

No. 98003-9

NO. 78790-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Dependency of Z.G., and M.G., Minors

STATE OF WASHINGTON, DSHS,

Respondent,

v.

S.G.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi, Judge

BRIEF IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	6
I. THE TRIAL COURT VIOLATED DUE PROCESS AND ICWA WHEN IT FAILED TO CONDUCT A MANDATORY, THRESHOLD INQUIRY INTO WHETHER THERE WAS “REASON TO KNOW” THE CHILDREN MAY BE INDIAN CHILDREN.....	6
(i) <u>A Correct Determination of Whether ICWA Applies in a Particular Case Is both the Product of and a Trigger for Unique Procedural Due Process Requirements under ICWA.</u>	7
(ii) <u>ICWA’s Pretrial Process Under 25 C.F.R. 23.107(a) is Intended to Effectuate a Determination of Whether ICWA Applies.</u>	13
(iii) <u>The Trial Court Failed to Conduct the Mandatory Pretrial Inquiry Required Under 25 C.F.R. § 23.107(a).</u> ..	17
II. THE RECORD ESTABLISHES THERE WAS “REASON TO KNOW” S.G. AND M.G. WERE INDIAN CHILDREN AND THUS THE TRIAL COURT WAS OBLIGATED TO APPLY ICWA.	24
(i) <u>What Constitutes a “Reason to Know”</u>	25
(ii) <u>Neither This Court’s Interpretation of ICWA In T.L.G. Nor The New Regulations Render ICWA Unconstitutional.</u>	30

TABLE OF CONTENTS (CONT'D)

	Page
(iii) <u>At the Time of the Shelter Care Hearing, There Was "Reason to Know" Z.G. and M.G. May Be Indian Children</u>	38
III. REVIEW SHOULD BE GRANTED EVEN IF THE ISSUES ARE TECHNICALLY MOOT.	44
D. <u>CONCLUSION</u>	Error! Bookmark not defined.

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Seattle v. Pub. Employment Relations Comm'n</u> 116 Wn.2d 923, 809 P.2d 1377 (1991).....	18
<u>Crosby v. Spokane County</u> 137 Wn.2d 296, 971 P.2d 32 (1999).....	18
<u>DeFunis v. Odegaard</u> 84 Wn.2d 617, 529 P.2d 438 (1974).....	45
<u>Halsted v. Sallee</u> 31 Wn. App. 193, 639 P.2d 877 (1982).....	8
<u>In re Dependency of A.L.W.</u> 108 Wn. App. 664, 32 P.3d 297 (2001).....	25
<u>In re Dependency of A.M.</u> 106 Wn. App. 123, 22 P.3d 828 (2001).....	20
<u>In re Dependency of A.W.</u> 53 Wn. App. 22, 765 P.2d 307 (1988).....	11, 23, 35, 36
<u>In re Dependency of H.</u> 71 Wn. App. 524, 859 P.2d 1258, 1260 (1993).....	46
<u>In re Dependency of J.H.</u> 117 Wn.2d 460, 815 P.2d 1380 (1991).....	8
<u>In re Dependency of K.N.J.</u> 171 Wn.2d 568, 257 P.3d 522 (2011).....	22
<u>In re Dependency of R.L.</u> 123 Wn. App. 215, 98 P.3d 75 (2004).....	8
<u>In re Dependency of T.L.G.</u> 126 Wn. App. 181, 108 P.3d 156 (2005) 7, 11, 13, 16, 27-30, 37-42, 45, 46 <u>In re Feb. 14, 2017, Special Election on Moses Lake Sch. Dist. #161</u>	

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Proposition 1 (Special Election)</u> , 2 Wn.App.2d 689, 701, 413 P.3d 577 (2018).....	18
<u>In re Marriage of Horner</u> 151 Wn.2d 884, 93 P.3d 124 (2004).....	45
<u>In re Welfare of L.N.B.-L.</u> 157 Wn. App. 215, 237 P.3d 944 (2010).....	19, 28, 39
<u>Matter of Adoption of Crews</u> 118 Wn.2d 561, 825 P.2d 305 (1992).....	10
<u>Matter of Adoption of T.A.W.</u> 186 Wn.2d 828, 383 P.3d 492 (2016).....	11, 37
<u>Matter of K.J.B.</u> 187 Wn.2d 592, 387 P.3d 1072 (2017).....	9
<u>Matter of L.D.</u> 391 Mont. 33, 414 P.3d 768 (2018).....	8, 12, 29
<u>Matter of Welfare of M.S.S.</u> 86 Wn. App. 127, 936 P.2d 36 (1997).....	19
<u>People In Interest of E.R.</u> __ P.3d __, 2018 WL 1959477 (2018)	16
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	21, 22
<u>State v. Kalebaugh</u> 183 Wn.2d 578, 355 P.3d 253 (2015).....	12
<u>State v. Lynch</u> 178 Wn.2d 487, 309 P.3d 482 (2013).....	23
<u>State v. Morales</u> 173 Wn.2d 560, 269 P.3d 263 (2012).....	18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Rasch</u> 24 Wash. 332, 64 P. 531 (1901).....	8
 <u>FEDERAL CASES</u>	
<u>Board of County Comm'rs v. Seber</u> 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943).....	31
<u>Brackeen v. Zinke</u> 338 F. Supp. 3d 514 (N.D. Tex. 2018).	30, 32, 33, 34, 35, 36, 37
<u>Cherokee Nation v. State of Ga.</u> 30 U.S. 1, 8 L. Ed. 25 (1831).....	31
<u>McClanahan v. Arizona State Tax Comm'n</u> 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).....	31
<u>Miss. Band of Choctaw Indians v. Holyfield</u> 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).....	35
<u>Morton v. Mancari</u> 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)....	31, 32, 33, 34, 36
<u>Mullane v. Cent. Hanover Bank & Trust Co.</u> 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....	11
<u>Pascua v. Heil</u> 126 Wn. App. 520, 108 P.3d 1253 (2005).....	11
<u>Rice v. Cayetano</u> 538 I.S. 495, 120 S.Ct. 1044. 145 L.Ed.2d 1007 (2007)	36
<u>Santosky v. Kramer</u> 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	8
<u>Simmons v. Eagle Seelatsee</u> 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966).....	32
<u>Stanley v. Illinois</u> 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).....	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>U.S. v. Nat'l Dairy Prods. Corp.</u> 372 U.S. 29, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963).....	35
<u>United States v. Antelope</u> 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).....	31
<u>Williams v. Lee</u> 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).....	32
<u>OTHER AUTHORITIES</u>	
<u>B.H. v. People ex rel. X.H.</u> 138 P.3d 299 (Colo. 2006).....	27
<u>Geouge v. Traylor</u> 68 Va. App. 343, 808 S.E.2d 541 (2017).....	42, 43
<u>In Interest of A.B.</u> 663 N.W.2d 636 (N.D. Supreme court, 2003).	37
<u>In re A.L</u> 63, 623 N.W.2d 418 (2001)	27
<u>In re Antoinette S.</u> 104 Cal.App.4th 1401, 129 Cal.Rptr.2d 15 (2002).....	27
<u>In re B.R.</u> 176 Cal. App. 4th 773, 97 Cal. Rptr. 3d 890 (2009).....	33
<u>In re Baby Boy C.</u> 27 A.D.3d, 805 N.Y.S.2d 324 (2005)	37
<u>In re Baby Boy L.</u> 103 P.3d 1107(OK Supreme Court, 2004).....	37
<u>In re D.C.</u> 243 Cal. App. 4th 41, 196 Cal. Rptr. 3d 283 (2015).....	37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>In re Gabriel G.</u> 206 Cal. App. 4th 1160, 142 Cal. Rptr. 3d 344 (2012).....	40
<u>In re Guardianship of J.O.</u> 327 N.J.Super. 304, 743 A.2d 341 (2000)	27
<u>In re Hunter</u> 132 Or. App. 361, 888 P.2d 124 (1995).....	41
<u>In re Johanson</u> 156 Mich. App. 608, 402 N.W.2d 13 (1986).....	27
<u>In re Kahlen W.</u> 233 Cal. App. 3d 1414, 285 Cal. Rptr. 507 (1991).....	10, 27
<u>In re Morris</u> 491 Mich. 81, 815 N.W.2d 62 (2012).....	27
<u>In re N.B.</u> 199 P.3d 16 (Colo. App. 2007).....	19, 28, 37, 39
<u>In re T.M.</u> 245 Mich. App. 181, 628 N.W.2d 570 (2001).....	27
<u>In re Termination of Parental Rights to Arianna R.G.</u> 259 Wis.2d 563, 657 N.W.2d 363 (2003).....	25
<u>In re Vincent M.</u> 150 Cal.App.4th 1247, 59 Cal.Rptr.3d 321 (2007).....	33, 37
<u>Interest of A.M.</u> No. 08-18-00105-CV, 2018 WL 6583392 (Tex. App. Dec. 14, 2018).....	35
<u>Matter of A.P.</u> 818 S.E.2d 396 (N.C. Ct. App. 2018).....	26, 29
<u>Matter of J.W.E.</u> 2018 OK CIV APP 29, 419 P.3d 374 (2018).....	26, 29

