

FILED
Court of Appeals
Division III
State of Washington
9/17/2018 10:03 AM

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 OPENING 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 2nd Avenue S. #407
Seattle, WA 98104
(206) 464-1519

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR.....	3
III. STATEMENT OF CASE.....	3
A. PROCEDURAL HISTORY.....	6
IV. ARGUMENT	11
A. THE TRIAL COURT ERRED BY FINDING THAT A NONPARENTAL CUSTODY PROCEEDING IS NOT A “CHILD CUSTODY PROCEEDING” SUBJECT TO THE INDIAN CHILD WELFARE ACT, 25 U.S.C. §§ 1901-63 AND THE WASHINGTON STATE INDIAN CHILD WELFARE ACT, RCW 13.38.010-190.....	11
1. The Trial Court Erred by Entering Custody Orders that Violate ICWA On Their Face	12
a. <u>ICWA and WICWA Aim to Protect the Rights of Indian Children, Parents and Tribes by Preventing Unwarranted Separation</u>	13
b. <u>The Trial Court Knew, or Should Have Known, that N.J. is an Indian Child</u>	14
c. <u>ICWA and WICWA Apply to Nonparental Custody Proceedings Involving an Indian Child</u>	18
2. The Court Must Determine That the Respondents Satisfied the Federal and State Indian Child Welfare Acts’ Prerequisites Before a Valid Foster	

TABLE OF CONTENTS

	<u>Page</u>
Care Placement Could Be Ordered; this was Never Accomplished	20
a. <u>The Mother Did Not Consent to the Placement With the Respondents</u>	21
b. <u>Respondents Did Not Satisfy ICWA's Prerequisites for an Involuntary Placement</u>	22
3. Actions Taken in Violation of ICWA's Procedural and Evidentiary Requirements Must be Invalidated Under 25 U.S.C. § 1914 and the Orders That Were the Subject of the Motion to Invalidate Must be Vacated	26
B. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION TO INVALIDATE THE NONPARENTAL CUSTODY DECREE, PURSUANT TO 25 U.S.C. § 1914, ON THE GROUNDS THAT THE COURT LACKED JURISDICTION	27
C. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION FOR RECONSIDERATION ON THE GROUNDS THAT THE COURT LACKED SUFFICIENT INFORMATION TO RULE WHEN THE ENTIRE STEVENS COUNTY FILE HAD BEEN TRANSFERRED TO SPOKANE COUNTY	28
D. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION TO VACATE	30
1. The Trial Court Erred by Denying Ms. Acevedo's Motion to Vacate for Lack of Jurisdiction When Venue had been Transferred to Spokane County	

TABLE OF CONTENTS

	<u>Page</u>
Superior Court, Pursuant to RCW 4.12.030(3).....	30
2. The Trial Court Erred by Denying Ms. Acevedo’s Motion to Vacate Because Ms. Acevedo was a Child When She Signed the Order; She had no Guardian Ad Litem and No Attorney; She was Abused by One of the Parties and Dependent on the Other Two; and She Repudiated the Agreement Within a Year of Attaining Her Majority.....	35
a. <u>CR 60(b)(10) Allows this Court to Vacate the Third Party Custody Petition</u>	36
b. <u>CR 60(b)(11) Allows this Court to Vacate the Non-parental Custody Decree</u>	39
V. CONCLUSION	41

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>In re A.L.W.</i> , 108 Wn. App. 664, 32 P.3d 297, 301 (2001).....	16
<i>Aydelotte v. Audette</i> , 110 Wn.2d 248, 750 P.2d 1276 (1988).....	32
<i>In re Baby Boy Doe</i> , 123 Idaho 464, 849 P.2d 925, 931 (1993)	16
<i>In re Beach</i> , 159 Wn. App. 686, 246 P.3d 845 (2011).....	12, 18, 19
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009).....	<i>passim</i>
<i>Clampitt v. Thurston Cty</i> , 98 Wn.2d 638, 658 P.2d 641 (1983).....	34
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	37
<i>Doble v. State</i> , 95 Wn. 62, 163 P. 37 (1917).....	32
<i>Doe v. Mann</i> , 415 F.3d 1038, 1047 (9 th Cir. 2005).....	28
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972).....	29, 35
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993).....	37
<i>In re Marriage of Hardt</i> , 39 Wn. App. 493, 693 P.2d 1386 (1985).....	36
<i>In re Adoption of Henderson</i> , 97 Wn.2d 356, 644 P.2d 1178 (1982).....	40

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Hous. Auth. of Grant County v. Newbigging</i> , 105 Wn. App. 178, 19 P.3d 1081 (2001).....	40
<i>J.I. Case Thresh'g Mach. Co. v. Sires et al</i> , 21 Wn. 322, 58 P.209 (1899).....	32, 33
<i>In re Welfare of J.N.</i> , 123 Wn. App. 564, 95 P.3d 414 (2004).....	37, 38
<i>In re K.B.</i> , 2013 MT 133, 22, 370 Mont. 254, 259-60, 301 P.3d 836, 840 (.....)	27
<i>State v. Keller</i> , 32 Wn. App. 135, 140, 647 P.2d 35 (1982).....	39
<i>Kommavongsa v. Haskell</i> , 149 Wn.2d 288, 295, 67 P.3d 1068 (2003).....	30
<i>Lightfoot v. Cendant Mortg. Corp.</i> , 137 S. Ct. 553, 560-561, 196 L. Ed. 2d 493 (2017).....	27
<i>In re Mahaney</i> , 146 Wn.2d 878, 888, 51 P.3d 776, 782 (2002).....	18, 25
<i>State ex rel. McWhorter v. Superior Court</i> , 112 Wn. 574, 192 P. 903 (1920).....	32
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L. Ed. 2d 29 (1989).....	13, 25
<i>Morgan v. Burks</i> , 17 Wn. App. 193, 198, 563 P.2d 1260 (1977).....	30
<i>Morrison v. Morrison</i> , 25 Wn. 466, 470, 65 P. 779 (1901).....	37
<i>Morrow v. Winslow</i> , 94 F.3d 1386, 1394 (10th Cir. 1996).....	27

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Oytan v. David-Oytan</i> , 171 Wn. App. 781, 288 P.3d 56 (2012).....	31
<i>In re Custody of S.B.R.</i> , 43 Wn. App. 622, 719 P.2d 154, 156 (1986).....	13, 19, 22
<i>Showalter v. Wild Oats</i> , 124 Wn. App. 506, 101 P.3d 867 (2004).....	35
<i>Shoop v. Kittitas C'ty</i> , 108 Wn. App. 388, 30 P.3d 529 (2001).....	31, 32
<i>Smith v. Monson</i> , 157 Wn. App. 443, 236 P.3d 991 (2010).....	31
<i>In re Adoption of T.A.W.</i> , 186 Wn.2d 828, 383 P.3d 492 (2016).....	1, 20
<i>In re T.L.G.</i> , 126 Wn. App. 181, 108 P.3d 156, 161 (2005).....	16, 23
<i>Troxel v. Granville</i> , 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.49 (2000)	36
<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn. App. 234, 122 P.3d 729 (2005).....	28
<i>Wilson v. Wilson</i> , 39 Wn. 641, 82 P. 154 (1905).....	36
<i>Young v. Clark</i> , 149 Wn.2d 130, 65 P.3d 1192 (2003).....	32

