

No. 98003-9

NO. 78790-0-I

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

In re Dependency of Z.J.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

REPLY BRIEF IN SUPPORT OF MOTION FOR ACCELERATED
REVIEW

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
I. THE TRIAL COURT’S FAILURE TO CONDUCT THE THRESHOLD INQUIRY MANDATED UNDER 25 C.F.R. §23.107(A) IS A MATTER OF DUE PROCESS.	1
II. THE TRIAL COURT’S COMPLETE FAILURE TO CONDUCT THE MANDATORY ICWA INQUIRY CANNOT BE EXCUSED UNDER THE DOCTRINE OF “SUBSTANTIAL COMPLIANCE.”.....	3
III. THIS COURT’S DECISION IN T.L.G. REMAINS GOOD LAW AND IS CONSISTENT WITH NEW ICWA REGULATIONS.	5
IV. THE “REASON TO KNOW” STANDARD AS INTERPRETED IN T.L.G. DOES NOT CREATE AN IMPROPER RACIAL CLASSIFICATION.....	7
(i) <u>The State Misstates Appellant’s Position, Raising the Specter of an Equal Protection Issue when there Is None.</u>	8
(ii) <u>T.L.G.’s Interpretation of ICWA Does Not Create a Racial Classification</u>	10
(iii) <u>The Other Cases Relied upon by the State Support S.G.’S Position that there Is no Racial Classification</u>	12

TABLE OF CONTENTS

	Page
V. THE RECORD ESTABLISHES THERE WAS IN FACT REASON TO KNOW M.G. AND Z.G. MAY BE INDIAN CHILDREN.....	13
VI. WICWA REQUIRES ACTIVE EFFORTS BE SHOWN AT SOME SHELTER CARE HEARINGS.....	16
B. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re A.W.
741 N.W.2d 793 (2007) 12, 13

In re Dependency of T.L.G.
126 Wn. App. 181, 108 P.3d 156 (2005) 5, 6, 7, 8, 10, 11, 12, 13

US W. Commc'ns, Inc. v. Utils. & Transp. Comm'n
134 Wn.2d 74, 949 P.2d 1337 (1997) 18

OTHER JURISDICTIONS

In re Hunter
132 Or. App. 361, 888 P.2d 124 (1995) 15

In re Termination of Parental Rights to Arianna R.G.
259 Wis.2d 563, 657 N.W.2d 363 (2003) 6, 11

FEDERAL CASES

Brackeen v. Zinke
388 F. Supp.3d 514 (N.D. Tex, 2018) 7

Morton v. Mancari
417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) 11

Santosky v. Kramer
455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) 9

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

25 C.F.R. § 23.107.....	1, 2, 3, 4, 6, 7, 8
25 C.F.R. § 23.113.....	3
25 C.F.R. § 24.107.....	4
BIA “Guidelines”	10, 16
Federal Statute, § 232B.3	12
Former Iowa Code § 232B.3	12
ICWA.....	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 21
Matthew L.M. Fletcher, Wenona T. Singel, <u>Indian Children and the Federal-Tribal Trust Relationship</u> 95 Neb. L. Rev. 885 (2017)	3
RCW 13.34.....	17
RCW 13.34.040.....	17
RCW 13.34.050.....	18, 19, 20
RCW 13.34.060.....	18, 19
RCW 13.34.065.....	17
RCW 13.38.040.....	13, 17, 18, 19, 20
RCW 13.38.050.....	10
RCW 13.38.070.....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 13.38.140.....	3, 17, 18
RCW 26.44.050.....	18, 20
WICWA	1, 3, 5, 10, 11, 16, 17, 20

A. ARGUMENT IN REPLY

I. THE TRIAL COURT'S FAILURE TO CONDUCT THE THRESHOLD INQUIRY MANDATED UNDER 25 C.F.R. §23.107(A) IS A MATTER OF DUE PROCESS.

