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DIVISION ONE

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NO. 63996-0-1

**COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON**

IN RE: THE DEPENDENCY OF R.K.L.,

UPPER SKAGIT INDIAN TRIBE,

Appellant,

v.

D.S.H.S.,

Respondent.

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STATE OF WASHINGTON
2009 DEC - 2 PM 3:59

OPENING BRIEF OF APPELLANT

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INTRODUCTION

The issue presented by this appeal is whether it was proper for the lower court to grant the Nooksack Indian Tribe's ("Nooksack"), a federally recognized Indian Tribe, motion to intervene in a dependency case involving an enrolled Upper Skagit tribal member child, domiciled on the Upper Skagit Reservation, seven (7) years after Nooksack had actual notice of the proceeding, and four (4) years after the permanent guardianship order had issued. The Upper Skagit Indian Tribe ("Upper Skagit"), a federally recognized Indian Tribe, appellant, appeals the commissioner's ruling granting the Nooksack Indian Tribe's motion to intervene and respectfully requests this Court to reverse the decision.

The federal Indian Child Welfare Act ("ACT") provides for intervention in a dependency case by the "Indian child's tribe", or if there is not an Indian child's tribe then any Tribe(s) with which the child is enrollable¹. When a child is an enrolled member of a tribe, that tribe is the "Indian child's tribe" for the purposes of intervention and asserting the rights granted the child's tribe under federal and state law. Allowing other tribes to intervene, once the child has enrolled in a tribe, is contrary to both the plain language and intent of the Act, as well as prejudices the rights of the Indian child's tribe.

The lower court's ruling allowed three tribes to "intervene" in this case and presumably in the case management.² As a matter of law, once a child has enrolled in a

¹ Enrollment with a federally recognized tribe is the equivalent of citizenship it creates a political relationship with an individual and the federally recognized tribe which gives the individual access to certain benefits the tribal government may offer.

² The Lummi Nation withdrew from the dependency case after the ruling now on appeal.

tribe only the Indian child's tribe can intervene and therefore, the decision is not discretionary to the Court and must be reversed.

ASSIGNMENT OF ERROR

The court abused its discretion by granting the Nooksack Tribe's motion to intervene.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether the Nooksack Tribe had standing to intervene under the federal Indian Child Welfare Act.
- B. Whether it was an error of law to grant the Nooksack Tribe's motion to intervene as an intervention of right under CR 24 (a).
- C. Whether it was an abuse of discretion to grant the Nooksack Tribe's motion to intervene as a permissive intervention under CR 24 (b).

STATEMENT OF THE CASE

The underlying dependency involves an enrolled member of Upper Skagit who is domiciled on the Upper Skagit Indian Reservation³. The mother of the child is an enrolled member of Upper Skagit. The father of the child is an enrolled member of Nooksack. Nooksack filed a Motion to Intervene on May 6, 2009, relying on the sole assertion that it was entitled, as a matter of right, to intervene as it was the "Indian child's Tribe" pursuant to the Indian Child Welfare Act ("Act"), *25 U.S.C. Sec. 1901, et al.* Upper Skagit responded that due to the enrollment of the child with Upper Skagit and pursuant to the Act, Upper Skagit was the "Indian child's Tribe". Nooksack replied to Upper Skagit's Response and included a new contention seeking to rely upon CR 24 (b) (1) for intervention. Nooksack did not include a declaration to support any factual

³ There is a separate but related Dependency for this child's other two siblings who are also enrolled with the Upper Skagit and who have been placed with the same guardian, an Upper Skagit member who resides on the Upper Skagit Reservation.

assertions in any of its filings. Because Nooksack's reply included new argument, the lower court permitted Upper Skagit to file a reply to the Nooksack reply. The lower court then held a hearing on July 14, 2009 and issued an Order granting Nooksack's motion for intervention.

ARGUMENT

A. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT NOOKSACK TRIBE HAD STANDING TO INTERVENE UNDER THE INDIAN CHILD WELFARE ACT

Any party seeking intervention must establish the threshold issue of what legal interest it has in the underlying case.

