

FILED
SUPREME COURT
STATE OF WASHINGTON
5/28/2020 2:40 PM
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FILED
SUPREME COURT
STATE OF WASHINGTON
6/5/2020
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NO. 98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF Z.J.G., AND M.G., MINORS

WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH
AND FAMILIES

Respondent,

v.

SCOTT JAMES GREER

Appellant.

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

The Honorable Patrick Oishi, Judge

SUPPLEMENTAL AMICUS BRIEF ON BEHALF THE CHILDREN'S
TRIBES:
THE CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN
TRIBES OF ALASKA AND KLAWOCK COOPERATIVE ASS'N

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INTEREST OF AMICUS

The Central Council of Tlingit and Haida Indian Tribes of Alaska (“Tlingit & Haida”) is a federally-recognized tribal nation of more than 31,000 citizens headquartered in Juneau, Alaska. Tlingit & Haida is a regional tribe, with eighteen constituent community councils located throughout Southeast Alaska, including Klawock, a Tlingit village.¹ Klawock Cooperative Association (KCA) is a federally-recognized tribal nation on Prince of Wales Island that compacts with Tlingit & Haida for services, including Indian Child Welfare Act advocacy. The minor children involved in this case are KCA tribal citizens, and KCA is the “Indian child’s tribe” under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et. seq. and the Washington Indian Child Welfare Act (WICWA), RCW §§ 13.38.010 et. seq. Tlingit & Haida intervened in the trial court proceedings on behalf of KCA. However, because it received no notice of the original appeal and could not participate as a party, it has been advised to file as amicus at this stage.

¹ Tlingit & Haida was originally formed to represent the indigenous people that have lived in Southeast Alaska since time immemorial to respond to the United States taking land for two national parks with no compensation to the tribes. David S. Case & David A. Voluck, *Alaska Natives and American Laws* 335 (3d ed. 2012). In 1994, Congress reaffirmed the federal recognition of Tlingit & Haida in the Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994) codified at 25 U.S.C. §§ 1212, 1213 (2006).

Over the past half century, Washington has become a major hub for economically-displaced Tlingit people, driven by assimilationist boarding school policies, the disparate effects of Alaska's resource economy, and diminishment of subsistence harvests. Tlingit & Haida citizens live all over the world, though as of 2010, twenty-two percent of U.S. residents with Tlingit, Haida, or Tsimshian ancestry lived in Washington. Eddie Hunsinger & Eric Sandberg, *The Alaska Native Population*, Alaska Economic Trends, Apr. 2013, at 9, <https://labor.state.ak.us/trends/apr13.pdf>.

Tlingit & Haida and KCA have a direct interest in the outcome of these proceedings, both for the children involved here and all of their children in Washington state, where the largest number of Tlingit & Haida children reside outside of Alaska.

STATEMENT OF THE CASE

After the police removed the minor children in this case from their parents, the state filed a sworn child welfare petition identifying the children as “Indian children,” and identifying the case as one covered by the federal and state Indian Child Welfare Acts. Dependency Pet. (DPP) at 2. The Petition lists as supporting information:

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.

Id.

Nonetheless, the trial court determined that there was no “reason to know” the children were “Indian children” because of unverified statements from the state social worker and parents about tribal enrollment. The court did not wait to hear from the named tribes themselves - the only parties with legal authority to determine citizenship - as to the children’s tribal status.

The level of specificity in the parties’ testimony regarding the children’s ties to identified tribal communities, per 25 C.F.R. 23.107 (c)(2) and RCW 13.38.070(1), provided the lower court with enough evidence for the court to have “reason to know” there “may be” Indian children involved in the case, and to treat the children as Indian children until the

tribes themselves could confirm or deny the children's tribal citizenship. 25 C.F.R. 23.107(b)(2). Without the court finding that there was reason to know the children were or may be Indian children, there was no requirement the Tribes receive formal, legally required notice or that the family receive ICWA and WICWA protections. The lower court holding, which errs on the side of lower protection standards, will lead to disparate treatment of Indian children depending on the state in which they reside, is contrary to the goals of both ICWA and WICWA, and is an unnecessarily narrow reading of the ICWA Regulations. Therefore, the Tribe respectfully asks the Court to reverse the Court of Appeals decision to ensure tribal children and families receive ICWA's and WICWA's protections at the earliest possible hearing.

