FILED
MAY 26 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 287289

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OF THE STATE OF WASHINGTON

DIVISION III

In Re the Matter of

SHAWN BEACH
Appellant

v.

RACHELL JOHNSTON
Respondent

BRIEF OF APPELLANT

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900 North Maple
Suite 200
Spokane, Washington 99201
(509) 624-4922

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Indian Child Welfare Act applies to the custody of Angel Beach and of Logan Johnston to the children were placed in the custody of Rachell Johnston extent that placement. (*RP 463/19*)

2. The trial court erred in denying Shawn Beach's petition of Angel Johnston based on de facto parent status, particularly because the when the trial court did in fact deem Mr. Beach to be Angel's de facto father. (*CP 91; RP 485/15*)

4. The trial court erred in finding that "because the Indian Child Welfare Act applies, [Mr. Beach] does not stand in parity with the biological parent, Ms. Johnston, and is not entitled to visitation. (*CP 90; RP 485/20*)

5. The trial court erred in concluding that "Shawn Beach is not the "parent" of Angel Johnston as that term is defined by the Indian Child Welfare Act." (*CP 91*)

6. The trial court erred in concluding that "Angel Johnston should be returned to the custody of Rachell Johnston immediately" (*CP 91*)

II. STATEMENT OF THE CASE

As background, Rachell Johnston has eight children. (*RP 218/12*) Her first child, Aspen, resides with his non-Indian father, and under the terms of a parenting plan entered in Spokane County, limitations were placed against Ms. Johnston. (*RP 176/3 227/7; 285/18; 286/16*) Ms. Johnston voluntarily relinquished custody of her second child, a daughter, via a third party custody decree to a non-Indian family member, to be raised in a non-Indian family. (*RP 31/1; 227/1*) She took this step without giving any notice to the Northern Cheyenne Tribe. (*Id.*) During the pendency of the most recent CPS investigation[1] into Ms. Johnston's parenting, her third and fourth children, Breidyn and Mariah, were placed with their non-Indian paternal grandmother, where they resided from about October 1, 2007 to January 4, 2008. (*RP 33/25; 34/16; 227/15*). The residential status of these two children is not reflected in the record. Ms. Johnston gave birth to her eighth child, Alexandra, during the pendency of this action. (*RP 206/3*) Alexandra's father is not Indian. (*RP 228/5*)

The children at issue in the case are children five, six, and seven:

1 The guardian ad litem had "four to five volumes of CPS files that encompassed four 3-inch binders. (RP 90/22)

Angel Beach, Samantha Beach, and Logan Johnston respectively. Angel Beach was born on April 24, 2003, and she is not Mr. Beach's biological child. (*RP 37/4*). Samantha Beach, born on May 6, 2004, is the parties' biological child. (*RP60/19)* Logan Johnston was born to Rachell Johnston in February of 2007 and Mr. Beach is not his father. (*RP 73/6*) For purposes of appeal, the focus is centered squarely on Angel, though Mr. Beach would certainly welcome this court's intervention on Logan's behalf as well since the caselaw and rationale cited herein applies equally to Logan.

This matter commenced on May 15, 2007, when Shawn Beach filed a Summons and Petition for Parenting Plan for Angel Beach, along with ex parte restraining order seeking primary residential placement of his daughters, Samantha and Angel Beach. (*RP 232/17*). In September of 2007, he sought, and was awarded, temporary primary residential placement of Logan by way of a non-parent custody action. (*RP 73/9*) From May of 2007 (for the girls) and September of 2007 (for Logan) until August of 2009, Ms. Johnston had no overnight contacts with the children. (*RP 138/20*) From August of 2009 until the time of trial in November of that year, Ms. Johnston had visitation with children other weekend from

Saturday at 9:00 a.m. until Sunday at 6:00 p.m. and weekly Tuesday visits. (*RP 138/12*)

Mr. Beach and Ms. Johnston started dating early in Ms. Johnston's pregnancy with Angel. (*RP 36/144*). He was involved in her prenatal regime and was present for her birth (*RP 36/23; 383/4*). Angel and Ms. Johnston moved in with Mr. Beach when Angel was about 10 days old until, and they lived together in his current home until their separation in approximately September of 2006. (*RP37/8; 381/24*)