In his opening brief, appellant S.G. asserts the trial court erred when it failed to engage in the pretrial process required under 25 C.F.R. 23.107(a), and this resulted in a procedural due process violation. Brief of Appellant (BOA) at 6-23. In response, the State claims ICWA and WICWA do not confer rights of a constitutional nature and, thus, there was no due process violation.¹ Brief of Respondent (BOR) at 36-38. As shown below, the State is incorrect.

As explained in detail in appellant's opening brief, ICWA provides key procedural due process protections for both Indian families and tribes, through special notice requirements and a heightened burden of proof. See, BOA at 10-13 (discussing this in detail). The State points out that the special ten-day notice requirements in ICWA and WICWA do not apply to the initial 72-hour shelter care context, but it acknowledges the statutes provide for a higher burden of proof even at that hearing. BOR at 7, 11-12. This concession alone demonstrates that ICWA does indeed provide certain due process protections.

¹ ICWA refers to the Indian Child Welfare Act. WICWA pertains to the Washington Indian Child Welfare Act.

In the context of 72-hour shelter care hearings, the only way the trial court can determine the correct standard of proof to be applied is by determining whether ICWA is triggered. The applicability of ICWA hinges on the question of whether there is “reason to know” a child is or may be an Indian child. 25 C.F.R. 23.107(a) mandates the trial court undertake affirmative steps to determine whether there is “reason to know.”

The federal regulations make clear procuring information about the child’s Indian status is not something left to 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 they have information indicating there is a “reason to know” the child may be an Indian child. Id. Presumably, this is so the trial court may ask open-ended questions that are not confined by the parties’ presentation of the issues but instead calculated to procure all information relevant to determining the Indian status of the child.

The trial court’s failure to comply with this procedure is an error of constitutional magnitude because this is a mandated process that is intended to effectuate notice reasonably calculated to reach all interested parties.² It is also a procedure for determining the proper standard of

² Appellant acknowledges that ICWA’s ten-day notice provision does not apply at the 72-hour shelter care hearing. However, appellant continues to highlight this aspect of due process (BOA at 11-12) because the question of whether there is

proof to be applied. 25 C.F.R. § 23.107(b)(2) and § 23.113; RCW 13.38.140(1). Hence, the State is incorrect when it suggests the procedural safeguards embodied in 25 C.F.R. § 23.107(a) are not constitutional in nature. See, Matthew L.M. Fletcher, Wenona T. Singel, Indian Children and the Federal-Tribal Trust Relationship, 95 Neb. L. Rev. 885, 960 (2017) (explaining that the procedural aspects of ICWA are intended to guarantee due process to Indian parents).

II. THE TRIAL COURT'S COMPLETE FAILURE TO CONDUCT THE MANDATORY ICWA INQUIRY CANNOT BE EXCUSED UNDER THE DOCTRINE OF "SUBSTANTIAL COMPLIANCE."

In his opening brief, S.G. explains that the record lacks any evidence that the trial court was aware of, let alone properly exercised, its obligation to conduct ICWA's mandatory threshold inquiry under 25 C.F.R. § 23.107. BOA at 17-24. The State has conceded the trial court did not undertake the inquiry. BORMDR 1. However, it suggests this error should be disregarded under the doctrine of "substantial compliance." BOR at 9-10. The State misapplies that doctrine.

"reason to know" under the new federal regulations may come up in the context of other child custody proceedings in which the ten-day notice provision applies (including 30-day shelter care hearings). Moreover, even in the context of 72-hour shelter care hearings, both ICWA and WICWA require or encourage as a best practice to make diligent efforts to give notice to the tribe as soon as possible. RCW 13.34.065(4)(h); RCW 13.38.140(3); BIA Bureau of Indian Affairs (BIA), "Guidelines for Implementing the Indian Child Welfare Act," (Guidelines), December 2016, p. 28-29.