STATUTES

25 U.S.C. §§ 1901-63	3, 11
25 U.S.C. § 1901(4)	13
25 U.S.C. § 1902.....	1, 13, 22, 26

TABLE OF AUTHORITIES

	<u>Page</u>
25 U.S.C. § 1903(1)(i)	18
25 U.S.C. § 1903(4)	14, 15
25 U.S.C. § 1911.....	27
25 U.S.C. § 1912.....	27
25 U.S.C. § 1912(a)	22, 23
25 U.S.C. § 1912(b)	25
25 U.S.C. § 1912(c)	25
25 U.S.C. § 1912(d)	24
25 U.S.C. § 1912(e)	24
25 U.S.C. § 1913.....	27
25 U.S.C. § 1913(a)	21, 22
25 U.S.C. § 1914.....	<i>passim</i>
RCW 4.12.020.....	32
RCW 4.12.030.....	10
RCW 4.12.030(3)	30
RCW 4.12.090(1)	33
RCW 4.12.100.....	29
RCW 13.38.....	19, 20
RCW 13.38.010-90	3, 11
RCW 13.38.030.....	1, 14
RCW 13.38.040.....	6
RCW 13.38.040(1)(b).....	24

TABLE OF AUTHORITIES

	<u>Page</u>
RCW 13.38.040(3)(a)	18
RCW 13.38.040(4)	28
RCW 13.38.040(7)	14
RCW 13.38.070.....	22
RCW 13.38.070(1)	22, 23
RCW 13.38.070(11)	14
RCW 13.38.130(1)	24
RCW 13.38.130(2)	24
RCW 13.38.150(1)	21
RCW 26.09.....	31
RCW 26.09.280.....	31
RCW 26.10.030(1)	31
RCW 26.10.034.....	10
RCW 26.10.034(1)	1, 19
RCW 26.10.034(2)	20, 23
RCW 26.18.220.....	22
RCW 26.20.190.....	31
RCW 26.28.015.....	37
 COURT RULES	
CR 59	35
CR 60	37, 39
CR 60(b)(2)	8, 10, 36

TABLE OF AUTHORITIES

	<u>Page</u>
CR 60(b)(10)	<i>passim</i>
CR 60(b)(11)	<i>passim</i>
RAP 2.4(c).....	35

REGULATIONS

25 C.F.R. § 23.107(a)	14
25 C.F.R. § 23.107(b)(1)	15
25 C.F.R. § 23.107(b)(2)	15
25 C.F.R. § 23.107(c)(1), (2)	15
25 C.F.R. § 13.108(a), (b)	16
82 Fed. Reg. 12986, 13005 (March 8, 2017)	17
83 Fed. Reg. 4235, 4238 (Jan. 30, 2018)	17

OTHER AUTHORITIES

BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 11 (Dec. 30, 2016)	15
BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 12 (Dec. 30, 2016)	16, 28
PHILLIP C. CROSBY, CUSTODY OF VAUGHN: EMPHASIZING THE IMPORTANCE OF DOMESTIC VIOLENCE IN CHILD CUSTODY CASES, Boston University Law Review (1997).....	41
LISA KRZEWSKI, BUT I DIDN'T DO IT: PROTECTING THE RIGHTS OF JUVENILES DURING INTERROGATION, Boston College Third World Law Journal, 361 (2002)	38

I. INTRODUCTION

Petitioner, Ms. Tatum Acevedo, challenges a non-parental custody decree giving custody of her daughter, N.J., an Indian child, to her paternal grandparents. Ms. Acevedo, barely 16 when the order was entered, had no guardian ad litem or attorney, and, therefore, no understanding of what she was signing. No one - not even the court - explained it to her. Furthermore, the grandparents gave no notice to any tribe of the third-party custody proceeding.

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA") to protect the stability and security of Indian tribes and families by establishing minimum federal standards for removing Indian children from their parents. 25 U.S.C. § 1902. In 2004, the Washington State Legislature made clear that the Indian Child Welfare Act applies to all non-parental custody proceedings involving an Indian child. RCW 26.10.034(1) (2004). In 2011, the Legislature reaffirmed the State's commitment to protect Indian children and prevent out-of-home placement by enacting a Washington State Indian Child Welfare Act ("WICWA") intended to clarify existing laws and codify existing policies and practices. RCW 13.38.030. The federal and state statutes are coextensive, "barring specific differences in their statutory language." *In re Adoption of T.A.W.*,

186 Wn.2d 828, 844, 383 P.3d 492 (2016). The trial court committed obvious error by determining that the federal and state Indian Child Welfare Acts do not apply to a non-parental custody proceeding. This Court should correct the errors below to ensure that any future orders entered in this proceeding comply with the Acts, as mandated by federal and state law.

A court without jurisdiction must dismiss the action before the court. Superior courts are courts of general jurisdiction. The Washington Constitution vests them with original jurisdiction over anything where the Legislature has not vested jurisdiction elsewhere. Jurisdiction has not been vested elsewhere on non-parental custody; thus, the trial court erred in denying Ms. Acevedo's motion to vacate the non-parental custody on the grounds that it lacked jurisdiction. When a court transfers venue, the transferring court sends the entire record to the recipient court. The trial court erred in denying the motion for reconsideration on the grounds that it lacked the record to determine what happened.

Parents have a fundamental constitutional right to the care, custody, and control of their children. Non-parental or third party custody decrees infringe on that constitutional right and, therefore, must comply with procedural safeguards designed to ensure parents'

rights are not improperly interfered with. The trial court erred in refusing to vacate the third-party custody here when Ms. Acevedo did not knowingly or voluntarily give up her rights to her daughter.

II. ASSIGNMENT OF ERROR

- (1) The trial court erred by finding that a non-parental custody proceeding is not a "child custody proceeding" subject to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 and the Washington State Indian Child Welfare Act, RCW 13.38.010-190.
- (2) The trial court erred by entering non-parental custody orders that do not satisfy the procedural and evidentiary requirements of the Indian Welfare Act, 25 U.S.C. §§ 1901-63 and the Washington State Indian Child Welfare Act, RCW 13.38.010-190.
- (3) The trial court erred by denying Ms. Acevedo's motion to invalidate the non-parental custody decree, pursuant to 25 U.S.C. § 1914, on the grounds that the court lacked jurisdiction.
- (4) The trial court erred by denying Ms. Acevedo's motion for reconsideration on the grounds that the court lacked sufficient information to rule when the entire Stevens County file had been transferred to Spokane County.
- (5) The trial court erred by finding it lacked jurisdiction to grant Ms. Acevedo's motion to vacate when venue had been transferred to Spokane County Superior Court.
- (6) The trial court erred by denying Ms. Acevedo's motion to vacate because Ms. Acevedo was a minor when she signed the order, had no guardian ad litem and no attorney, she was abused by one of the parties and dependent on the other two, and she repudiated the agreement within a year of attaining her majority.