The meaning of "interest" is broadly interpreted, requiring flexibility and a case-by-case analysis and balancing of the relative concerns of the prospective intervenor, the original parties to the lawsuit and the public in the efficient resolution of controversies. The interest which the intervenor seeks to protect must be one recognized by law. *In re Dependency of J.H.* 117 Wash.2d 460, 815 P.2d 1380, Wash., 1991. (Internal citation omitted)

Nooksack failed to meet the legal interest threshold. In its motion for intervention Nooksack asserted that it was the "Indian child's Tribe" as defined by the Act, granting Nooksack the *right* to intervene at any time in the proceedings. *Nooksack's Motion to Intervene p.1 para 3.* After Upper Skagit submitted its response Nooksack changed its argument asserting that Upper Skagit misunderstood its original motion and that Nooksack was not asserting that it was seeking intervention as a matter of right based on its standing as the "Indian child's tribe" but rather pursuant to CR 24(b). Further, in its reply brief Nooksack argued intervention was based on Nooksack's determination that the child is eligible for enrollment with Nooksack.

Nooksack then sought permissive intervention based on eligibility for enrollment of the child with Nooksack. In furtherance of this new position Nooksack relied upon

permissive language in the “Guidelines for State Courts; Indian Custody Proceedings” published in the Federal Register Vol. 44 No. 228 which it argued suggested that more than one tribe may be permitted to intervene in a proceeding. This argument might have been applicable if the child was not already enrolled in a Tribe, but once the child is enrolled and there is an “Indian child’s Tribe” and the Act precludes the inclusion of multiple tribes. “*The Indian child’s tribe shall have a right to intervene at any point in the proceeding.*” 25 U.S.C.1901 et. sec. (*Emphasis added*) The Act does not use the terminology “primary tribe” as used by Nooksack. Neither does the Act provide for intervention by any tribe with a claim that the child may be enrollable at some time in the future. The Act’s provision for intervention is singular in its tense and clear in its meaning. It does not vest a legal interest in any tribe that attempts to assert that it has an interest. The Act vests the “Indian child’s Tribe” with the exclusive interest and standing. Nooksack is not the “Indian child’s Tribe” as defined by the Act, and does not have a legal interest that gives it standing to intervene. It was an abuse of the Trial Court’s discretion to consider Nooksack’s motion without first finding the legal interest required to bring a motion to intervene. *In the Matter of the WELFARE OF B.W.*, 454 N.W. 2d 437 (Minn. Ct. App. 1990).

There was no evidence to support Nooksack’s argument that the child is eligible for enrollment in the Nooksack Tribe. The issue as to whether the child is enrollable first arose in Nooksack’s response brief and then at the motion hearing. The assertion that the child is enrollable was not supported by a letter from the Nooksack enrollment department, a Nooksack Tribal Council resolution or an excerpt from the Nooksack enrollment ordinance. The court must rely on evidence to support its ruling and there

was none presented by Nooksack to support its assertion it simply relied upon argument as set forth in its reply without any affidavit or declaration in support thereof.

Even if Nooksack had provided evidence that the child was eligible for enrollment in the Nooksack Tribe, such an alleged fact is simply inapplicable given that the child is enrolled with Upper Skagit and not Nooksack. Upper Skagit recognizes a Sovereign's authority to determine who is and who is not eligible for enrollment. However, a federally recognized tribe is bound by its enrollment ordinance and at the time intervention was sought by Nooksack its enrollment ordinance did not permit dual enrollment (enrollment in more than one tribe at the same time). The effect of that limitation precludes Nooksack from asserting that the child was enrollable with Nooksack at the time it sought intervention as the child was already enrolled with Upper Skagit. This fact alone necessarily eviscerates any basis of Nooksack to assert legal standing to permissively intervene in the case.

B. WHETHER IT WAS AN ERROR OF LAW TO GRANT THE NOOKSACK'S TRIBE'S MOTION TO INTERVENE AS AN INTERVENTION OF RIGHT UNDER CR 24 (a).

The decision to grant the Nooksack Tribe's motion to intervene did not specify whether intervention was granted based on intervention of right or permissive intervention. When a court does not disclose its basis for granting intervention, the decision must be affirmed if either kind of intervention was appropriate. *Ferencak v. Department of Labor & Industries*, 142 Wash. App. 713, 175 P.3d 1109, (Wash. Ct. App Div. 1 2008). The standard of review for intervention of right is whether the trial court committed an error of law. *Id.*

To be granted intervention of right under CR 24(a)(1) the Nooksack Tribe must establish that a statute conferred an unconditional right to intervene. To grant intervention of right under CR 24(a)(2) the intervenor must satisfy four criteria: (1) the application is timely; (2) the applicant claims an interest that is the subject of the action; (3) the disposition will likely adversely affect the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately protected by the existing parties. *See Ferencak.*

1. The Nooksack Tribe does not have an unconditional right to intervene under CR 24 (a)(1).

The Indian Child Welfare Act, 25 U.S.C. Sec. 1911 (c), confers a right to intervene at any point in the proceeding for the Indian child's Tribe. Intervention by an Indian child's Tribe authorized by the Act is the kind of intervention permitted under CR 24 (a)(1), when a statute confers an unconditional right to intervene. The plain language of the Act confers the right to intervene on a single tribe and does not provide for multiple interveners.

"Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts; 25 U.S.C. Sec. 1903.

While the language of the Act is abundantly clear, the Department of Interior issued "Guidelines for State Courts; Indian Custody Proceedings" published in the Federal Register Vol. 44 No. 228. These guidelines at pages 67586 through 67587 set forth the Department's test as to how state courts are to determine an Indian Child's Tribe under the Act. Section B.2.(e) of the Guidelines eliminates any potential ambiguity when

a child, as is the case before this Court, is a member of only one Tribe. “If the child is a member of only one tribe, that tribe **shall** be designated the Indian child’s tribe even though the child is eligible for membership in another tribe.” *Id. at 67587 (Emphasis added)*

Accordingly it is an error of law if the Court below granted Nooksack’s intervention as a matter of right, because the only Tribe that has a right to intervene as a matter of right in these proceedings is Upper Skagit.

2. The Nooksack Tribe’s application was not timely.

The federal Indian Child Welfare Act allows for intervention of the Indian child’s Tribe at any point in the proceeding. However Nooksack is not the Indian child’s Tribe and therefore must apply for intervention as a matter of right in a timely manner.

In ruling on the issue of timeliness, the court erred when it recognized the Nooksack Tribe as having an unconditional right to intervene regardless of the timeliness issue as though Nooksack were the Indian child’s Tribe.

“With respect to the timeliness on a motion to intervene. I - - in addition - - none of the (RP 33) attorneys apparently found a case for me. We had our - - court clerk do some research on this and there’s a Montana case where - - a Montana case where the tribe isn’t - - a tribe does not waive their right to intervene even when they don’t intervene promptly after receiving notice or for any particular time because there isn’t any time limit imposed by the federal statute, there wasn’t any time limit imposed by the federal statute, there wasn’t any time limit imposed. There is no time limit imposed by Washington State law or by court rule, and certainly not by a local court rule. So I don’t think the tribe has waived any right to intervene.” RP 34

Because Nooksack it not the Indian child’s Tribe as defined by the Act, Nooksack does not have a statutory right to intervene at any point in the proceedings. *See 25 U.S.C. Sec. 1911 (c)*. Therefore, Nooksack must show the circumstances contributing

to the delay in moving to intervene as required by CR 24 (b) and the trial court must analyze those circumstances leading to the delay under Washington law. The Court did not require Nooksack to meet this burden and Nooksack did not provide any evidence in the record to support any argument that it acted in a timely manner. Therefore it was an error of law to permit intervention as a matter of right. In fact, intervention was sought seven (7) years after Nooksack had actual notice of the proceeding, and four (4) years after the permanent guardianship order had issued.

C. WHETHER IT WAS AN ABUSE OF DISCRETION TO GRANT THE NOOKSACK TRIBE'S MOTION TO INTERVENE AS A PERMISSIVE INTERVENTION UNDER CR 24 (b).

Decisions granting permissive intervention are reviewed for an abuse of discretion. *Ferencak v. Department of Labor & Industries*, 142 Wash.App. 713, 175 P.3d 1109, (2008).

A trial court's decision on permissive intervention in a dependency is within the court's informed discretion and will not be disturbed absent an abuse of that discretion. *In re J.H.*, 117 Wash.2d at 472, 815 P.2d 1380., *In re Dependency of J.S.*, 111 Wash.App. 796, 808, 46 P.3d 273, Wash.App. Div. 1, (2002).

“ ‘An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.’ ” See *In re Dependency of J.H. at 472,1386.*

For permissive intervention under CR 24(b)⁴ the application need only be timely and present a common question of law or fact with the main action, though the court will

⁴ Court Rule 24(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action:

(2) When an applicants claim or defense and the main action have a question of law or fact in common. When a party to an action relies for

also consider whether the intervention would unduly delay or prejudice the rights of the original parties. *See Ferencak*.

Nooksack filed a Motion to Intervene on May 6, 2009, seven (7) years after initiation of the matter. Nooksack cited as authority for its intervention the Act. In Nooksack's reply brief, page 5, Nooksack cites CR 24 (b) as the procedural mechanism under which intervention was sought. The commissioner in exercising discretion did adequately analyze whether intervention would unduly delay or prejudice the adjudication of rights of the original parties. Rather the court asserted that it was Upper Skagit's obligation to establish prejudice when it should have been the moving party's burden to show that its intervention would not prejudice the existing parties. That said it is hard to imagine anything more prejudicial to a Sovereign Tribe than infringement upon its relationship to its minor members. Nooksack's actions seek to infringe upon the authority that Upper Skagit holds between it and its members. The rationale for the passage of the Act was to preserve the unique relationship that an Indian child's Tribe has with its member children.