As explained in detail in appellant's opening brief, substantial compliance requires some attempt by the court at compliance with 25 C.F.R. § 23.107's mandatory pretrial inquiry. BOA at 18-20. That did not happen here. The State suggests this should be overlooked since the parties volunteered some information pertaining to children's Indian status during the hearing and since the trial court determined ICWA did not apply. However, the record shows no attempt at actual compliance by the court to comply with its duty under the statute. Hence, the doctrine of "substantial compliance" does not apply on that basis alone.

Moreover, the fact that the trial court ultimately determined ICWA did not apply is not grounds for finding substantial compliance. The trial court explicitly based its decision that ICWA did not apply on the testimony of the parties. Its decision was thus limited only to the evidence that the parties chose to present. Thus, this decision was not the product of the court's open-ended inquiry conducted outside the constraints of the adversarial process as is called for under 25 C.F.R. § 24.107(a). Instead, it was the product of noncompliance and, therefore, cannot possibly be used to establish "substantial compliance."

In sum, there was not substantial compliance in this case. The trial court simply did not know of, or ignored, its mandatory duty under 25 § 23.107(a) to conduct an on-the-record, pretrial ICWA inquiry before the

shelter care hearing commenced. As such, this Court should reject the State's claim that there was substantial compliance.

III. THIS COURT'S DECISION IN T.L.G.³ REMAINS GOOD LAW AND IS CONSISTENT WITH NEW ICWA REGULATIONS.

In his opening brief, appellant argues the record established there was "reason to know" S.G. and M.G. may be Indian children because both parents asserted their Indian heritage, the parties confirmed the children's eligibility for tribal membership, and the State failed to provide any evidence that heritage was not sufficient to meet the membership criteria of the particular tribes at issue. BOA at 24-47. Specifically, S.G. explained that given the record here the parents' assertion of Indian heritage sufficed to meet the bar for establishing "reason to know" as set forth by this Court in T.L.G. and as indicated under the new ICWA regulations. BOA at 25-29. In response, the State claims T.L.G. is no longer good law after the passage of the new regulations. BOR at 24. However, a careful reading of that case and the new regulations demonstrates T.L.G. remains good law.

The substance of T.L.G.'s holding tracks the new regulations. Both T.L.G. and the new regulations encourage a broad reading of the "reason to know" standard. WICWA applies where the court or the Department

³ In re Dependency of T.L.G., 126 Wn. App. 181, 189-91, 108 P.3d 156 (2005)

has reason to know the child “is or may be” an Indian child. RCW 13.38.070(1). ICWA applies where the court has information before it “indicating” the child is an Indian child. 25 C.F.R. § 23.107(c)(2). 25 § 23.107(c)(2). Thus, under both T.L.G. and the new ICWA regulations, if the Court is given information indicating that the child is or may be an Indian child, ICWA applies.

Contrary to the State’s suggestion (BOR at 19), the new regulations do not in any way mitigate T.L.G.’s holding that a report of Indian heritage is an indication that the child is an Indian child. This is because both T.L.G. and the new regulations recognize that tribes determine membership. Some tribes have exercised their sovereign power and decided to confer political membership based solely on heritage.⁴ Just because T.L.G. recognizes that an assertion of ancestry alone may create a political relationship between parent and tribe, this does not mean that it is choosing to trigger ICWA based only on ancestry. Under T.L.G. ICWA is triggered based on a “reason to know” the child or parent may be political members of a tribe due to the tribes use of ancestry as its sole membership criteria.

In sum, neither the new regulations nor T.L.G.’s interpretation of the “reason to know” standard result in an improper racial classification. 25 §

⁴ See, In re Termination of Parental Rights to Arianna R.G., 259 Wis.2d 563, 657 N.W.2d 363, 369 (2003)

23.107(c)(2); T.L.G. 126 Wn. App at 190-92. If the trial court has before it a report of Indian heritage, and there is no evidence to the contrary, then this establishes a “reason to the know” the child may be an Indian child without running afoul of the equal protection clause. Hence, this Court should reject the State’s suggestion that applying T.L.G.’s holding leads to the unconstitutional application of ICWA.