III. STATEMENT OF CASE

Appellant Tatum Acevedo was born on December 26, 1998.

CP 114. She met and began dating Respondent Anthony Jordan in

2013. CP 29. In early 2013, Ms. Acevedo, then fourteen, became pregnant with Mr. Jordan's child. CP 27. Ms. Acevedo moved in with Mr. Jordan and his parents, Brandi and Steve Jordan¹. CP 31. On November 29, 2013, N.J. was born². After N.J. was born, Ms. Acevedo continued to live with Anthony, Brandi, and Steve Jordan. CP 31.

In 2016, Brandi and Steve Jordan divorced. CP 27. While the divorce was pending, from August to December 21, 2016, Ms. Acevedo, Mr. Jordan, and N.J. lived with Ms. Acevedo's parents. CP 27. Ms. Jordan eventually found a new home and Ms. Acevedo, N.J., and Mr. Jordan moved in. CP 27-28.

Domestic Violence Experienced by Ms. Acevedo and N.J.

Ms. Acevedo experienced harsh, controlling behavior or abuse from both Anthony Jordan and Brandi Jordan. For example, "[i]t is not unusual for [Ms. Jordan] to use [N.J.] as a weapon against [Ms. Acevedo]. If [Ms. Acevedo] do[es] anything that makes [Ms. Jordan] mad, she will take [N.J.] away from [Ms. Acevedo]." CP at 28. Ms. Acevedo's relationship with Mr. Anthony Jordan was

¹ For clarity, Anthony Jordan is referred to as Mr. Jordan and Steve Jordan will be referred to as Steve. No offense is meant by this.

² In the original declaration in support of the temporary restraining order, Ms. Acevedo accidentally stated N.J. was born on November 29, 2014. CP 27. This was addressed and corrected below.

characterized by severe physical and emotional abuse. CP 29. Mr. Jordan, prone to extreme emotions, hit Ms. Acevedo when upset. CP 29. When she was pregnant, he punched her in the stomach because he did not want to have the child. CP 29. He choked, hit, and pushed her. CP 29-30. He abused Ms. Acevedo in his parents' home in front of N.J. CP 29-30. After seeing Anthony Jordan abuse N.J., Ms. Acevedo started planning to leave, but she knew she could not leave N.J. with Mr. Jordan. CP 30.

Third-Party Custody

In early 2015, Mr. Steve Jordan and Ms. Jordan had obtained a third party custody order. CP 141. Ms. Acevedo "was led to believe, [her] parental rights had been terminated and [N.J.] had been adopted." CP at 27. In 2017, Ms. Acevedo filed to modify the third party custody and moved out of the Jordan home. CP 31. She now rents a two-bedroom apartment and has a full-time job. *Id.* Though she is young, she is self-sufficient. *Id.*

Mr. Anthony Jordan is a member of the Picayune Rancheria of the Chukchansi Indians. CP 455. The Tribe has indicated they are interested in intervening in the case. *Id.*

A. PROCEDURAL HISTORY

On December 19, 2014, Respondents Brandi and Steve Jordan filed a pro se petition for non-parental custody of N.J. in Stevens County Superior Court. CP 113. N.J. was just over a year old. CP 162. Appellant Ms. Acevedo was 15 and Respondent Anthony Jordan was 17. CP 162. On January 2, 2015, Brandi and Steve Jordan presented the Stevens County Superior Court Commissioner with agreed Final Non-Parental Custody Orders. CP 141. Ms. Acevedo and Mr. Jordan initialed each paragraph. CP 125-39. For both parents, visitation was “unlimited within the petitioners (sic) home.” CP at 313. The decree read “Neither parent was a suitable custodian at the beginning of the case [d]ue to age of parents.” CP at 389.

Under the Indian Child Welfare Act section of the findings of fact and conclusions of law, N.J.’s Indian status is listed as “tribal heritage not enrolled.” CP at 319. The findings read:

Based upon the following, the child(ren) are not Indian child(ren) as defined in RCW 13.38.040, and the federal and Washington State Indian Child Welfare Acts do not apply to these proceedings: the child(s) (sic) father and grandparents are Indian.

Id. The record reflects that the orders were signed by presentment, and not signed in open court. CP 326, 327, 330. The record

indicates that the respondents were not present January 2, 2015. CP 330. Tatum did not have a guardian ad litem or an attorney. There is no notice of appearance or order appointing a guardian ad litem in the record. No guardian ad litem signed the order on adequate cause. CP 329.

On December 20, 2017, within a year of turning 18, Ms. Acevedo filed to modify the non-parental custody order and moved for an ex parte restraining order in Spokane County Superior Court. CP 1, 50-55. Despite the original order being entered in Stevens County, Ms. Acevedo filed in Spokane County Superior Court because Spokane County is where N.J., Brandi Jordan, Anthony Jordan, and Tatum Acevedo reside. CP 268.

A Spokane County Superior Court Commissioner granted the immediate ex parte restraining order the same day it was filed. CP 56-59. At the hearing for the restraining order, the Commissioner stated, "the court would like to raise the issue of whether these non-parental custody orders are valid based on the parent's age." CP 58. Shortly thereafter, on December 22, 2017, Tatum filed a motion to vacate the non-parental custody within the Spokane County modification case. CP 470-74. Ms. Acevedo filed four days before turning 19. *Id.*

On January 10, 2018, the court found “by a preponderance of the evidence that Mr. Jordan has physically abused Ms. Acevedo. . . . The court also finds that [N.J.] was witness to and subject to the violence.” CP at 414. At the hearing, Commissioner Stewart acknowledged the complexity of this case:

On this particular case your case beyond today is also complicated. There’s a petition to modify. There’s a petition to vacate the underlying nonparental custody decree based on the fact that Ms. Acevedo at the very minimum was 15, unrepresented, didn’t have a guardian ad litem and there’s no indication her biological parents were aware of that order.

CP at 556.

On February 9, 2018, Ms. Acevedo filed a motion to transfer venue from Stevens County to Spokane County. CP 476. On March 6, 2018, Ms. Acevedo filed a motion to invalidate the non-parental custody based on the Indian Child Welfare Act and the Washington State Indian Child Welfare Act. CP 161. On March 7, 2018, Ms. Acevedo filed a memorandum in support of her motion to vacate. CP 162. In support of her argument, Ms. Acevedo relied on CR 60(b)(2), (b)(10), and (b)(11). CP 165.

On March 8, 2018, Stevens County Superior Court entered an order transferring venue of the Stevens County non-parental custody case to Spokane County. CP 427. The court said “Alright, well

counsel, as we talk here it becomes more and more evident that the proper ruling, I think, and what I will do is change venue to Spokane County.” CP at 444. Pursuant to statute, on March 21, 2018, Stevens County transferred the entire record to Spokane County. CP 229. Due to procedural problems, the transferred case was not automatically consolidated with the ongoing modification petition in Spokane, but instead given a new Spokane County cause number. CP 450, 462.

On March 22, 2018, without a hearing, the Spokane County trial court denied Ms. Acevedo’s motions to vacate and invalidate. CP 453. The order reads, in pertinent part, “This Court does not have jurisdiction to vacate or invalidate Orders entered in other counties. These motions must be brought before the Stevens County Superior.” CP at 452-53.

