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NO. 89779-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES (DSHS), SANDRA DURON and JOHN DOE
DURON, CAROL SCHMIDT and JOHN DOE SCHMIDT, BEVERLY
PAYNE and JOHN DOE PAYNE, JAMES BULZOMI, ROBERT STUTZ
and JANE DOE STUTZ, INGRID McKENNY and JOHN DOE
McKENNY,

Respondents.

RESPONSE TO PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

When serious allegations of psychological and physical abuse are made by foster children against a foster home licensee, the state has a duty to investigate. In this case the children in Kathie Costanich's foster home accused her of physical abuse and more significantly psychological abuse claiming Ms. Costanich called them names like "fucker," "slut," "cock sucker," and "fucking cunt." Ms. Costanich admits that she has a "trucker's mouth" and routinely used words such as "fuck," "bitch," and "asshole," but denies directing these names at the children in her home. A history of referrals regarding Ms. Costanich's use of abusive language toward the foster children in her care dated back to 1998.

Ms. Costanich sued the state and the caseworkers who were involved in the investigation of these allegations under a myriad of torts and civil rights theories. The only two claims that are at issue in this petition relate to a claim of negligent investigation and a claim of outrage.

Regarding the negligent investigation claim, the trial court and Court of Appeals correctly followed this Court's holding in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), in concluding that Ms. Costanich's voluntary agreement to transfer jurisdiction of her guardianship of her two Indian girls to the Kalispel Tribe constituted, at most, a constructive placement. The absence of an actual harmful

placement decision by DSHS was a proper basis for the dismissal of her negligent investigation claim.

Similarly, the Court of Appeals correctly affirmed the dismissal of Ms. Costanich's outrage claim based upon its conclusion that the investigation of allegations of foster child abuse in a licensed foster care home was not so outrageous in character or so extreme in degree as to be regarded atrocious and utterly intolerable in a civilized society. As the record in this case reflects, while Ms. Costanich denied she directed profanity *at* the children and the State was unable to prove in the licensing hearing that the profanity had actually harmed the children, it is absolutely undisputed that the children made those serious allegations of abuse and indeed continue to stand by those allegations to this day.

The dismissal of Ms. Costanich's claims are consistent with this Court's prior decisions. Therefore, review should be denied.

II. ISSUES

1. Did the trial court correctly dismiss Ms. Costanich's negligent investigation claim by finding, as a matter of law, that a claimant's feeling of being forced to transfer her case to the Kalispel Tribe amounted to nothing more than a "constructive placement" argument that this Court previously rejected in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005)?

2. Did the trial court correctly dismiss Ms. Costanich's outrage claim when the material substance of the abuse referral was substantiated by all children in Ms. Costanich's care?

3. Ms. Costanich has listed the statutory-cost award as an Issue Presented for Review in her Petition. The Respondents believe such matter is premature and respectfully requests an opportunity to fully brief this matter if Ms. Costanich's Petition is accepted.

III. STATEMENT OF FACTS¹

A. History Of Costanich Foster Home

Ms. Costanich was first licensed as a foster parent for the State of Washington on October 31, 1983. Over time, the Costanich foster home became known as a placement for "violent, sexually aggressive youth (SAY) and medically fragile infants." *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 551, 156 P.3d 232 (2007). She also became known as a foster parent home that "received numerous Child Protective Services (CPS)/Licensing complaints with respect to the care

¹ Ms. Costanich's Statement of Facts and arguments contained within the body of her brief rely heavily on a declaration signed by her on April 8, 2012. CP at 1510-30. This is particularly true when she argues about why the Kalispel Tribe decided to have EN and BN stay on the reservation in July 2002. DSHS sought to strike this declaration and the lower court made the following finding: "The Declaration of Kathie Costanich is laced with hearsay, conclusory assertions, and irrelevancies. Rather than striking the declaration in the wholesale manner advocated by DSHS, however, the court, to the best of its ability has considered Ms. Costanich's declaration to the extent that it offers admissible and relevant evidence for the purpose of understanding her perspective and for the purpose of viewing the evidence and all reasonable inferences from the evidence in the light most favorable to her." CP at 1662-80. It remains DSHS' position that this declaration should be disregarded or at a minimum, limited to showing her subjective state of mind.

and treatment of foster children placed in [their] home.” CP at 631. As of June 11, 2001, there had been a total of 27 CPS/Licensing referrals made against the Costanich home.² CP at 632-38. These referrals consisted of licensing concerns, physical abuse and neglect, sex abuse, and emotional abuse.

B. Alleging Physical And Emotional Abuse Of Foster Children Referral (Number 28)

By the summer of 2001, Ms. Costanich had six dependent foster children living in her home; FW (age 17); KD (age 16); JS (age 12); PT (age 10); EN (age 8); and BN (age 4).³ CP at 109, 119. On July 11, 2001, DSHS received the 28th abuse referral against the Costanich home. CP at 639. This referral alleged that Ms. Costanich was both physically and emotionally abusive to the children in her care. Specifically, the referral said Ms. Costanich has a “potty mouth” and she calls one of the young girls in her home a “cunt” and refers to an African-American boy as “black ass.”

²These 27 DSHS referrals consisted of claims for physical abuse, physical neglect, sex abuse, and other licensing issues. During the time of these referrals, Ms. Costanich was alleged to have cussed at her foster children (CP at 632); used derogatory names against a foster child such as “bastard” (CP at 634); and swearing in front of the foster children but only “judiciously” (CP at 634).

³FW was in a dependency guardianship with Ms. Costanich. KD, JS, and PT were identified as sexually aggressive youth (SAY). EN and BN were in dependency guardianships with Ms. Costanich and enrolled Kalispel tribal members. (See App. A and B).

C. The Investigation

The July 11th abuse referral was assigned to DSHS Investigator Sandy Duron (Ms. Duron). CP at 415. Ms. Duron personally interviewed each foster child residing in the Costanich home and reviewed extensive documentation. CP at 415, 476, 478-83. With the exception of BN who was four at the time, all stated that Costanich regularly used profanity such as “fuck” and “bitch” and would often tell the children to “go to your fucken room.” CP at 479. Four year old BN stated she learned the words “fuck you,” “shit,” “fucker,” and “asshole” from Ms. Costanich. CP at 479. The children corroborated that Ms. Costanich called eight year old EN a “cunt.” They also confirmed that ten year old PT was told to “get his black ass down to his room” and that urine soaked sheets were rubbed on his face. CP at 478-79. Finally, the children reported that Ms. Costanich kicked them and pulled their hair. CP at 478-79, 482.