ARGUMENT

I. TRIBAL GOVERNMENTS, NOT STATE EMPLOYEES OR PARENTS, ARE THE ONLY SOURCE THAT CAN PROVIDE STATE COURTS WITH DEFINITIVE INFORMATION REGARDING A CHILD’S STATUS AS AN INDIAN CHILD

Indian tribes possess the sole discretion to determine who is a member or eligible for membership in their tribe. As noted in the leading treatise on federal Indian law, “[e]ach tribe, as a distinct political community, has the power to determine its own tribal membership.” Nell Newton, ed. *Cohen’s Handbook of Federal Indian Law*, 214 (2012). In fact, a tribe's right to define its own citizenship “has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 36, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) (“An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress.”); *see also* RCW 13.38.050. This means that in any case involving a determination of whether a child is an “Indian child,” 25 U.S.C. 1903(4), under the Indian Child Welfare Act (ICWA), tribal governments have the last word. *See In re M.C.P.*, 571 A.2d 627, 634 (Vt. 1989).

More than any other party, the Tribe has the most compelling interest in properly identifying children who are or may be tribal citizens.

Though parents receive heightened protections in child welfare proceedings under ICWA and the Washington Indian Child Welfare Act (WICWA), parents may not want tribal professionals involved in their lives, they may not understand their own tribal connections, or even agree with family placement preferences. However, the United States Supreme Court's landmark decision on ICWA in *Holyfield* squarely holds that an individual parent cannot override ICWA because the wellbeing of both tribal children and nations hinges on its application. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). The provisions of ICWA were "not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49, *citing* 25 U.S.C. §§ 1901(3).

In order to effectuate tribal confirmation of membership, both the ICWA regulations and WICWA require the petitioner seeking foster care placement or termination of parental rights to inquire and contact any tribe where the child might be a member or is eligible for membership. 25 C.F.R. §23.107(a), RCW 13.38.050. This inquiry and good faith effort is not a substitute for the formal notice that is required when "the petitioning party or court knows, or has *reason to know*, that the child is *or may be* an

Indian child.” (emphasis added) RCW 13.38.070, *cf.* 25 U.S.C. 1912 (a)(“...or has reason to know that the child is an Indian child”). Only the written tribal determination or tribal testimony that a child is a member or is eligible for membership is conclusive that the child is an Indian child. RCW 13.38.070(3)(a). There is no requirement in RCW 13.38.070(3)(a) that the *parent* be a member for the tribal determination of membership, which makes sense, given the tribe is the sole arbiter of membership.

In this case, the trial court based its “reason to know” determination on the testimony of a state social worker and two parents regarding their own enrollment. The state social worker relayed a hearsay conversation with an unknown tribal employee, with an unknown title, and an unknown source of information, that the children’s grandmother was enrolled with Tlingit & Haida but the mother and children were not. Report of Proceedings (RP) at 11. No tribal representative was present to testify, and the state presented no written determination from any tribal representative. While this may certainly be difficult to achieve at a shelter care hearing, the purpose of the “reason to know” provision is to ensure children are considered Indian children during the pendency of time it takes to issue formal notice. 25 C.F.R. 23.107(b)(2).