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>People in Interest of M.D.</u> __ N.W. __, 2018 WL 6071252 (2018).....	35
<u>S.S. v. Stephanie H.</u> 241 Ariz. 419, 388 P.3d 569 (Ct. App. 2017) <u>review denied</u> (4/18/2017) cert. denied sub nom. <u>S.S. v. Colorado River Indian Tribes</u> 138 S. Ct. 380, 199 L. Ed. 2d 306 (2017).....	36

RULES, STATUTES AND OTHER AUTHORITIES

Bureau of Indian Affairs (BIA), “Guidelines for Implementing the Indian Child Welfare Act,” December 2016	7, 10, 15, 25, 39
<u>Cohen's Handbook of Federal Indian Law § 3.03</u> (Nell Jessup Newton, et al. eds., 2005).....	25
Matthew L.M. Fletcher, Wenona T. Singel, <u>Indian Children and the Federal-Tribal Trust Relationship</u> 95 Neb. L. Rev. 885 (2017)	11
25 CFR § 23.2	10
25 C.F.R. § 23.107.....	7, 13, 14, 15, 16, 17, 20, 23, 28, 29, 39, 43
25 C.F.R. § 23.113	12, 16
25 U.S.C. § 1901.....	6
25 U.S.C. § 1903.....	3, 13, 34
25 U.S.C. § 1911.....	13
25 U.S.C. § 1912.....	1, 13, 26, 27
25 U.S.C.A. § 1912.....	11
Indian Child Welfare Act (ICWA)	<i>Passim</i>

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 13.34.065	9, 12, 14
RCW 13.34.070	11
RCW 13.38.040	3, 10, 13
RCW 13.38.070	1, 13, 26, 29, 43
RCW 13.38.090	13
RCW 13.38.130	12, 16
RCW 26.44.050	9
U.S. Const. amend. XIV	8
Washington Indian Child Welfare Act (WICWA)	<i>Passim</i>
Const. art I, § 3	8

A. ASSIGNMENTS OF ERROR

1. The trial court violated due process and the Indian Child Welfare Act (ICWA) when it failed to conduct a mandatory, threshold inquiry into whether there was “reason to know” whether appellant’s children were Indian children.¹

2. The trial court abused its discretion when it failed to apply ICWA and the Washington Indian Child Welfare Act (WICWA)² during the shelter care process.

3. Despite technical mootness, review of the issues is merited.

Issues Pertaining to Assignments of Error

1. Mandatory ICWA regulations now require trial courts conduct an on-the-record, threshold inquiry at the commencement of shelter care proceedings to assess whether there is “reason to know” the child at issue may be an Indian child. This mandated process is intended to facilitate a determination as to whether ICWA applies. If ICWA does apply, critical elements of due process are triggered, including special notice requirements and a higher burden of proof for out-of-home

¹ As explained below, “reason to know” is the specific standard used in ICWA as a means of determining whether ICWA applies to a particular proceeding. 25 U.S.C. § 1912; RCW 13.38.070(1).

² ICWA refers to the Indian Child Welfare Act and WICWA refers the Washington Indian Child Welfare Act. Many of the provisions track each other. For ease of reading, appellant refers only to ICWA unless there are relevant differences between the two laws.

placement. Despite this, the trial court never conducted this inquiry at the commencement of the shelter care hearing. Did the trial court violate applicable statutes and due process when it failed to conduct ICWA's mandatory pretrial inquiry?

2. Prior to the shelter care hearing, the Department of Children, Youth and Families (the Department) was put on notice that the parents believed they are of Indian heritage. Based on this, the Department alleged in the dependency petition that it had "reason to know" the children were Indian children. Yet, a few days later at the shelter care hearing, the Department took the position ICWA did not apply. However, during the hearing, the parents affirmed their belief they are of Indian heritage in relation to several specific tribes. Despite this, the trial court found there was no "reason to know" appellant's children may be Indian children, and it did not comply with ICWA ordering out-of-home placement. Did the trial court err?

3. The issues raised are technically moot. Yet, they are of continuing and substantial public importance. Should this court review the merits?

B. STATEMENT OF THE CASE

Appellant S.G. is the father of Z.G. and M.G. RP 35. L.G. is their mother. RP 35. On June 28, 2018, the children were placed in law enforcement protective custody due to concerns of neglect and unsanitary living conditions.³ RP 15-16.

On June 29, 2018, the Department filed a dependency petition asserting that its Office of Indian Child Welfare (OICW) was requesting out-of-home placement. CP 3. In its petition it alleged the following in regard to the children's Indian status:

Based on the following, the petitioner knows or has reason to know the child is an Indian child as defined in RCW 13.38.040 and 25 U.S.C. § 1903(4), and the Federal and Washington State Indian Child Welfare Acts do apply to this proceeding:

Mother has Tlingit-Haida heritage and is eligible for membership with Klawock Cooperative Association. She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederate Tribes of the Umatilla in Oregon.

The petitioner has made the following preliminary efforts to provide notice of this proceeding to all tribes to which the petitioner knows or has reason to know the child may be a member or eligible for membership if the biological parent is also a member:

Inquiry to tribes has been initiated. Worker has called Central Council Tlingit Haida regarding this family and petition. Further inquiry and notification to tribes is ongoing.

CP 2.

³ The family was struggling with housing at the time and forced to resort to living in an R.V., which had recently been vandalized before police arrived. RP 46-47.

A shelter care hearing took place on July 2, 2018, but it had to be continued to July 3, 2018, due to a discovery violation by the State. RP 1, 53, 59. The trial court began the proceeding by providing the parents with information about the shelter care hearing in general. RP 5-7. However, the trial court did not make a threshold ICWA inquiry asking each participant whether they knew or had reason to know if the children were Indian children. RP 4-9.

The State called social worker Richard Summers. RP 9. After Summers was sworn, the trial court asked him if he filed the petitions, if the information in the petitions was correct, and if he wished to incorporate them as part of his testimony. RP 10. He answered affirmatively to all three questions. RP 10.

During its direct examination of Summers, the State asked whether the children “qualified” under WICWA. RP 11. Summers responded, “To my knowledge, not at this time.” RP 11. When asked what investigation he had undertaken, Summers explained he had called the Tlingit and Haida Indian tribes of Alaska and “they gave me information that the maternal grandmother is an enrolled member, but the mother is not enrolled, and the children are not enrolled.” RP 11. Summers also stated, “To my knowledge, the father is not enrolled in a federally recognized tribe either.” RP 11-12.

L.G. testified that she is eligible for American Indian tribal membership through the Tlingit and Haida tribe, but she is not an enrolled member of a federally recognized tribe. RP 88, 90. She was never directly asked about her native heritage through the Klawock Cooperative Association. RP 83-91. L.G. was also never directly asked about her Cherokee heritage. RP 83-91. However, during his testimony, S.G. confirmed the mother has Cherokee heritage. RP 66. S.G. testified he also has Native American heritage through the Confederated Tribes of the Umatilla in Oregon. RP 67. Both parents testified the children are eligible for tribal membership. RP 67, 88.

During closing arguments, both parents asserted ICWA's heightened standard of proof applied in the proceeding because there was "reason to know" the children may be Indian children. RP 110, 113. In response, the State essentially claimed ICWA did not apply because there was no proof the children in fact met the definition of an Indian child at that time. RP 117.

