68744-1

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NO. 68744-1-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

KATHIE COSTANICH,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS), SANDRA DURON and JOHN DOE DURON, CAROL SCHMIDT and JOHN DOE SCHMIDT, BEVERLY PAYNE and JOHN DOE PAYNE, JAMES BULZOMI and JANE DOE BULZOMI, ROBERT STUTZ and JANE DOE STUTZ, INGRID McKENNY and JOHN DOE McKENNY,

Respondent.

REPLY BRIEF

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INTRODUCTION

This Court previously held that Kathie and Ken Costanich provided unsurpassed foster care for some of the neediest and most difficult children in the system. Of the many children they cared for, their relationship with two sisters, E and B, is the most permanent. The Costanichs wanted to adopt E and B, but the Tribe would not allow it.

The Tribe nonetheless recognized their "parent/child relationship" with E and B. CP 680. The dependency orders also recognized that the sisters would not be reunited with their biological mother, a chronic alcoholic and drug addict, but would remain with the Costanichs at least until adulthood.

Yet in 2002, the Tribe removed the sisters form their home, placing them with complete strangers after DSHS concluded that Costanich was abusive because she cursed, tried to convince the Tribe to take the sisters, and filed its own motion to terminate the Costanichs' guardianship. The trial court left the Costanichs remediless, finding that they "agreed" to give their girls away. DSHS now claims that they lack standing because they are not "real" parents or guardians. This Court should reverse and remand for trial regarding the damages suffered by this family.

REPLY STATEMENT OF THE CASE

DSHS attempts to minimize Costanich's relationship with E and B, suggesting that since her legal title is "dependency guardian," she is somehow less than a mother. BR 19. Other than DSHS, every person involved in E and B's life, and most importantly the Tribe recognizes the Costanichs' "parent/child relationship" with E and B. CP 680.

E and B's biological mother, Christina Nick, is an alcoholic and drug addict, who suffers from a fatal illness. CP 673, 675. The police removed E from Nick when she was just six-months old, placing her with Costanich. CP 674-75, 1512-13.[1] B was removed at birth and placed with Costanich at Nick's request. CP 673, 1513. As to both girls, the guardianship court found (CP 662-63, 668-69):

- That the State's efforts to prevent the break-up of the family had failed;
- That there was little likelihood that the conditions of E and B's dependency would be remedied so that E or B could be returned to Nick in the future; and

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[1] DSHS asks this Court to "disregard" Costanich's declaration, which the trial court refused to strike despite acknowledging that it contained some hearsay and irrelevancies. BR 5 n.2 (citing CP 1510-30). There is no basis for disregarding a sworn statement the trial court considered, particularly on DSHS's unsupported and sweeping assertion.

- That continued custody by the biological parents would likely result in serious emotional or physical damage to the girls.

The guardianship orders gave Costanich the rights to "physical custody," to protect and educate, and to provide and consent to medical care, travel, social activities, and school activities. CP 664, 669. Costanich was to facilitate the girls' relationship with the Tribe and with Nick, and did so. CP 664-65, 670-71, 1513, 1538. The orders provide that the guardianship will continue until the girls are 18, or further court order. CP 664, 670. Prior to the investigation that is the subject of this lawsuit, there is no indication that DSHS did anything to end Costanich's guardianship or to find a different permanent home for the girls.

REPLY ARGUMENT

A. There are fact questions as to whether DSHS's negligent investigation resulted in a harmful placement.

The trial court erroneously ruled that DSHS made no placement decision under ***Roberson***, *infra*, ruling as a matter of law that Costanich "voluntarily" sent her daughters to live with compete strangers, while they cried and begged her not to leave them. CP 1637-38. This Court should reverse.

1. DSHS's argument that it conducted a "complete and unbiased" investigation is itself incomplete and biased. BR 27-28.

DSHS begins with the largely unsupported assertion that its investigation of Costanich was "thorough and complete," entirely ignoring the Ninth Circuit's holding that Duron made "actual misrepresentations" during her investigation and that there were material fact questions as to whether Duron "deliberately fabricat[ed] evidence." BA 18-19; BR 27-28. The Ninth Circuit opinion plainly contradicts DSHS's claim:

- Duron admitted that she made only brief contact with 18 of the 34 people she claimed to have interviewed.
- Despite claiming that she interviewed three of the children's therapists and received a report from a fourth, Duron admitted that she did not actually speak to <u>any</u> "[m]edical professionals."
- Duron never interviewed the therapist whose referral sparked the investigation.
- Duron's report attributed statements to witnesses who denied making the statements and used quotation marks around witness statements that were never actually made.
- A number of witnesses specifically disputed Duron's reports supposedly memorializing the information she received during her investigation.
- The errors in Duron's report are not questions of character or tone, but are actual misrepresentations.

Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101, 1111-13 (9th Cir. 2009).

DSHS also ignores (1) sworn statements that Duron wanted Costanich to be guilty and refused to believe any contrary statement; (2) letters from the children's doctors, therapists, aids, and CASAs, stating that they were not abused, but were thriving in the Costanich home and should remain there; and (3) the letter from E and B's doctor opining that taking the girls away from Costanich would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 250-66, 1418-21, 1452-58, 1516-18. DSHS relies heavily on statements from J and K that Costanich used profanity. BR 28. These statements are irrelevant – Costanich has always acknowledge that she used profanity and both the A.L.J and this Court were unpersuaded that her language was abusive. BA 16, 18.

In short, DSHS's unsupported assertion that its investigation was "thorough and unbiased" adds insult to injury.

2. This matter is comparable to, but even more egregious than *Tyner*.

In ***Tyner***, our Supreme Court held that DSHS can be liable for negligent investigation where it fails to provide material information to a fact finder that makes a harmful placement decision. ***Tyner v. Dep't of Soc. & Health Servs.***, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000). There, the information DSHS failed to

disclose was (1) a caseworker's determination that the allegations against Tyner were "unfounded"; and (2) information from collateral sources Tyner provided, whom DSHS failed to contact. ***Tyner***, 141 Wn.2d at 87-88. This failure presented a fact question as to DSHS's negligence. *Id.*

The failures to disclose here are far more egregious than in ***Tyner***. DSHS pressed the Tribe to take jurisdiction and to terminate Costanich's guardianship. CP 1400, 1521. DSHS provided the Tribe a completely one-sided account, consisting largely of Duron's report, which the Ninth Circuit already held is full of misrepresentations and possible fabrications. BA 32-33. DSHS withheld statements from the children's doctors, therapists, CASAs, and aids, all of whom opined that the children should remain with Costanich, and many of whom questioned DSHS's investigation, and worse, its motivation. CP 250-66, 1418-21, 1452-58, 1516-18. Most importantly, DSHS withheld that E and B's social workers fought to keep the girls with Costanich and that their psychologist opined that removing them would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 258, 290-93, 1539, 1562, 1565-67. The trial court correctly found that reasonable minds could differ as to whether DSHS

provided the juvenile court and the Tribe with all relevant information, and "assume[d]" DSHS failed to do so. CP 1636.

