

FILED  
Court of Appeals  
Division III  
State of Washington  
2/13/2019 2:03 PM

NO. 361144

---

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

---

TATUM ACEVEDO,

Appellant,

v.

BRANDI JORDAN, STEVE JORDAN  
and ANTHONY JORDAN

Respondents.

---

APPELLANT'S REPLY BRIEF

---

CLAIRE CARDEN, WSBA #50590  
Northwest Justice Project  
1702 W. Broadway  
Spokane, WA 99201  
(509) 324-9128

JENNIFER YOGI, WSBA #31928  
Northwest Justice Project  
401 2<sup>nd</sup> Avenue S. #407  
Seattle, WA 98104  
(206) 464-1519

Attorneys for Appellant

**TABLE OF CONTENTS**

	<u>Page</u>
<b>A. THE RESPONDENTS' ARGUMENT THAT THE FEDERAL AND STATE INDIAN CHILD WELFARE ACTS DO NOT APPLY TO THE PROCEEDING IS UNSUPPORTED BY CASE LAW .....</b>	<b>1</b>
<b>1. This is a Foster Care Placement Involving an Indian Child; Therefore, ICWA and WICWA Apply .....</b>	<b>1</b>
<b>2. There is Insufficient Evidence in the Record to Conclude that the Grandparents Are Indian Custodians .....</b>	<b>4</b>
<b>3. Even if the Grandparents Were Indian Custodians, Their Rights do not Trump those of the Parents .....</b>	<b>5</b>
<b>B. THE TRIAL COURT HAD JURISDICTION TO DECIDE THE MOTIONS TO INVALIDATE AND VACATE .....</b>	<b>7</b>
<b>C. THE TRIAL COURT ERRED BY DENYING THE MOTION FOR RECONSIDERATION WHEN IT HAD THE FULL RECORD BEFORE IT .....</b>	<b>9</b>
<b>D. THE PURPORTED AGREEMENT DOES NOT PREVENT MS. ACEVEDO FROM MOVING TO INVALIDATE OR VACATE THE THIRD-PARTY CUSTODY DECREE .....</b>	<b>10</b>
<b>E. CONCLUSION .....</b>	<b>12</b>

## CASES

<i>In re Baby Boy Doe</i> , 123 Idaho 464, 849 P.2d 925, 93132 (1993) .....	11
<i>In re Beach</i> , 159 Wn. App. 686, 246 P.3d 845 (2011) .....	2, 3
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009) .....	2, 3, 6
<i>D.J. v. P.C.</i> , 36 P.3d 663, 672 (Alaska 2001) .....	7
<i>Lubin v. Cowell</i> , 25 Wn.3d 171, 185, 170 P.2d 301 (1946) .....	11
<i>In re Mahaney</i> , 146 Wn.2d 878, 888, 51 P.3d 776, 782 (2002) .....	2
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) .....	11
<i>Plummer v. Northern Pac. Ry. Co.</i> , 98 Wn.67, 70, 167 P.73 (1917) .....	10
<i>State v. Posey</i> , 174 Wn.2d 131, 139, 272 P.3d 840 (2012) .....	7, 8
<i>Ralph v. State Dep't of Nat. Res.</i> , 182 Wn. 2d 242, 252, 343 P.3d 342, 347 (2014) .....	8
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978) .....	4
<i>In re Custody of Shields</i> , 157 Wn.2d. 126, 136 P.3d 117 (2006) .....	7
<i>Shoop v. Kittitas County</i> , 108 Wn. App. 388, 390, 30 P.3d 529 (2001) .....	9

<i>In re Custody of S.B.R.</i> , 43 Wn. App. 622, 719 P.2d 154, 156 (1986) .....	2
<i>In re Adoption of T.A.W.</i> , 186 Wn.2d 828, 383 P.3d 492 (2016).....	3, 6, 11
<i>United States v. Wheeler</i> , 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 1086 n. 18, 55 L.Ed.2d 303 (1978).....	4
<i>Young v. Clark</i> , 149 Wn.2d 130, 134, 65 P.3d 1192 (2003).....	8