On March 26, 2018, Commissioner Stewart ordered the transferred Stevens County case consolidated with the Spokane County Superior Court case. CP at 450.

On March 30, 2018, Ms. Acevedo filed a motion for reconsideration of the trial court’s denial of both her motion to vacate and motion to invalidate the non-parental custody. CP 460. There, Ms. Acevedo argued that the trial court had jurisdiction over both the

motion to invalidate, pursuant to 25 U.S.C. § 1914 and RCW 26.10.034, and the motion to vacate, pursuant to RCW 4.12.030. CP 359-459. On May 2, 2018, the trial court issued a written ruling denying Ms. Acevedo's motion for reconsideration saying "[t]he parties may proceed with the motions to vacate and/or invalidate in Stevens County." CP 578-79. The court found:

(1) Petitioner asks this Court to consider the motion to invalidate under 25 U.S.C. section 1914. That section allows any court of competent jurisdiction to invalidate an action if the Indian child is "the subject of any action for *foster care placement or termination of parental rights*" (emphasis added). The action before the Court is a Nonparental Custody action, not foster care placement or termination, therefore this section of the U.S.C. does not apply. (2) The motion to vacate is brought pursuant to CR 60(b)(2), (10) and (11). Section (2) allows for vacation "for erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings". Section (10) allows for vacation due to "Error in judgment shown by a minor, within 12 months after arriving at full age", and section (11) for "any other reason justifying relief from the operation of the judgment." This Court has no knowledge of what the record in Stevens County reflects or what the standard procedure to that County is as to who was present, who was questioned, what evidence or testimony was presented, etc. In Spokane County, the matter could have been simply handled in the ex parte department by having a commissioner review the agreed orders without taking any further evidence. In other counties, testimony is often required. This Court cannot examine the question of whether the proceedings were "erroneous" without that

information, and that information is readily available in Stevens County.”

CP at 578-79.

On May 30, 2018, Tatum filed a timely notice of appeal. CP 580.

IV. ARGUMENT

Non-parental custody infringes on a parent’s constitutional right to the care, custody, and control of their child and must, therefore, be subjected to heightened scrutiny. This case is an example of what happens when the trial court fails to enforce those rights and removes a child from a fit parent, flouting procedural safeguards. Below, the trial court erred by (1) denying the motion to invalidate, (2) denying the motion to reconsider the motion to vacate, and (3) denying the motion to vacate.

A. THE TRIAL COURT ERRED BY FINDING THAT A NONPARENTAL CUSTODY PROCEEDING IS NOT A “CHILD CUSTODY PROCEEDING” SUBJECT TO THE INDIAN CHILD WELFARE ACT, 25 U.S.C. §§ 1901-63 AND THE WASHINGTON STATE INDIAN CHILD WELFARE ACT, RCW 13.38.010-190.

The trial court erroneously determined that the Indian Child Welfare Act (ICWA) and Washington Indian Child Welfare Act (WICWA) do not apply to third party custody cases. The application and interpretation of ICWA and WICWA is a question of law that is

reviewed de novo. *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, 194, 202 P.3d 971 (2009).

1. The Trial Court Erred by Entering Custody Orders that Violate ICWA on Their Face.

This is a case to which the federal and state Indian Child Welfare Acts apply. The Acts prescribe specific procedural safeguards and evidentiary standards that must be met in state courts before those courts can remove Indian children from the custody of their parents. The court failed to apply ICWA and never determined whether the respondents satisfied the Acts' procedural and evidentiary requirements before entering orders, which placed the child with respondents. The respondents have utterly failed to satisfy the Acts' prerequisites and the case has proceeded without regard to the protections guaranteed to the child, her parents, and her tribe by the ICWA and WICWA. In the absence of full compliance with ICWA, the orders are invalid pursuant to 25 U.S.C. § 1914, and the court erred by denying the mother's motion to invalidate the orders and her subsequent motion for reconsideration. The trial court erred in denying the motion to invalidate when (i) ICWA and WICWA aim to protect children, parents and tribal rights, (ii) N.J. is

an Indian child, and (iii) ICWA and WICWA apply to nonparental custody cases involving an Indian child.

a. ICWA and WICWA Aim to Protect the Rights of Indian Children, Parents and Tribes by Preventing Unwarranted Separation.

Congress passed ICWA in response to statistical data and expert testimony documenting large numbers of Indian children separated from their families at alarmingly high rates, and placed in foster care outside their homes and communities. See 25 U.S.C. § 1901(4); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L. Ed. 2d 29 (1989). ICWA was enacted not only to protect the interests of Indian children and families, but also out of concern for the impact on the tribes themselves. *Holyfield* at 49. Tribes have independent interests in Indian children and must be allowed to participate in hearings in which their interests are significantly implicated. *In re Custody of C.C.M.*, 149 Wn. App. at 198 (2009), quoting *In re Custody of S.B.R.*, 43 Wn. App. 622, 626, 719 P.2d 154, 156 (1986). ICWA imposes heightened standards intended to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. 25 U.S.C. § 1902. WICWA echoes that it is the state's intention to promote practices designed to prevent out-of-home placement of

Indian children that is inconsistent with the rights of the parents.
RCW 13.38.030.

b. The Trial Court Knew, or Should Have Known,
that N.J. is an Indian Child.

Pursuant to both ICWA and WICWA, N.J. must be treated as an Indian child. The Acts define an "Indian child" as any unmarried person under age eighteen and (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4); RCW 13.38.040(7). An "Indian tribe" is any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services by the secretary of the interior. 25 U.S.C. § 1903(4); RCW 13.38.070(11).

Under the federal regulations implementing ICWA and promulgated in 2016, state courts must ask each participant in a voluntary child custody proceeding whether the participants know or have reason to know that the child is an Indian child. 25 C.F.R. § 23.107(a). The court has reason to know an "Indian child" is involved if any participant in the proceeding, officer of the court involved in the proceeding, Indian tribe, Indian organization, or agency informs the court that it has information indicating that the child is an Indian child;

or that it has discovered information indicating that the child is an Indian child. 25 C.F.R. § 23.107(c)(1), (2). State courts and agencies are encouraged to interpret these factors expansively. BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 11 (Dec. 30, 2016).

The ICWA proscribes that once the court has reason to know the child may be an Indian child, but does not have conclusive evidence, the court should confirm and work with all potential Tribes to verify whether the child is in fact a member or eligible for membership. 25 C.F.R. § 23.107(b)(1). If the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child. 25 C.F.R. § 23.107(b)(2).

At the moment that the respondents and the court had reason to know that N.J. is or may be an Indian child, it was required to follow ICWA. Here, the respondents and the court knew, or had reason to know, that N.J. is an Indian child from the outset of the case. The respondents alleged in their petition, and it is undisputed, that N.J. is an "Indian child" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(4). CP 115.