DSHS argues that ***Tyner*** is distinguishable, where the Superior Court did not make a placement decision on DSHS's motion to terminate Costanich's guardianship before transferring jurisdiction to the Tribe. BR 30. But again, the "pivotal question" under ***Tyner*** is whether DSHS gave all material information to "the court." ***Tyner v. Dep't of Soc. & Health Servs.***, 92 Wn. App. 504, 518, 963 P.2d 215 (1998), *rev'd*, 141 Wn.2d 68 (2000). It does not matter which court DSHS negligently misinformed.

DSHS's argument that E and B "were never removed from Ms. Costanich's care" ignores the facts. BA 30. After many failed attempts to work with DSHS, Costanich was faced with an impossible choice – try to cooperate with the Tribe, or risk losing E and B forever. CP 1521-22. Costanich acquiesced to Tribal jurisdiction, but saw no real choice in the matter, as she could not win a fight over tribal children against the Tribe. *Id.* Her best chance of keeping E and B was to do whatever the Tribe wanted and pray. *Id.*

DSHS has no answer for the simple fact that Costanich would not voluntarily send her children to live with strangers, while

they cried, screamed, and begged her not to leave them. CP 1524-25. Costanich would have signed anything thought to keep her daughters. CP 1525. Whether this was "voluntary" or "agreed" is a jury question.

3. *Roberson* is easily distinguished.

The trial court ruled as a matter of law that ***Tyner*** is inapplicable and that ***Roberson v. Perez*** required dismissal. CP 1636, 1639-42 (citing 156 Wn.2d 33, 123 P.3d 844 (2005)). This matter is nothing like ***Roberson***. This Court should reverse.

In ***Roberson***, Honnah Sims and her husband sent their teenaged son to live with his grandparents upon learning that Sims was amongst the "accused" in what came to be known as the "Wenatchee sex ring" cases. 156 Wn.2d at 36. It appears that DSHS had not even begun investigating Sims. *Id.* Sims was arrested in May, acquitted in July, and her child returned in November. *Id.*

By contrast, DSHS had not just "accused" Costanich, but had completed its shoddy investigation and labeled her an abuser. BA 9. DSHS then tried to convince the Tribe to remove E and B. CP 674, 1400, 1521. When the Tribe refused, DSHS filed its own petition to terminate Costanich's guardianship and to remove the

girls. *Compare* ***Roberson***, 156 Wn.2d at 46-47 *with* CP 674, 1400, 1521. DSHS took these steps before E and B were removed, in stark contrast to ***Roberson***, in which DSHS filed a dependency petition after Sims had sent her son away. BR 31. This is a harmful placement decision under ***Roberson***.

Without any discussion, DSHS states that Costanich "voluntarily" agreed to the Tribe's jurisdiction, arguing that this absolves DSHS of any wrongdoing. BR 31. Again, Costanich agreed to the Tribe's jurisdiction only when, after many attempts to cooperate with DSHS, it became obvious that they were determined to take her girls. CP 1521-22. DSHS has no answer to the simple fact that tribal jurisdiction did not "frustrate" DSHS's efforts to remove E and B. ***Roberson***, 156 Wn.2d at 47. DSHS had already been encouraging the Tribe to take jurisdiction for months and agreed to its jurisdiction. CP 674, 684, 1400, 1521.

DSHS's argument that Costanich could control her damages – the duration of E and B's removal – again assumes without any argument that she acted voluntarily. BR 32; ***Roberson***, 156 Wn.2d at 46-47. Costanich had to hand her young, developmentally disabled daughters over to complete strangers, while they kicked, screamed and begged her not to leave. CP 1523-25. Calling her

the "originator and beneficiary" of this nightmare is as insulting as it is inaccurate. BR 32. What this family went through is not remotely comparable to sending a teenager to stay with his grandparents. *Compare id. with* ***Roberson***, 156 Wn.2d at 46-47.

4. It is no coincidence that the Tribe removed E and B after DSHS concluded that Costanich was abusive.

DSHS argues that Costanich failed to prove a causal connection between DSHS's negligent investigation and the Tribe's decision to remove E and B. BR 32-33. It argues that the "Agreed Visitation Order" is not concerned with DSHS or the abuse allegations, but rather with E and B's connection to the Tribe. *Id.* Again, DSHS ignores the facts.

DSHS continuously ignores that for months it attempted to convince the Tribe to take jurisdiction and to remove E and B. CP 674, 1400, 1521. When the Tribe refused, DSHS applied more pressure, filing its own motion to terminate Costanich's guardianship. CP 658, 1400, 1521, 1629. The Tribe took jurisdiction, with DSHS's agreement, on the same day as DSHS's removal and termination hearing. CP 683-86, 1521, 1549.

DSHS's assertion that it never told the Tribe that Costanich was abusive is unfounded – a letter from the Attorney General

plainly states that DSHS sent the Tribe its file on Costanich. *Compare* BR 30 *with* CP 1549.[2] And Tribal members told E that Costanich was "horrible" for having verbally abused her. CP 1526-27. In supplying the Tribe with its grossly inaccurate report, DSHS withheld letters from doctors, therapists, aids, and CASAs who vehemently contradicted DSHS's abuse finding and warned that removing E and B would cause irreparable harm. CP 250-66, 1418-21, 1452-58, 1516-17.

5. The removal was no "summer vacation."

DSHS's argument that this was all really just one big, happy "summer vacation" also ignores what this family went through. BR 34-36. The order refers to E and B's removal as a "vacation" only to soften their transition. CP 1524. Costanich was ordered to bring E and B to the Kalispel reservation and to leave them for 30 days with complete strangers. CP 1524-25. E and B were just 9 and 5-years old and had never before been separated from Costanich. CP 819-21, 1523. For months beforehand, the girls had watched their brothers disappear from their home. CP 1523. The Tribe

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[2] DSHS asked the Tribe to return the file when Costanich sought a protective order, but the Tribe refused. CP 1549.

physically removed the girls from Costanich's arms while they screamed, cried, and begged her not to go. CP 1525.

DSHS argues that the visitation order was really just "a continued fulfillment" of the dependency order, requiring Costanich to keep the girls connected with the Tribe and their biological mother. BR 34-35. Costanich fulfilled that obligation in the past, and the Tribe had never ordered Costanich to bring the girls to the reservation, much less to leave them there for a month. CP 1523-25, 1565, 1567. This supposed "vacation" was an unprecedented intrusion into this "family unit." *Compare id. with* BR 35.

In sum, DSHS did all it could to have E and B removed, but tries to escape liability because it convinced the Tribe to do its dirty work. DSHS should have to face a jury and answer for its shoddy investigation. This Court should reverse.

B. Material fact disputes on Costanich's outrage claim prohibit summary judgment.

DSHS does not disagree with the following:

> It is outrageous and utterly intolerable for a government employee to lie under oath and to fabricate grossly inflammatory evidence during a civil investigation. Our justice system cannot tolerate such atrocious misbehavior.

BA 37; BR 36-41. But DSHS persists in the argument that whether Duron's report includes material misrepresentations, and whether

Duron even "made errors during her investigation" are open questions. BR 36-41. The Ninth Circuit opinion, which DSHS entirely ignores, forecloses this argument. This Court should reverse.

To prove "outrage," a plaintiff must show: (1) "extreme and outrageous conduct"; (2) that is intentionally or recklessly inflicted; and (3) "resulting severe emotional distress." ***Corey v. Pierce Cnty.***, 154 Wn. App. 752, 763, 225 P.3d 367, *rev. denied,* 170 Wn.2d 1016 (2010). If "reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability," the issue must go to the jury. ***Corey***, 154 Wn. App. at 763.