**CONSTITUTION**

CONST. art. IV, § 6.....	8
--------------------------	---

**STATUTES**

25 U.S.C. § 1903(1).....	1, 2
25 U.S.C. § 1903(3).....	4
25 U.S.C. § 1903(6).....	4
25 U.S.C. § 1912(d).....	3
25 U.S.C. § 1921 .....	6
RCW 4.12.030 .....	9
RCW 4.12.100 .....	10
RCW 13.38.130 .....	1, 2, 3, 4, 8
RCW 26.10.030 .....	8
RCW 26.10.034 .....	1, 2

**COURT RULES**

CR 60..... 8

**A. THE RESPONDENTS' ARGUMENT THAT THE FEDERAL AND STATE INDIAN CHILD WELFARE ACTS DO NOT APPLY TO THE PROCEEDING IS UNSUPPORTED BY CASE LAW.**

**1. This is a Foster Care Placement Involving an Indian Child; Therefore, ICWA and WICWA Apply.**

Respondents do not assert that the nonparental custody action complied with Indian Child Welfare laws, only that they are inapplicable to the proceeding. This argument fails. The Indian Child Welfare Act (ICWA) and its state counterpart, the Washington State Indian Child Welfare Act (WICWA), apply to child custody proceedings involving an Indian child. Child custody proceedings include "foster care placements" where the parent cannot have the child returned upon demand. 25 U.S.C. § 1903(1)(i); RCW 13.38.040(3)(a). In Washington, actions under Title 26.10 involving an Indian child are subject to WICWA. RCW 26.10.034(1).

Respondent Anthony Jordan argues WICWA does not apply because this case does not involve an "out of home placement." Brief of Respondent Anthony Jordan, pp. 6-7. Similarly, Respondent Brandi Jordan argues that because the child's father lived in her home with the child, ICWA was not violated. Brief of Respondent

Brandi Jordan, pp. 1-2. This interpretation is at odds with the plain language of RCW 26.10.034, RCW 13.38.040(3)(a), 25 U.S.C. § 1903(1)(i) and well-settled precedent. *In re Interest of Mahaney*, 146 Wn.2d 878, 889, 51 P.3d 776 (2002); *In re Beach*, 159 Wn. App. 686, 690, 246 P.3d 845, 847 (2011); *In re Custody of C.C.M.*, 149 Wn. App. 184, 195, 202 P.3d 971 (2009). In deciding whether a “foster care placement” exists, the determining factor is whether there is a legal impediment to the parent retrieving the child. *In re Interest of Mahaney*, 146 Wn.2d 878, 889, 51 P.3d 776 (2002); *In re Custody of S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154, 156 (1986). Therefore, an out of home placement includes situations where a parent is living with the child, but does not have legal custody. The response briefs do not address this fundamental point. Notably, Respondents fail to cite any Washington case law in support of their argument.

Respondent Anthony Jordan argues that this is not a “child custody proceeding” as defined by 25 U.S.C. § 1903(1) and RCW 13.38.040(3) because the child was placed with Indian custodians. Father’s Response Brief, pp. 7-8. But application of ICWA is not predicated on the identity of the parties with whom the child is placed. The relevant questions are (1) whether the child is an Indian child;

and (2) if it is the type of proceeding to which ICWA applies. *In re Adoption of T.A.W.*, 186 Wn.2d 282, 848, 383 P.3d 492, 501 (2016). All Respondents concede that N.J. is an Indian child. So, the remaining issue is whether this is a child custody proceeding. Here, a nonparental custody decree was entered where the mother could not retrieve the child upon demand; therefore, it is a child custody proceeding subject to ICWA and WICWA.