The trial court ruled ICWA did not apply based on "the testimony in this case and the reasonable cause standard." RP 118. It thus proceeded to order out-of-home placement without determining whether ICWA notices had been sent to all relevant tribes and without applying ICWA's higher standard of proof. RP 118; CP 11-12. S.G. sought discretionary review, challenging the trial court's failure to comply with ICWA. CP 20-31.

Commissioner Mary Neel granted review. Ruling on Discretionary Review (RDR) at 4.

C. ARGUMENT

I. THE TRIAL COURT VIOLATED DUE PROCESS AND ICWA WHEN IT FAILED TO CONDUCT A MANDATORY, THRESHOLD INQUIRY INTO WHETHER THERE WAS “REASON TO KNOW” THE CHILDREN MAY BE INDIAN CHILDREN.

Washington courts must comply with ICWA’s mandatory provisions. ICWA is intended to address decades worth of societal and personal injustices that have undermined the vitality of Native American tribes and families by destroying their connection with Indian children. Congress recognizes: “[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” 25 U.S.C. § 1901(3), (4). However, prior to the passage of ICWA, “an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies[.]” 25 U.S.C. § 1901(3), (4). ICWA was enacted to rectify such injustices.

In spirit and in text, ICWA codifies the national government’s commitment to protecting Indian families from undue State interference. Indeed, even stronger ICWA regulations went into place in December 2016 in order to further reign in State actions that continue to weaken Native

American tribes and families. 25 C.F.R. part 23; Bureau of Indian Affairs (BIA), “Guidelines for Implementing the Indian Child Welfare Act,” (Guidelines), December 2016, p. 6-7. These regulations were designed to address the need for more robust substantive and procedural regulations that continue to be binding on State agencies and courts. Id.

To this end, as explained below, ICWA requires the trial court undertake a threshold, on-the-record inquiry to determine the child’s Indian status. 25 C.F.R. 23.107(a). This inquiry is a mandatory procedural requirement designed to alert the court as to whether there is any “reason to know” the child may be an Indian child. Thus, it is a crucial factor in both providing and triggering the due process protections embodied in ICWA. Unfortunately, the record here establishes the trial court failed to conduct this threshold inquiry.

- (i) A Correct Determination of Whether ICWA Applies in a Particular Case Is both the Product of and a Trigger for Unique Procedural Due Process Requirements under ICWA.

All child custody proceedings invoke substantial due process issues. ““It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent.”” In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005) (quoting State v. Rasch, 24 Wash. 332, 335, 64 P. 531

(1901)). It is well established that all parents have a fundamental right to maintain their family unit in the face of government interference. Santosky v. Kramer, 455 U.S. 745, 753, 760, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) U.S. Const. amend. XIV; Const. art I, § 3. “The parents’ right to custody of their children is described as being rooted in the natural and the common law, and as being a sacred right that is more precious than the right to life itself.” In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). This fundamental right endures even if the parents “have not been model parents.” Santosky, 455 U.S. at 753.

Due to the fundamental liberty interests at stake in parental-rights deprivation proceedings, these proceedings are accorded strict due process. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Santosky, 455 U.S. at 754; In re Dependency of R.L., 123 Wn. App. 215, 221, 98 P.3d 75, 78 (2004). Hence, a parent’s right to the custody of his children may not be interfered with without the complete protection of due process safeguards. Halsted v. Sallee, 31 Wn. App. 193, 639 P.2d 877 (1982).

As a matter of federal and state constitutional due process, parental rights “must be protected by fundamentally fair procedures.” Matter of L.D., 391 Mont. 33, 38, 414 P.3d 768 (2018) (citations omitted). To this end, where the law creates a mandatory duty upon the trial court to

undertake a specific procedure in a parental-rights deprivation action, the record must establish the trial court fulfilled this duty. Matter of K.J.B., 187 Wn.2d 592, 606, 387 P.3d 1072, 1080 (2017). If it does not, this may be grounds for remand or reversal. Id.

Washington law establishes procedures for removing a child from his parents' care and maintaining out-of-home placement. A child may be placed in protective custody without court order if a law enforcement officer has probable cause to believe the child is abused or neglected. RCW 26.44.050. A shelter care hearing must take place within 72 hours so the child's removal can be properly adjudicated.⁴ RCW 13.34.065. The purpose of this hearing is "to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending." RCW 13.34.065(1)(a).

Overlaying Washington's shelter care statutes are the requirements and rights found in ICWA and WICWA. Both statutes apply to shelter care hearings. Under ICWA, shelter care hearings are classified as emergency

⁴ The statute provides for specific procedures when continuances are necessary. RCW 13.34.065(2)(a).

proceedings.⁵ Under WICWA, a shelter care hearing qualifies as a "Child custody proceeding."⁶

ICWA regulations provide a binding, consistent, nationwide interpretation of ICWA's substantive and procedural standards. BIA, "Guidelines," p. 7. In passing ICWA, Congress identified two important policies: (1) to protect the interests of Indian child and (2) to promote the stability and security of Indian tribes, families, and parents. In re Kahlen W., 233 Cal. App. 3d 1414, 1421, 285 Cal. Rptr. 507 (1991) (citations omitted). ICWA sets forth minimum federal standards, both substantive and procedural, for furthering these identified policies during child custody proceedings and emergency proceedings. Id.; Matter of Adoption of Crews, 118 Wn.2d 561, 568, 825 P.2d 305 (1992).

WICWA likewise further those policies. The Washington Supreme Court has stated that ICWA and WICWA should be read as coextensive barring specific differences in their statutory language. Matter of Adoption

⁵ ICWA provides: "Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR § 23.2.

⁶ WICWA defines child custody proceedings as:

"Foster care placement" which means any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home, institution, or with a relative, guardian, conservator, or suitable other person where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

of T.A.W., 186 Wn.2d 828, 844, 383 P.3d 492, 498 (2016). To the extent there is a discrepancy, ICWA displaces any Washington law or procedure that is less protective. BIA, “Guidelines,” p. 7. However, the State may pass more protective measures. Id.

ICWA sets forth procedures that go to the heart of due process. First it sets forth specific notice requirements. 25 U.S.C.A. § 1912(a) and (c); RCW 13.34.070(10)(a). Notice is a central due process protection. See, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (explaining an “elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ...”); Pascua v. Heil, 126 Wn. App. 520, 528, 108 P.3d 1253, 1258 (2005) (concluding that due process requires courts strictly apply laws intended to effectuate meaningful notice to all interested parties).

“The procedural aspects [of ICWA] are intended to guarantee due process to Indian parents, such as notice..., that were absent in thousands of Indian child removals before ICWA.” Matthew L.M. Fletcher, Wenona T. Singel, Indian Children and the Federal-Tribal Trust Relationship, 95 Neb. L. Rev. 885, 960 (2017). As this Court has recognized, without the special notice procedures, the substantive rights granted to tribes and Indian families under ICWA are meaningless. T.L.G., 126 Wn. App. at 191. Consequently,

due process demands trial courts strictly comply with all ICWA procedures that are intended to effectuate its notice requirements. Id. at 190-91; L.D., 391 Mont. at 41.

A second due process element triggered by ICWA's application is the heightened standard of proof for out-of-home placement. Due process requires courts apply the correct standard of proof and failure to do so is a manifest constitutional error. State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015). In non-ICWA shelter care hearings, RCW 13.34.065(5)(a) merely requires there be "reasonable cause" to believe (1) "reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home" and (2) "the release of such child would present a serious threat of substantial harm to such child." However, if ICWA applies, the State must (1) show by clear, cogent, and convincing evidence "active efforts" were made to prevent the need for removal, and (2) show continued custody of the child is likely to result in serious emotional or physical damage to the child. RCW 13.38.130; 25 C.F.R. § 23.113. Failure to apply this heightened standard in an ICWA case is an abuse of discretion amounting to a due process violation.

In sum, the new ICWA regulations provide a pretrial procedure to determine whether ICWA applies. Strict compliance with this mandated

procedure is required. If the trial court fails to comply with this procedure which is required by law, this is itself a violation of due process which in turns triggers the violation of other key due process elements.

(ii) ICWA's Pretrial Process Under 25 C.F.R. 23.107(a) is Intended to Effectuate a Determination of Whether ICWA Applies.