Ms. Duron also interviewed Ms. Costanich’s assistants (Chrystal Hill, Sara McClaughlin, and Tori McClaughlin). CP at 479, 481-82. They confirmed Ms. Costanich used profanity, such as “fuck” and “bitch,” around the children. CP at 479, 481-82. Ms. Hill also confirmed that Ms. Costanich called EN a “cunt” and a “bitch.”⁴ CP at 481. Ms. Duron interviewed friends and relatives of Ms. Costanich, as well as PT’s guardian ad litem and the girl’s psychiatrist, Dr. Vincent. CP at 482-83.

⁴ This statement was never repudiated by Ms. Hill. CP at 568.

With the exception of Dr. Vincent, these witnesses all confirmed that they observed Ms. Costanich direct profanity at the children. CP at 480-83.

On July 19, 2001, Ms. Duron personally interviewed Ms. Costanich.⁵ CP at 452-53. Ms. Duron asked Ms. Costanich about the allegations in the referral and further information disclosed during the investigation. CP at 452-53. Ms. Costanich confirmed she used the words “fuck,” “son of a bitch,” and “black ass.” CP at 453. A representative of the Foster Parent Association of Washington State, Larry Stevens, who was present during this interview, stated Ms. Costanich used “fuck” as “every noun, verb, adjective there is.” CP at 453. Ms. Costanich and Larry Stevens thought this was funny and both laughed. CP at 453.

On October 3, 2001, DSHS decided to hire a clinical psychologist, Beverly Cartwright, to give them an opinion as to the effect abusive language would have on young children in the Costanich home. CP at 417, 492. After a review of DSHS records, Dr. Cartwright opined that “[p]eojorative statements can erode a child’s confidence, a child’s will to succeed and capacity to change This behavior can also maintain attachment difficulties, undermines relationships with authority figures, and exacerbate poor self-management styles that include not [*sic*]

⁵ Also at this interview was Ms. Costanich’s husband, Ken Costanich and Larry Stevens, a representative of the Foster Parent Association of Washington State (FPAWS). CP at 452.

withdrawal and suppression of emotions, but also acting out.” CP at 493-94.

Based on the investigative interviews, document review, numerous DSHS group meetings, and Dr. Cartwright’s report, Ms. Duron determined that the referral for child abuse and neglect was founded only as to emotional abuse, but inconclusive as to physical abuse. CP at 119, 706.

D. Appeal Of Abuse Finding And License Revocation

Based on the finding of emotional abuse, DSHS also revoked Ms. Costanich’s foster care license. Ultimately, the revocation and abuse finding was overturned. *Costanich*, 138 Wn. App. at 553. This Court accepted review on the issue of Ms. Costanich’s entitlement to attorney fees and held that Ms. Costanich was “entitled to \$25,000 in attorney fees at both the superior court and the Court of Appeals, and up to \$25,000 for review by our court as well.” *Costanich v. Dep’t of Soc. & Health Servs.*, 164 Wn.2d 925, 935, 194 P.3d 988 (2008).

E. Attempt to Terminate Ms. Costanich’s Dependency Guardianship Status

Based on the founded finding against Ms. Costanich, DSHS and the current social worker for EN and BN, Jackie Timentwa-Wilson, felt that the two girls should be removed from the Costanich home. CP at 1617. On March 28, 2002, Ms. Timentwa-Wilson and an Assistant Attorney General filed a Motion to Terminate Ms. Costanich’s

guardianship of EN and BN in King County. CP at 1617. Prior to the King County Juvenile Court hearing on DSHS' motion to terminate the guardianship of EN and BN, the Kalispel Tribe filed a motion to take over jurisdiction of the girls' dependency cases. (*See App. C*).

On March 12, 2002, Ms. Costanich voluntarily agreed to the Kalispel Tribe's motion to transfer jurisdiction.⁶ CP at 1102-03. As a result of Ms. Costanich's agreement with the Kalispel Tribe, DSHS' motion to terminate guardianship was never heard on the merits by the King County Juvenile Court. CP at 659. Further, EN and BN continued to reside with Ms. Costanich for months after DSHS lost jurisdiction of the dependency cases. CP at 1606.

F. Summer Vacation With The Kalispel Tribe

By June 2002, Ms. Costanich and the Kalispel Tribe entered into an "Agreed Visitation Order." (*See App. D*). The order provided for EN and BN to go to the Kalispel Reservation for a 30 day (July to August 2002) visit which was meant to be a "summer vacation." CP at 1594, 1606. The vacation allowed EN and BN an opportunity to stay with their extended family members on the Kalispel Reservation and to meet certain Kalispel tribal members. They also were included in tribal youth events

⁶ Ms. Costanich claims to have had no choice in the decision to transfer EN and BN's dependency case to the Kalispel Tribe. This is an inaccurate statement. She could have objected to the transfer pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(b) (*see App. E.*). Instead of objecting, Ms. Costanich through her attorney Carol Farr agreed to the transfer. *See* CP at 1588-89 and Order of Dismissal on Reconsideration of Summary Judgment Order, footnote 10, CP at 1674-1675.

and other exciting events such as the Kalispel Tribal Pow Wow. CP at 1594-95.

DSHS was not a party to the Kalispel Tribe's visitation order, nor did DSHS provide any input or opposition to the creation of the order. CP at 659, 1593-96. At the end of the 30 day summer vacation, the Kalispel Tribe returned both EN and BN to the Costanich home.

G. Procedural History

While Ms. Costanich was pursuing an administrative appeal of her license revocation, she also filed a personal injury action against DSHS and six individually named defendants alleging both state tort claims and federal civil rights claims.⁷

The Defendants removed the federal civil rights claim to federal court. State Defendants were granted summary judgment based on qualified and absolute immunity. The district court granted the State's motion for summary judgment and declined to exercise jurisdiction over the state tort causes of action.⁸ Ms. Costanich unsuccessfully appealed the dismissal of her § 1983 claims. *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1117 (2010). Specifically, the Ninth Circuit concluded the foster care licensee's rights were not clearly established

⁷ 42 U.S.C. § 1983; CP at 7.

⁸ During the dependency of the federal court appeal, the state law claims were stayed by King County Superior Court.

regarding liberty and property interests and therefore, the state social workers were entitled to qualified immunity.

With Ms. Costanich's § 1983 claims finally resolved, the King County Superior Court placed her remaining state law claims back on the active docket on March 31, 2011. CP at 78. Ms. Costanich filed a motion for partial summary judgment (CP at 79-107) and DSHS cross-moved for summary judgment. CP at 388-409. On December 2, 2011, the Honorable King County Superior Court, Judge Jay V. White, granted DSHS' motion for summary judgment in part. CP at 1086-91. The court granted DSHS' motion as to intentional infliction of emotional distress (outrage), malicious prosecution, and abuse of process, but denied its motion with regard to negligent investigation. CP at 1086-91. However, on the eve of trial (April 3, 2012), Judge White reconsidered his prior ruling on DSHS' motion regarding negligent investigation. CP at 1662-80. Judge White requested that the parties submit additional briefing regarding the applicability of *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), to the remaining claim of negligent investigation. The judge did not ask for additional facts.⁹ On April 13, 2012, the Court dismissed Ms. Costanich's negligent investigation claim on summary judgment as a matter of law. CP at 1679. The appeal was timely filed. CP at 1652-55.