According to Ms. Johnston's testimony, David Davis is Angel's biological father, and "[h]e knows about her, and he wants nothing to do with her." (*RP 258/2*) She told Mr. Beach that Mr. Davis was a "drug addict, he was no good, and she wanted him nowhere near [Angel] . . .and she would never seek him out." (*RP 381/17*) Ms. Johnston has not commenced any court action to establish Mr. Davis as Angel's father (*Id.*) and she made no efforts to track Mr. Davis down since she learned that she was pregnant. (*RP 258/18*) With Ms. Johnston's encouragement and approval, Angel has always gone by the name Angel Beach. (*RP 384/5*) Ms. Johnston recognized Mr. Beach as Angel's father in CPS records (*RP 40/18*) but her trial position was that the court deny Mr. Beach's request to

be named Angel Beach's de facto father. (*RP 259/11*) She took this position knowing that, if granted, it would render Angel fatherless. (*Id.*)

Mr. Beach treats Angel exactly the same way that he treats Samantha, holding her out as his daughter, Angel Beach. (*RP 354/7*) The guardian ad litem agrees Mr. Beach has always considered Angel his daughter and treated her as such, and that he is the only father Angel has ever known. (*RP 37/14*) More importantly, Angel Beach treats Mr. Beach as a father, calling him "dad" and "daddy." (*RP 38/20*).

After Ms. Johnston and Mr. Beach separated, Angel had visitation with him along with Samantha despite the fact that there was no legal requirement for this residential time. (*RP 39/10; 195/9*) In fact, Mr. Beach testifies that there was not one single occasion where Angel did not visit him along with Samantha, and that Angel's presence was just an unspoken "given." (*RP 361/8*) During the work season, Mr. Beach had them every weekend starting Friday when he got off work until Sunday and Wednesdays. (*RP 360/9*) During the off season, which typically starts in November and runs to the spring, Mr. Beach had the girls with more frequently: "Sometimes two weeks at a time. I had them for multiple days, like five days at a time." (*RP 297/10; 360/19*)

As noted above, the girls, and eventually Logan, moved their primary residence to Mr. Beach's home. This is the same home that Angel resided in from her birth to the parties' separation, the same house she lived in when she visited her father prior to the May 15, 2007 order, which gave Mr. Beach primary residential placement. (*RP 57/22*) In the summer of 2008, Mr. Beach's girlfriend, Rian Williams, moved into his home along with her ten year old daughter, Lauren. (*RP 343/1*) Ms. Williams' undisputed testimony is that she has a close and bonded relationship with Angel, and that Lauren and Angel also have a close sibling-like relationship. (*RP 355/11*) The guardian ad litem agreed that Ms. Williams and Angel share an appropriate and affectionate relationship. (*RP 67/116*) This group of people constituted Angel Beach's family.

At the time of trial, Angel Beach was six and a half years old, a first grader at Lidgerwood Elementary School. (*RP 355/5*) Up until the trial court's ruling took effect, she had lived her entire life with her little sister, Samantha, who is one year behind her in school. (*RP 69/3; 352/11*). The girls even shared the same kindergarten teacher. (*Id.*)

Ms. Johnston admitted that it would not be in Samantha and Angel's best interest to live in separate homes. (*RP 69/3*) When

questioned about the impact a separation would have on the girls, she concluded that since the girls ". . . have lived together their entire lives . . . it would be very likely to be difficult for them." (*RP 69/3*) The guardian ad litem in this case believes that it would be in the best interests of Angel and Samantha to live in the same home (*RP 69/10*) and that it would be "a very difficult situation" for Angel if Mr. Beach were cut out of her life. (*RP 49/10*). The guardian ad litem recommended that both Angel and Samantha reside primarily with their father, concluding that he "would provide a more stable and safe home" and further, that 26.9.191 restrictions be imposed for Ms. Johnston because of her drug abuse and the impact of that abuse on her children. (*RP 47/19; 68/13; 69/10*)

Like Angel, Logan has no recognized or acknowledged father. Travis Johnson, Mr. Beach's neighbor, is believed to be Logan's biological father. (*RP 55/10; 321/18*) However, Ms. Johnston has no plans to petition to establish Mr. Johnson as Logan's father because she is afraid of the repercussions from Mr. Johnson's wife. (*RP 261/24*) Mr. Johnson has likewise taken no steps to assert his paternal rights with Logan. (*RP 322/6*)