Child welfare proceedings are often difficult and complicated, with parents who may have serious deficits. They may, or may not, have the

ability or information to testify as to their own tribal enrollment status. For example, the mother in this case was an abused and neglected child herself, with CPS history and a self-report that she left home at the age of twelve. DPP at 7. *Her* mother was on probation for domestic violence against her now-deceased father at the start of this case and she told CPS staff that she had no family support nearby, except for two aunts in California for whom she had virtually no information. DPP at 4. In 2017, the mother in this case suffered a traumatic brain injury when someone attacked her with a baseball bat, causing memory loss and other health issues. DPP at 7. At the time of the petition, she had cycled through bouts of homelessness for years. DPP at 5-6. This mother, with a noted brain injury and memory issues, testified that she did not believe she had enrolled with the Tribe, RP, 88, 90. However, given she left home at age twelve, she would not necessarily know if a family member had enrolled her as a child. And at the time of the hearing, no party had records to verify whether her impression was true or not. The father had no connection with Tlingit & Haida or KCA and testified that he was not aware of his own enrollment in the tribes he was connected to. RP, 66-67.

However, even with the mother's testimony and the social worker's testimony, *Id.* at 88, and none from Tlingit & Haida or KCA, the trial court ruled that there was not "reason to know" the children were or

may be Indian children. Despite this finding, which is legally required to ensure notice under RCW 13.38.070, Tlingit & Haida received informal notice alerting them to this case and intervened on KCA's behalf after the shelter care hearing. Giving the Tribe the opportunity to make its own determination of the children's tribal citizenship made all the difference later in this case, as it will in many others. That original trial court finding, however, lead to a lower standard of evidence at the shelter care hearing, and did not require formal notice to be sent to the Tribes.

II. THE LOWER COURT DECISION RESOLVING DOUBTS ABOUT TRIBAL CITIZENSHIP AGAINST TRIBES THWARTS THE PURPOSE OF ICWA AND WICWA AND CLASHES WITH THE HOLDINGS OF CASES IN A MAJORITY OF SISTER STATES.

A. WICWA's Requirements Match the Sister States' Holdings Requiring a Low Evidentiary Bar for Noticing Tribes and are Not Superseded by the Passage of the Federal Regulations

Adopting the lower court's interpretation of "reason to know" would limit the protections Washington requires in WICWA. RCW §§ 13.38.010 et seq. In 2010, the Washington legislature required the Washington State Racial Disproportionality Advisory Committee to explore the root causes of, and make recommendations for, the remediation of racial disproportionality in Washington state. The committee found Indian children were being removed and persisted in the state child welfare system at a rate higher than other groups of children in

the state. Wash. St. Racial Disproportionality Advisory Comm. *Racial Disproportionality in Washington State Report to the Legislature*, at 15 (2010),

https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Racial%20Disproportionality%20in%20WA%20State_1ab0b5ee-4ce0-4bc7-9454-662e99f602b5.pdf.

As part of the remediation plan, the advisory committee recommended that the state study efforts in other states to increase the enforcement of ICWA and determine if those efforts helped reduce the disproportionality. *Id* at 17. The state found that the other states' efforts in Iowa, Minnesota, Wisconsin, and California, which included passing state ICWA laws, to reduce disproportionality had worked. *Id*. The intent of WICWA was to create law, policies, and practices designed to ensure that Indian children have the right to their relationship to their tribe. *Id*. This Court specifically recognized the importance of the protections of WICWA in the court system. *In re T.A. W.*, 186 Wn.2d 828, 843 (2016).

Washington's passage of WICWA reflects a commitment to weighing in on the side of *protecting* potentially eligible children, as opposed to excluding them. RCW 13.38.070. In many ways, WICWA mirrors the language of ICWA, but there are important distinctions, specifically regarding tribal membership and Indian children. WICWA

changes the reason to know standard by adding the phrase “or may be” into its reason to know standard. RCW 13.38.070. In addition, while the definition of “Indian child” and “Indian child’s tribe” (where the child is a member or eligible for membership) are the same in both laws, 25 U.S.C. 1903(4), (5); RCW 13.38.040 (7),(9), WICWA defines “member” and “membership” as “a determination by an Indian tribe that a person is a member or eligible for membership in that Indian tribe.” RCW 13.38.040(12). And WICWA states that a written determination or testimony by a tribe “attesting” that a child is a member of or eligible for membership “shall be conclusive that the child is an Indian child.” RCW 13.38.040(12).