As explained above, ICWA's notice procedures and heightened standard of proof are triggered when the State commences child custody proceedings or emergency proceedings involving an "Indian child." 25 U.S.C. § 1911(c); RCW 13.38.090. The statute defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4); RCW 13.38.040(7). However, ICWA is triggered even where there is still a question whether the child meets this definition. T.L.G., 126 Wn. App. at 191-92. It applies when there is merely "reason to know" a child may be an Indian child. Id.; 25 U.S.C. § 1912.

WICWA's express language casts an even wider net. The law applies in "any involuntary child custody proceeding ... in which the petitioning party or the court knows, or has reason to know, that the child is or may be an Indian child." RCW 13.38.070(1) (emphasis added). Thus, in a Washington shelter care hearing, WICWA is triggered if either

the Department or the trial court has any reason to know the child may be an Indian child.

Whenever there is “reason to know,” under either ICWA or WICWA, the trial court must treat the child as an Indian child. 25 C.F.R. 23.107(b)(2). However, the question here is what procedure the trial court must engage in to assess whether there is “reason to know” the child may be an Indian child.

Under Washington’s shelter care law, the trial court is required to inquire into whether the child is or may be an Indian child and whether there is compliance with ICWA. RCW 13.34.065 (4)(h). However, the statute does not specify in detail whether this must be done on the record, at what point in the hearing this must be done, and to whom the inquiry should be directed. Fortunately, federal law now fills these gaps.

Federal regulations established the following pretrial procedure:

State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

25 C.F.R. § 23.107(a). Hence, ICWA sets forth a threshold procedure all Washington trial courts “must” provide before shelter care hearings.

Indeed, even if the parties fail to assert that ICWA applies, the trial court has a duty to conduct this inquiry, asking each participant if he or she has any reason to believe the child may be an Indian child. BIA, “Guidelines,” at 11.

The timing of this mandatory inquiry is critical to determining the trial court’s power to act, to meeting the goals and policies underlying ICWA, and to achieving a stable placement for the child. As the BIA warns:

If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties and can create delays and instability in placements for the Indian child.

BIA, “Guidelines,” p. 11.

The regulations make clear that the question of a child’s Indian status is too important to merely leave for the parties to litigate in an adversarial fashion. Instead, 25 C.F.R. 23.107(a) places squarely on the trial judge’s shoulders the obligation to ask each participant – on the record – if he or she has information indicating there a “reason to know” the child may be an Indian child. Id. Presumably, this will allow the trial court to ask open-ended questions that are not confined by the parties’

presentation of the issues but are instead calculated to procure all information relevant to determining the Indian status of the child.

By making this inquiry a threshold requirement, the legislature enables the court to determine and apply the correct standard of proof before ordering out-of-home placement. If there is any reason to know that the child may be an Indian child, the trial court must treat the child as an Indian child. 25 C.F.R. § 23.107. And if the child is treated like an Indian child, the trial court must satisfy two important requirements before ordering out-of-home placement:

- It must find that out-of-home placement was necessary to “prevent imminent physical damage or harm to the child.” 25 C.F.R. § 23.113.
- It must ensure that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. RCW 13.38.130

If these requirements are not met, the shelter care order is subject to remand and possible reversal. T.L.G., 126 Wn. App. at 185; see also, People In Interest of E.R., ___ P.3d ___, 2018 WL 1959477 (2018) (remanding where the trial court failed to conduct the proper pretrial ICWA inquiry under 25 C.F.R. 23.107(a)).

In sum, 25 C.F.R. § 23.107(a) is intended to effectuate a determination of whether the child is an Indian child for ICWA. This determination is crucial to the trial court’s ability to issue an enforceable

child-welfare order. Consequently, this pretrial inquiry is a mandatory procedure that is not only required by law, but it is essential to enforceability of the trial court's order.

(iii) The Trial Court Failed to Conduct the Mandatory Pretrial Inquiry Required Under 25 C.F.R. § 23.107(a).

Based on this record, it cannot be said the trial court complied with the mandatory procedure under 25 C.F.R. § 23.107(a). Indeed, the record lacks any evidence the trial court was aware of, let alone properly exercised, its duty to conduct ICWA's threshold inquiry.

Although the trial court took time at the beginning of the shelter care hearing to explain to the parties the general nature of the proceeding, it did not make a single pretrial inquiry of any participant as to whether he or she had any reason to know the children may be Indian children. RP 4-6. ICWA required the trial court directly ask each parent and the State about this at the commencement of the shelter care hearing. It required this to be on the record. The trial court's failure to discharge its mandatory duty to conduct this on-the-record inquiry at the commencement of the shelter care hearing was not only an abuse of discretion, but it also violated S.G.'s right to due process.

In its response to the Motion for Discretionary review the State argued the trial court's failure to conduct the mandatory ICWA inquiry

should be disregarded under the doctrine of “substantial compliance.” Brief in Response to Motion for Discretionary Review (BORMDR) at 9-10. This argument should be rejected, because it misapplies that doctrine.

Washington law defines “substantial compliance” as actual compliance in respect to the substance essential to every reasonable objective of a statute. Crosby v. Spokane County, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). Hence, substantial compliance demands some attempt to comply with the statute. In re Feb. 14, 2017, Special Election on Moses Lake Sch. Dist. #161 Proposition 1 (Special Election), 2 Wn.App.2d 689, 701, 413 P.3d 577 (2018).

In cases finding substantial compliance, “there has been actual compliance with the statute, albeit procedurally faulty.” City of Seattle v. Pub. Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991). Noncompliance with a statutory or binding regulatory mandate is not “substantial compliance.” Special Election, 2 Wn.App.2d 689, 701; State v. Morales, 173 Wn.2d 560, 575, 269 P.3d 263, 271 (2012). In this case, there was noncompliance.

To support its argument, the State cited three cases in which substantial compliance was deemed adequate. BORMDR at 9-10. However, these cases are distinguishable. As shown below, in each of

those cases the record showed some attempt at compliance, albeit procedurally faulty.

In Matter of Welfare of M.S.S., 86 Wn. App. 127, 936 P.2d 36 (1997), the Department mailed notice to the Cook Inlet tribe, but the notice was not sent by registered mail with return receipt requested as required by law. As such, actual compliance was attempted, but it was faulty. Id. at 135-36. Interestingly, however, the Court of Appeals found noncompliance as to another aspect of the case. A child was born after the dependency began. The State provided no evidence of ICWA notification as to this child. Hence, the trial court found noncompliance in that context and remanded. Id. at 136. Given this, M.S.S. simply does not help the State further its argument.

Next, the State cited In re Welfare of L.N.B.-L., 157 Wn. App. 215, 237 P.3d 944 (2010), which is also distinguishable. There, the record did not establish whether ICWA service had been proper, but there was no need for remand because the tribe obviously had notice since it had participated in the proceedings. It appears the appellate court inferred that there was some kind of actual compliance with ICWA's notice requirement.

Finally, the State cited In re Dependency of A.M., 106 Wn. App. 123, 137, 22 P.3d 828 (2001). There, the parent complained that the trial court's findings did not specifically use the language of ICWA. However, there was no statutory mandate as to exactly what language was required, and the other findings established the necessary substance for ICWA purposes. In the end, this Court essentially found there was an attempt at actual compliance. Id. at 137.

In contrast to A.M., as the State recognizes (BORMDR at 1), the trial court made no attempt to actually comply with the mandatory pretrial process set forth in 25 C.F.R. § 23.107(a). Yet, it suggests this should be overlooked under the doctrine of "substantial compliance" since the parties volunteered some information pertaining to Indian status during the hearing. However, the record shows no attempt by the trial court to conduct the mandated pretrial inquiry and ask the parties itself, outside the context of the adversarial proceeding, about the children's Indian status. Instead, there was complete noncompliance. Hence, the doctrine of "substantial compliance" does not apply.

In response, the State may also claim the shelter order – through its boilerplate language – sufficiently establishes the trial court undertook the necessary ICWA inquiry. However, this Court should reject such an argument.

The shelter care order contains the following boilerplate, preprinted statement:

2.2. **Child's Indian Status:** The court asked each participant on the record whether the participant knows or has reason to know that the child is an Indian child.

CP 10 (emphasis in original). This finding does not include a checkbox to register even minimal individualized judicial consideration in a particular case. Id. Rather, every time one of these forms is used, there is a preformatted conclusion the trial court followed ICWA's pretrial requirements regardless of what actually transpired. Thus, this type of finding by its very nature cannot alone reliably establish the trial court did in fact conduct ICWA's threshold inquiry.