IV. THE “REASON TO KNOW” STANDARD AS INTERPRETED IN T.L.G. DOES NOT CREATE AN IMPROPER RACIAL CLASSIFICATION.

The State attempts to walk a fine line between opposing the holding in Brackeen v. Zinke, 388 F. Supp.3d 514 (N.D. Tex, 2018), finding ICWA unconstitutional but also urging this Court to apply the same flawed equal protection reasoning in Brackeen to undercut T.L.G.’s interpretation of the “reason to know” standard. BOR at 21-22. However, just like Brackeen, the State’s argument is flawed because it fails to distinguish between political and racial classifications. See, BOA at 30-38 (discussing in detail Brackeen’s flawed constitutional analysis and the overwhelming precedent that shows this). As shown below, in its effort to raise the specter of an equal protection violation, the State mischaracterizes appellant’s argument, misreads T.L.G., and misapplies other case law.

(i) The State Misstates Appellant's Position, Raising the Specter of an Equal Protection Issue when there Is None.

The State's argument is built upon a misstatement of appellant's fundamental position. It claims the father's position is that "... any report of heritage with a federally recognized tribe constitutes a 'reason to know,' [and] then the court would be required to treat all children with reported Native American heritage as Indian children under ICWA until or unless it is determined they are not Indian." BOR at 20 (emphasis added). However, this is an overstatement and amounts to nothing more than a strawman that the State proceeds to knock down.

Appellant's position – which is consistent with T.L.G. and 25 C.F.R. § 23.107(c)(2) – is that when there is a report of heritage as to a particular tribe and when the Court has no information before it indicating that the child or parent's tribal heritage alone does not confer political tribal membership, there is "reason to know" the child may be an Indian child. The State glosses over the fact that a parent's assertion of Indian heritage can always be rebutted with information indicating that the particular tribe at issue requires more than that for political membership. Indeed, the State is not an impotent party that must haplessly sit by when there is information that a tribe requires more than ancestry to become a political member.

If the trial court has before it information that heritage alone is not enough to confer political membership in the particular tribe at issue, then it may justifiably decline to find there “reason to know” regardless of a reported heritage. In this way, the trial court is not “required” to find that there is “reason to know” merely based on a parent’s assertion of Indian heritage.

The State is in a uniquely better position than parents to provide evidence that establishes Indian heritage alone does not trigger a “reason to know” when particular tribes are involved. Indeed, the Department has an Office of Indian Child Welfare that presumably has more collective expertise and experience in this area than any single parent, and it could (or perhaps does) collect and maintain records of tribal membership requirements.⁵ The Department also has the ability to call tribal representatives, and find out about membership criteria.⁶ Additionally, the Department might be able to present information that a parent has already

⁵ As the U.S. Supreme Court has noted, the State’s resources “dwarf” that of a parent, and it has far greater access to records and more expertise in child custody matters than do parents. Santosky v. Kramer, 455 U.S. 745, 763, 102 S. Ct. 1388, 1400, 71 L. Ed. 2d 599 (1982).

⁶ As explained below, in this case, the social worker called the tribe before the shelter care hearing, but he failed to ask the necessary questions regarding membership qualifications – a factor which contributed greatly to the trial court’s failure to apply ICWA even when there were in fact Indian children involved.

relinquished their tribal membership based on their own records regarding a parent.⁷

Placing the burden on the State to inform the court that Indian ancestry does not equate to membership for the particular tribe at issue is also consistent with the Washington Legislature's directive that the party seeking to place a child in foster care exercise diligence and make a good faith effort to determine the child's Indian status. RCW 13.38.050. It is consistent with ICWA guidelines that encourage courts to err on the side of applying ICWA early rather than risk the harsh results of proceeding in a case involving an Indian Child without applying ICWA. BIA "Guidelines" p. 11. Most importantly, this approach ensures the trial court is able to make a reasoned decision as to whether ICWA is triggered based on as much information as possible about the child's Indian status.