In ***Corey***, Pierce County Prosecutor Barbara Corey was publically accused of criminal conduct despite an internal investigation that revealed little. 154 Wn. App. at 764. This Court affirmed the trial court's ruling permitting Corey's outrage claim to go to the jury, holding that the false accusation was "particularly loathsome" to Corey, a "longtime public servant." *Id.*

It is equally "loathsome" for Costanich to be falsely accused of child abuse. *Id.* This Court previously held that for more than 20 years, Costanich has provided "unsurpassed" care "for some of the neediest and most difficult foster children in the system."

Costanich v. Dep't of Soc & Health Servs., 138 Wn. App. 547, 551-52, 156 P.3d 232 (2007). Twenty years of service to this State, to DSHS, and to far too many needy children to count was cavalierly called into question with one shoddy investigation – one false allegation.

But this situation is far worse than the one in ***Corey***. DSHS did not just accuse Costanich of child abuse, it used its false abuse allegations to remove her children and to take her foster-care license. Reasonable minds plainly could differ on whether DSHS's conduct was outrageous. ***Corey***, 154 Wn. App. at 763. This matter should have gone to a jury. *Id.* DSHS ignores ***Corey***, making no response whatsoever. BR 36-41.

And again, DSHS ignores the Ninth Circuit opinion unequivocally holding that Duron's report includes many material misrepresentations used specifically to bolster her abuse finding. *Supra*, Argument § A1. The Ninth Circuit went on to hold that there remains a material question of fact as to whether these "misrepresentations" were actually "deliberate" – that is, whether Duron knowing lied in her report. *Id.* This is the entire point of Costanich's outrage argument: Duron's misrepresentations are alone sufficient to support Costanich's outrage claim, but even if

her misrepresentations are not sufficiently outrageous, then material fact questions as to whether Duron's conduct was intentional preclude summary judgment on outrage. BA 37.

DSHS argues that it is not required to provide "a perfect investigation," and thus that it is not outrageous for a government employee to make misrepresentations in the context of something as serious as a child-abuse investigation. BR 39. This is in keeping with DSHS's assertion that its allegedly outrageous conduct "probably goes on every single day in juvenile court." 11/4/11 RP 73. Everyone should be outraged that DSHS would fill an abuse-investigation report with misrepresentation and fabrication, and use that report to remove children from a non-abusive home and the only mother they have ever known, despite considerable evidence that the children are thriving.

DSHS attempts to excuse its conduct by arguing that the ALJ judge confirmed "some of Duron's findings." BR 39. It is no consolation that "some" of Duron's statements were accurate.

And it is entirely inaccurate for DSHS to claim that it "chose to believe" the children in Costanich's care, rather than Costanich and others, including "healthcare providers." BR 37. Duron did not even interview the children's doctors and therapists. ***Costanich***,

627 F.3d at 1112. DSHS seems to suggest that this all boils down to a matter of the children's word against that of Costanich and "her friends," but "[a]ll of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment." ***Costanich***, 138 Wn. App. at 561 (quoting ALJ decision). Even E and B's social worker, who also investigated the matter, concluded that the girls were thriving with Costanich and should not be removed from her home. *Id.*

This is precisely why ***Waller v. State***, the case upon which DSHS principally relies, is easily distinguishable. BA 39-42. (distinguishing ***Waller v. State***, 64 Wn. App. 318, 824 P.2d 1225, *rev. denied*, 119 Wn.2d 1014 (1992)). During the DSHS investigation of Richard Waller, a police detective, several therapists, and at least one pediatrician, reported to DSHS that Waller had physically and sexually abused the children. ***Waller***, 64 Wn. App. at 322. This Court held that DSHS's conduct was not sufficiently outrageous, where "the caseworkers were supported in part by the expert opinions of therapists." *Id.* at 337.

DSHS claims that "[s]imilar to ***Waller***," Duron chose to rely on statements from the children, others at DSHS, and psychologist

Beverly Cartwright. BA 38-39. For the most part, DSHS fails to address Costaniches' arguments on this point:

- It is quite common for troubled, developmentally disabled, or brain-damaged children like those in Costanich's home to make false reports against their foster parents and guardians. CP 1533. DSHS is very familiar with this fact. CP 492. K, whose false allegations prompted DSHS's investigation, was a "SAY" (Sexually Aggressive Youth), and a "very angry" child who was known for his "storytelling." CP 1514. DSHS's only response is that "[t]his claim of storytelling is based solely on Costanich's declaration." BR 38 n.26. No one would know better than the woman who fostered K for two years – his longest placement. CP 1514.
- Duron's purported reliance on other DSHS employees, who knew nothing about this matter other than what Duron told them, is meaningless. DSHS does not respond.
- Cartwright relied exclusively on DSHS's one-sided abuse allegations, but still offered no opinion as to whether Costanich's language posed a risk of harm. CP 492-94; ***Costanich***, 138 Wn. App. at 561.

DSHS also all but ignores the expert report of Darlene Flowers, who opined that DSHS's investigation was a "vendetta" and that DSHS has a disturbing pattern of attacking strong, vocal foster-parents like Costanich. BA 44-45. DSHS argues only that Costanich cited Flowers' "CV," unsworn testimony that this Court should not consider. BR 40 (citing CP 1175-83). This criticism is unfounded – the document DSHS refers to in not just Flowers' CV, but her expert witness report. CP 1175-84.

DSHS next argues that it did not intend to inflict emotional distress, but was only fulfilling its statutory obligations to investigate and to revoke Costanich's license based on its conclusion that she was abusive. BR 40. This begs the questions, which is not whether DSHS had to investigate, but whether the manner in which it conducted its investigation was outrageous.

Finally, DSHS argues that there is insufficient evidence of severe emotional distress (to survive summary judgment), where Costanich did not "seek counseling or professional psychiatric help" after the investigation. BR 41. DSHS provides no authority to support its unfounded claim that the tort of outrage requires the plaintiff to have sought professional help. *Id.* In any event, DSHS acknowledges that Costanich suffered from stomach pain and depression, for which she took prescribed medication. *Id.*

This Court should reverse the summary judgment order dismissing Costanich's outrage claims and remand for trial.

C. The trial court erroneously awarded DSHS statutory costs.

The trial court awarded DSHS statutory costs under RCW 4.84.080. CP 1645-47; 1651. If this Court reverses one of both of the erroneous summary-judgment orders, then it should also reverse this cost award.

D. Costanich has standing as a dependency guardian and/or *de facto* parent.

1. The cases upon which DSHS relies do not remotely suggest that a dependency guardian with an acknowledged "parent/child relationship" with the dependent children lacks standing as a matter of law.

With passing references to ***Blackwell*** and ***Ducote***, DSHS argues that despite her obvious "parent/child relationship" with E and B, Costanich does not have standing as a matter of law because a dependency guardian cannot ever be a "parent, guardian, or custodian." CP 680; BR 19-20 (citing ***Ducote v. Dep't of Soc. & Health Servs.***, 167 Wn.2d 697, 222 P.3d 785 (2009); ***Blackwell v. Dep't of Soc. & Health Servs.***, 131 Wn. App. 372, 127 P.3d 752 (2006)). But neither case suggests such a bright-line rule. Costanich is the only parent E and B have ever known, and all those involved with the family, including the Tribe, recognize their "parent/child relationship." CP 115, 258, 261, 460, 465, 680, 712. This is precisely why the trial court found that questions of fact preclude summary judgment on standing. CP 1089. This Court should reject DSHS's argument that Costanich lacks standing as a matter of law.