Outside of the WICWA definition of Indian child, the state law never mentions the child’s need to be the biological child of a member. RCW 13.38.070(3)(a). This is important because the lower court found the federal regulations essentially require the parent to prove their own tribal enrollment for a court to find reason to know an Indian child is involved in the case—which is not a requirement for a tribal determination of tribal membership. Because these RCW provisions together provide a higher standard of protection than ICWA itself, the state must follow the law that provides the higher protection. 25 U.S.C. 1921 and 25 CFR § 23.106(b).

In this case, the lower court was faced with conflicting information regarding whether the children qualified as “Indian children.” Although the parties believed that no child or parent was tribally enrolled (which would not be determinative under WICWA regardless), the state’s own social worker, as well as the father, testified it was possible the children were eligible for tribal membership. RP at 11-12. In addition to the social worker, the mother also testified that she and the children were eligible for tribal membership with Tlingit & Haida. *Id.* at 88. Yet the lower court resolved its doubts in favor of *not* applying ICWA and WICWA – precisely the opposite of what these laws require.

B. The 2016 ICWA Regulations do not Change the Requirements or the Language of ICWA’s “Reason to Know” Standard.

ICWA does not require the citizenship status of children to be proven before providing protections. The “reason to know” presumption that an identified American Indian or Alaska Native child qualifies as an “Indian child” fits with the fact that ICWA’s heightened protections may always be eased, but they cannot be afforded after-the-fact. Once participants provide the court with enough information that a court has reason to know a child is an Indian child, the court must treat the child as an Indian child, and order legal notice be sent to the tribes. 25 C.F.R. § 23.107(b)(2); 25 U.S.C. 1912(a). In the case of a shelter care hearing, that

would be to ensure the evidentiary standard in 25 U.S.C. 1922 is met before the court orders the child removed from their home and their parents.

As described by the United States Department of Interior, all parties share an interest in abiding by ICWA from the earliest stages of a case, whenever it appears that it may apply. *See* 25 C.F.R. pt. 23; 81 Fed. Reg. 38779, 38803 (June 14, 2016). Resolving any doubts in favor of application is “intended to avoid the delays and duplication that would result if a court moved forward with a child-custody proceeding (where there is reason to know the child is an Indian child) without applying ICWA, only to get late confirmation that a child is, in fact, an Indian child.” *Id.* at 38803. This is primarily because ICWA provides at least two serious remedies—the invalidation of proceedings under 25 U.S.C. 1914, or the denial of jurisdiction due to an improper removal under 25 U.S.C. 1920.² Additionally, “the early application of ICWA's requirements—

² *See In re Morris*, 815 N.W.2d 62, 75 (Mich. 2012) (“However, if the trial court errs by concluding that no notice is required and proceeds to place the child into foster care or terminate parental rights, the purposes of ICWA are frustrated and the Indian child, the parent or Indian custodian, or the Indian child's tribe may petition to have the proceedings invalidated pursuant to 25 U.S.C.A. § 1914.”); *In re A.L.C.* 8 Wash.App.2d 864, 877 (2019) (“Here, the Department has improperly maintained [the child's] placement in out-of-home care because the Department has failed to provide active efforts to prevent the breakup of the Indian family. The appropriate remedy is the remedy prescribed by statute. Thus, we remand to the juvenile court to either immediately return A.L.C. or make the statutorily required finding that returning A.L.C. will subject her to substantial and immediate danger or threat of such danger.”)

which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children.” 81 Fed. Reg. 38803.