(ii) T.L.G.'s Interpretation of ICWA Does Not Create a Racial Classification.

The States suggests that T.L.G.'s interpretation of the "reason to know" standard somehow transforms the political classification in ICWA to a racial classification. BOR at 19-22. However, the reasoning in T.L.G. is consistent with the notion that ICWA and WICWA define "Indian child" based on political, not racial classifications.

⁷ This is a question the court could ask during the required pretrial ICWA inquiry – presuming the court conducts this inquiry.

This Court's analysis in T.L.G. (and appellant's position here) does not hinge on race – it hinges on a tribe's right as a sovereign entity to decide tribal membership based on whatever criteria it chooses. Both T.L.G. and the new regulations recognize that tribes determine membership. Some tribes have exercised their sovereign power and decided to confer political membership based solely on heritage.⁸ If the trial court has before it a report of Indian heritage, and there is no evidence establishing that the tribe requires more, then this is sufficient to show a "reason to the know" the child may be an Indian child without running afoul of the equal protection clause.

Applying T.L.G.'s reasoning here, does not make ICWA or WICWA vulnerable to a constitutional challenge. Tribes are political entities that have the right to determine for themselves whether ancestry alone is sufficient to establish tribal membership. That is the tribe's prerogative. And, exercising this prerogative does not violate equal protections because the tribes are sovereign entities. See, e.g., Morton v. Mancari, 417 U.S. 535, 553–55, 94 S. Ct. 2474, 2485, 41 L. Ed. 2d 290 (1974).

⁸ See, In re Termination of Parental Rights to Arianna R.G., 259 Wis.2d 563, 657 N.W.2d 363, 369 (2003).

(iii) The Other Cases Relied upon by the State Support S.G.'S Position that there Is no Racial Classification.

The State claims the Iowa Supreme Court's decision in In re A.W., 741 N.W.2d 793 (2007), supports its position that application of T.L.G.'s "reason to know" standard results in an improper racial classification. RP 21-22. However, the State misreads fundamental aspects of A.W.

At issue in A.W. was the Iowa Indian Child Welfare Act (IICWA)'s definition of an "Indian child." Iowa defined Indian child as "an unmarried Indian person who is under eighteen years of age or a child who is under eighteen years of age that *an Indian tribe identifies as a child of the tribe's community.*" Former Iowa Code § 232B.3(6) (emphasis added). Comparing this to ICWA's definition of an Indian child as "any unmarried person who is under age eighteen and is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," the Iowa Supreme Court noted "unlike the federal statute, section 232B.3(6) purports to include within the definition of 'Indian child' children without regard to whether they are members of a tribe or eligible for membership." A.W., 741 N.W.2d. at 799. From this, it concluded that IICWA created a racial classification based on ethnicity rather than defining "Indian child" in terms of political membership in the tribe. Id. at 807.

Unlike Iowa's former statute defining "Indian child," Washington's definition of an "Indian child" does not create a racial classification based on Indian ethnicity. RCW 13.38.040(7). Instead, it tracks ICWA's definition of "Indian child," defining it based on the child's or the parent's political membership in a tribe. Id. This was the same statutory language before this Court in T.L.G. when it interpreted the "reason to know" standard. Hence, the State is simply wrong when it suggests A.W. shows T.L.G.'s interpretation of the "reason to know" standard has created a racial classification. Indeed, A.W. demonstrates just the opposite.

For the reason stated above, this Court should reject the State's contention that applying its holding in T.L.G. as advocated by appellant will result in an equal protection violation.

V. THE RECORD ESTABLISHES THERE WAS IN FACT REASON TO KNOW M.G. AND Z.G. MAY BE INDIAN CHILDREN.

In his opening brief, S.G. specified in detail how the information before the trial court established a "reason to know" Z.G. and M.G. may be Indian children. BOA at 38-42. In response, the State first argues that because neither parent testified they are members of a tribe, ICWA did not apply. BOR at 23. However, T.L.G. makes clear that a parent does not determine membership – the tribe does. 126 Wn. App. at 191. Hence, a parent's assertion that he or she does not believe themselves to be

members of a tribe does not establish that in fact they are not members unless it has been verified by the tribe itself. Id.