The findings of facts presented by the respondents state, “the child’s father and grandparents are Indian” and that N.J. has “tribal heritage” but is “not enrolled.” CP 319. This information cannot support a conclusion that N.J. is not an Indian child. First, the child’s enrollment status may provide evidence of tribal membership, but enrollment is not the sole indicator of tribal membership. *In re T.L.G.*, 126 Wn. App. 181, 191, 108 P.3d 156, 161 (2005). Enrollment is an administrative function. The core of the inquiry under ICWA is *eligibility* for membership in the parent’s tribe. *In re Baby Boy Doe*, 123 Idaho 464, 470, 849 P.2d 925, 931 (1993). Second, the respondents’ belief regarding the child’s tribal membership or eligibility for membership is not dispositive. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 191, 108 P.3d 156, 161 (2005). The tribe has the sole power to decide membership. *In re A.L.W.*, 108 Wn. App. 664, 672, 32 P.3d 297, 301 (2001); 25 C.F.R. § 23.108(a),(b); BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 12 (Dec. 30, 2016) (“these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations.”).

The statements in the petition regarding the grandparents’, father’s, and child’s Indian status, alone, undoubtedly constitute a

basis for the court to have reason to know of N.J.'s Indian status. Moreover, Ms. Acevedo subsequently provided documentation from the Picayune Rancheria of Chukchansi Indians of California confirming N.J.'s father's membership with the tribe, and indicating their intention to intervene in the proceedings. CP 455. The Picayune Rancheria of Chukchansi Indians of California is a federally recognized tribe. 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018). This information about N.J.'s Indian status came directly from the agent designated by the Picayune Rancheria of the Chukchansi Indians to receive ICWA notice.³ This is the best source of information to support the conclusion that N.J. is an Indian child. BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 12 (Dec. 30, 2016). Therefore, the court and the respondents had reason to know that N.J. is an Indian child, and must follow ICWA unless and until it is determined that N.J. does not meet the definition of an Indian child.

³ The BIA publishes a list of designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its website. 2016 Guidelines, pp. 19-20; *see also* 82 FR 12986, 13005 (March 8, 2017).

c. ICWA and WICWA Apply to Nonparental Custody Proceedings Involving an Indian Child.

The trial court erred in deciding that ICWA and WICWA do not apply to nonparental custody proceedings. ICWA applies to any “foster care placement” involving an Indian child. *In re Beach*, 159 Wn. App. 686, 690, 246 P.3d 845, 847 (2011). A foster care placement is characterized as one involving the removal of an Indian child from her parent for temporary placement where the parent cannot have the child returned upon demand, but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i); RCW 13.38.040(3)(a). For purposes of determining whether the child is in a “foster care placement,” the determinative factor is whether there is a legal impediment to the parent retrieving the child. *In re Mahaney*, 146 Wn.2d 878, 888, 51 P.3d 776, 782 (2002). In *Mahaney*, the Washington Supreme Court found that placing children with their paternal grandmother through a temporary custody order, even though they had been in her physical custody for nine years, constituted a foster care placement: “Because the children were in custody where they were not returnable to [the mother] on demand, their placement with their grandmother,

Mahaney, amounted to foster care placement under ICWA.” *Id.* at 889.

The placement does not have to be state-initiated. Since 2004, State statute mandates that ICWA applies to any non-parental custody action where the child is an Indian child. RCW 26.10.034(1). In 2011, that provision was expanded to include the application of WICWA, codified at RCW 13.38, to any action for non-parental custody involving an Indian child. RCW 26.10.034(1). The statute mandates that if the child is an Indian child, chapter 13.38 RCW shall apply to third party actions involving custody of minor children under RCW 26.10. *Id.*

Washington courts have affirmed that non-parental custody actions are foster care placements under ICWA. *In re Custody of C.C.M.*, 149 Wn. App. 184, 195, 202 P.3d 971, 976 (2009) (citing *In re Interest of Mahaney*, 146 Wn.2d 878, 889, 51 P.3d 776 (2002)); *In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986); accord *J.W. v. R.J.*, 951 P.2d 1206, 1213 (Alaska 1998); *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. Ct. App. 1993)); see also, *In re Beach*, 159 Wn. App. 686, 689, 246 P.3d 845, 846-47 (2011) (concluding that the Indian Child Welfare Act applied to custody proceeding filed by individual claiming to be de facto parent). Either

parent may invoke the protections of ICWA. *In the Matter of the Adoption of T.A.W.*, 186 Wn.2d 828, 839, 383 P.3d 492, 496 (2016). ICWA and WICWA equally apply to and protect the rights of a non-Indian parent of an Indian child. *Id.*

Here, the court entered final orders granting non-parental custody to the respondents where Ms. Acevedo could not retrieve N.J. at will. The non-parental custody decree, findings of fact and conclusions of law, and adequate cause order entered on January 2, 2015, constitute a foster care placement because the orders placed N.J. in her paternal grandparents' custody and her mother could not have her returned upon demand. As such, the respondents were required to demonstrate that they had satisfied all procedural and evidentiary requirements of the Acts before the court could enter a valid non-parental custody order of N.J.

2. The Court Must Determine that the Respondents Satisfied the Federal and State Indian Child Welfare Acts' Prerequisites Before a Valid Foster Care Placement Could Be Ordered; this was Never Accomplished.

Under RCW 26.10.034(2), every order must contain a finding that the federal Indian Child Welfare Act and chapter 13.38 RCW does or does not apply. Where the court finds that either statute applies, the order must also contain a finding that all notice and

evidentiary requirements under the Acts have been satisfied. *Id.* The non-parental custody decree, findings of fact and conclusions of law, and adequate cause order entered on January 2, 2015, fail to satisfy ICWA's prerequisites. As a result, the Spokane County Superior Court erred in denying the mother's motion for reconsideration of the denial of her Motion to Invalidate the Nonparental Custody Orders, pursuant to 25 U.S.C. § 1914. The numerous violations of ICWA that occurred here compel invalidation of the orders; all orders heretofore entered in the case must be vacated.

a. The Mother Did Not Consent to the Placement With the Respondents.

To the extent that Ms. Acevedo agreed to place N.J. with respondents, this did not constitute valid consent to non-parental custody under ICWA. A voluntary consent to a foster care placement is not valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail. 25 U.S.C. § 1913(a); RCW 13.38.150(1). The court must also certify that the parent fully understood the explanation. *Id.* Ms. Acevedo did not execute a

consent in writing before a judge. There is no record of a judge's certificate that the consequences were explained to her, and that she understood. The record shows that orders were entered by presentment and not in open court. CP 326, 327, 330.

b. Respondents Did Not Satisfy ICWA's Prerequisites for an Involuntary Placement.

This action was, therefore, an "involuntary" proceeding because neither parent consented under the strict requirements of 25 U.S.C. § 1913(a). *In re S.B.R.*, 43 Wn. App. 622, 624-625, 719 P.2d 154 (1986). ICWA includes both procedural and evidentiary standards that must be met before a child can be removed from her home. These are intended to protect the rights of the Indian child, parents and tribe, and prevent the unnecessary breakup of the family. 25 U.S.C. § 1902.