The 2016 federal regulations slightly rewrote the 1979 Guidelines for State Courts on the reason to know standard. Indian Child Custody Proceedings. 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979). The regulations require the court to ask all of the participants if they “know or have reason to know the child is an Indian child.” 25 C.F.R. §23.107(a). If there is reason to know, but not sufficient evidence to determine the child is or is not an Indian child, the court must confirm by way of a report that the agency has used due diligence in determining the child’s Indian status, and treat the child as an Indian child until determined otherwise on the record. 25 C.F.R. §§23.107(b)(1), (2). Finally, the regulations state the court has a reason to know an Indian child is involved in the case after the initial inquiry of the parties if,

- (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
- (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has *discovered information indicating* that the child is an Indian child;

- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. §23.107(c)(emphasis added).

The 2016 ICWA Guidelines interpreting the regulations direct that “[s]tate courts and agencies are encouraged to interpret these factors expansively.” Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act, B.1 (2016). Nothing indicates the regulations provision should be read as repudiating or superseding the various states case or statutory law that provides a low evidentiary bar to trigger the “reason to know.” See *In re Dependency of Colnar*, 52 Wn.App. 37, 40-41 (1988)(discussing Washington’s reason to know standard prior to the regulations and WICWA).

This “reason to know” presumption also takes into account the fact that it is often impossible to have an instantaneous determination about a child’s tribal citizenship at the start of emergency child protection proceedings. Like many large tribes, Tlingit & Haida receives hundreds of notices from various state agencies and courts every year, and each one

must be carefully considered and checked against membership rolls of both Tlingit & Haida and the family's local village. Per BIA reporting data, in 2019 Tlingit & Haida responded to inquiries for 324 children. Barbara Dude Aff. 1 (attached). Its staff of eight social workers intervened on behalf of 235 children, about a third of whom live in Alaska, and a third of whom live in Washington. *Id.*

Citizens of Tlingit & Haida commonly have dual citizenship with other federally-recognized tribes throughout Southeast Alaska, and these tribes may or may not have a compacting relationship with Tlingit & Haida. Identifying the appropriate local village may require tracking back three to five generations, on both sides of the family. This takes considerable time, assuming all of the information in the notice is correct. Tribes across the country must interpret fifty states' notice forms, hope the notice information is correct, and respond in a timely matter. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 632 (S.C. 2012), *rev'd* 570 U.S. 637, 133 S.Ct 2552, 186 L.Ed.2d 729 (2013)(the notice misspelled birth father's name and gave the wrong birthdate, so Cherokee Nation was unable to verify the child was eligible for membership at Cherokee Nation).

Therefore, Tlingit & Haida and KCA must rely on state courts to provide initial ICWA protections to its children while the state agency

puts together legal notices with all of the necessary information to determine tribal membership or eligibility for membership, mails it to the tribes, and then affords the tribes the opportunity to conduct their own research and determine which, if any, tribe has the most significant contacts with the child. 25 U.S.C. §1903(5).

Congress considered this issue when passing ICWA and wrote: “[t]he constitutional and plenary power of Congress over Indians, Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process under tribal law.” H.R. Rep. No. 95-1386, at 17 (1978). In other words, the “reason to know” standard is much lower than a “know” standard in order to ensure the child receives ICWA’s protections *before* Tlingit & Haida or any tribe makes the final determination of the membership or eligibility for membership of the child.

C. Sister States Have a Low Evidentiary Burden to Trigger the “Reason to Know” Standard Both Before and After the Regulations were Issued.

In the leading case on ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 43-44, the Supreme Court was clear about the uniform application of the law across the several states. *Id.* at 46. The federal government reiterated this intent to encourage uniformity with the publication of Federal Regulations governing ICWA in 2016. 25

C.F.R. pt. 23; 81 Fed. Reg. 38779 (June 14, 2016)(“This final rule promotes the uniform application of Federal law designed to protect Indian children, their parents, and Indian tribes.”). While it is unlikely all fifty states will interpret ICWA identically, the original decision in this case is an outlier in the majority of ICWA case law in this area, both before and after the adoption of the regulations.