The State also claims there was no “reason to know” the children were Indian children because the trial court was provided with information from the tribe “which was contrary to the definition of an Indian child.” BOR at 23. However, this claim is based on a misreading of the facts.

Specifically, the State claims that at the time of the shelter care hearing:

...there was sufficient information from the tribe to contradict the legal definition [of “Indian child”], as the tribe itself reported the mother was not a member and the children were not members.

BOR at 23 (emphasis added). The State points to the social worker’s testimony about information he gained from a phone call to Tlingit-Haight tribe. BR at 23. However, the social worker’s testimony did not convey a report from the tribe that that the children and mother were not members.

The social worker testified only that the tribe reported neither the mother nor the children were “enrolled” in the Tlingit-Haight tribe. RP 11-12. This is fundamentally different than saying that they were not were members of the tribe. This is because lack of enrollment does not necessarily equal lack of membership when determining 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).

Moreover, the social worker offered no testimony regarding the Cherokee and Klawock Cooperative Association, which were also at issue here. RP 11-12, CP 2. Hence, the record does not indicate – as the State suggests – that the relevant tribes “reported the mother was not a member and the children were not members.” BOR at 23. And, it certainly does not support the State’s claim that “it is uncontested that the mother was not a member of a federally recognized tribe.” BOR at 28.

Indeed, the Department’s failure to distinguish between the concept of tribal enrollment and political membership ultimately contributed to the trial court’s erroneous conclusion that ICWA did not apply. By testifying only about enrollment and not tribal membership status and criteria, the social worker’s testimony misled the trial court into believing that heritage alone was an insufficient basis to conclude the children may be Indian children. However, just days after the shelter care hearing, the Tlingit-Haight tribe successfully intervened, clarifying that the children were members of this tribe. CP 19.

Indeed, this case demonstrates that if the bar for triggering ICWA is set too high and the “reason to know” standard interpreted too narrowly, there is a high risk that dependency proceedings will run afoul of ICWA

and be subject to invalidation. Luckily, in this case, the error was remedied relatively quickly – but such errors are not always caught so quickly, and this can have devastating impacts on a child’s stability. See, BIA, “Guidelines” at 11 (cautioning about such consequences).

In sum, the parents and the Department testified to the children’s Indian ancestry. There was no evidence that ancestry alone was insufficient to confer tribal membership. Hence, there was “reason to know” Z.G. and M.G. may be Indian children, and the trial court erred when it ruled otherwise and failed to comply with ICWA during the shelter care hearing.

VI. WICWA REQUIRES ACTIVE EFFORTS BE SHOWN AT SOME SHELTER CARE HEARINGS.

In his opening brief, S.G. asserted that when there is reason to know the child at issue in a shelter care hearing may be an Indian child, then the State must show active efforts. BOA at 16. In response, the State claims active efforts need not be shown at 72-hour shelter care hearings. BOR at 7-11. As explained below, a careful reading of the relevant statutes indicates the Legislature intends for a more nuanced approach than either party has applied heretofore.

While ICWA does not require “active efforts” be shown at the 72-hour shelter care hearing, WICWA does under the circumstances of this case. RCW 13.38.040(1)(a)(i) defines active efforts in relevant part as:

In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to the parent, parents, or Indian custodian prior to filing the dependency petition, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family beyond simply providing referrals to such services.

Under Washington law, a shelter care hearing is a dependency proceeding seeking out-of-home placement. RCW 13.34.065. In this case, the Department provided voluntary services to the parents prior to the filing of the Dependency petition on June 29, 2019. RP 12,107; BOR at Appendix A (Dependency Order, p. 3). Hence, under RCW 13.34.040(1)(a)(i), the Department was required to show active efforts.⁹

Arguing to the contrary, the State points to RCW 13.38.140(1).