⁹ Ms. Costanich's briefing contained 205 pages and a new declaration signed by her with 107 paragraphs of alleged new facts. CP at 1378-1583.

On November 4, 2013, the Court of Appeals, Division I affirmed Judge White's dismissal of Ms. Costanich's complaint on summary judgment in an unpublished opinion. Both parties filed a motion to publish the aforesaid decision and they were denied on December 16, 2013. Ms. Costanich timely filed a Petition for Review.

IV. REASONS THIS COURT SHOULD DENY REVIEW

A. The Appellate Court's Decision Is Consistent With This Court's Decisions In *Roberson v. Perez* or *Tyner v. Dep't of Soc. & Health Serv.* RAP 13.4(b)(1)

The necessary elements to a claim of negligent investigation include proof that DSHS (1) "gathered incomplete or biased information" during the course of its abuse investigation and (2) that said investigation results in a "harmful placement decision such as removing a child from a nonabusive home . . ." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003) (emphasis added). Subsequent to *M.W.*, this Court held that harmful placement decisions could not be premised upon the theory of "constructive removal." *Roberson v. Perez*, 156 Wn.2d at 46. The dismissal of Ms. Costanich's negligent investigation claim is in accord with the holding in *Roberson*.

In *Roberson*, parents, Jonathan and Honnah Sims, claimed that a negligent investigation resulted in a harmful placement of their child. Both Jonathan and Honnah were named suspects in an abuse and/or neglect referral received by the Department of Social and Health Services.

Id. at 46. Before the investigation commenced, Jonathan and Honnah Sims voluntarily relinquished their parental rights to their son (Daniel) and sent him to stay in Kansas with his grandmother. The decision to send Daniel to Kansas was a “preemptive move” on the part of Daniel’s parents to keep him at arms’ length from a Child Protective Services (CPS) investigation. *Id.* at 46. Daniel stayed with his grandmother for approximately seven months. *Id.* at 36. Later, Jonathan and Honnah Sims filed a lawsuit claiming that their voluntary seven month separation from their son was the result of a negligent investigation.

This Court labeled the Sims’ claim as a “constructive placement” and declined to extend the cause of action for negligent investigation to such “constructive placement” decisions and noted that the extension of the negligent investigation claim to that end was “beyond the statute.” *Id.* at 46.

The Costanich case is analogous to *Roberson* for several reasons. First, Ms. Costanich had the ability to contest transfer of EN and BN’s dependency cases to the Kalispel Tribe, but she voluntarily agreed to this transfer without objection. CP at 1674-75 (footnote 10). This agreement to transfer jurisdiction is identical to the action of the parents in *Roberson*, who voluntarily sent their son to Kansas to keep him from being interviewed by DSHS.

Second, Ms. Costanich's negligent investigation claim is premised upon the same speculative constructive placement theory that was rejected by the *Roberson* court. It would be pure conjecture to assume what, if anything, the King County Juvenile Court would have done with DSHS' motion to terminate guardianship if the case had remained in state court. Similarly, in *Roberson*, "(CPS) filed a dependency petition concerning [Daniel], with an accompanying motion for a court order to take him into custody . . .;" the social workers received an "order to take [Daniel] into custody and place him in shelter care . . ."; and obtained "an order instructing [Daniel's] grandmother to turn him over to the authorities." *Roberson*, 156 Wn.2d. at 51-52 (Sanders, J. dissenting). None of these actions were considered by this Court sufficient to constitute a placement decision because the Sims had already sent their son out of state and the orders remained unexecuted.

Third, just as in *Roberson*, once EN and BN's case was transferred to tribal court, the Defendants no longer had the authority to remove the girls from Ms. Costanich's care. Perhaps even more strikingly, DSHS never went so far as to receive an order to take EN and BN into custody, nor did DSHS obtain an order requiring anyone to turn over EN and BN to authorities. Markedly, DSHS was provided no opportunity for input into the Kalispel Tribe's decisions. CP at 659. In fact, no removal (placement decision) regarding EN and BN ever occurred while the girls were within

the jurisdiction of state court.¹⁰ Notably, these children remained with Ms. Costanich long after the tribe obtained jurisdiction. CP at 1606.

Finally, as this Court noted in *Roberson*, claimants asserting constructive placements largely control the extent of their damages. *Roberson*, 156 Wn.2d 33 at 46. This is certainly true in the case at bar. The Plaintiff set in motion the alleged harmful placement, by agreeing to a 30 day “summer vacation” with the Kalispel Tribe without DSHS being a party to that agreement.¹¹ There is no evidence that this summer vacation was based upon any action by DSHS, let alone the motion to terminate guardianship that was dismissed months earlier.

Based on the foregoing, Ms. Costanich’s voluntary actions with regard to the Kalispel Tribe are reasons why this case was dismissed pursuant to *Roberson* and accordingly do not warrant review by this Court.

The appellate court accurately distinguished *Tyner v. Dep’t of Soc. & Health Serv.*, 141 Wn.2d 68, 1 P.3d 1148 (2000) and therefore the present matter is not in conflict with it. In *Tyner*, a DSHS social worker filed a dependency petition alleging that Mr. Tyner sexually abused his children. Based upon that petition, the court entered an order prohibiting Mr. Tyner from having contact with his children. Subsequent to filing the

¹⁰ The Defendants had no authority to remove EN and BN from the Plaintiff unless the King County Juvenile Court had granted their motion on April 12, 2002.

¹¹ The Court of Appeals on page 13 of its opinion astutely observed that the 30 day summer vacation with the Kalispel Tribe was actually consistent with the terms Ms. Costanich originally agreed to when she became EN and BN’s guardian. See orders, App. A and B.

dependency petition, the social worker concluded his abuse investigation against Mr. Tyner and determined the allegations to be unfounded. However, the social worker failed to inform the court of his finding and the court continued to restrict Mr. Tyner's contact with his children. The restriction on Tyner's contact with his children was directly related to the social worker's failure to update the court on the result of the abuse investigation against Mr. Tyner. First, a motion to terminate the dependency guardianship by itself is not a placement decision because the King County Superior Court never had the opportunity to rule on DSHS' motion to terminate before the Kalispel Tribe took jurisdiction. CP at 1610-11. Second, EN and BN never were removed from Ms. Costanich's care unlike the children in the *Tyner* case. CP at 1606. Third, there is no evidence that DSHS represented before the Kalispel Tribal Court that Ms. Costanich is verbally abusive to the children in her care. Finally, there is no evidence that the tribal court received and/or relied on DSHS' abuse investigation report to create the June 2002 Agreed Visitation Order. *Tyner* is not instructive to this matter as asserted by Ms. Costanich.