In ***Tyner***, our Supreme Court implied a negligent investigation cause of action from the statutory duty to investigate

imposed by RCW 26.44.050. 141 Wn.2d at 82. The dual purposes of this statutory duty are to protect children and to preserve the integrity of the family (*id.* at 79):

> [C]hildren are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children.

To determine the class of persons entitled to bring a negligent investigation claim, ***Tyner*** looked to RCW 26.44.100, providing that the purpose of RCW Chapter 26.44 is to prevent child abuse without unnecessarily interfering with "[t]he bond between a child and his or her parent, custodian, or guardian." *Id.* at 78, 80. More recently in ***Ducote***, our Supreme Court held that a stepparent lacks standing to bring a negligent investigation claim, where the "bond" between a stepparent and a stepchild is not entitled to the same protection as the bond between a child and her parent guardian, or custodian. ***Ducote***, 167 Wn.2d at 704. Crucial to that holding is that stepparents "are not defined in the chapters governing dependency proceedings or investigations of child abuse; rather, they are defined in the context of support for dependent children." 167 Wn.2d at 704 n.2. In other words, stepparents are defined by their marital status to the child's parent, not by their relationship to the child. *Id.*

Costanich, who has raised E and B since infancy, is unlike a stepparent. Everyone but DSHS, including the Tribe, acknowledges the "parent/child relationship" between Costanich and her girls. CP 115, 258, 261, 460, 465, 680, 712. This "bond" is plainly worthy of protection. ***Ducote***, 167 Wn.2d at 704.

DSHS's comparison to ***Blackwell*** is also misplaced. BR 20. The Blackwells were foster parents of D.R. for two years and had taken no steps to become his guardians or to adopt. 131 Wn. App. at 374, 377. There was no strong parent-child bond, where D.R. wanted to leave the Blackwell home. *Id.* at 378.

As foster parents, the very nature of the Blackwell relationship with D.R. was "temporary, transitional, and for the purpose of supporting the reunification with legal parents." ***In re Dependency of J.H.,*** 117 Wn.2d 460, 469, 815 P.2d 1380 (1991). This was not true of Costanich – the guardianship orders appointed Costanich until the girls turned 18, finding that there was little chance of reunification with the biological parents and that that the State would no longer provide services to that end. *Supra*, Statement of the Case. ***Blackwell*** simply is not comparable to this matter, in which all but DSHS recognize the strong "parent/child"

bond between Costanich and the girls. CP 115, 258, 261, 460, 465, 680, 712.

Neither ***Ducote***, nor ***Blackwell*** suggest that a dependency guardian with a "parent/child relationship" with her dependent children could not fall within the ambit of "guardian" as used in RCW 26.44.100. Again, Costanich is a "parent" in every sense of the word. CP 680. And her "parent/child relationship" with E and B was intended to last until they reached adulthood. CP 664, 670, 680. Her home is the only home these girls have ever known. The label "dependency" before "guardian" should not remove Costanich from the class of persons RCW chapter 26.44 protects.

In ***Blackwell***, this Court also recognized that foster parents who established their *de facto* parentage under the five-part ***L.B.*** test could fall within the ambit of "parent, guardian, or custodian." 131 Wn. App. at 378 (discussing ***In re Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005)); *see also* ***In re Parentage & Custody of A.F.J.***, 161 Wn. App. 803, 811, 260 P.3d 889 (2011)

(explaining ***Blackwell***), *rev. granted* 172 Wn.2d 1017 (2011).[3] DSHS principally argues that the availability of other remedies precludes Costanich's *de facto* parent "status," but this Court rejected a similar argument in ***A.F.J.***, holding that the petitioner there did not have statutory remedies where she had no time to adopt and could not obtain third-party custody, as the biological mother was not unfit. BR 21-22; ***A.F.J.***, 161 Wn. App. at 816-17.

Statutory remedies were no more available to Costanich than they were to the foster parent in ***A.F.J.*** Costanich wanted to adopt, but the Tribe does not allow non-member adoption. CP 819. Nor could she obtain third-party custody, where the Tribe would not consent to the termination of Nick's parental rights. CP 673.

DSHS also suggests that recognizing *de facto* parentage is inconsistent with ICWA. BR 23 (citing ***In re Parenting & Support***

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[3] To establish *de facto* parentage, a petitioner must show (1) that the biological parent consented to and fostered the parent-like relationship, (2) that the petitioner and the child lived together, (3) that the petitioner assumed obligations of parenthood without expectation of financial compensation; (4) that the petitioner has been in a parental role for a length of time sufficient to have established a bonded, dependent, parental relationship; and (5) that the petitioner undertook a permanent, unequivocal, committed, and responsible parental role in the child's life. ***L.B.***, 155 Wn.2d at 708. DSHS apparently concedes factors two and four. BR 24-25.

of Beach, 159 Wn. App. 686, 246 P.3d 845 (2011)). But again, the Tribe acknowledged Costanich's "parent/child relationship" with E and B. CP 680. Recognizing Costanich's *de facto* parentage, consistent with the Tribe's own recognition, cannot offend ICWA.

In any event, ***Beach*** does not preclude *de facto* parentage of Indian children, but held that regardless of the petitioner's *de facto* parentage, ICWA would control any custody proceeding involving an Indian parent. 159 Wn. App. at 692-93. ICWA plainly does not control Costanich's claim against DSHS. ***Beach*** is inapposite.

Finally, Costanich set forth sufficient evidence of her *de facto* parentage to survive summary judgment. *Compare* BR 1 n.1 and CP 1089 *with* BR 24-25. DSHS incredibly suggests that Nick did not consent to or foster E and B's relationship with Costanich. BR 24. But Nick asked DSHS to place B with Costanich, having visited E in Costanich's home before B's birth. CP 1513.

Equally incredibly, DSHS claims that Costanich did not undertake a "permanent" parental role because she did not "form a permanent legal relationship" with E and B. BR 24-25. Costanich is the only mother these girls, 5 and 9-years old when DSHS intervened, have ever known. CP 675, 680, 819-20. Her guardianship was to continue until the girls turned 18. CP 664,

670. In any event, the entire purpose of the *de facto* parent doctrine is to recognize a parent in fact, who has no other "legal relationship." BR 24-25.

Finally, in ***A.F.J.***, this Court rejected the argument that foster parents cannot be *de facto* parents because they receive funding from the State. *Compare* 161 Wn. App. at 822 *with* BR 24. Receiving funds to provide shelter, food, clothing, and the like is a far cry from being a paid "nanny or child-care provider." *Id.*

CONCLUSION

This Court should find standing, reverse, and remand for trial.

RESPECTFULLY SUBMITTED this 15th day of April, 2013.

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NO. 68744-1-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

KATHIE COSTANICH,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS), SANDRA DURON and JOHN DOE DURON, CAROL SCHMIDT and JOHN DOE SCHMIDT, BEVERLY PAYNE and JOHN DOE PAYNE, JAMES BULZOMI and JANE DOE BULZOMI, ROBERT STUTZ and JANE DOE STUTZ, INGRID McKENNY and JOHN DOE McKENNY,

Respondent.