This is distinct from a situation where a parent transfers temporary care of an Indian child, but maintains legal custody. Nor was this a valid voluntary placement under ICWA. See Appellant's Brief, pp. 21-22. As an involuntary placement, the fact that the grandparents are relatives, even if they are Native American relatives, is irrelevant to the analysis of ICWA's application. See, e.g., *In re Beach*, 159 Wn. App. at 690 (ICWA applies even if the child is placed with a "de facto" parent); *C.C.M.*, 149 Wn. App. at 195 (ICWA applied to nonparental custody proceeding initiated by Native American grandparent); *Adoption of T.A.W.*, 186 Wn.2d at 851 (active efforts requirement under 25 U.S.C. § 1912(d) and RCW 13.38.130(1) apply to termination proceedings, even when the child will not be removed from an Indian parent).

**2. There is Insufficient Evidence in the Record to Conclude that the Grandparents Are Indian Custodians.**

Respondent Anthony Jordan asserts that his parents are “Indian custodians.” Father’s Response Brief, p. 8. However, he misstates the definition of the term. Brief of Respondent Anthony Jordan, pp. 7-8. The Acts define an “Indian custodian” as “any *Indian person* who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” 25 U.S.C. § 1903(6); RCW 13.38.040(10) (emphasis added). An “Indian” is any person who is a member of an Indian tribe, or an Alaska Native. 25 U.S.C. § 1903(3); RCW 13.38.040(6). Being a member of an Indian tribe is an official status. Federally recognized Indian tribes have the exclusive right to determine their membership unless limited by treaty or statute. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 1086 n. 18, 55 L.Ed.2d 303 (1978).

There is no evidence in the record regarding either of the grandparents’ membership in a federally recognized tribe. In presenting final orders, the grandparents submitted findings of fact

stating, “the child’s father and grandparents are Indian.” CP 319. The father alleges that the paternal side of the family is “of Indian decent” [sic]. Father’s Response Brief, p. 7. Until now, the grandparents have not claimed to be Indian custodians, and the trial court has never made such a finding. The court record lacks the information necessary for this Court to determine that the grandparents are Indian custodians.

If the grandparents are Indian, as defined by the Acts, they would be considered Indian custodians, if they have a valid custody order of an Indian child under state law. However, they should not be able to assert privileged status as Indian custodians when that custody order was obtained with utter disregard for the Indian Child Welfare Act. This is the crux of the mother’s challenge: the grandparents’ status as legal custodians is invalid because it was obtained in violation of ICWA and WICWA. See Appellant’s Brief, pp. 22-26.

**3. Even if the Grandparents Were Indian Custodians, Their Rights do not Trump those of the Parents.**

Even if the grandparents were Indian custodians, placement with Indian custodians is not an exception to ICWA’s application to this proceeding. ICWA contains only two exceptions: delinquency

proceedings or custody determinations made during a divorce in which one parent retains custody. *Adoption of T.A.W.*, 186 Wn. 2d. at 850, 858. Washington courts have declined to expand these exceptions. *Id.* at 851 (“Absent express legislative intent to the contrary, we refuse to create any additional exceptions.”).

This Court has already addressed a situation where an Indian custodian sought nonparental custody of an Indian child from a parent. *In re Custody of C.C.M.* involved a custody proceeding brought by an Indian custodian and his spouse. The Court found that this constituted a foster care placement since its purpose was to divest the parent of his legal right to custody. *Id.* at 195. The Indian custodian argued that he possessed an equal right to custody as the parents. The Court disagreed. *Id.* at 199. The Court reasoned that while the Acts afford parents and Indian custodians many of the same rights, ICWA mandates that when a state or federal law affords greater protection than ICWA, that law shall apply. *Id.* at 201, citing 25 U.S.C. § 1921. Because Washington state law has a strong preference for parental custody, it provides greater protection to the parent than ICWA. Accordingly, cases involving competing interests of Indian custodians and parents require that the nonparent satisfy Washington’s stringent nonparental custody standard under *In re*

*Custody of Shields*, 157 Wn.2d. 126, 136 P.3d 117 (2006). *Id.*, citing *D.J. v. P.C.*, 36 P.3d 663, 672 (Alaska 2001).