Since *Tyner* can easily be distinguished from the present matter, *Tyner* does not provide a basis for this Court to review Ms. Costanich's negligent investigation claim.

B. The Appellate Court's Decision Is Consistent With Its Decision In *Corey v. Pierce County*. RAP 13.4(b)(2)

The dismissal of Ms. Costanich's outrage claim can easily be distinguished from *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367, review denied, 170 Wn.2d 1016 (2010) and therefore no conflict is present. In *Corey*, the Plaintiff (a Pierce County Prosecutor) was accused by her supervisor of "criminal behavior" despite knowing that an internal investigation revealed little substance. The Plaintiff's supervisor further implied that she mishandled public funds while serving as a prosecutor. The appellate court affirmed the trial court's decision to let Plaintiff's outrage claim go to the jury based upon the forgoing and also because the accusation against her was "particularly loathsome" since she was a long time public servant.

Unlike *Corey*, there is substantial evidence to support the allegation that Ms. Costanich emotionally abused children in her care. Most of the children in her care reported that they were called things such as bitch, fucker, and cunt. These children still stand by their prior claims and two of the children have signed declarations in support of the State's motion for summary judgment reaffirming their testimony.¹² Ms. Costanich admits to telling one African American child in her care to

¹² Notably, the summary judgment record in this case was different from the summary judgment record before the Ninth Circuit Court of Appeals insofar as the complaining child witnesses had not reaffirmed the accuracy of their allegations of abuse by Ms. Costanich.

“move his black ass.” In Ms. Costanich’s administrative licensing revocation appeal, the Administrative Law Judge found that Ms. Costanich rubbed urine soaked sheet on the face of her 10 year old foster child. CP at 526. Significantly, Ms. Costanich had a long history of abuse allegations (27 previous abuse referrals). This fact certainly stands in stark contrast to the absence of any evidence of misconduct on the part of the Plaintiff in *Corey*. For these reasons, the Court should deny review.

C. This Matter Does Not Involve A Significant Constitutional Question Of Whether There Is A Due Process Right To Be Free From Misrepresentations and Possible Fabrications In A Civil Investigation Conducted By A State Actor Because That Question Was Already Answered By The Ninth Circuit. RAP 13.4 (b)(3)

The Constitutional question as to whether Ms. Costanich’s due process rights were violated was an issue that was directly decided in the Ninth Circuit and is now the law of the case and this Court should give that decision full faith and credit. *Costanich v. Dep’t of Soc. & Health Servs.*, 627 F.3d 1101 (9th Cir. 2010). The Ninth Circuit held that due process rights asserted by Ms. Costanich were not clearly established at the time when her case arose and therefore, the Defendants were entitled to qualified immunity. *Id.* at 1116. Accordingly, the Ninth Circuit affirmed dismissal of Ms. Costanich’s 1983 civil rights claims.

Moreover, because the federal court dismissed Ms. Costanich’s due process claims they were not before the trial court when summary

judgment was entered, nor were they before the Court of Appeals when that decision was affirmed. The attempt to raise them now for the first time on appeal, in direct conflict with the Ninth Circuit decision is highly improper and should be rejected.

Based upon the foregoing, this Court should deny review because all Constitutional questions have been litigated in a separate proceeding and subsequent review of that proceeding would be barred by the doctrine of collateral estoppel.

D. This Case Contains No Issues Of Substantial Public Interest As Alleged By Ms. Costanich. RAP 13.4(b)(4)

Although not raised in her issues presented for review, in subsection D of her Petition for Review, Ms. Costanich raises two issues asserting that foster parents have no remedies. The facts of this case belie the accuracy of those assertions. With regard to a foster care license revocation, foster care licensees are afforded a statutory right to appeal which was successfully utilized by Ms. Costanich in this case (*Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn.App 547, 156 P.3d 232 (2007)) and she was awarded \$75,000 in attorney's fees (*Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 1012, 203 P.3d 380 (2008)). Regarding future claims involving allocations involving the deliberate fabrication of material evidence in a civil investigation, the Ninth Circuit's decision in Ms. Costanich's case clearly establishes the law thereby entitling foster

parents the opportunity to bring a § 1983 civil rights claim when such facts actually exist. *See Costanich*, 627 F.3d at 1114 (9th Cir. 2010). (“ . . . going forward, officials who deliberately fabricate evidence in civil child abuse proceedings which result in the deprivation of a protected liberty or property interest are not entitled to qualified immunity.”)

Ms. Costanich’s allegation that foster families are remedy-less when DSHS negligence forces them to make harmful placement decisions confuses two important legal principles. First, foster parents do not have a claim for negligent investigation because they are not within the class of persons protected under RCW 26.44.010 (*see* App. F), which creates the statutory cause of action. *See Blackwell v. Dep’t of Soc. & Health Servs.*, 131 Wn. App. 372, 127 P.3d 752 (2006) (cause of action for negligent investigation is limited to parents, guardians, and custodians).

Second, the law is clearly established that if a person falls within a protected class of persons governed by RCW 26.44.050 (*see* App. G) then they have a cause of action for negligent investigation if it results in a harmful placement by DSHS. As noted previously, DSHS did not remove the girls from Ms. Costanich, she voluntarily agreed to the assumption of jurisdiction by the Kalispel Tribe. Under this Court’s decision in *Roberson*, Ms. Costanich’s constructive placement of the girls negated her claim of negligent investigation against DSHS.

For these reasons, this Court should deny review.

V. CONCLUSION

Based on the foregoing arguments, this Court should deny review of Ms. Costanich's Petition for Review pursuant to RAP 13.4 (*see* App. H).

RESPECTFULLY SUBMITTED this 6th day of March, 2014.

ROBERT W. FERGUSON
Attorney General



THOMAS R. KNOLL, JR.
WSBA #38559
Assistant Attorney General
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300
thomask@atg.wa.gov

PROOF OF SERVICE

I certify that I served a copy of this Response to Petition for Review on all parties or their counsel of record on the date below via email transmission and United States Mail, with proper postage affixed as follows:

Vonda Michell Sargent
Law Offices of Vonda M Sargent
119 1st Ave S Ste. 500
Seattle, WA 98104-3400
sisterlaw@mac.com

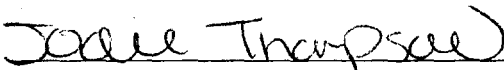
Shelby R. Frost Lemmel
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carol@leonardmoen.com

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241 Madison Ave N
Bainbridge Island, WA 98110-1811
ken@appeal-law.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of March 2014, in Tumwater, Washington.