First, respondents have an affirmative duty to provide notice to the child's parents and tribe whenever they know or have reason to know that the proceeding involves an Indian child. 25 U.S.C. § 1912(a); RCW 13.38.070. As discussed in section (1)(a)(i), above, there was ample reason to know that N.J. is an Indian child. Legal notice must be done by use of a mandatory form. RCW 13.38.070(1); RCW 26.18.220. The notice must be served by

certified mail, return receipt requested. 25 U.S.C. § 1912(a); RCW 13.38.070(1). No foster care placement proceeding may be held until at least 10 days after receipt of notice by the child's parents and the tribe. *Id.*

The federal and state Acts and RCW 26.10.034(2) each place the burden of ensuring notice to the tribe and the parents "squarely on the shoulders of the court." See *In re Dependency of T.L.G.*, 126 Wn. App. 181, 192 (2005); see also, *In re Custody of C.C.M.*, 149 Wn. App. 184, 197, 202 P.3d 971 (2009) ("a trial court has an independent responsibility to ensure proper notice to an interested tribe"). The court record provides no indication that the respondents served the child's tribe, nor the parents, notice of the proceeding. There is no Return of Service, Declaration of Mailing or Certificate of Service, nor does the record contain a return receipt verifying that the notice was sent by certified mail.

Additionally, the respondents failed to satisfy the heightened evidentiary standards imposed by ICWA and WICWA. Those prerequisites are two-fold.

First, the Acts require that any party seeking foster care placement of an Indian child shall first satisfy the court that "active efforts have been made to provide remedial services and

rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” 25 U.S.C. § 1912(d); RCW 13.38.130(1). WICWA clarifies that private parties, such as the respondents, must demonstrate that they have made a documented, concerted, and good faith effort to facilitate the parents’ receipt of and engagement of reasonably available and culturally appropriate, preventative, remedial or rehabilitative services and shall include services offered by tribes and Indian organizations whenever possible. RCW 13.38.040(1)(b). An effort must be made to engage the parent in remedial services and rehabilitation programs beyond simply providing referrals to such services. *Id.* Respondents made no such showing, nor did they even allege that such efforts were made. Neither did the respondents show or allege that any effort to provide such services or programs had failed to achieve their intended effect.

Second, no foster care placement may be ordered in such a proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e); RCW 13.38.130(2).

To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

In re Mahaney, 146 Wn.2d 878, 892, 51 P.3d 776 (2002) (quoting GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS, 44 Fed. Reg. 67,593 (Nov. 26, 1979)). This requirement was not met prior to entry of the final custody order. To date, no testimony or declaration from qualified expert witnesses has been presented to the court. Respondents did not provide any information relevant to Ms. Acevedo's specific circumstances other than her age and what, if any, risk that her continued custody might pose for her child.

Finally, ICWA sets forth minimum standards for the placement of Indian children by state courts and provides procedural safeguards to insure that parental rights are protected. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 56, 109 S. Ct. 1597, 1613 (1989). These include the stringent standards of proof described above, the parties' right to examine all reports and documents filed with the court, and an indigent parent's right to appointment of counsel. *Id.*; 25 U.S.C. § 1912 (b), (c). The record indicates that Ms. Acevedo was never appointed legal counsel, nor

was she advised of her right to counsel. Thus, the respondents failed to satisfy any of the requirements of ICWA or WICWA.

3. Actions Taken in Violation of ICWA's Procedural and Evidentiary Requirements Must be Invalidated Under 25 U.S.C. § 1914 and the Orders That Were the Subject of the Motion to Invalidate Must be Vacated.

Satisfying these prerequisites is mandatory and the court below erred in failing to invalidate the orders based on its deficiencies. "It is well-established that the failure to provide proper notice or to allow a tribe to intervene constitute grounds to invalidate the child custody proceeding." *In re Custody of C.C.M.*, 149 Wn. App. 184, 197, 202 P.3d 971, 977 (2009). Where an action is taken that clearly fails to meet ICWA's procedural and evidentiary requirements, the orders should be vacated. 25 U.S.C. § 1914. To do otherwise is inconsistent with Congress's stated goal in the passage of ICWA: to promote the stability and security of Indian tribes and families by the establishment of minimum substantive and procedural standards for the removal of Indian children from their families. 25 U.S.C. § 1902. Any future orders in this proceeding must comply with these prerequisites. This Court should reverse the order denying reconsideration and remand the case for entry of

further orders consistent with the federal and state Indian Child Welfare Acts.

B. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION TO INVALIDATE THE NONPARENTAL CUSTODY DECREE, PURSUANT TO 25 U.S.C. § 1914, ON THE GROUNDS THAT THE COURT LACKED JURISDICTION.

The trial court erred by denying Ms. Acevedo's motion to invalidate the nonparental custody orders because it was a court of competent jurisdiction to hear such a motion. A parent may petition any court of competent jurisdiction to invalidate a child custody proceeding upon a showing that it violated any provision of sections 25 U.S.C. §§ 1911, 1912, 1913 or 25 U.S.C. § 1914. A court of competent jurisdiction is not defined under the federal Act, but is generally one which has jurisdiction over the relevant subject matter under federal or state law. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560-561, 196 L. Ed. 2d 493 (2017); *see also, Morrow v. Winslow*, 94 F.3d 1386, 1394 (10th Cir. 1996) (finding that both federal and state courts are courts of competent jurisdiction to hear claims under § 1914). The court of competent jurisdiction may be a different court from the court where the original proceedings occurred. *In re K.B.*, 2013 MT 133, 22, 370 Mont. 254, 259-60, 301 P.3d 836, 840 (court of competent jurisdiction includes an appeals

court where ICWA violations have been alleged for the first time); *see also, Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005) (finding that federal courts have authority to invalidate state court actions under section 1914); BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 75 (Dec. 30, 2016).

Under WICWA, a court of competent jurisdiction is a federal or state court that had proper subject matter jurisdiction to enter the order in accordance WICWA and the laws of that state. RCW 13.38.040(4). Ms. Acevedo's motion to invalidate was heard by the state superior court with jurisdiction over the proceeding; therefore, it was the appropriate forum for the motion and the denial was erroneous.

C. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION FOR RECONSIDERATION ON THE GROUNDS THAT THE COURT LACKED SUFFICIENT INFORMATION TO RULE WHEN THE ENTIRE STEVENS COUNTY FILE HAD BEEN TRANSFERRED TO SPOKANE COUNTY.

The trial court erred by denying Ms. Acevedo's motion for reconsideration when it had more than sufficient information to determine what had occurred. Appellate courts review motions for reconsideration for abuse of discretion. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). A trial court abuses its discretion when it bases its decision on "clearly untenable

or manifestly unreasonable” grounds. *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972). The trial court abused its discretion by denying Ms. Acevedo’s motion for reconsideration on the basis that there was insufficient evidence of the Stevens County proceeding before the court.

RCW 4.12.100 reads:

The clerk of the court must also transmit with the original papers where an order is made changing the place of trial, a certified transcript of all record entries up to and including the order for such change.

The parties and the courts fully complied with RCW 4.12.100. This means that everything that would have been available in Stevens County was available to the trial court in Spokane County. There were also sworn statements regarding the lack of counsel or a guardian ad litem. The order itself reflects that it was entered by presentment. No attorney or guardian ad litem signed the order. No notice of appearance or order appointing a GAL is in the record. There was no additional information to present to the court.