Because the determination of a child’s Indian status is so important, most states have concluded that this “reason to know” standard must be a very low evidentiary bar. *See In re M.C.P.*, 571 A.2d at 633; *G.L. v. Dep’t of Children and Families*, 80 So.3d 1065 (Fla. Dist. Ct. App. 2012); *In re B.R.*, 97 Cal.Rptr.3d 890 (Cal. Ct. App. 2009).³ In 2012, for example, the Michigan Supreme Court unanimously agreed that notice was so important that any “sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement.” *In re Morris*, 815 N.W.2d at 64 (2012) *cited approvingly in Michelle M. v. Dep’t of Child Safety*, 401 P.3d 1013, 1017 (Ariz. Ct. App. 2017) and *In re J.W.E.*, 419 P.3d 374, 378 (Okla. Civ.

³ *But see In re Austin J.*, 261 Cal.Rptr.3d 297 (Cal. Ct. App. 2020), where the Second District in California has taken the more stringent interpretation adopted by the court of appeals here. In California, however, the state adopted the regulations as state law and replaced a previous state law definition. *Id.* at 309.

App. 2018). And a few years prior to the *Morris* decision, the Colorado Supreme Court wrestled with the same question and held,

Precisely what constitutes “reason to know” or “reason to believe” in any particular set of circumstances will necessarily evade meaningful description. As in other contexts, reasonable grounds to believe must depend upon *the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge.*

B.H. v. People ex rel. X.H., 138 P.3d 299, 303 (Colo. 2006) (emphasis added). In addition, a majority of courts interpreting the new regulations have determined that “[t]he recently adopted regulations implementing the Act also make clear that the ‘reason to know’ standard requires less than actual proof that the child meets the statutory definition of ‘Indian child.’” *Geouge v. Traylor*, 68 Va. App. 343, 365, 808 S.E.2d 541, 551 (2017); *see also Matter of J.W.E.*, 419 P.3d at 378-380 (Okla. Civ. App. 2018); *Matter of L.A.G.*, 429 P.3d 629, 632–33 (Mont. 2018); *Matter of B.Y.*, 432 P.3d 129, 132 (Mont. 2018); *State ex rel. Children, Youth & Families Dep’t v. Tanisha G.* 451 P.3d 86, 88 (N.M. Ct. App. 2019).

In its attempt to read the regulations narrowly, the state points to a couple of cases that remain minority holdings. The first is an unpublished case in Texas, even though more recent, published, cases from Texas have

not adopted that same reasoning. *See Interest of M.R.* ___S.W.3d___, 2020 WL 500783, *3 (Tex. Ct. App. 2020).

In the second, an Alabama Court of Appeals case, the grandmother of the parent in that case advised the court that the family may be related to an unnamed Ojibwe tribe. In holding this was not enough information to find a reason to know there was an Indian child involved, the court quotes the *Geouge* decision extensively, and ultimately agrees that “[t]hus, all that is required for the [ICWA]’s notice provisions to apply is for a party or counsel to assert in good faith a belief that the child ‘is an ‘Indian child.’”” *T.W. v. Shelby Cty. Dep’t of Human Res.*, No. 2180005, 2019 WL 1970066, at *8 (Ala. Civ. App. May 3, 2019). The *Geouge* court ultimately held that the Mother’s claim that ICWA “might apply” because the biological father of the child might be Cherokee, and provided no additional information, was not high enough to clear the “low bar” of “assert[ing] in good faith a belief that the child ‘is an ‘Indian child’” 808 S.E.2d at 553. Even assuming this standard is correct, in Washington a party or parent would only have to assert in good faith that the child *may be* an Indian child, as the social worker did here. RCW 13.30.050.