Indeed, the Washington Supreme Court has explicitly rejected the use of boilerplate language purporting to establish the trial court conducted a statutorily required inquiry when the record shows otherwise. In State v. Blazina, the relevant statutory language required the trial court to engage in an individualized inquiry as to the defendant's ability to pay legal financial obligations before it ordered discretionary fees. 182 Wn.2d 827, 831, 344 P.3d 680, 685 (2015). The Judgment and Sentence at issue contained boilerplate language purporting to establish the trial court

conducted the proper inquiry; however, the record showed otherwise. Id. at 831, 837-38.

The Supreme Court concluded that without an on-the-record inquiry showing that trial court actually considered the defendant's financial ability to pay, the boilerplate language was essentially meaningless. Id. at 838. It explained:

Practically speaking, [the statutory imperative that the trial court conduct an inquiry] means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.

Id. As such, the Supreme Court rejected the argument that the boilerplate language was itself reliable proof that the inquiry took place. Id. see also, In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding in the context of dependency orders a boilerplate finding alone is insufficient to show the trial court engaged in independent consideration of the necessary facts).

Just as in Blazina, the boilerplate language in the shelter care order suggesting that ICWA's threshold inquiry took place is insufficient to overcome the verbatim hearing record, which shows it did not. Hence, this Court should reject any attempt by the State to put forth the

preprinted, boilerplate statement to show compliance with 25 C.F.R. § 23.107(a).

Next, the State may claim this procedural error was harmless. This is not so. When trial error is of a constitutional magnitude, “prejudice is presumed, and the State bears the burden of proving it was harmless beyond a reasonable doubt.” State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482, 486 (2013); In re Dependency of A.W., 53 Wn. App. 22, 27, 765 P.2d 307 (1988) (applying this constitutional harmless error standard in the context of a parental-rights deprivation hearing). The State cannot overcome this presumption here.

The record establishes many reasons to doubt that the trial court would have found ICWA inapplicable had it complied with 25 CFR § 23.107. Indeed, at the very least, the trial court would have been alerted that “reason to know” was the proper standard, not the more lax “reasonable cause standard” it applied. RP 118. Moreover, as shown below, had the trial court applied this standard properly under controlling precedent, it is highly likely the outcome would have been different. Thus, the error was not harmless.

In sum, a correct determination of whether ICWA applies in a shelter care hearing is both the product of and a trigger for particularized procedural due process requirements. Thus, it is vitally important the trial

court comply with all mandatory procedures for determining whether ICWA is triggered. To this end, federal law requires trial courts to conduct an on-the-record, threshold inquiry at the commencement of any shelter care hearing, asking each participant whether he or she has “reason to know” the child may be an Indian child. The record shows no such inquiry occurred here. Consequently, this Court should find the trial court violated due process and committed reversible error when it did not conduct the pretrial inquiry as was legally required.

II. THE RECORD ESTABLISHES THERE WAS “REASON TO KNOW” S.G. AND M.G. WERE INDIAN CHILDREN AND THUS THE TRIAL COURT WAS OBLIGATED TO APPLY ICWA.

Under WICWA and this Court’s interpretation of ICWA, there is “reason to know” a child may be an Indian child whenever the Department or the trial court is informed that a parent has Indian heritage. Once such heritage is asserted, the trial court must comply with ICWA until it is determined – by conclusive evidence and after all relevant tribes have received notice – that the child is not an Indian child as defined by ICWA. Here, Indian heritage was asserted prior to the shelter care hearing, so ICWA applied.

(i) What Constitutes a “Reason to Know”

The Indian status of a child need not be certain before ICWA is applicable. This is because the determination of whether a child is an “Indian child” turns on tribal membership – and membership is left to the control of each individual tribe. BIA, “Guidelines” at 10; see also, Cohen's Handbook of Federal Indian Law § 3.03[3] (Nell Jessup Newton, et al. eds., 2005) (explaining “one of an Indian tribe's most basic powers is the authority to determine questions of its own membership”).

Depending upon an individual tribe's criteria for membership, the ability of a court to ascertain membership in a particular case without a tribal determination may vary greatly. See, In re Termination of Parental Rights to Arianna R.G., 259 Wis.2d 563, 657 N.W.2d 363, 369 (2003) (while many tribes require registration or enrollment as a condition of membership, some automatically include descendants of members). Ultimately, a tribal determination about whether a child or parent is a member of a tribe is conclusive evidence as to whether the child is an “Indian child” under the ICWA. In re Dependency of A.L.W., 108 Wn. App. 664, 670, 32 P.3d 297, 300 (2001).

In the context of shelter care hearings, the difficulty arises when the trial court does not have a definite determination from the relevant tribes regarding the parent and/or child’s Indian status. Given the

expedited nature of shelter care hearings, this is often the case. Hence, at the time of a shelter care hearing, the trial court most likely will have to determine whether there is “reason to know” the child may be an Indian child.

As explained above, ICWA is applicable whenever the trial court knows or has reason to know the child is an Indian child. 25 U.S.C. § 1912(a) (2000). In Washington, ICWA is applicable whenever the Department or the trial court has reason to know that the child is or “may be” an Indian child. RCW 13.38.070(1). If there are sufficient indicia showing a “reason to know,” courts must comply with ICWA or their orders may be subject to reversal. Matter of J.W.E., 2018 OK CIV APP 29, 419 P.3d 374, 375 (2018) (applying new federal regulations and reversing a termination order where the trial court had “reason to know” the child may be an Indian child but did not apply ICWA); Matter of A.P., 818 S.E.2d 396, 400 (N.C. Ct. App. 2018) (applying new federal regulations in dependency action, finding there was “reason to know” the child may be an Indian child and remanding for compliance with ICWA). Thus, the relevant question here is: how much information suggesting a child may have Indian heritage suffices under the “reason to know” standard.

Prior to the promulgation of the most recent ICWA regulations, courts across the country were divided as to how high to set the bar regarding what constitutes a “reason to know” under 25 U.S.C. § 1912(a). Many courts set the bar low, requiring only sufficiently reliable indicia that a child or parent may be of Indian heritage.⁷ Others have required more, setting a higher bar.⁸

This Court has come down on the side of those setting a low bar for determining when ICWA is triggered. T.L.G., 126 Wn. App. at 189-91. In T.L.G., it interpreted ICWA’s “reason to know” standard expansively. Id. Indeed, it concluded ICWA was triggered merely by the parent’s report she had heard from her adoptive parents that her biological

⁷ See, e.g., In re Morris, 491 Mich. 81, 108, 815 N.W.2d 62, 75 (2012) (explaining that a parent’s statement informing the court he or she had Cherokee Indian heritage was information to trigger ICWA); B.H. v. People ex rel. X.H., 138 P.3d 299, 304 (Colo. 2006) (holding that sufficiently reliable information of virtually any criteria upon which membership might be based triggers ICWA); In re Antoinette S., 104 Cal.App.4th 1401, 1407–08, 129 Cal.Rptr.2d 15, 20–21 (2002) (concluding the father’s bare assertion that he believed his deceased grandparents might have Indian ancestry was sufficient to trigger ICWA); In re T.M., 245 Mich. App. 181, 187, 628 N.W.2d 570, 573 (2001) (finding ICWA triggered where the respondent testified that although she was not a member of a tribe, she was of Native American heritage and believed she had Cherokee ancestry); In re Kahlen W., 233 Cal.App.3d 1414, 1420, 285 Cal.Rptr. 507, 511–12 (1991) (finding notice requirements triggered where the respondent mother asserted she was a member of an Indian tribe).