**B. THE TRIAL COURT HAD JURISDICTION TO DECIDE THE MOTIONS TO INVALIDATE AND VACATE.**

The trial court erred in denying the motions to invalidate and vacate on jurisdictional grounds. Respondent Anthony Jordan argues that because Stevens County Superior Court entered the initial nonparental custody decree, the Spokane County Superior Court, where the case was subsequently transferred, lacked jurisdiction to invalidate the decree. Brief of Respondent Anthony Jordan at 10. This argument blurs the question of a court's jurisdiction and venue, and erroneously concludes that the Spokane County Superior Court is not a court of competent jurisdiction to invalidate orders or to vacate.

"Jurisdiction means the power to hear and determine." *State v. Posey*, 174 Wn.2d 131, 139, 272 P.3d 840 (2012). Spokane County Superior Court has both personal and subject matter jurisdiction over the motion to vacate. All parties, except Mr. Steven Jordan, reside in Spokane County and were served in Spokane County. No party has challenged personal jurisdiction and, therefore, it has been waived. Superior courts have subject matter

jurisdiction over non-parental custody matters, motions to vacate, and motions to invalidate. RCW 26.10.030; CR 60; RCW 13.38.040(4).

Respondents' "distinction between 'jurisdiction of the subject matter' and 'the power or authority to render the particular judgment' rests on an antiquated understanding of subject matter jurisdiction." *Posey*, 174 Wn.2d at 138. Superior courts are courts of general jurisdiction. Article IV, section 6, of the Washington state constitution states that a superior court "shall . . . have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Under this provision of the Washington State Constitution, all superior courts have the same authority to adjudicate the same types of controversies. *Ralph v. State Dep't of Nat. Res.*, 182 Wn. 2d 242, 252, 343 P.3d 342, 347 (2014), citing CONST. art. IV, § 6. Article IV, section 6, prevents the Legislature from limiting subject matter jurisdiction "as among superior courts." *Ralph*, 182 Wn.2d at 252 (quoting *Young v. Clark*, 149 Wn.2d 130, 134, 65 P.3d 1192 (2003)). The fact that this case was originally filed in Stevens County Superior Court does not, and cannot, strip Spokane County Superior Court of jurisdiction.

Respondent correctly points out that when a court lacks jurisdiction it can only dismiss the case. *Shoop v. Kittitas County*, 108 Wn. App. 388, 390, 30 P.3d 529 (2001). However, venue is importantly distinct from jurisdiction because, as happened here, the courts can transfer venue to another court. RCW 4.12.030. Respondent asks this Court to ignore this distinction between venue and jurisdiction, while also asking the Court to ignore the fact that the trial court had personal jurisdiction over the parties, subject matter jurisdiction, and venue. Therefore, the trial court erred by dismissing both the motion to invalidate and the motion to vacate on jurisdictional grounds.

**C. THE TRIAL COURT ERRED BY DENYING THE MOTION FOR RECONSIDERATION WHEN IT HAD THE FULL RECORD BEFORE IT.**

Respondent Anthony Jordan argues that the trial court did not err in denying the motion for reconsideration because “it is clear that the trial court did not abuse its discretion[.]” Brief of Respondent Anthony Jordan at 11. This statement is utterly devoid of support in his briefing or in the record. On reconsideration, the trial court found that the court lacked sufficient information to determine whether the proceedings were erroneous. This statement ignores that the entire record from Stevens County was transferred to Spokane County.

RCW 4.12.100. The trial court incorrectly decided it needed to know what normal practice in Stevens County was to determine whether it was erroneous. The record itself is replete with evidence of what happened on January 2, 2015: a non-parental custody order removed a child from her mother without regard to any procedural safeguards. It purported to do this by agreement, when the mother was fifteen. This is erroneous.