Finally, in *In re J.W.E.* the mother testified she was enrolled at Cheyenne Arapaho. 419 P.3d at 375. Her children were only eligible to be enrolled at Choctaw. *Id.* At that point, the children did not qualify as

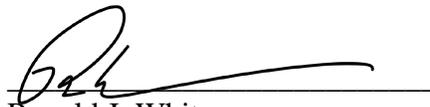
biological children of an enrolled Choctaw member or enrollable children of a Cheyenne Arapaho member. Mother's testimony was that she was "becoming an established member" in the Choctaw Tribe. *Id.* Under the department's argument, the trial court's holding that it did not have reason to know the children were Indian children with that testimony would have been the correct holding. And yet the Oklahoma Civil Court of Appeals reversed, holding the trial court did have reason to know at that point. *Id.* at 379.

Therefore, in Arizona, Colorado, Florida, Michigan, Montana, New Mexico, Oklahoma, Vermont, most districts of California, and in Washington before the lower court's decision here, the testimony proffered by the mother, father, and social worker in this case would have been considered sufficient to create "reason to know." This would have ensured Tlingit & Haida and the child's local tribal village received the legally required notice of the on-going proceedings and the children would have received heightened §1922 protections at the shelter care hearing. Under the lower court's decision, these same Tlingit & Haida children in Washington's courts would not receive those protections.

CONCLUSION

Because the court had reason to know the children were or may be Indian children at the shelter care hearing, and because the Court's decision would strip Tlingit & Haida children, along with all other Native children, of the important protections of ICWA and WICWA at one of the most critical points of a child protection proceeding, the Tribe respectfully asks this Court to reverse the Court of Appeals decision in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the date listed below I served a copy of this document on all parties or their counsel of record on the date below as follows:

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**IN RE THE DEPENDENCY OF Z.J.G. AND M.G., Minors,
WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,**

Respondent,

v.

SCOTT JAMES GREER,

Appellant.

AFFIDAVIT OF BARBARA DUDE IN SUPPORT OF AMICUS BRIEF

I, Barbara Dude, do swear or affirm that the following facts are true to the best of my knowledge:

- 1) I am the Family Services Administrator for the Tribal Family & Youth Services (TFYS) Department at Central Council of the Tlingit and Haida Indian Tribes of Alaska (Tlingit & Haida).**
- 2) In my role, I supervise our ICWA staff in Juneau headquarters, including our three ICWA caseworkers and our intake specialist.**
- 3) Part of my job duties include reporting quarterly data on ICWA inquiries and open cases to the Bureau of Indian Affairs.**
- 4) Per our Department's BIA reporting data that I reviewed in preparation for the Amicus Brief, Tlingit & Haida responded to inquiries for 324 children across the United States in 2019.**
- 5) In 2019, our total Southeast staff of eight case workers intervened on behalf of 235 children, about a third of whom live in Alaska, and a third of whom live in Washington.**
- 6) As a matter of practice, Tlingit & Haida strives to intervene in ICWA cases as early as possible, ideally from the initial hearing.**
- 7) Early intervention is critical in demonstrating support for the family, helping the department identify culturally-appropriate services to increase the chances of reunification, assisting the department in meeting their obligations to identify relative placements for the children, and ensuring that tribal children have access to all of the resources available to them.**

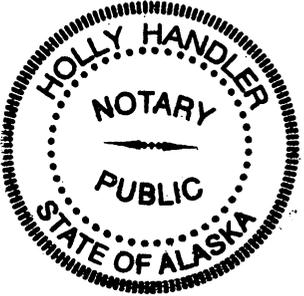
Further your affiant sayeth naught.

DATE: 5.26.2020

Barbara Dude

Barbara Dude
Family Services Administrator
Tribal Family & Youth Services (TFYS)
Tlingit and Haida Indian Tribes of Alaska
320 W Willoughby Ave., Suite 300
Juneau, Alaska 99801
Direct: 907.463.7148 • Fax: 907.885.0032
bdude@ccthita-nsn.gov

Subscribed and sworn to or affirmed before me at Juneau, Alaska, on 5/26/2020
(date)



Holly Handler

Clerk of Court, Notary Public, or other person
authorized to administer oaths.

My commission expires: 1/29/2023

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