⁸ See, e.g., In re A.L., 63, 623 N.W.2d 418, 422 (2001) (holding ICWA not triggered when mother’s counsel raised unsupported and vague assertions during a termination hearing about the child’s potential eligibility for enrollment in a specific tribe); In re Johanson, 156 Mich. App. 608, 613, 402 N.W.2d 13, 15–16 (1986) (holding no “reason to know” where respondent mother made several references to the Saginaw Tribe of Chippewa Indians but stated that she was not a member); In re Guardianship of J.O., 327 N.J.Super. 304, 316, 743 A.2d 341, 347 (2000) (holding mother’s casual references to Indian ancestry were insufficient to trigger ICWA’s notice requirement).

father was Cherokee. Id. T.L.G. reached this conclusion even though the parent testified she was not enrolled or a member of any tribe. Id. This Court explained that the mother's mere "assertion of Cherokee heritage gave the court 'reason to know'" and thereby triggered ICWA notice requirements. Id. at 192; see also, In re Welfare of L.N.B.-L., 157 Wn. App. 215, 225, 240, P.3d 944, 950 (2010) (holding an assertion the parent had Indian heritage with a federally recognized tribe triggered ICWA).

T.L.G.'s application of a low bar is consistent with the new ICWA regulations. These regulations list factors establishing when there is "reason to know." 25 C.F.R. § 23.107(c). If just one factor exists in a case, ICWA is triggered and the child must be "treated as an Indian child 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). One of these factors provides that ICWA is triggered if:

"Any participant in the proceeding, officer of the court involved in the proceedings, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that a child is an Indian child."

25 C.F.R. § 23.107(c)(2) (emphasis added). State courts are encouraged to interpret this factor expansively. BIA, "Guidelines" at 11. When in doubt, the BIA cautions, it is better to conduct further investigation into a

child's status early in the case. Id. T.L.G.'s interpretation of ICWA reflects this sentiment.⁹

Most courts having considered the “reason to know” standard in light of the new ICWA regulations have in essence affirmed T.L.G. was correct when it interpreted that standard expansively. For example, the North Carolina Court of Appeals applied 25 C.F.R. § 23.107(c)(2) and held ICWA was triggered by a mere report the parent and child have “American Indian Heritage” with the Cherokee and Bear foot tribes. Matter of A.P., 818 S.E.2d 396, 400 (N.C. Ct. App. 2018); see also, Matter of L.D., 391 Mont. 33, 2018 MT 60 (2018) (interpreting the new regulations expansively and finding there was “reason to know”); Matter of J.W.E., 419 P.3d 374, 378-79, 2018 OK CIV APP 29 (2018) (same).

For reasons stated above, this Court's interpretation of the “reason to know” standard under ICWA is still valid. As such, there is generally sufficient evidence to trigger ICWA when a parent asserts Indian heritage through a federally recognized tribe.

⁹ T.L.G.'s holding also harmonizes with the expressly broad language in WICWA. In WICWA, the Legislature also has adopted a more expansive approach to determining a child's Indian status. WICWA is triggered when there is reason to know the child “may be” an Indian child. RCW 13.38.070(1). A report of Indian heritage by a parent gives reason to know a child “may be” and Indian child. Thus, T.L.G., although not addressing WICWA directly, is consistent with WICWA.

(ii) Neither This Court's Interpretation of ICWA In T.L.G. Nor The New Regulations Render ICWA Unconstitutional.

Recently, a federal district court in Texas held portions of ICWA relevant to this case are unconstitutional. Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018). Citing Brackeen, the State claims ICWA and the WICWA would be “vulnerable to constitutional challenge” if this Court were to find a parent’s report of Indian heritage establishes “reason to know.” BORMDR at 15. The State’s claim should be rejected.

First, Brackeen is not binding on this Court, and the order has been stayed by the Fifth Circuit while an appeal is pending. Brackeen, 338 F.Supp. 3d at 514, appeal docketed, No. 18-11479 (5th Cir. Nov. 19, 2018). More importantly, as explained below, Brackeen’s constitutional analysis is based on the flawed premise that ICWA’s definition of an Indian child amounts to a racial classification. From this faulty premise, Brackeen applies strict scrutiny to invalidate certain provisions of ICWA. However, when the actual statutory language is considered in the context of Indian law in general, it is apparent that ICWA’s definition of “Indian child” does not violate equal protection.

Brackeen’s constitutional analysis is based on a misrepresentation of the language of ICWA and flies in the face of an extensive body of case law that establishes ICWA’s classifications are based on the political

status of tribes, not race. The unique political status of tribes arises from hundreds of years of treaties and engagements among governments. E.g., Cherokee Nation v. State of Ga., 30 U.S. 1, 2, 8 L. Ed. 25 (1831). This status informs regulations aimed at Native Americans. The United States Supreme Court has explained: “Federal regulation of Indian affairs is not based upon impermissible [racial] classifications. Rather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” United States v. Antelope, 430 U.S. 641, 646, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).

Given the unique political status of Native American tribes and the United States’ commitment and obligation to support self-determination, the Supreme Court has explained that so long as a so-called preference for Native Americans is reasonable and rationally designed to further Indian self-government, such a classification does not offend the constitution. Morton v. Mancari, 417 U.S. 535, 554–55, 94 S. Ct. 2474, 2485, 41 L. Ed. 2d 290 (1974). Indeed, the Supreme Court has on numerous occasions specifically upheld legislation that singles out Native Americans for particular or special treatment. See, e.g., Board of County Comm’rs v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); Simmons v. Eagle

Seelatsee, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966) (statutory definition of tribal membership, with resulting interest in trust estate); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs).

The Supreme Court's decision in Morton vs. Mancari illustrates the difference between political tribal classifications and racial classifications. At issue there was the Indian Reorganization Act of 1934, which created a hiring preference for Indian employees in the BIA. Id. at 535. This was challenged as an unconstitutional racial preference that constituted race discrimination.

The Supreme Court situated its legal analysis within the context of the historical relationship between the United States government and Native American tribes, holding the hiring preferences did not constitute racial discrimination. Id. at 552-53. It explained that the hiring preference could not constitute racial discrimination because "it is not even a 'racial' preference." Id. at 553. Distinguishing between racial and political classifications, the Supreme Court explained that the hiring preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" Id. at 554.

Applying Morton's reasoning to ICWA, the flaws of Brackeen become apparent. There can be no doubt that ICWA is reasonably and

rationally designed to further Indian self-government. Indeed, ICWA provides exclusive tribal jurisdiction over custody proceedings involving Indian children domiciled or residing within tribal reservations, and concurrent but presumptive tribal jurisdiction in other cases. 25 U.S.C.A. § 1911.

Under ICWA, tribal membership is a proxy for political affiliation not race. As one court explained: “ICWA recognizes the political affiliation that follows from tribal membership in a federally recognized tribe, rather than a racial or ancestral Indian origin.” In re B.R., 176 Cal. App. 4th 773, 783, 97 Cal. Rptr. 3d 890, 896 (2009) (citing In re Vincent M. 150 Cal.App.4th 1247, 1267, 59 Cal.Rptr.3d 321 (2007)).

Brackeen rejects Morton’s applicability to ICWA, claiming that ICWA preferences apply to children who are merely eligible for tribal membership due to their race. Brackeen, 338 F. Supp. 3d at 532. However, Brackeen can only reach this conclusion by excising key language found in ICWA and by ignoring the historical underpinnings and objectives of the law. Id. at 533.

When framing ICWA’s so-called “eligibility” standard for purposes of its decision, Brackeen claims the law applies to children who are “simply *eligible* for membership who have a biological Indian parent.” Id. (emphasis in original). This is not what ICWA says. ICWA applies to

children who are eligible for tribal membership and who have biological parents who are “members of an Indian tribe.” 25 U.S.C. § 1903(4). In other words, ICWA requires a political tribal affiliation within the parent-child relationship. In this way, ICWA’s classification is “not directed towards a ‘racial’ group consisting of ‘Indians’” but rather “only to members of ‘federally recognized’ tribes.” Morton, 417 U.S. at 553, n. 24.

Brackeen conveniently ignores that even when ICWA refers to a child’s “eligibility” as a tribal member, it ties such eligibility to the parent’s tribal membership. Brackeen, 338 F. Supp. 3d at 533. Instead, of accepting the plain language of the statute, the Texas district court boldly rephrases the eligibility requirement so as to insert Indian ancestry and erase reference to tribal membership. Id. Perhaps this is because only by ignoring the actual language of ICWA may that court make a colorable claim that ICWA’s definition of “Indian child” is a race-based classification and thus subject to strict scrutiny. However, the plain language of the statute dooms Brackeen’s constitutional analysis and the State’s reliance on it here.¹⁰

¹⁰ Notably, the first court to file a published opinion addressing Brackeen declined to follow that decision. The Supreme Court of South Dakota stated:

We are aware of the recent decision of the United States District Court for the Northern District of Texas holding parts of ICWA, including its

A good example of the difference between racial and political classifications can be found in In re A.W., 741 N.W.2d 792 (2007). There, the Iowa Supreme Court found the Iowa Indian Child Welfare Act (IICWA) contained an improper racial classification, but ICWA did not. IICWA defined Indian without regard to whether the child or parent is a member of a tribe. Id. at 799. By doing so, it placed “ethnic Indian children in the same class as tribal Indian children and then separate[d] them from other non-Indian children who are ineligible for membership in an Indian tribe.” Id. at 807. Because the definition created preferences on ethnicity, the Iowa Supreme Court found IICWA violated equal protection.