JODIE THOMPSON, Legal Secretary

APPENDIX A

RECEIVED
KING COUNTY, WASHINGTON

JAN 05 1996

DEPARTMENT OF
JUDICIAL ADMINISTRATION

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SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DIVISION

IN RE THE WELFARE OF:)

E [REDACTED] N [REDACTED])

Minor Child.)

NO. 93-7-00216-3

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER APPOINTING
GUARDIAN OF MINOR
(Indian Child)

THIS MATTER came on regularly before the undersigned Judge of
the above-entitled court to appoint Kathy Costanich and George
Costanich as guardians for the above-named minor child. The court
having considered the files and records herein, having heard the
testimony presented, and being fully advised in the premises, now
makes the following:

1.0 FINDINGS OF FACT

1.1 E [REDACTED] N [REDACTED] was born on [REDACTED] Withheld, and currently
resides in foster care in King County, Washington.

1.2 The child's mother, [REDACTED] currently resides at
an unknown address.

1.3 The child's putative father, [REDACTED] currently
resides at an unknown address.

05050594

ORIGINAL
EXHIBIT B
Page 1108

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue #2000
Seattle, WA 98164-1012
(206) 464-7045

1 1.4 The child has been found to be dependent pursuant to RCW
2 13.34.030(2) on May 25, 1993 as to the child's mother and on May
3 28, 1993 as to the father.

4 1.5 The court also entered a dispositional order pursuant to
5 RCW 13.34.130 on May 25, 1993 as to the child's mother and on May
6 28, 1993 as to the father.

7 1.6 The Indian Child Welfare Act, 25 U.S.C. Section 1901 et.
8 seq. applies to these proceedings. The child's tribe was
9 properly and timely served.

10 1.7 Neither parent is a member of the Armed Forces and the
11 Soldiers and Sailors Civil Relief Act does not apply to the
12 proceedings.

13 1.8 The child has been removed from the custody of the
14 parents for a period of at least six months pursuant to a finding
15 of dependency under RCW 13.34.030(2).

16 1.9 Services ordered under RCW 13.34.130 have been offered
17 or provided and all necessary services reasonably available,
18 capable of correcting the parental deficiencies within the
19 foreseeable future have been offered or provided.

20 1.10 There is little likelihood that conditions will be
21 remedied so that the child can be returned to the parents in the
22 near future.

23 1.11 Guardianship rather than termination of the parent-
24 child relationship or continuation of efforts to return the child
25 to the parents' custody is in the best interests of the child.
26

05050595

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON

900 Fourth Avenue #2000

Seattle, WA 98164-1012

(206) 464-7045

FFCL & ORDER OF ~~TERMINATION~~ 2

Page 100

1 1.12 Active efforts have been made to provide remedial
2 services and rehabilitative programs designed to prevent the
3 breakup of the Indian family and these efforts have been
4 unsuccessful.

5 1.13 The court finds by clear and convincing evidence,
6 including the testimony of a qualified expert witness, that
7 continued custody of the child by the parent is likely to result
8 in serious emotional or physical damage to the child. This
9 finding shall not be deemed sufficient in itself to support an
10 order of termination pursuant to RCW 13.34.180.

11 1.14 The requirements of RCW 13.34.236 have been met, and
12 Kathy Costanich and George Costanich are suitable to act as
13 guardians for the minor child.

14 2.0 CONCLUSIONS OF LAW

15 2.1 The court has jurisdiction over the parties and subject
16 matter herein.

17 2.2 Except where otherwise noted, the above findings have
18 been proven by ^{clear, cogent + convincing} ~~clear, cogent + convincing~~ evidence.

19 3.0 ORDER

05050596

20 IT IS HEREBY ORDERED:

21 3.1 That the child's dependency status is reaffirmed. The
22 Tribe, DCFS and the mother agree to review this matter in
23 approximately one year.

24 3.2 Kathy Costanich and George Costanich are appointed
25 guardians for the minor child. This appointment is for the
26 purpose of assisting the court in the supervision of the

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue #2000
Seattle, WA 98164-1012
(206) 464-7045

FFCL & ORDER OF GUARDIANSHIP

1 dependency, and is not for any other purpose. The guardians have
2 the following rights and duties:

- 3 a. To maintain the physical custody of the juvenile;
- 4 b. To protect and educate the juvenile;
- 5 c. To provide food, clothing, shelter, education as
6 required by law, and routine medical care for the
7 juvenile;
- 8 d. To consent to emergency medical and surgical care and to
9 sign a release of medical information to appropriate
10 authorities, pursuant to law;
- 11 e. To consent to social activities of the child such as
12 travel, vacations, religious education and school
13 activities, etc.;
- 14 f. The right to notice and representation by counsel at any
15 review hearing scheduled by the parents, agency, GAL,
16 guardian or court.
- 17 g. Other: To develop with the tribal and DCFS social
18 workers, and carry out, a specific plan for maintaining
19 contact between the child and the Kalispel Tribe,
20 including exposure to the Tribe's culture.

21 3.3 The guardianship will continue until the child reaches
22 18 years of age or until further order of the Court.

23 3.4 Pursuant to RCW 13.34.233 and RCW 13.34.150 any order
24 made by the court in the case of a dependent child may be changed,
25 modified, or set aside only upon a showing of a change in
26 circumstance.

3.5 Visitation/communication will be facilitated between the
mother, child, foster parents and the Kalispel Tribe as follows:

05050597

FFCL & ORDER OF GUARDIANSHIP

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue #2000
Seattle, WA 98164-1013
(206) 464-7045

1) Mother shall be included in the child's upbringing, including visitations and shall be consulted with regard to cultural and religious issues and contact with extended family.

2) The Kalispel Tribe shall likewise be involved in the child's upbringing, including religious and cultural events during the child's minority. Foster parents shall maintain contact with the Tribe regarding the child's status, including pictures and medical information.

3.6 DCFS shall be the supervising agency.

3.7 The guardians are authorized to consent to all necessary medical, dental or psychological treatment for the child.

DATED this ~~17th~~ ^{5th} day of ~~December~~ *January*, 19~~85~~.

Jana H. Smith
JUDGE COMMISSIONER

Presented by:

Mary F. Li
Mary F. Li
Assistant Attorney General
WSBA #13567

Allen Sanders
Allen Sanders
Attorney for the Kalispel Tribe

Jana Heyd WSBA 70157
Jana Heyd, Attorney for Mother
As to form

05050598

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue #2000
Seattle, WA 98164-1012
(206) 464-7045

APPENDIX B

FILED

93 JUL 1 AM 10:47

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

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SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DIVISION

IN RE THE DEPENDENCY OF:

B [REDACTED] R [REDACTED] N [REDACTED]

BD Withheld

Minor child.

