likelihood that respondent would be able to rectify the conditions that led to the adjudication within a reasonable time considering the children's ages.

The same evidence also supports the trial court's determination that §§ 19b(3)(g) and (j) were each proven. A parent must sufficiently benefit from services to enable the court to find that he or she is able to provide a home for the child where there would no longer be a risk of harm. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Respondent's inability to demonstrate that she could make appropriate choices to safeguard the children or could be reasonably expected to do so within a reasonable time, considering the children's ages, supports the trial court's finding that § 19b(3)(g) was proven. The evidence also establishes that, given respondent's conduct or capacity, there is a reasonable likelihood that the children would be harmed if they were returned to respondent's home. Accordingly, the trial court did not clearly err in finding that § 19b(3)(j) was also established by clear and convincing evidence.

We are not persuaded that petitioner's motions to suspend parenting time violated respondent's statutory or constitutional rights, or otherwise provide a basis for vacating the trial court's finding that the statutory grounds for termination were established. Our Supreme Court has stated: "[a] due process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich at 210. The material issue for purposes of evaluating petitioner's actions is the reasonableness of its efforts to reunify the family. When a child is removed from a parent's custody, petitioner is required to make reasonable efforts to rectify the conditions that caused the removal by adopting a case service plan. *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005); see also MCL 712A.18f. In general, the reasonableness of the services offered to a respondent may affect the sufficiency of the evidence offered to establish a statutory ground for termination. *In re Fried*, 266 Mich App at 541. Here, respondent has failed to establish anything about the actual services provided by petitioner that would preclude the trial court from finding that the statutory grounds for termination were established by clear and convincing evidence. Additionally, the judicial oversight provided in this case provided a means for respondent to challenge petitioner's motions. *Martin v Children's Aid Society*, 215 Mich App 88, 98; 544 NW2d 651 (1996). Accordingly, we affirm the trial court's decision.

We note that the minor children also argue on appeal that the trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. However, respondent has not challenged the trial court's best interests decision and, accordingly, has abandoned any claim of error associated with that decision. *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998) ("failure to brief the merits of an allegation of error is deemed an abandonment of an issue").

Petitioner and the minor children also raise an issue concerning compliance with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* Although respondent does not raise any issue involving the ICWA, we believe that consideration of the issue is appropriate in this case in the interests of justice. *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994); see also *In re BR*, 176 Cal App 4th 773, 779; 97 Cal Rptr 3d 890 (2009).

Ordinarily, our review of unpreserved issues in a child protection proceeding is limited to plain error affecting substantial rights. *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Here, the only arguable plain error is that the trial court did not make an on-the-record determination that the ICWA notice requirements were satisfied. Because respondent disclosed at the preliminary hearing that she had Indian heritage, the court had a duty to ensure compliance with the ICWA notice requirements. *In re IEM*, 233 Mich App 438, 447; 592 NW2d 751 (1999).

We decline to consider the documents submitted with petitioner's brief on appeal to establish that it satisfied the ICWA notice requirements. Although this Court has discretion to allow additions to the record, MCR 7.216(A)(4), the appropriate means for an appellee to amend the record is by motion. *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997). Limiting our review to the record, we conclude that the order terminating respondent's parental rights under Michigan law should be conditionally affirmed and that the case should be remanded to the trial court to determine whether petitioner complied with the ICWA notice requirements, consistent with *In re IEM*, 233 Mich App at 448-450, and *In re TM (After Remand)*, 245 Mich App 181, 190-192; 628 NW2d 570 (2001). If petitioner establishes compliance with the ICWA, the order terminating respondent's parental rights shall be affirmed. If petitioner is unable to establish compliance, the trial court shall conduct further proceedings to ensure compliance with the ICWA.

Conditionally affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ Donald S. Owens  
/s/ Stephen L. Borrello