Comparing IICWA to ICWA, however, the Iowa Supreme Court explained that while the former conferred benefits based on race, the latter did not. It concluded ICWA’s “Indian child” definitely referred to a

placement preferences, unconstitutional. Brackeen v. Zinke, No. 4:17-cv-00868-0, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018). However, the decision may be appealed and ICWA has previously been upheld by the United States Supreme Court. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Moreover, we are not bound by the decision of the District Court in Texas and must presume that ICWA is constitutional. U.S. v. Nat’l Dairy Prods. Corp., 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963) (noting that Acts of Congress have “strong presumptive validity”)[.]

People in Interest of M.D., ___ N.W. ___, 2018 WL 6071252, n. 4.(2018); see also, Interest of A.M., No. 08-18-00105-CV, 2018 WL 6583392, at *2 (Tex. App. Dec. 14, 2018) (refusing to dismiss under Brackeen because that decision “may be appealed and ICWA has previously been upheld by the United States Supreme Court.”)

political classification, not a racial classification. Id. at 809. Relying on Morton, the Iowa Supreme Court thus concluded ICWA did not involve racial preferences and was constitutional.¹¹

Numerous other courts have also rejected arguments similar to that put forth in Brackeen on the following grounds: (1) the United States Supreme Court has consistently rejected claims that laws which treat Indians as a distinct class violate equal protection; (2) the different treatment of Indians and non-Indians under ICWA is based on parents' and children's political status as tribal members and the sovereign nature of the tribe; (3) the substantive due process and equal protection challenges are subject to a rational basis analysis, and ICWA is rationally related to both the protection of the integrity of Indian families and tribes and the fulfillment of Congress's unique guardianship obligations toward Indians; and (4) Congress's plenary power to legislate Indian matters is well established, and the ICWA is an appropriate exercise of that power. E.g., S.S. v. Stephanie H., 241 Ariz. 419, 426, 388 P.3d 569, 576 (Ct. App. 2017), review denied (Apr. 18, 2017), cert. denied sub nom. S.S. v. Colorado River Indian Tribes, 138 S. Ct. 380, 199 L. Ed. 2d 306 (2017);

¹¹ A.W.'s analysis of ICWA and its discussion of the United States Supreme Court's prior decisions in both Morton and Rice v. Cayetano, 538 I.S. 495, 120 S.Ct. 1044. 145 L.Ed.2d 1007 (2007) are thorough, well-reasoned, and in many ways show how Brackeen's characterization of Morton and Rice is misguided. A.W., 741 N.W.2d at 809-10.

In re D.C., 243 Cal. App. 4th 41, 60, 196 Cal. Rptr. 3d 283, 299 (2015); In re N.B., 199 P.3d 16, 23 (Colo. App. 2007); In re Vincent M., 150 Cal.App.4th 1247, 1265–68, 59 Cal.Rptr.3d 321, 334–37 (2007); In re Baby Boy C., 27 A.D.3d at 49–52, 805 N.Y.S.2d at 324 (2005); In re Baby Boy L., 103 P.3d at 1107(OK Supreme Court, 2004); In Interest of A.B., 663 N.W.2d at 636–37 (N.D. Supreme court, 2003).

The Washington Supreme Court has not yet had an opportunity to consider whether ICWA and WICWA unconstitutionally discriminate based on race. However, it did take the opportunity to comment on the issue recently, stating:

We note several courts have already rejected these arguments because the disparate treatment afforded Indians under ICWA is not race based, but is instead based on their political status in a sovereign government. See, e.g., N.B., 199 P.3d at 22–23.

Matter of Adoption of T.A.W., 186 Wn 2d 828, 861, n. 20, 383 P.3d 492, 507 (2016). While not binding, this comment certainly suggests our Supreme Court will not be swayed by a Brackeen-type challenge because Washington recognizes ICWA’s classification is political not racial.

Given Brackeen’s flaws, this Court should reject the State’s suggestion that T.L.G.’s interpretation of ICWA somehow transforms the political classification in that law to a racial classification. T.L.G. does nothing to change the premise that ICWA and WICWA contain political

not racial classifications. This premise is not somehow weakened merely because T.L.G. recognizes that tribes sometimes base membership upon Indian heritage alone. T.L.G.'s analysis does not hinge on race. Instead, it is predicated upon the recognition that it is a tribe's right as a sovereign entity to decide tribal membership based on whatever criteria it chooses. As such, applying T.L.G. to this case does not make ICWA or WICWA vulnerable to constitutional challenge.

For the reasons stated above, this Court should reject the State's contention that applying the holding in T.L.G. to this case will result in an equal protection violation. Instead, this Court should find T.L.G. is still good law and controls the outcome in this case.

(iii) At the Time of the Shelter Care Hearing, There Was "Reason to Know" Z.G. and M.G. May Be Indian Children.

The record establishes that, at the time of the shelter care hearing, there was sufficient indicia of Indian heritage to establish a "reason to know" that Z.G. and M.G. were Indian children thereby triggering ICWA.

First, the Department's own pleadings admit it had "reason to know" the children may be Indian Children based on three facts: (1) the mother's assertion she has Tlingit-Haida heritage and is eligible for membership with Klawock Cooperative Association, (2) the mother's

assertion she has Cherokee heritage, and (3) the father's assertion he may have native heritage with the Confederated Tribes of the Umatilla.¹² CP 2. These facts sufficed to trigger ICWA's applicability from the moment the dependency petition was filed. T.L.G., 126 Wn. App. 189, see, also, L.N.B.-L., 157 Wn. App. at 239 (finding there was "reason to know" where the dependency petition stated the father "has Cherokee and Black Foot ancestry, but is not enrolled").

Because ICWA had been triggered with the filing of the dependency petition, both the Department and the trial court were obligated to treat Z.G. and M.G. as if they were Indian children until there was a conclusive determination by the tribes that the children did not fall within the definition of an Indian child. 25 C.F.R. § 23.107(b)(2); BIA, "Guidelines," at 12. The record establishes the trial court could not reasonably and independently conclude Z.G. and M.G. were not Indian children given the information before it. Instead, the trial court's conclusion to the contrary is deeply flawed.

The trial court stated it was relying solely on the testimony of the social worker and the parents to make a conclusive determination that ICWA did not apply. As shown below, however, this testimony was

¹² The tribes mentioned are all federally recognized. <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#or> (last accessed 9-28-18)

insufficient to establish the children were not Indian children. Therefore, it did not negate the court's duty to apply ICWA.

First, Social Worker Summers' testimony actually reaffirmed the Department had "reason to know," and it once again placed the trial court on notice of this fact. Summers testified under oath that the content of the petitions were correct, and he incorporated that into his testimony. RP 9-10. These petitions not only contain the Department's admission it had "reason to know," they also established that the parents both asserted having Indian heritage. CP 2. The State failed to present conclusive evidence to the contrary at trial. Hence, Summer's incorporation of the petition was alone sufficient to trigger ICWA under T.L.G.

Summers also testified that the tribe confirmed L.G.'s mother (the maternal grandmother) is an enrolled member of the Tlingit and Haida tribes. RP 11. This again establishes "reason to know." See, T.L.G., 126 Wn. App. at 189,192 (holding an assertion that the grandparent is an enrolled member provides "reason to know"); In re Gabriel G., 206 Cal. App. 4th 1160, 1167, 142 Cal. Rptr. 3d 344, 349 (2012) (same). As such, this testimony, supported that there was "reason to know."