The significance of a tribe's right to intervene under federal and state law is that there are specific rights and actions that may be exercised by the child's tribe that can affect the interests of the Indian child. If more than one tribe is granted intervener status, or equal status, in the case, then that will create confusion, conflict and delay as the

ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

multiple intervening tribes compete over how to exercise the singular rights intended to be granted to the Indian child's Tribe.

In the ruling now being reviewed, the commissioner left open the possibility of three tribes having intervener status.

But our court it – while it is not an every day occurrence that more than one tribe actually intervenes in a case, it's not unheard of in this court to have more than one tribe appear in court and be allowed to intervene and be treated as a party. RP at 32. We don't typically sign orders of intervention. We allow people, we allow tribes to intervene by filing a notice of appearance and then all – the other parties are expected to treat them like party [sic], and they do. RP at 33.

Whether the Upper Skagit Tribe is the primary tribe, that also has not been specifically noted or addressed, and I – it's not before the court. And whether the Upper Skagit Tribe should be the primary tribe is not before the court. RP at 36 So I'm going to allow the Nooksack Tribe to – I will sign an order allowing intervention of the Nooksack Tribe, just as – and I will continue to allow the Upper Skagit Tribe to be a party, and I will continue to allow the Lummi Tribe to be a party to the extent that anything is before the court on that. RP at 36

If it becomes an issue where it is necessary where the tribes have distinct interests and the court needs to make a decision on which is the primary tribe, then I'll decide at that time. RP at 36.

There are several inherent conflicts created by multiple tribes being allowed to intervene. By their very nature, each tribe is a separate sovereign entity with distinct interests. Were it otherwise, this matter would not be an issue for the court to decide.

The most significant interest created by the Act is the preference for placing Indian children in foster care, preadoptive placements and adoptive placements.

Under *25 USC 1915*, placement of Indian children is given priority based on the Indian child's Tribe.

a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

- (1) a member of the child's extended family;
- (2) other members of the Indian child's tribe; or
- (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child’s extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child’s tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.

25 USC 1911 (b), which provides for transfer of proceedings, is an example of a federal law that states in plain language the intent that these rights should be exercised by a single tribe. That law states that, “In any State court proceeding ... an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe ... upon the petition of ... the Indian child’s tribe...”

Wash. Rev. Code § 13.34.250, provides for the preference characteristics when placing Indian child in foster care home.

Whenever appropriate, an Indian child shall be placed in a foster care home with the following characteristics which shall be given preference in the following order:

- (1) Relatives;
- (2) An Indian family of the same tribe as the child;
- (3) An Indian family of a Washington Indian tribe of a similar culture to that tribe; *RCW 13.34.250*

Other areas of potential conflict and confusion are listed as follows:

- 1) 25 USC 1914, gives the Indian child’s tribe in any action for foster care placement or termination of parental rights under State law the right to petition any court of competent jurisdiction to invalidate such action upon a showing that

such action violated any provision of sections 1911, 1912, and 1913 of this title.

2) 25 USC 1915 (c), gives the Indian child's tribe the right to establish a different order of preference for placement of Indian children by resolution.

By permitting Nooksack to intervene, the lower court did not analyze the rights granted to the Indian child's Tribe by state and federal law in relation to the prejudice to those rights that Nooksack's intervention would create for Upper Skagit. Had the lower court fully analyzed the prejudice to the rights granted the Upper Skagit as the Indian child's Tribe, then it may have taken a different position. Under the circumstances, the trial court's failure to analyze the applicable law in relation to the prejudice to the rights of the original parties is tantamount to the trial court taking a position that no reasonable person would take and is therefore an abuse of its discretion. .

CONCLUSION

The lower court abused its discretion when it granted Nooksack's motion for intervention. The lower court's order should be reversed and Nooksack should be removed as party to this case.

Dated this 2nd day of December 2009

UPPER SKAGIT INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY



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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2009, I mailed via first class post, the foregoing UPPER SKAGIT INDIAN TRIBE'S OPENING BRIEF to Mr. James Erb, Staff Attorney for the Nooksack Indian Tribe at, P.O. Box 157, Deming, WA 98244, and to Ms. Lisa Keeler, Assistant Attorney General for the State of Washington, at 103 E. Holly St., suite 310, Bellingham, WA 98225.



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