In fact, the record is replete with evidence of what occurred in Stevens County Superior Court on January 2, 2015: an “agreed” order was presented to the court commissioner who, off record, signed it. The Spokane County trial court seemed to believe that it

needed to ascertain the usual practice of the Stevens County Superior Court in order to determine if the proceedings were erroneous. This is incorrect. The question before the trial court was not whether what happened on January 2, 2015, followed usual practice, but rather whether it is proper. The proceedings were erroneous whether it is Stevens County's usual practice or not.

D. THE TRIAL COURT ERRED BY DENYING MS. ACEVEDO'S MOTION TO VACATE.

The trial court denied Ms. Acevedo's motion to vacate the third party custody erroneously because (a) it had jurisdiction to decide it and (b) vacation is proper in these circumstances.

1. The Trial Court Erred by Denying Ms. Acevedo's Motion to Vacate for Lack of Jurisdiction When Venue had been Transferred to Spokane County Superior Court, Pursuant to RCW 4.12.030(3).

The trial court erred in finding that it lacked jurisdiction over Ms. Acevedo's motion to vacate. In general, appellate courts review motions to vacate for abuse of discretion; however, purely legal questions are reviewed de novo. *Morgan v. Burks*, 17 Wn. App. 193, 198, 563 P.2d 1260 (1977); *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003). Whether the trial court had jurisdiction is a purely legal question, which this Court should review

de novo. *Smith v. Monson*, 157 Wn. App. 443, 447, 236 P.3d 991 (2010).

For a court to render a decision it must have jurisdiction. Personal jurisdiction, or the power to act over the parties, is established via minimum contacts or by acquiescence. *Oytan v. David-Oytan*, 171 Wn. App. 781, 803, 288 P.3d 56 (2012). Subject matter jurisdiction is the power of the court to act over the type of case. *Shoop v. Kittitas C'ty*, 108 Wn. App. 388, 393, 30 P.3d 529 (2001). Superior courts in Washington are courts of general jurisdiction. WA. CONST. Art. IV, § 6 ("The superior court shall also 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."). They have subject matter jurisdiction over non-parental custody proceedings. RCW 26.10.030(1). RCW 26.10.190 points courts to the provisions of 26.09 RCW. RCW 26.09.280 reads:

Every action or proceeding to change, modify, or enforce any final order, judgment, or decree . . . regarding [a] parenting plan . . . may be brought in the county where the minor children are then residing, or in the court in which the final order, judgment, or decree was entered, or in the county where the parent or other person who has the care, custody, or control of the children is then residing.

Courts of co-ordinate jurisdiction were long held not to be competent to vacate judgments of other co-ordinate courts. *J.I. Case Thresh'g Mach. Co. v. Sires et al*, 21 Wn. 322, 323, 58 P.209 (1899).

“The power to vacate judgments . . . is a power inherent in and to be exercised by the court which rendered the judgment. . . . As between courts of co-ordinate jurisdiction, such as two county courts . . . , the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face: relief must be sought in the court where the judgment was entered.”

Doble v. State, 95 Wn. 62, 69-70, 163 P. 37 (1917) (internal citation omitted). In *Doble*, the court erroneously interpreted this inherent power as jurisdictional. This is tied to the erroneous interpretation of venue statutes as jurisdictional. See, e.g., *State ex rel. McWhorter v. Superior Court*, 112 Wn. 574, 192 P. 903 (1920); *Aydelotte v. Audette*, 110 Wn.2d 248, 750 P.2d 1276 (1988) (“While arguably RCW 4.12.020 might be characterized as a venue statute, see 2 L. Orland at 79-80, where it has considered the issue, the court has consistently held the statute to be jurisdictional.”). Citing to the constitutional grant of original jurisdiction to the superior courts, this interpretation of venue statutes was overruled in the early 2000s. *Shoop v. Kittitas C'ty*, 108 Wn. App. 388, 30 P.3d 529 (2001); *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003). Therefore, the Case

P.3d 1192 (2003). Therefore, the *Case Threshing Machine* line of cases was overruled along with these other erroneous limitations on superior court jurisdiction. *J.I. Case Thresh'g Mach. Co. v. Sires et al*, 21 Wn. 322, 323, 58 P.209 (1899).

In this case, there is no question that Spokane County Superior Court has personal jurisdiction over all the parties. All, but one party, reside in Spokane County. The child resides in Spokane County. Finally, no party raised a timely objection to personal jurisdiction. There is also no question that Spokane County Superior Court has subject matter jurisdiction. Spokane County Superior Court is a court of general jurisdiction where child custody proceedings are properly adjudicated. Thus, the trial court erred in denying Ms. Acevedo's motion to vacate on jurisdictional grounds.

If, however, this Court finds *Case Threshing Machine* still viable, the facts in this case are also distinguishable due to the venue transfer. None of the cases that address one court vacating the decision of another involved a case where venue had been transferred. "The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein." RCW 4.12.090(1). The venue transfer statute is clear that a jurisdiction transfers with the

case from one court to the other. The Supreme Court has previously indicated that motions to vacate are a type of proceedings that could be subject to a motion to transfer venue. *Clampitt v. Thurston Cty*, 98 Wn.2d 638, 658 P.2d 641 (1983).

Here, Stevens County Superior Court, a court of competent jurisdiction, transferred venue to Spokane County Superior Court, a court of co-ordinate jurisdiction. The transfer of venue is one court ceding to another court the right to make decisions over a case. Spokane County Superior Court erroneously deemed that it lacked jurisdiction after the Stevens County Superior Court had ceded its authority to Spokane. This interpretation would never allow for a venue transfer for post-trial motions, which the Washington Supreme Court tacitly accepted should be allowed in *Clampitt supra*. Thus, the trial court erred by finding that it lacked jurisdiction and should be reversed.

2. The Trial Court Erred by Denying Ms. Acevedo's Motion to Vacate⁴ Because Ms. Acevedo was a Child When She Signed the Order; She had no Guardian Ad Litem and No Attorney; She was Abused by One of the Parties and Dependent on the Other Two; and She Repudiated the Agreement Within a Year of Attaining Her Majority.

The trial court erred in denying Ms. Acevedo's motion to vacate the non-parental custody. Motions to vacate are reviewed for abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when it bases its decision on "clearly untenable or manifestly unreasonable" grounds. *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972). The trial court originally denied the motion to vacate on jurisdictional grounds addressed *infra* at section (3)(a). On reconsideration, the trial court determined that it did not have sufficient information regarding the Stevens County proceedings addressed *infra* at section (2). The court erred by failing to address the merits of the argument, despite two opportunities to do so. It was manifestly unreasonable to deny the motion to vacate this non-

⁴ Pursuant to RAP 2.4(c), even though the motion to vacate was a final judgment not designated in the notice of appeal, "the appellate court will review a final judgment not designated only if the notice designates an order deciding a timely posttrial motion based on . . . CR 59 [motion for reconsideration]. . .". Therefore, the denial of the motion to vacate is properly before the Court.

parental custody order when Ms. Acevedo was a minor when she signed the order and repudiated the agreement within a year of turning 18, had no guardian ad litem and no attorney, and she was abused by one party and reliant on the other two for housing.