NO. 97-7-01447-4 SEA

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
APPOINTING DEPENDENCY
GUARDIAN (INDIAN CHILD)
[CLERK'S ACTION REQUIRED]

THIS MATTER came on regularly before the undersigned Judge of the above-entitled court to appoint dependency guardians for the above-named minor child. The court having considered the files and records herein, having heard the testimony presented, and being fully advised in the premises, now makes the following:

1.0 FINDINGS OF FACT

1.1 B [REDACTED] R [REDACTED] N [REDACTED] the minor child herein, was born on [REDACTED]. The child currently resides in foster care in King County, Washington.

1.2 The child's mother, [REDACTED] was last known to be living at the [REDACTED] Withheld

1.2a Ms. [REDACTED] ~~did~~ did not appear in response to notice by personal service *through her attorney.*

05050820

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER APPOINTING
DEPENDENCY GUARDIAN (INDIAN

ATTORNEY GENERAL OF WASHINGTON
900 FOURTH AVENUE SUITE 200
SEATTLE, WASHINGTON 98164-1012
TELEPHONE (206) 464-7045

EXHIBIT C

1 1.3 The identity and whereabouts of the child's natural
2 father are unknown.

3 1.4 The child was found to be dependent pursuant to RCW
4 13.34.030 on June 11, 1997.

5 1.5 The court also entered dispositional orders pursuant to
6 RCW 13.34.130 on June 11, 1997.

7 1.6. The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.
8 applies to these proceedings.

9 1.6a. The child is a member of the Kalispel Indian Tribe,
10 which is federally recognized.

11 % 1.6a. The child is eligible for membership in the Indian
12 Tribe, which is federally recognized, and is the biological child
13 of a member of a federally recognized Indian Tribe.

14 1.6b. The child is not a ward of Tribal Court and is not
15 resident/domiciled on an exclusive jurisdiction Indian
16 reservation.

17 1.6c. The child's tribe has been notified of this proceeding
18 by registered mail received at least 15 days prior to the hearing.

19 1.7 Neither parent is a member of the Armed Forces and the
20 Soldiers and Sailors Civil Relief Act, 50 U.S.C. § 501 et seq.,
21 does not apply to these proceedings.

22 1.8 The child has been removed from the custody of the
23 parents for a period of at least six months pursuant to a finding
24 of dependency under RCW 13.34.030.

25 1.9 Services ordered under RCW 13.34.130 have been offered
26 or provided, and all necessary services reasonably available and

05050821

FINDINGS OF FACT, CONCLUSIONS OF . . . 2
LAW, AND ORDER APPOINTING
DEPENDENCY GUARDIAN (INDIAN

ATTORNEY GENERAL OF WASHINGTON
900 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98164-1012
TELEPHONE (206) 464-7045

EXHIBIT C

Page 1114.

1 capable of correcting the parental deficiencies within the
2 foreseeable future have been offered or provided.

3 1.10 There is little likelihood that conditions will be
4 remedied so that the child can be returned to the parents in the
5 near future. The parents are not fit or capable of parenting the
6 child at this time.

7 1.11 Dependency guardianship rather than termination of the
8 parent-child relationship or continuation of efforts to return the
9 child to the parents' custody is in the best interests of the
10 child.

11 1.12 Pursuant to 25 U.S.C. §1912(d), active efforts have
12 been made to provide remedial services and rehabilitative programs
13 designed to prevent the breakup of the Indian family, and these
14 efforts have been unsuccessful.

15 1.13 Pursuant to 25 U.S.C. §1912(f), the court finds by
16 clear and convincing evidence, including the testimony of a
17 qualified expert witness, that continued custody of the child by
18 the parents or Indian custodian is likely to result in serious
19 emotional or physical damage to the child.

20 1.14 George and Kathie Costanich are suitable to act as
21 dependency guardians of the child and meet the minimum
22 requirements to care for the child as provided in RCW 74.15.030.

23 1.15 The proposed guardians do not fall within the
24 placement preferences of 25 U.S.C. 1915, but there is good cause
25 to continue placement with the proposed guardians because the
26 child is a special needs child. The tribe has not chosen to be a

05050822

1 party to this matter, but has approved this placement. The child
2 is thriving in this placement, and the child is also placed with
3 another sibling.

4 2.0 CONCLUSIONS OF LAW

5 2.1 The court has jurisdiction over the parties and subject
6 matter herein.

7 2.2 The above findings, unless otherwise noted, have been
8 proven by a preponderance of the evidence.

9 3.0 ORDER

10 IT IS HEREBY ORDERED:

11 3.1 That the child's dependency status is reaffirmed;
12 however, the requirements of a periodic review and the provision
13 of reunification services to the parents are terminated.

14 3.2 George and Kathie Costanich are appointed as dependency
15 guardians for the minor child. This appointment is for the
16 purpose of assisting the Court in the supervision of the
17 dependency, and is not for any other purpose. The dependency
18 guardians have the following rights and duties:

- 19
- 20 a. To maintain the physical custody of the child;
- 21 b. To protect, discipline and educate the child;
- 22 c. To provide food, clothing, shelter, education as required
23 by law, and routine health care and counseling as needed
24 for the child. Dependency Guardians are entitled to
25 access to all of the child's medical records;
- 26 d. To consent to all necessary health and surgical care,
including both routine and emergency treatment, to consent
to the administration of anaesthesia, to administer
medication prescribed by child's doctor or nurse
practitioner; and to sign a release of health care

05050823

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER APPOINTING
DEPENDENCY GUARDIAN (INDIAN

4

ATTORNEY GENERAL OF WASHINGTON
900 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98164-1012
TELEPHONE (206) 464-7045

EXHIBIT C
Page 1116

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information to appropriate authorities pursuant to law. The term "health care" includes, but is not limited to medical, dental, psychological and psychiatric care and treatment.

- e. To consent to social and school activities of the child;
- f. To provide an annual written accounting to the court regarding receipt by the dependency guardians of any funds, benefits, or property belonging to the child and expenditures made therefrom;
- g. The right to notice and representation by counsel at an hearing scheduled by the parents, agency, GAL, dependent guardian or court.
- h. To keep DSHS informed of your current residential address and phone number.
- i. To develop with the tribal and DCFS social workers, and carry out, a specific plan for maintaining contact between the child and the Kalispel tribe including exposure to the tribes culture.

3.3 The dependency guardianship will continue until the child reaches 18 years of age or until further order of the Court

3.4 Pursuant to RCW 13.34.233 any party may request the court to modify or terminate a dependency guardianship order under RCW 13.34.150; notice of any motion must be properly and timely served on all parties including the guardian; the dependency guardianship may be modified or terminated if the court finds by preponderance of the evidence that there has been a change of circumstances subsequent to the establishment of the dependency guardianship and that it is in the child's best interest to modify or terminate the dependency guardianship.