**D. THE PURPORTED AGREEMENT DOES NOT PREVENT MS. ACEVEDO FROM MOVING TO INVALIDATE OR VACATE THE THIRD-PARTY CUSTODY DECREE.**

Respondents Brandi and Anthony Jordan both argue, in essence, that Ms. Acevedo cannot attack this non-parental custody because it was agreed; however, it is important to remember that Ms. Acevedo was 15 at the time of this alleged agreement; she did not receive legal advice or representation prior to signing the agreement; and did not know what she was signing. Even if there were a valid agreement, this argument fails because the Stevens County Superior Court did not follow the strictures of ICWA or WICWA, nor did it provide Ms. Acevedo with any procedural safeguards. In addition, Ms. Acevedo disaffirmed this agreement within a reasonable time of attaining her majority, thus rendering it void ab initio. *Plummer v. Northern Pac. Ry. Co.*, 98 Wn.67, 70, 167 P.73

(1917). The right to disaffirm a contract is “a shield to protect the [minor] from injustice and wrong[.]” *Lubin v. Cowell*, 25 Wn.3d 171, 185, 170 P.2d 301 (1946). Ms. Acevedo asks this Court to shield her from this injustice.

The Respondent errs in claiming that because the parties “agreed” that ICWA did not apply, it does not. Father’s Response Brief, p. 9. The parties’ views on the application of the Acts are irrelevant. Courts disfavor judicially-created exceptions to ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption); *Matter of Baby Boy Doe*, 123 Idaho 464, 849 P.2d 925, 931–32 (1993) (application of an Indian family requirement would circumvent ICWA’s mandates and harm the tribe’s interest in its Indian children); *T.A.W.*, 186 Wn. 2d. at 851. It would be inconsistent with the policy goals of ICWA, and forty years of case precedent, for a court to approve parties’ avoidance of ICWA by agreement. As outlined above, ICWA’s application turns on the Indian status of the child and the type of proceeding before the Court. Here, there was ample information before the court indicating that the child was an

Indian child. Appellant's Brief, pp. 14-17. As such, the Court had a duty to make further inquiry, and to follow ICWA's procedural and evidentiary requirements, unless and until there was information indicating that the child is not an Indian child.

**E. CONCLUSION**

For the foregoing reasons, Appellant Tatum Acevedo asks this Court to reverse the trial court's denial of her motions to vacate, invalidate and reconsider.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2019.



---

CLAIRE CARDEN, WSBA #50590  
JENNIFER YOGI, WSBA #31928

CERTIFICATE OF SERVICE

I certify that on the 13<sup>th</sup> day of February, 2019, I caused a true and correct copy of this document – APPELLANT’S REPLY BRIEF - to be served on the party listed below via first class U.S. mail, postage prepaid:

Steve Jordan  
4105 B Springdale Hunters Rd.  
Springdale, WA 99173

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

DATED this 13<sup>th</sup> day of February, 2019, at Spokane, WA.

  
\_\_\_\_\_  
Marcy Chicks

# NORTHWEST JUSTICE PROJECT

February 13, 2019 - 2:03 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36114-4  
**Appellate Court Case Title:** Tatum Acevedo v. Anthony J. Jordan, et al  
**Superior Court Case Number:** 17-3-02827-2

### The following documents have been uploaded:

- 361144\_Briefs\_20190213140002D3889670\_2273.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellant's Reply Brief.pdf*

### A copy of the uploaded files will be sent to:

- KapriLawFirm@gmail.com
- brandijordan1972@gmail.com
- fort@law.msu.edu
- jennifery@nwjustice.org
- ronw@cirj.org

### Comments:

---

Sender Name: Marcy Chicks - Email: marcy@nwjustice.org

**Filing on Behalf of:** Claire Joan Priscill Carden - Email: claire.carden@nwjustice.org (Alternate Email: )

Address:  
500 W. 8th Street, Suite 275  
Vancouver, WA, 98660  
Phone: (360) 693-6130

**Note: The Filing Id is 20190213140002D3889670**