REPLY BRIEF

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INTRODUCTION

This Court previously held that Kathie and Ken Costanich provided unsurpassed foster care for some of the neediest and most difficult children in the system. Of the many children they cared for, their relationship with two sisters, E and B, is the most permanent. The Costanichs wanted to adopt E and B, but the Tribe would not allow it.

The Tribe nonetheless recognized their "parent/child relationship" with E and B. CP 680. The dependency orders also recognized that the sisters would not be reunited with their biological mother, a chronic alcoholic and drug addict, but would remain with the Costanichs at least until adulthood.

Yet in 2002, the Tribe removed the sisters form their home, placing them with complete strangers after DSHS concluded that Costanich was abusive because she cursed, tried to convince the Tribe to take the sisters, and filed its own motion to terminate the Costanichs' guardianship. The trial court left the Costanichs remediless, finding that they "agreed" to give their girls away. DSHS now claims that they lack standing because they are not "real" parents or guardians. This Court should reverse and remand for trial regarding the damages suffered by this family.

REPLY STATEMENT OF THE CASE

DSHS attempts to minimize Costanich's relationship with E and B, suggesting that since her legal title is "dependency guardian," she is somehow less than a mother. BR 19. Other than DSHS, every person involved in E and B's life, and most importantly the Tribe recognizes the Costanichs' "parent/child relationship" with E and B. CP 680.

E and B's biological mother, Christina Nick, is an alcoholic and drug addict, who suffers from a fatal illness. CP 673, 675. The police removed E from Nick when she was just six-months old, placing her with Costanich. CP 674-75, 1512-13.[1] B was removed at birth and placed with Costanich at Nick's request. CP 673, 1513. As to both girls, the guardianship court found (CP 662-63, 668-69):

- That the State's efforts to prevent the break-up of the family had failed;
- That there was little likelihood that the conditions of E and B's dependency would be remedied so that E or B could be returned to Nick in the future; and

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[1] DSHS asks this Court to "disregard" Costanich's declaration, which the trial court refused to strike despite acknowledging that it contained some hearsay and irrelevancies. BR 5 n.2 (citing CP 1510-30). There is no basis for disregarding a sworn statement the trial court considered, particularly on DSHS's unsupported and sweeping assertion.

- That continued custody by the biological parents would likely result in serious emotional or physical damage to the girls.

The guardianship orders gave Costanich the rights to "physical custody," to protect and educate, and to provide and consent to medical care, travel, social activities, and school activities. CP 664, 669. Costanich was to facilitate the girls' relationship with the Tribe and with Nick, and did so. CP 664-65, 670-71, 1513, 1538. The orders provide that the guardianship will continue until the girls are 18, or further court order. CP 664, 670. Prior to the investigation that is the subject of this lawsuit, there is no indication that DSHS did anything to end Costanich's guardianship or to find a different permanent home for the girls.

REPLY ARGUMENT

A. There are fact questions as to whether DSHS's negligent investigation resulted in a harmful placement.

The trial court erroneously ruled that DSHS made no placement decision under ***Roberson***, *infra*, ruling as a matter of law that Costanich "voluntarily" sent her daughters to live with compete strangers, while they cried and begged her not to leave them. CP 1637-38. This Court should reverse.

1. DSHS's argument that it conducted a "complete and unbiased" investigation is itself incomplete and biased. BR 27-28.

DSHS begins with the largely unsupported assertion that its investigation of Costanich was "thorough and complete," entirely ignoring the Ninth Circuit's holding that Duron made "actual misrepresentations" during her investigation and that there were material fact questions as to whether Duron "deliberately fabricat[ed] evidence." BA 18-19; BR 27-28. The Ninth Circuit opinion plainly contradicts DSHS's claim:

- Duron admitted that she made only brief contact with 18 of the 34 people she claimed to have interviewed.
- Despite claiming that she interviewed three of the children's therapists and received a report from a fourth, Duron admitted that she did not actually speak to <u>any</u> "[m]edical professionals."
- Duron never interviewed the therapist whose referral sparked the investigation.
- Duron's report attributed statements to witnesses who denied making the statements and used quotation marks around witness statements that were never actually made.
- A number of witnesses specifically disputed Duron's reports supposedly memorializing the information she received during her investigation.
- The errors in Duron's report are not questions of character or tone, but are actual misrepresentations.

Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101, 1111-13 (9th Cir. 2009).

DSHS also ignores (1) sworn statements that Duron wanted Costanich to be guilty and refused to believe any contrary statement; (2) letters from the children's doctors, therapists, aids, and CASAs, stating that they were not abused, but were thriving in the Costanich home and should remain there; and (3) the letter from E and B's doctor opining that taking the girls away from Costanich would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 250-66, 1418-21, 1452-58, 1516-18. DSHS relies heavily on statements from J and K that Costanich used profanity. BR 28. These statements are irrelevant – Costanich has always acknowledge that she used profanity and both the A.L.J and this Court were unpersuaded that her language was abusive. BA 16, 18.

In short, DSHS's unsupported assertion that its investigation was "thorough and unbiased" adds insult to injury.

2. This matter is comparable to, but even more egregious than *Tyner*.

In ***Tyner***, our Supreme Court held that DSHS can be liable for negligent investigation where it fails to provide material information to a fact finder that makes a harmful placement decision. ***Tyner v. Dep't of Soc. & Health Servs.***, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000). There, the information DSHS failed to

disclose was (1) a caseworker's determination that the allegations against Tyner were "unfounded"; and (2) information from collateral sources Tyner provided, whom DSHS failed to contact. ***Tyner***, 141 Wn.2d at 87-88. This failure presented a fact question as to DSHS's negligence. *Id.*

The failures to disclose here are far more egregious than in ***Tyner***. DSHS pressed the Tribe to take jurisdiction and to terminate Costanich's guardianship. CP 1400, 1521. DSHS provided the Tribe a completely one-sided account, consisting largely of Duron's report, which the Ninth Circuit already held is full of misrepresentations and possible fabrications. BA 32-33. DSHS withheld statements from the children's doctors, therapists, CASAs, and aids, all of whom opined that the children should remain with Costanich, and many of whom questioned DSHS's investigation, and worse, its motivation. CP 250-66, 1418-21, 1452-58, 1516-18. Most importantly, DSHS withheld that E and B's social workers fought to keep the girls with Costanich and that their psychologist opined that removing them would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 258, 290-93, 1539, 1562, 1565-67. The trial court correctly found that reasonable minds could differ as to whether DSHS

provided the juvenile court and the Tribe with all relevant information, and "assume[d]" DSHS failed to do so. CP 1636.

DSHS argues that ***Tyner*** is distinguishable, where the Superior Court did not make a placement decision on DSHS's motion to terminate Costanich's guardianship before transferring jurisdiction to the Tribe. BR 30. But again, the "pivotal question" under ***Tyner*** is whether DSHS gave all material information to "the court." ***Tyner v. Dep't of Soc. & Health Servs.***, 92 Wn. App. 504, 518, 963 P.2d 215 (1998), *rev'd*, 141 Wn.2d 68 (2000). It does not matter which court DSHS negligently misinformed.