That statute provides:

Notwithstanding any other provision of federal or state law, nothing shall be construed to prevent the department or law enforcement from the emergency removal of an Indian child who is a resident of or is domiciled on an Indian reservation,

⁹ This is also consistent with BIA Guidelines (p. 29) which state: “We recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.”

but is temporarily located off the reservation, from his or her parent or Indian custodian or the emergency placement of such child in a foster home, under applicable state law, to prevent imminent physical damage or harm to the child.

This suggests that active efforts need not be shown at a 72-hour shelter care hearing contrary to RCW 13.38.040(1)(a)(i). Thus, there appears to be a conflict between the two laws.

Fortunately, the statutes can be harmonized such that they achieve the Legislature's intent to both protect Indian children from harm and to prevent the unnecessary break up of an Indian family. See, US W. Commc'ns, Inc. v. Utils. & Transp. Comm'n, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997) (explaining "[s]tatutes on the same subject matter must be read together to give each effect and to harmonize each with the other"). The statutes are harmonized if RCW 13.38.140(1) is construed to apply to emergency removal and placement under RCW 13.34.050 and RCW 26.44.050, and RCW 13.38.040(1)(a)(i) is construed to apply to 72-hour shelter care hearings where the family was already receiving services from the Department.¹⁰

¹⁰ Under Washington law, emergency placement and removal either occurs by an emergency court order under RCW 13.34.050 or through emergency taking of custody under RCW 26.44.050. RCW 13.34.060. After this the child is immediately placed in shelter care. RCW 13.34.060. Within 72 hours of this emergency removal and emergency placement, the State must either return the child or seek from the court an order permitting out-of-home placement. RCW 13.34.060.

Under this harmonized reading of the statutes, “active efforts” need not be shown prior to the emergency removal of a child under RCW 13.34.050 and .060. “Active efforts” also need not be shown if the Department has not yet had the opportunity to work with the family in providing services. However, the Department must show “active efforts” at the 72-hour shelter care hearing if it has already been working with the Indian family and providing services. This way, the immediate emergency removal of an Indian child from a harmful situation is not hampered by an “active efforts” requirement. Yet, at the same time, this fulfills the Legislature’s intent that, when the Department has been working with an Indian family, it must show to the court it was engaging in “active efforts” to help prevent the break-up of that family.

Importantly, the requirement that the Department show active efforts under RCW 13.38.040(1)(a)(i) would not be too burdensome. The 72-shelter care proceeding takes a few days after the Indian child’s initial emergency removal and placement has occurred. The “active efforts” requirement would only apply if the State had already been working with the family. Hence, the Department would be in a position to quickly demonstrate whether active efforts were taken to avoid the emergency removal, and the Court would be able to determine whether the child could

be returned home if the State were to fulfill its duty to provide active efforts.

In sum, under WICWA, the State need not show active efforts were made prior to an emergency removal and placement of an Indian child pursuant to RCW 13.34.050 or RCW 26.44.050. However, when the Department has voluntarily provided services to this family prior to the filing of the Dependency petition – such as here – the State has the burden of proving at the 72-hour shelter care hearing that it engaged in active efforts to prevent the break-up of this Indian family. RCW 13.38.040(1)(a)(i).

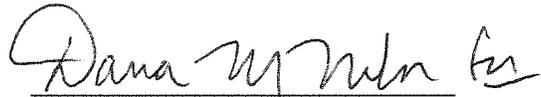
B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should conclude the trial court violated due process when it failed to conduct the mandatory pretrial ICWA inquiry. Additionally, it should find the trial court erred when it concluded ICWA was not triggered.

DATED this 26th day of April, 2019.

Respectfully submitted,

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Appellate Court Case Number: 78790-0
Appellate Court Case Title: Dependency of: Z.J.G. 9/3/16, Scott James Greer, Petitioner v. DSHS, Respondent
Superior Court Case Number: 18-7-02176-4

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