Logan was born with cocaine in his system (*RP 73/24*) and has significant special needs that require substantial treatment regime with a

number of providers (*RP 78/3; 91/25 to 103/16*) Mr. Beach and Ms. Williams treat Logan like a son (*RP 107/6*) and he thrived under their care and commitment to his treatment requirements. (*RP 91/25 to 103/16*) Based on the bonding assessment, Logan has a healthy attachment with both of them. (*RP 113/4*) In fact, the bonding assessor indicated concern about the impact that removing Logan from Mr. Beach's home would have on his overall development. (*RP105/19*) Likewise, the guardian ad litem expressed concern that there could be "actual detriment to Logan if [he was] taken from Mr. Beach and that relationship not be allowed to continue. (*RP 115/6*)

This Indian Child Welfare Act is relevant to these cases because Ms. Johnston is an enrolled member, through her father, of the Northern Cheyenne Tribe. (*RP 216/10*) His last name is "Nason" but Ms. Johnston has been Rachell Johnston since her birth. (*RP 216/8; 217/14*) None of Ms. Johnston's eight children are enrolled members of the Tribe. (*RP 218/12*). Likewise, none of the children have ever been to the Northern Cheyenne Reservation, located some 11 to 13 hours away in Lame Deer, Montana. (*RP 220/21; 226/6*) In fact, Ms. Johnston has only been to the Northern Cheyenne Reservation once in her 30 years—in 1998, when she went on location for a funeral. (*RP 223/11*) She has never voted in any

tribal elections (*RP 225/1*); is wholly unfamiliar with the Tribe's political structure (*RP 225/22*); and at the time of trial had no idea who was the Tribe's leader (*RP 226/9*). She could not name the Northern Cheyenne Tribe's best known historian. (*RP 226/17*) She has never participated in any reservation activities (*RP 225/10*) but did testify that several of her children have attended local powwows, although Angel Beach was not one of the children who attended. (*RP230/22*)

At trial, Ms. Johnston testified that she "started going to the American Indian Center a few weeks ago. . ." (*RP 229/17*) and that she connected with a self-proclaimed minister there by the name of Gary Fox. (*RP 229/4*) This represents Ms. Johnston's sole attempt to embrace her Indian heritage with education and cultural enrichment. (*Id.*)

Mr. Beach testified that during the course of their relationship Ms. Johnston never discussed her Native American heritage, never indicated that she wanted to share that heritage or that culture with the children, never took Samantha and Angel to powwows. (*RP 366/14; 386/5*). Despite the fact that he resides in Spokane, Mr. Nason, Ms. Johnston's father and the source of her Indian bloodline, was not at all involved in her life or the life of her children. (*RP 367/9*) Mr. Beach recalled only

meeting him one time, at the hospital following a catastrophic accident involving Ms. Johnston's oldest son. (*Id.*)

After three days of trial, the court granted primary residential placement of Samantha to her father and adopted the limiting factors recommended by the guardian ad litem. (*RP 467/18*) The trial court found Mr. Beach to be Angel Beach's de facto father (*RP 485/15*), but nevertheless concluded that the Indian Child Welfare Act applied to her custody (*RP 463/19*) such that Angel had to be returned to her mother's home. Despite the de facto parent ruling, the trial court failed to put Mr. Beach in parity with a biological parent and did not order any visitation with Angel. (*RP 485/20)* Finally, the trial court ruled that Logan be returned to Ms. Johnston, again under the auspices of the Indian Child Welfare Act, and no provisions were made for contact with Mr. Beach. (*RP 479/8*)

II. ARGUMENT

1. THE STANDARDS OF REVIEW IN THIS MATTER ARE DE NOVO AND ABUSE OF DISCRETION.

The question of federal preemption is reviewed de novo. *State v. Labor Ready, Inc., 103 Wash.App. 775, 779, 14 P.3d 828 (2000).*

Questions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003).*

Constitutional challenges are also reviewed de novo. *Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).*

A ruling concerning the placement of a child is reviewed for abuse of discretion. *In Re Marriage of Kovacs, 121 Wash.2d 795, 801, 854 P.2d 629 (1993).* A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

2. WASHINGTON'S DE FACTO PARENT DOCTRINE IS NOT PREEMPTED BY THE INDIAN CHILD WELFARE ACT.

Washington law regarding de facto parentage, and not the Indian Child Welfare Act, governs the custody of Angel Beach. To prove this contention, we must briefly review (a) the purpose and thrust of the ICWA; (b) the doctrine of preemption; and (c) Washington's de facto parent doctrine.

a. The purpose and thrust of the ICWA is to balance the best interest of an Indian child against society's need to preserve the heritage of the Indian culture without sacrificing the needs and interests of the child.