05050824

1 3.5 Visitation/communication will be facilitated between
2 the mother, child, foster parents and the Kalispel tribe as
3 follows: A. The mother shall be included in the child's
4 upbringing including visitations and shall be consulted with
5 regard to cultural and religious issues and contact with extended
6 family. B. The Kalispel tribe shall likewise be involved in the
7 child's upbringing including religious and cultural events during
8 the child's minority. C. The foster parents shall maintain
9 contact with the tribe regarding the child's status including
10 pictures and medical information.

11 3.6 DCFS shall be the supervising agency.

12 3.7 The dependency review hearing previously set is
13 stricken.

14 3.8 The fact finding hearing in this matter previously
15 scheduled is stricken.

16 DATED this 1 day of July, 1998.

17
18 Jawana A. Darity
19 JUDGE/COMMISSIONER

20 Presented by:

21 BY TERRI W. MALOLLEPSY
22 TERRI W. MALOLLEPSY
23 Assistant Attorney General
24 WSEA # 16368

25
26 05050825

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COPY RECEIVED; APPROVED AS TO CONTENT;
NOTICE OF PRESENTATION WAIVED:

Child's Mother

Sandy Belcher

Child's Guardian ad Litem

Stephanie Battista

Supervising Agency

Child's Tribe

[x] not intervened

Anna Hill WSB 70151

Attorney for Mother

Mother has indicated to me that she is in agreement with guardianship of the provisions of the guardianship as the same is the guardianship for the child. Mary the child's

Joseph C. Mulberry
Attorney for Supervising Agency

(waived presentation)

05050826

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER APPOINTING
DEPENDENCY GUARDIAN (INDIAN

7

ATTORNEY GENERAL OF WASHINGTON
900 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98164-1012
TELEPHONE (206) 464-7045

EXHIBIT C

APPENDIX C

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

IN THE INTEREST OF:

Withheld
Withheld
DOB: Withheld

An Indian Child

No. 97-7-01447-4 SEA
93-7-00216-3 SEA

As filed
 SEA KNT
MOTION & ORDER TO TRANSFER
JURISDICTION TO TRIBAL COURT
(Clerk's Action Required)

I. MOTION

The undersigned moves this court for an order to transfer jurisdiction of these proceedings from this court to the Tribal Court of the ~~Kelispel~~ *Kelispel* Tribe of Indians.

This motion is based on the provisions of 25 U.S.C. 1911 (b), the Indian Child Welfare Act.

Date: 4/12/02

TR
Signature TOM T REMANE WSBA 15710
Attorney for Kelispel Tribe of Indians
Title:

ORDER

The matter has come before the court upon a motion under 25 U.S.C. 1911 (b) to transfer of jurisdiction of these proceedings from this court to the Tribal Court of the ~~Kelispel~~ *Kelispel* Tribe of Indians.

The Court has considered the above motion, therefore, IT IS HEREBY ORDERED that this court releases any and all jurisdiction of these proceedings and transfers the same to the Tribal Court of the ~~Kelispel~~ *Kelispel* Tribe of Indians. This release and transfer is contingent upon acceptance of jurisdiction by the Tribal Court, *attached hereto*.

The hearings set for 4/17/02 and 5/8/02 are STRICKEN.

ORIGINAL

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April 12, 2002
Date

Lorraine Canada-Sheriff
Judge / Commissioner

Presented by:
[Signature] USDA 15710
Attorney for Kishpaq Tribe of Indians
Name

[Signature] #13567
Assistant Attorney General
Name of Tribal Representative

- AAG
- DCFS Social Worker
- Private Agency

- Father or
- Father's Attorney

[Signature] WSB
7015

- Mother or
- Mother's attorney

- Guardian Ad Litem
- Attorney for Minor

Case File #27470
 attorney for ~~K~~
guardians
Kathleen & Max Courtman

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UNITED STATES OF AMERICA
KALISPEL INDIAN RESERVATION
KALISPEL TRIBAL COURT

DEPENDENCY OF:

N^{Withheld} E^{Withheld} Withheld
N^{Withheld} B^{Withheld}

) Case No. 93-7-00216-3 SEA
) Case No. 97-7-01447-4 SEA

) MOTION AND ORDER FOR
) THE TRIBAL COURT TO
) ACCEPT JURISDICTION UNDER
) 25 U.S.C. 1911(b)

MOTION

The undersigned asks that the Court accept the transfer of jurisdiction of these proceedings to the Kalispel Tribal Court. This motion is based upon the provisions of 25 U.S.C. 1911(b); the Indian Child Welfare Act.

DATED this 11 day of April, 2002.

Kathy Jensen
Kathy Jensen, WSBA #28370
Kalispel Tribal Attorney

Kalispel Tribal Court
P.O. Box 96
Usk, Washington 99180
(509) 445-1664
Fax: (509) 445-4039


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ORDER

The undersigned has considered the motion, therefore,

IT IS HEREBY ORDERED that the Kalispel Tribal Court accepts any and all jurisdiction
over these proceedings.

DATED this 11 day of April, 2002.


Milton Nomee, Chief Judge
Kalispel Tribal Court

Kalispel Tribal Court
P.O. Box 96
Usk, Washington 99180
(509) 445-1664
Fax: (509) 445-4039

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APPENDIX D

UNITED STATES OF AMERICA
KALISPEL INDIAN RESERVATION
KALISPEL TRIBAL COURT

FILE
10-20-02

DEPENDENCY OF:

Case No. 2002-005JUV

N [REDACTED] E [REDACTED]
N [REDACTED] E [REDACTED]

AGREED VISITATION
ORDER

THIS MATTER came before the Kalispel Tribal Court upon the request of the Kalispel Tribal Indian Child Welfare Worker for an extended visitation of the children on the Kalispel Indian Reservation. Present for Court were [] Christina Nick, natural mother; [] Jana Hayd, attorney for Christina Nick; [] Kathie Costanich, guardian; [] George Costanich, guardian; [] Carol Farr, attorney for guardians; [] DCFS Social Worker; [] Dina Nomze, Kalispel ICW Worker; [✓] Kathy Jensen, Kalispel Indian Child Welfare Presenting Officer. The Court having heard the testimony presented, and having read the files and records herein, deeming itself fully advised in the premises, makes the following:

FINDINGS OF FACT

1. [REDACTED] N [REDACTED] and [REDACTED] N [REDACTED] are enrolled members of the Kalispel Tribe of Indians and have had limited contact with the Kalispel Tribe and its members.