DSHS's argument that E and B "were never removed from Ms. Costanich's care" ignores the facts. BA 30. After many failed attempts to work with DSHS, Costanich was faced with an impossible choice – try to cooperate with the Tribe, or risk losing E and B forever. CP 1521-22. Costanich acquiesced to Tribal jurisdiction, but saw no real choice in the matter, as she could not win a fight over tribal children against the Tribe. *Id.* Her best chance of keeping E and B was to do whatever the Tribe wanted and pray. *Id.*

DSHS has no answer for the simple fact that Costanich would not voluntarily send her children to live with strangers, while

they cried, screamed, and begged her not to leave them. CP 1524-25. Costanich would have signed anything thought to keep her daughters. CP 1525. Whether this was "voluntary" or "agreed" is a jury question.

3. *Roberson* is easily distinguished.

The trial court ruled as a matter of law that ***Tyner*** is inapplicable and that ***Roberson v. Perez*** required dismissal. CP 1636, 1639-42 (citing 156 Wn.2d 33, 123 P.3d 844 (2005)). This matter is nothing like ***Roberson***. This Court should reverse.

In ***Roberson***, Honnah Sims and her husband sent their teenaged son to live with his grandparents upon learning that Sims was amongst the "accused" in what came to be known as the "Wenatchee sex ring" cases. 156 Wn.2d at 36. It appears that DSHS had not even begun investigating Sims. *Id.* Sims was arrested in May, acquitted in July, and her child returned in November. *Id.*

By contrast, DSHS had not just "accused" Costanich, but had completed its shoddy investigation and labeled her an abuser. BA 9. DSHS then tried to convince the Tribe to remove E and B. CP 674, 1400, 1521. When the Tribe refused, DSHS filed its own petition to terminate Costanich's guardianship and to remove the

girls. *Compare* ***Roberson***, 156 Wn.2d at 46-47 *with* CP 674, 1400, 1521. DSHS took these steps before E and B were removed, in stark contrast to ***Roberson***, in which DSHS filed a dependency petition after Sims had sent her son away. BR 31. This is a harmful placement decision under ***Roberson***.

Without any discussion, DSHS states that Costanich "voluntarily" agreed to the Tribe's jurisdiction, arguing that this absolves DSHS of any wrongdoing. BR 31. Again, Costanich agreed to the Tribe's jurisdiction only when, after many attempts to cooperate with DSHS, it became obvious that they were determined to take her girls. CP 1521-22. DSHS has no answer to the simple fact that tribal jurisdiction did not "frustrate" DSHS's efforts to remove E and B. ***Roberson***, 156 Wn.2d at 47. DSHS had already been encouraging the Tribe to take jurisdiction for months and agreed to its jurisdiction. CP 674, 684, 1400, 1521.

DSHS's argument that Costanich could control her damages – the duration of E and B's removal – again assumes without any argument that she acted voluntarily. BR 32; ***Roberson***, 156 Wn.2d at 46-47. Costanich had to hand her young, developmentally disabled daughters over to complete strangers, while they kicked, screamed and begged her not to leave. CP 1523-25. Calling her

the "originator and beneficiary" of this nightmare is as insulting as it is inaccurate. BR 32. What this family went through is not remotely comparable to sending a teenager to stay with his grandparents. *Compare id. with* ***Roberson***, 156 Wn.2d at 46-47.

4. It is no coincidence that the Tribe removed E and B after DSHS concluded that Costanich was abusive.

DSHS argues that Costanich failed to prove a causal connection between DSHS's negligent investigation and the Tribe's decision to remove E and B. BR 32-33. It argues that the "Agreed Visitation Order" is not concerned with DSHS or the abuse allegations, but rather with E and B's connection to the Tribe. *Id.* Again, DSHS ignores the facts.

DSHS continuously ignores that for months it attempted to convince the Tribe to take jurisdiction and to remove E and B. CP 674, 1400, 1521. When the Tribe refused, DSHS applied more pressure, filing its own motion to terminate Costanich's guardianship. CP 658, 1400, 1521, 1629. The Tribe took jurisdiction, with DSHS's agreement, on the same day as DSHS's removal and termination hearing. CP 683-86, 1521, 1549.

DSHS's assertion that it never told the Tribe that Costanich was abusive is unfounded – a letter from the Attorney General

plainly states that DSHS sent the Tribe its file on Costanich. *Compare* BR 30 *with* CP 1549.[2] And Tribal members told E that Costanich was "horrible" for having verbally abused her. CP 1526-27. In supplying the Tribe with its grossly inaccurate report, DSHS withheld letters from doctors, therapists, aids, and CASAs who vehemently contradicted DSHS's abuse finding and warned that removing E and B would cause irreparable harm. CP 250-66, 1418-21, 1452-58, 1516-17.

5. The removal was no "summer vacation."

DSHS's argument that this was all really just one big, happy "summer vacation" also ignores what this family went through. BR 34-36. The order refers to E and B's removal as a "vacation" only to soften their transition. CP 1524. Costanich was ordered to bring E and B to the Kalispel reservation and to leave them for 30 days with complete strangers. CP 1524-25. E and B were just 9 and 5-years old and had never before been separated from Costanich. CP 819-21, 1523. For months beforehand, the girls had watched their brothers disappear from their home. CP 1523. The Tribe

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[2] DSHS asked the Tribe to return the file when Costanich sought a protective order, but the Tribe refused. CP 1549.

physically removed the girls from Costanich's arms while they screamed, cried, and begged her not to go. CP 1525.

DSHS argues that the visitation order was really just "a continued fulfillment" of the dependency order, requiring Costanich to keep the girls connected with the Tribe and their biological mother. BR 34-35. Costanich fulfilled that obligation in the past, and the Tribe had never ordered Costanich to bring the girls to the reservation, much less to leave them there for a month. CP 1523-25, 1565, 1567. This supposed "vacation" was an unprecedented intrusion into this "family unit." *Compare id. with* BR 35.

In sum, DSHS did all it could to have E and B removed, but tries to escape liability because it convinced the Tribe to do its dirty work. DSHS should have to face a jury and answer for its shoddy investigation. This Court should reverse.

B. Material fact disputes on Costanich's outrage claim prohibit summary judgment.

DSHS does not disagree with the following:

> It is outrageous and utterly intolerable for a government employee to lie under oath and to fabricate grossly inflammatory evidence during a civil investigation. Our justice system cannot tolerate such atrocious misbehavior.

BA 37; BR 36-41. But DSHS persists in the argument that whether Duron's report includes material misrepresentations, and whether

Duron even "made errors during her investigation" are open questions. BR 36-41. The Ninth Circuit opinion, which DSHS entirely ignores, forecloses this argument. This Court should reverse.

To prove "outrage," a plaintiff must show: (1) "extreme and outrageous conduct"; (2) that is intentionally or recklessly inflicted; and (3) "resulting severe emotional distress." ***Corey v. Pierce Cnty.***, 154 Wn. App. 752, 763, 225 P.3d 367, *rev. denied,* 170 Wn.2d 1016 (2010). If "reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability," the issue must go to the jury. ***Corey***, 154 Wn. App. at 763.