Summers' other testimony did not definitively establish that neither the children nor the parents were tribal members. Summers testified "to his knowledge," the children did not "qualify under

WICWA.” RP 11. However, he explained that the basis for this conclusion was a single call to the Tlingit and Haida tribes of Alaska in which some unidentified person stated the mother is not an “enrolled member.” RP 11. Summers also claimed the father was “not enrolled” in a federally recognized tribe; however, he offered no information as to the basis for this assertion. RP 11-12.

Even assuming arguendo there was reliable evidence establishing the parents were not enrolled members of a tribe, this was still not sufficient proof the children were not Indian Children. As explained above, lack of enrollment in an Indian tribe is simply not conclusive as to the issue of whether a child qualifies as an “Indian child” under ICWA. E.g., T.L.G., 126 Wn. App. at 191; In re Hunter, 132 Or. App. 361, 364, 888 P.2d 124 (1995).

Finally, Summers offered no information as to the children’s or L.G.’s status in regard to the Cherokee and Klawock Cooperative Association. As such, with regard to these tribes, the trial court was left only with Department’s admission in the dependency petition that it had “reason to know” the children were Indian children based on L.G.’s assertion that she was of Cherokee and Klawock heritage.

The parents’ testimony also affirmed there was “reason to know” the children may be Indian children. L.G. affirmed her Indian heritage

and testified that her children were eligible for tribal membership. RP 88, 90. She acknowledged she was not “enrolled” as a member of a federally recognized tribe. RP 88, 90. Again, however, lack of enrollment is not definitive as to the question of whether a child is an Indian child. Additionally, the trial court could not reasonably rely on L.G.’s belief that she was not a member of a tribe because membership is determined by the tribes alone, not parents. See, T.L.G., 126 Wn. App. at 191 (stating: “Nor is Dunlavy’s belief that she is not a tribal member dispositive.”).

S.G. testified he and L.G. both were of Indian heritage. RP 66-67. He also testified that it was his understanding the children were eligible for tribal membership. This again underscores the fact that there was “reason to believe,” rather than negating it. In the end, neither parents’ testimony could reasonably be construed as supporting a conclusive determination that the children were not Indian children. As such, the trial court abused its discretion when it did not apply ICWA before ordering out-of-home placement.

In its response to the motion for discretionary review, the State relied heavily on Geouge v. Traylor, 68 Va. App. 343, 368, 808 S.E.2d 541, 553 (2017) to support its claim that the information before the trial court was insufficient to establish a “reason to know.” BORMDR 16-17. In Geouge, the Court of Appeals of Virginia interpreted ICWA to set an

extremely high bar for establishing “reason to know” and thereby concluded the parent had not shown ICWA was triggered. 68 Va. App. 367-68. However, Geouge is distinguishable both on legal and factual grounds.

First, Geouge’s legal analysis focuses on the fact ICWA regulations require there be a reason to the know that the child “is an Indian child.” According to it, this language means that unless the evidence establishes conclusively the child or parent is a tribal member, ICWA is not triggered. Geouge, 68 Va. App. at 367. However, the new regulations do not support such a high bar. Indeed, they appear to be a response to this type of interpretation. BIA, “Guidelines,” p. 6-7.

Under 25 C.F.R. § 23.107(c)(2), there is “reason to know” a child is an Indian child if the trial court has before it information “indicating” the child is an Indian Child. Thus, information that suggests the child is an Indian Child suffices to trigger ICWA’s application. Moreover, under RCW 13.38.070(1), WICWA protections are triggered where there is information the child may be an Indian child. Given this language, the legal analysis in Geouge simply does not apply under WICWA. Hence, the State’s reliance on Geouge is not supported.

Additionally, Geouge is factually distinguishable. There, the trial court had before it information regarding the relevant tribes’ requirements

for membership and conclusive tribal determinations that the children were not eligible for tribal membership. Geouge, 68 Va. App. at 367-68. No such record was made here. Consequently, the State's reliance on Geouge is factually misplaced.

In sum, the parents' assertions of their Indian heritage constituted a "reason to know" the children may be Indian children. This triggered ICWA's application prior to the shelter care hearing. Even after the shelter care hearing, there were no grounds upon which the trial court could conclusively conclude that the children were not Indian children. Hence, the trial court was obligated to apply ICWA notice requirements and treat the children as Indian children (i.e. apply a higher standard of proof for out-of-home placement). It did not do so. Therefore, this Court should find the trial court abused its discretion when it failed to apply ICWA.

III. REVIEW SHOULD BE GRANTED EVEN IF THE ISSUES ARE TECHNICALLY MOOT.

Just days after the shelter care hearing, the Tlingit and Haida Tribes of Alaska determined the children were eligible for membership and intervened. CP 19. The trial court granted this motion to intervene and accordingly recognized the children as Indian children. CP 19. The State has also indicated that other tribes have been notified. RDR at 4 (granting

State's motion to supplement the record). Based on this, Commissioner Neel concluded the issues raised herein are technically moot. RDR at 4. Despite this, however, Commissioner Neel determined review of the merits was still appropriate. For reasons stated below, this Court should also find review is appropriate and reach the merits of the issues.

While appellate courts normally will not decide a moot issue, this Court may consider the issue if it is one of continuing and substantial public importance and is capable of evading review. DeFunis v. Odegaard, 84 Wn.2d 617, 627–28, 529 P.2d 438 (1974). To determine whether review is appropriate, the following factors are considered: whether the issue is of a public or private nature; whether an authoritative determination is desirable to provide future guidance to public officers; whether the issue is likely to recur; the level of genuine adverseness; the quality of advocacy of the issues; and the “likelihood that the issue will escape review because the facts of the controversy are short-lived. In re Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124, 128 (2004). As Commissioner Neel found, all factors support addressing the merits in this case.

First, the issues are of a public nature. The issues call for an interpretation and application of the new ICWA regulations and a determination of whether this Court's prior ruling in T.L.G. is still good law.

Second, an authoritative determination is needed to provide future guidance in child welfare cases. As this case shows, until there is an authoritative determination reinforcing that trial courts must undertake the mandatory pretrial inquiry and explaining that T.L.G. remains good law, trial courts and the Department may ignore the pretrial inquiry and actually apply the new regulations to limit ICWAs application rather than expand it as is the intent behind the new regulations. BIA “Guidelines,” p. 6-7.

It is particularly necessary for some guidance in the context of a shelter care hearing. The shelter care hearing is often the first stage of a child welfare action. ICWA requires an on-the-record inquiry at the commencement of an action. Thus, it often will be necessary to undertake the inquiry at shelter care. Also, the trial court will often consider for the first time whether out-of-home placement is necessary during a shelter care hearing. Hence, it is crucial for the courts and the parties to understand how to apply the new ICWA regulations in the shelter care context. Unfortunately, if these issues are not reviewed here, they will likely evade review in the shelter care context. See, In re Dependency of H., 71 Wn. App. 524, 528, 859 P.2d 1258, 1260 (1993) (reviewing moot issue in a shelter care proceeding because there is little chance that issue could be reviewed by an appellate court before it is mooted by a subsequent hearing).

Third, the issues here are likely to reoccur. A determination of a child's Indian status is required in all shelter care, dependency, and termination proceedings. Washington state has the seventh largest Native American population of the states.¹³ When and how ICWA is triggered, will undoubtedly be litigated in Washington courts many more times. As this case shows, trial courts and the parties are uncertain about how to apply existing case law in light of the new ICWA regulations. Thus, the issues raised herein will likely reoccur in other contexts.¹⁴

Finally, Commissioner Neel considered counsel's advocacy on both sides to be thorough. She also found there is a genuine adverseness in this case. RDR at 4.

To sum up, all factors weigh in favor of review despite the technical mootness of the ICWA issues raised herein. Hence, this Court should review the merits and issue an authoritative decision.

¹³ <https://www.worldatlas.com/articles/us-states-with-the-largest-native-american-populations.html>

¹⁴ Indeed, the errors alleged here have already reoccurred in at least one other case on appeal. See, In re Dependency of S.E.L., 79151-6-I. There, the parent raises the issue as it presented itself at the dependency and disposition stage. Currently, only the opening brief has been filed.

D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to find the trial court violated the law and due process when it failed to conduct ICWA's mandatory threshold inquiry. Additionally, appellant asks this Court to find the trial court erred when it concluded ICWA did not apply.

Dated this 21st day of February 2019.

Respectfully submitted

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