Kalispel Tribal Attorney's Office
P.O. Box 39
Ulk, Washington 99180
(509) 445-1147 x 225
Fax: (509) 445-1705

AGREED VISITATION ORDER - 1

05052174

1 E [redacted] N [redacted] and B [redacted] N [redacted] are of sufficient age to spend some time with the
2 Kalispel Tribe and its members.

3 3. Wilma Cullbooyah and Francis Cullbooyah, extended family members of E [redacted]
4 N [redacted] and B [redacted] N [redacted] and cultural leaders for the Kalispel Tribe, have agreed to host the
5 children during their visit with the Kalispel Tribe.

6 4. The visit of E [redacted] N [redacted] and B [redacted] N [redacted] with the Kalispel Tribe is intended
7 to be a summer vacation for the children. The children will participate in tribal youth events and
8 other tribal events during their visitation. The children will visit with other extended family,
9 tribal members, and community members of the Kalispel Tribe

10 5. Kathie and Ken Cosmanich, guardians of the children, will visit the children on the
11 Kalispel Indian Reservation during the extended visit of the children.

12 6. The children will receive appropriate services while visiting with the Kalispel
13 Tribe of Indians.

14 7. It is recognized by this Court that the Cosmanichs and the children have a
15 parent/child relationship. However, it is vitally important that the children know the Kalispel
16 Tribe, their relatives, and the community for cultural identity.

17 Based on the foregoing, the Court ORDERS:

18 1. E [redacted] N [redacted] and B [redacted] N [redacted] shall be transported to the Kalispel Indian
19 Reservation for an extended summer visit with the Kalispel Tribe. Kathie and Ken Cosmanich
20 shall transport the children to the Kalispel Indian Reservation on July 8, 2002, and may remain
21 for up to two days in the Udc, Washington area to assist in the visitation transition.
22 *
23 * They might bring the children over earlier, 4:30 PM, if that
24 can be arranged in some 3rd & 4th S.
25

AGREED VISITATION ORDER - 2

Kalispel Tribal Attorney's Office
P.O. Box 38
Udc, Washington 99102
(509) 445-1147 x 225
Fax: (509) 445-1705

ca
K.

1 2. E [redacted] and B [redacted] N [redacted] shall reside with Wilma and Francis Culliooyah while
 2 visiting with the Kalispel Tribe. Wilma and Francis Culliooyah are authorized to consent to
 3 routine and emergency medical and dental treatment as may be necessary to the children's health
 4 and development.

5 3. Kathie and Ken Costanich shall visit with the children on the Kalispel Indian
 6 Reservation as follows:
 7 a. Saturday, July 20, 2002;
 8 b. Saturday, July 27, 2002, if the children desire the visitation;
 9 c. The weekend of the Kalispel Tribal Pow wow, August 2 through 4, 2002;
 10 d. Other visitation as agreed upon between the Costanichs and Dina Normes.

11 ICW Worker.

12 4. The Costanichs shall support and encourage the children's relationship with the
 13 Kalispel Tribe of Indians. *The Costanichs fully support the girls' close and*
 14 *Continuing relationship with their Tribe, + are pleased*
 15 *that the girls have the opportunity to know their relatives + other members +*

16 5. It is in the children's best interest that they spend the summer with the Kalispel
 17 Tribe. *to learn more about their* ← *CA*
 18 *Culture + Customs*

19 4. All prior orders of this Court not inconsistent with this order remain in full force
 20 and effect.

21 5. This matter shall be reviewed at the July 18, 2002 court date, or as soon thereafter
 22 as possible.

23 DONE IN CLOSED COURT this ___ day of June 2002.

24 *Milhou Normes*
 25 Milhou Normes, Chief Judge
 Kalispel Tribal Court

Kalispel Tribal Attorney's Office
 P.O. Box 25
 Uak, Washington 99186
 (509) 443-1147 x 223
 Fax: (509) 443-1703

AGREED VISITATION ORDER - 3

05052176

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Presented by:

Kathy Jensen

Kathy Jensen, ICW Presenting Officer

Agreed as to form and content; Notice of Presentment Waived:

Agrees w/ concept

Jana Heyd, mother's attorney

Carol Farr

Carol Farr, guardians' attorney
#27470

Dina Nomes, ICW Worker

AGREED VISITATION ORDER - 4

Kallispel Tribal Attorney's Office
P.O. Box 39
Ulk, Washington 99186
(309) 445-1147 x 223
Fax: (309) 445-1705

TOTAL P.05

05052177

APPENDIX E

25 U.S.C.A. § 1911

United States Code Annotated
Title 25. Indians

Chapter 21. Indian Child Welfare (Refs & Annos)

Subchapter I. Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

APPENDIX F

RCW 26.44.010
Declaration of purpose.

The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. When the child's physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern. Reports of child abuse and neglect shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions. This chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety.

[2012 c 259 § 12; 1999 c 176 § 27; 1987 c 206 § 1; 1984 c 97 § 1; 1977 ex.s. c 80 § 24; 1975 1st ex.s. c 217 § 1; 1969 ex.s. c 35 § 1; 1965 c 13 § 1.]

Notes:

Family assessment response evaluation – Family assessment response survey – 2012 c 259: See notes following RCW 26.44.260.

Findings -- Purpose -- Severability -- Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

Severability -- 1984 c 97: See RCW 74.34.900.

Purpose – Intent – Severability – 1977 ex.s. c 80: See notes following RCW 4.16.190.

APPENDIX G

RCW 26.44.050

Abuse or neglect of child — Duty of law enforcement agency or department of social and health services — Taking child into custody without court order, when. (*Effective until December 1, 2013.*)

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

[1999 c 176 § 33. Prior: 1987 c 450 § 7; 1987 c 206 § 5; 1984 c 97 § 5; 1981 c 164 § 3; 1977 ex.s. c 291 § 51; 1977 ex.s. c 80 § 28; 1975 1st ex.s. c 217 § 5; 1971 ex.s. c 302 § 15; 1969 ex.s. c 35 § 5; 1965 c 13 § 5.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Severability -- 1984 c 97: See RCW 74.34.900.

Effective dates -- Severability -- 1977 ex.s. c 291: See notes following RCW 13.04.005.

APPENDIX H



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RULE 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of

Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Amended September 1, 1999; December 5, 2002; September 1, 2006; September 1, 2009; September 1, 2010 (format changes only)]

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Subject: Cause No. 89779-4 - Response to Petition for Review
Attachments: ResponseToPetition.pdf

Costanich v. State of Washington, et al.:

- Response to Petition for Review

Emailed on 3/11/14 to:

Vonda Mitchell Sargent Shelby R. Frost Lemmel
sisterlaw@mac.com Shelby@appeal-law.com

Carol Farr Kenneth Wendell Masters
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Thank you for your time.

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