In ***Corey***, Pierce County Prosecutor Barbara Corey was publically accused of criminal conduct despite an internal investigation that revealed little. 154 Wn. App. at 764. This Court affirmed the trial court's ruling permitting Corey's outrage claim to go to the jury, holding that the false accusation was "particularly loathsome" to Corey, a "longtime public servant." *Id.*

It is equally "loathsome" for Costanich to be falsely accused of child abuse. *Id.* This Court previously held that for more than 20 years, Costanich has provided "unsurpassed" care "for some of the neediest and most difficult foster children in the system."

Costanich v. Dep't of Soc & Health Servs., 138 Wn. App. 547, 551-52, 156 P.3d 232 (2007). Twenty years of service to this State, to DSHS, and to far too many needy children to count was cavalierly called into question with one shoddy investigation – one false allegation.

But this situation is far worse than the one in ***Corey***. DSHS did not just accuse Costanich of child abuse, it used its false abuse allegations to remove her children and to take her foster-care license. Reasonable minds plainly could differ on whether DSHS's conduct was outrageous. ***Corey***, 154 Wn. App. at 763. This matter should have gone to a jury. *Id.* DSHS ignores ***Corey***, making no response whatsoever. BR 36-41.

And again, DSHS ignores the Ninth Circuit opinion unequivocally holding that Duron's report includes many material misrepresentations used specifically to bolster her abuse finding. *Supra*, Argument § A1. The Ninth Circuit went on to hold that there remains a material question of fact as to whether these "misrepresentations" were actually "deliberate" – that is, whether Duron knowing lied in her report. *Id.* This is the entire point of Costanich's outrage argument: Duron's misrepresentations are alone sufficient to support Costanich's outrage claim, but even if

her misrepresentations are not sufficiently outrageous, then material fact questions as to whether Duron's conduct was intentional preclude summary judgment on outrage. BA 37.

DSHS argues that it is not required to provide "a perfect investigation," and thus that it is not outrageous for a government employee to make misrepresentations in the context of something as serious as a child-abuse investigation. BR 39. This is in keeping with DSHS's assertion that its allegedly outrageous conduct "probably goes on every single day in juvenile court." 11/4/11 RP 73. Everyone should be outraged that DSHS would fill an abuse-investigation report with misrepresentation and fabrication, and use that report to remove children from a non-abusive home and the only mother they have ever known, despite considerable evidence that the children are thriving.

DSHS attempts to excuse its conduct by arguing that the ALJ judge confirmed "some of Duron's findings." BR 39. It is no consolation that "some" of Duron's statements were accurate.

And it is entirely inaccurate for DSHS to claim that it "chose to believe" the children in Costanich's care, rather than Costanich and others, including "healthcare providers." BR 37. Duron did not even interview the children's doctors and therapists. ***Costanich***,

627 F.3d at 1112. DSHS seems to suggest that this all boils down to a matter of the children's word against that of Costanich and "her friends," but "[a]ll of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment." ***Costanich***, 138 Wn. App. at 561 (quoting ALJ decision). Even E and B's social worker, who also investigated the matter, concluded that the girls were thriving with Costanich and should not be removed from her home. *Id.*

This is precisely why ***Waller v. State***, the case upon which DSHS principally relies, is easily distinguishable. BA 39-42. (distinguishing ***Waller v. State***, 64 Wn. App. 318, 824 P.2d 1225, *rev. denied*, 119 Wn.2d 1014 (1992)). During the DSHS investigation of Richard Waller, a police detective, several therapists, and at least one pediatrician, reported to DSHS that Waller had physically and sexually abused the children. ***Waller***, 64 Wn. App. at 322. This Court held that DSHS's conduct was not sufficiently outrageous, where "the caseworkers were supported in part by the expert opinions of therapists." *Id.* at 337.

DSHS claims that "[s]imilar to ***Waller***," Duron chose to rely on statements from the children, others at DSHS, and psychologist

Beverly Cartwright. BA 38-39. For the most part, DSHS fails to address Costaniches' arguments on this point:

- It is quite common for troubled, developmentally disabled, or brain-damaged children like those in Costanich's home to make false reports against their foster parents and guardians. CP 1533. DSHS is very familiar with this fact. CP 492. K, whose false allegations prompted DSHS's investigation, was a "SAY" (Sexually Aggressive Youth), and a "very angry" child who was known for his "storytelling." CP 1514. DSHS's only response is that "[t]his claim of storytelling is based solely on Costanich's declaration." BR 38 n.26. No one would know better than the woman who fostered K for two years – his longest placement. CP 1514.
- Duron's purported reliance on other DSHS employees, who knew nothing about this matter other than what Duron told them, is meaningless. DSHS does not respond.
- Cartwright relied exclusively on DSHS's one-sided abuse allegations, but still offered no opinion as to whether Costanich's language posed a risk of harm. CP 492-94; ***Costanich***, 138 Wn. App. at 561.

DSHS also all but ignores the expert report of Darlene Flowers, who opined that DSHS's investigation was a "vendetta" and that DSHS has a disturbing pattern of attacking strong, vocal foster-parents like Costanich. BA 44-45. DSHS argues only that Costanich cited Flowers' "CV," unsworn testimony that this Court should not consider. BR 40 (citing CP 1175-83). This criticism is unfounded – the document DSHS refers to in not just Flowers' CV, but her expert witness report. CP 1175-84.

DSHS next argues that it did not intend to inflict emotional distress, but was only fulfilling its statutory obligations to investigate and to revoke Costanich's license based on its conclusion that she was abusive. BR 40. This begs the questions, which is not whether DSHS had to investigate, but whether the manner in which it conducted its investigation was outrageous.

Finally, DSHS argues that there is insufficient evidence of severe emotional distress (to survive summary judgment), where Costanich did not "seek counseling or professional psychiatric help" after the investigation. BR 41. DSHS provides no authority to support its unfounded claim that the tort of outrage requires the plaintiff to have sought professional help. *Id.* In any event, DSHS acknowledges that Costanich suffered from stomach pain and depression, for which she took prescribed medication. *Id.*

This Court should reverse the summary judgment order dismissing Costanich's outrage claims and remand for trial.

C. The trial court erroneously awarded DSHS statutory costs.

The trial court awarded DSHS statutory costs under RCW 4.84.080. CP 1645-47; 1651. If this Court reverses one of both of the erroneous summary-judgment orders, then it should also reverse this cost award.

D. Costanich has standing as a dependency guardian and/or *de facto* parent.

1. The cases upon which DSHS relies do not remotely suggest that a dependency guardian with an acknowledged "parent/child relationship" with the dependent children lacks standing as a matter of law.

With passing references to ***Blackwell*** and ***Ducote***, DSHS argues that despite her obvious "parent/child relationship" with E and B, Costanich does not have standing as a matter of law because a dependency guardian cannot ever be a "parent, guardian, or custodian." CP 680; BR 19-20 (citing ***Ducote v. Dep't of Soc. & Health Servs.***, 167 Wn.2d 697, 222 P.3d 785 (2009); ***Blackwell v. Dep't of Soc. & Health Servs.***, 131 Wn. App. 372, 127 P.3d 752 (2006)). But neither case suggests such a bright-line rule. Costanich is the only parent E and B have ever known, and all those involved with the family, including the Tribe, recognize their "parent/child relationship." CP 115, 258, 261, 460, 465, 680, 712. This is precisely why the trial court found that questions of fact preclude summary judgment on standing. CP 1089. This Court should reject DSHS's argument that Costanich lacks standing as a matter of law.