Below, Ms. Acevedo raised three grounds for vacation: CR 60(b)(2), (b)(10), and (b)(11). Any of these grounds is sufficient to vacate the judgment. Proceedings to vacate judgments are equitable in nature and the Court should exercise its authority liberally to preserve substantial rights and do justice between the parties. *In re Marriage of Hardt*, 39 Wn. App. 493, 693 P.2d 1386 (1985). One of the most significant and sacred rights is in question here; a parent's interest in the care, custody, and management of their child. *Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L.Ed.49 (2000).

a. CR 60(b)(10) Allows this Court to Vacate the Third Party Custody Petition.

Within a year of reaching the age of majority, Ms. Acevedo contends she made an error in judgment when entering into agreed non-parental custody orders. CR 60(b)(10). There is very little case law which interprets this rule⁵; however, children in Washington

⁵ Previously, this rule has been interpreted to apply when there is an error in the judgment or order. *Wilson v. Wilson*, 39 Wn. 641, 680-81, 82 P. 154 (1905);

receive different, indeed protective, treatment as compared to adults across a wide range of legal categories. *State v. Furman*, 122 Wn.2d 440, 459, 858 P.2d 1092 (1993). This reflects a recognition by courts and commentators alike that minors have less-developed decision-making faculties than adults. *Id.* RCW 26.28.015 explains that a child cannot sign legally binding contracts, or bring lawsuits, or otherwise involve themselves in legal proceedings. The policy behind this statute is that children “lack the experience, judgment, knowledge and resources to effectively assert their rights.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998).

In the adoption context, there is a case that illustrates the importance of procedural protections for a minor who relinquishes custody of her child: *In re Welfare of J.N.*, 123 Wn. App. 564, 95 P.3d 414 (2004). T.N., age 15, gave birth to a son, and subsequently relinquished her parental rights. *Id.* at 568. Within one year, T.N. filed a motion to vacate. *Id.* This motion was denied due

Morrison v. Morrison, 25 Wn. 466, 470, 65 P. 779 (1901). These cases were not interpreting CR 60, but rather a similar code in effect at that time. The code provided that a judgment could be modified “for error in a judgment shown by a minor within twelve months after arriving at full age.” (Emphasis added.) CR 60 removes the language “error in a judgment” and provides simply an “error in judgment.” The modification is noteworthy.

to the presence of independent counsel and a guardian ad litem; the court concluded that both factors supported the voluntariness of the relinquishment. *Id* at 571. However, Ms. Acevedo was afforded none of the protections that the court in *In re Welfare of J.N.* found compelling; the lack of independent counsel and a guardian ad litem weigh heavily in favor of a ruling that Ms. Acevedo's mistake should be remedied by the application of CR 60(b)(10).

Psychological literature teaches us that people feel compelled to comply with authority figures. This compulsion may be stronger with youth. LISA KRZEWSKI, BUT I DIDN'T DO IT: PROTECTING THE RIGHTS OF JUVENILES DURING INTERROGATION, Boston College Third World Law Journal, 361 (2002). Here, Ms. Acevedo was faced with a scenario where the people she was residing with, the grandparents of her child, petitioned the court for custody. Nothing in the record indicates Ms. Acevedo was properly advised of her rights, and the legal consequences of signing a non-parental custody order. Ms. Acevedo should have been afforded independent advice and counsel. Without counsel or guardian ad litem representation, and without any on-the-record colloquy, the only evidence regarding what Ms. Acevedo understood is her uncontroverted statements;

she did not understand the third-party custody. When Ms. Acevedo was a child, she made an error in judgment. She should not lose her child as a result. Ms. Acevedo is entitled to relief from the non-parental custody decree under CR 60(b)(10).

b. CR 60(b)(11) Allows this Court to Vacate the Non-parental Custody Decree.

If the Court determines that CR 60(b)(10) is inapplicable, Ms. Acevedo asks this Court to vacate the non-parental custody decree under CR 60(b)(11), the catch-all provision of CR 60.

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for . . . [a]ny other reason justifying relief from the operation of the judgment.

CR 60(b)(11).

The operation of CR 60(b)(11) is "confined to situations involving extraordinary circumstances not covered by any other section of the rule." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). "The circumstances must relate to irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *Id* at 141, quoting *Marie's Blue Cheese Dressing Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 758, 415 P.2d 501 (1966). In considering the application of CR 60(b)(11),

courts weigh the interests affected. *In re Adoption of Henderson*, 97 Wn.2d 356, 360, 644 P.2d 1178 (1982) (“in light of the unusual circumstances of the case, and particularly in view of the fact that the vital interests of the children are involved ...” use of CR 60(b)(11) was permitted.)

Here, there are a number of irregularities in the proceedings and extraneous to the proceedings. Equitable principles guide a court considering a motion to vacate. *Hous. Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 185, 19 P.3d 1081 (2001). Ms. Acevedo was a minor when she agreed to the non-parental custody decree. She did not understand what she was agreeing to. CP 27. She did not have a guardian ad litem or an attorney to explain the ramifications of the orders she signed. Throughout this process, Respondents have argued that Ms. Acevedo entered into this agreement voluntarily. But, the uncontroverted facts are that, until 2017 when she obtained an attorney, Ms. Acevedo was under the impression that this order terminated her parental rights. She did not know what she had agreed to. Other than her age, no evidence was presented to the court indicating she was an unfit parent.

Ms. Acevedo was also the victim of domestic violence and likely feared doing anything that may upset her abuser. CP 29-30.

An abusive relationship involves dynamics of power and control. Such a relationship generally involves the intimidation and victimization of the woman and, in addition to using physical violence, the abuser may utilize psychological weapons as well. PHILLIP C. CROSBY, CUSTODY OF VAUGHN: EMPHASIZING THE IMPORTANCE OF DOMESTIC VIOLENCE IN CHILD CUSTODY CASES, Boston University Law Review (1997).

Under the unique set of circumstances presented here, equity demands that this non-parental custody action be vacated. Ms. Acevedo asks this Court to find that the trial court erred in denying the motion to vacate, reverse, and remand with instructions to grant the motion to vacate.

VI. CONCLUSION

The original non-parental custody decree violated ICWA and WICWA. It was not entered into knowingly or voluntarily. Ms. Acevedo was barely 16 years old when it was signed and the court failed to apply procedural safeguards. The trial court erred in denying the motions to invalidate, vacate, and reconsider. These errors have resulted in Ms. Acevedo's continuing to be deprived of her child and her constitutional right to the care, custody, and control of that child. Therefore, Ms. Acevedo asks this Court to reverse the

trial court's denial and remand with instructions to vacate the underlying third party custody decree.

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

A handwritten signature in cursive script, appearing to read "C.C. - J.Y.", is written above a horizontal line.

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

NORTHWEST JUSTICE PROJECT

September 17, 2018 - 10:03 AM

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_20180917095503D3675366_2155.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellant's Opening Brief.pdf

A copy of the uploaded files will be sent to:

- KapriLawFirm@gmail.com
- jennifery@nwjustice.org

Comments:

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

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

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

Note: The Filing Id is 20180917095503D3675366