In ***Tyner***, our Supreme Court implied a negligent investigation cause of action from the statutory duty to investigate

imposed by RCW 26.44.050. 141 Wn.2d at 82. The dual purposes of this statutory duty are to protect children and to preserve the integrity of the family (*id.* at 79):

> [C]hildren are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children.

To determine the class of persons entitled to bring a negligent investigation claim, ***Tyner*** looked to RCW 26.44.100, providing that the purpose of RCW Chapter 26.44 is to prevent child abuse without unnecessarily interfering with "[t]he bond between a child and his or her parent, custodian, or guardian." *Id.* at 78, 80. More recently in ***Ducote***, our Supreme Court held that a stepparent lacks standing to bring a negligent investigation claim, where the "bond" between a stepparent and a stepchild is not entitled to the same protection as the bond between a child and her parent guardian, or custodian. ***Ducote***, 167 Wn.2d at 704. Crucial to that holding is that stepparents "are not defined in the chapters governing dependency proceedings or investigations of child abuse; rather, they are defined in the context of support for dependent children." 167 Wn.2d at 704 n.2. In other words, stepparents are defined by their marital status to the child's parent, not by their relationship to the child. *Id.*

Costanich, who has raised E and B since infancy, is unlike a stepparent. Everyone but DSHS, including the Tribe, acknowledges the "parent/child relationship" between Costanich and her girls. CP 115, 258, 261, 460, 465, 680, 712. This "bond" is plainly worthy of protection. ***Ducote***, 167 Wn.2d at 704.

DSHS's comparison to ***Blackwell*** is also misplaced. BR 20. The Blackwells were foster parents of D.R. for two years and had taken no steps to become his guardians or to adopt. 131 Wn. App. at 374, 377. There was no strong parent-child bond, where D.R. wanted to leave the Blackwell home. *Id.* at 378.

As foster parents, the very nature of the Blackwell relationship with D.R. was "temporary, transitional, and for the purpose of supporting the reunification with legal parents." ***In re Dependency of J.H.,*** 117 Wn.2d 460, 469, 815 P.2d 1380 (1991). This was not true of Costanich – the guardianship orders appointed Costanich until the girls turned 18, finding that there was little chance of reunification with the biological parents and that that the State would no longer provide services to that end. *Supra*, Statement of the Case. ***Blackwell*** simply is not comparable to this matter, in which all but DSHS recognize the strong "parent/child"

bond between Costanich and the girls. CP 115, 258, 261, 460, 465, 680, 712.

Neither ***Ducote***, nor ***Blackwell*** suggest that a dependency guardian with a "parent/child relationship" with her dependent children could not fall within the ambit of "guardian" as used in RCW 26.44.100. Again, Costanich is a "parent" in every sense of the word. CP 680. And her "parent/child relationship" with E and B was intended to last until they reached adulthood. CP 664, 670, 680. Her home is the only home these girls have ever known. The label "dependency" before "guardian" should not remove Costanich from the class of persons RCW chapter 26.44 protects.

In ***Blackwell***, this Court also recognized that foster parents who established their *de facto* parentage under the five-part ***L.B.*** test could fall within the ambit of "parent, guardian, or custodian." 131 Wn. App. at 378 (discussing ***In re Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005)); *see also* ***In re Parentage & Custody of A.F.J.***, 161 Wn. App. 803, 811, 260 P.3d 889 (2011)

(explaining ***Blackwell***), *rev. granted* 172 Wn.2d 1017 (2011).[3] DSHS principally argues that the availability of other remedies precludes Costanich's *de facto* parent "status," but this Court rejected a similar argument in ***A.F.J.***, holding that the petitioner there did not have statutory remedies where she had no time to adopt and could not obtain third-party custody, as the biological mother was not unfit. BR 21-22; ***A.F.J.***, 161 Wn. App. at 816-17.

Statutory remedies were no more available to Costanich than they were to the foster parent in ***A.F.J.*** Costanich wanted to adopt, but the Tribe does not allow non-member adoption. CP 819. Nor could she obtain third-party custody, where the Tribe would not consent to the termination of Nick's parental rights. CP 673.

DSHS also suggests that recognizing *de facto* parentage is inconsistent with ICWA. BR 23 (citing ***In re Parenting & Support***

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[3] To establish *de facto* parentage, a petitioner must show (1) that the biological parent consented to and fostered the parent-like relationship, (2) that the petitioner and the child lived together, (3) that the petitioner assumed obligations of parenthood without expectation of financial compensation; (4) that the petitioner has been in a parental role for a length of time sufficient to have established a bonded, dependent, parental relationship; and (5) that the petitioner undertook a permanent, unequivocal, committed, and responsible parental role in the child's life. ***L.B.***, 155 Wn.2d at 708. DSHS apparently concedes factors two and four. BR 24-25.

of Beach, 159 Wn. App. 686, 246 P.3d 845 (2011)). But again, the Tribe acknowledged Costanich's "parent/child relationship" with E and B. CP 680. Recognizing Costanich's *de facto* parentage, consistent with the Tribe's own recognition, cannot offend ICWA.

In any event, ***Beach*** does not preclude *de facto* parentage of Indian children, but held that regardless of the petitioner's *de facto* parentage, ICWA would control any custody proceeding involving an Indian parent. 159 Wn. App. at 692-93. ICWA plainly does not control Costanich's claim against DSHS. ***Beach*** is inapposite.

Finally, Costanich set forth sufficient evidence of her *de facto* parentage to survive summary judgment. *Compare* BR 1 n.1 and CP 1089 *with* BR 24-25. DSHS incredibly suggests that Nick did not consent to or foster E and B's relationship with Costanich. BR 24. But Nick asked DSHS to place B with Costanich, having visited E in Costanich's home before B's birth. CP 1513.

Equally incredibly, DSHS claims that Costanich did not undertake a "permanent" parental role because she did not "form a permanent legal relationship" with E and B. BR 24-25. Costanich is the only mother these girls, 5 and 9-years old when DSHS intervened, have ever known. CP 675, 680, 819-20. Her guardianship was to continue until the girls turned 18. CP 664,

670. In any event, the entire purpose of the *de facto* parent doctrine is to recognize a parent in fact, who has no other "legal relationship." BR 24-25.

Finally, in ***A.F.J.***, this Court rejected the argument that foster parents cannot be *de facto* parents because they receive funding from the State. *Compare* 161 Wn. App. at 822 *with* BR 24. Receiving funds to provide shelter, food, clothing, and the like is a far cry from being a paid "nanny or child-care provider." *Id.*

CONCLUSION

This Court should find standing, reverse, and remand for trial.

RESPECTFULLY SUBMITTED this 15th day of April, 2013.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 15th day of April 2013, to the following counsel of record at the following addresses:

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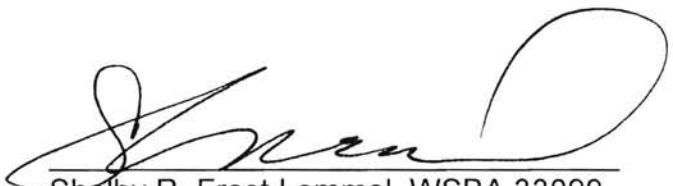

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