In order to fully analyze the issues before the court, it is important to first have a thorough understanding of the history and purpose of the

Indian Child Welfare Act (25 US.C. § 1901 et seq.) (hereafter "ICWA"). The ICWA, enacted in 1978, was born out of growing concern in the mid-1970's about the consequences to Indian children, families, and tribes over child welfare practices that separated large numbers of Indian children from their families and tribes, placing them instead in non-Indian homes through state adoptions, foster care, and parental rights termination proceedings. *Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30, 32.* Testimony at pre-enactment hearings attributed the high rates of removal of Indian children from their homes to "'government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing'" *Id. at 34.* Furthermore, testimony before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs opined that "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People...." *Id. at 34 (quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., at 193 (1978)).*

The stated purpose of the ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster care or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." *25 U.S.C. § 1902.* The congressional findings in support of the ICWA cite the interest of the United States in protecting Indian children who are members of or eligible for membership in an Indian tribe. *25 U.S.C. § 1901(3).* Title I of the ICWA applies to certain child custody proceedings involving an Indian child. *25 U.S.C. § 1903 (4).* "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. *Id.*

The ICWA contains adoptive, foster care, and preadoptive placement preferences. *25 U.S.C. § 1915.* In any adoptive placement of an Indian child, preference shall be given, in the absence of good cause to the contrary, to 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."

25 U.S.C. § 1915(a). There may be a different order of preference if provided for by tribal resolution, so long as the placement is the least restrictive appropriate to the particular needs the child. *25 U.S.C. § 1915(c).* The ICWA does not define "good cause" for departure from the placement preferences, but does provide that, where appropriate, the preference of the Indian child or parent shall be considered. *Id.*

The ICWA sets forth provisions concerning jurisdiction over Indian child custody proceedings. *25 U.S.C. § 1911* lays out a dual jurisdictional scheme. Section *1911(a)* establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child 'who resides or is domiciled within the reservation of such tribe,' as well as for wards of tribal courts regardless of domicile. Section *1911(b)*, on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation—on the petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court.

Various other provisions of ICWA Title I outline procedural and substantive standards for those child custody proceedings that do take

place in state court. The most important substantive requirement imposed on state courts is that of §1915(a), which, absent 'good cause' to the contrary, mandates that *adoptive placements* be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. at 36 (emphasis added). The ICWA 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.' [Citation.] It does so by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' [citation] and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.' [Citation.]" *Id. at 36-37.*

b. **The ICWA does not preempt state law on de facto parenting and as a consequence, the court must apply the standards set forth in RCW 26.09.187 to determine a final parenting plan for Angel Beach.**

The preemption doctrine derives from the supremacy clause of the United States Constitution which declares that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any

State to the Contrary notwithstanding." *U.S. Const., art. VI, cl. 2.*

A Supremacy Clause analysis " 'starts with the basic assumption that Congress did not intend to displace state law.' " *State v. Grimes, 111 Wash.App. 544, 550-51, 46 P.3d 801 (2002).* Federal preemption is required only when Congress conveys an intent to preempt state law by (1) "express preemption," where Congress explicitly defines the extent to which its enactments preempt state laws; (2) "field preemption," where state law regulates conduct in an area the federal government intended to exclusively occupy; and (3) "conflict preemption," where it is impossible to comply with both local and federal law. *Magnolia Neighborhood Planning Council v. City of Seattle, 63466-6-I (WACA) (March 29, 2010).* State law that conflicts with federal law, making compliance with both an impossibility, or state law that presents an obstacle to accomplishing a stated federal purpose, violates the Supremacy Clause of the United States Constitution. *Grimes, 111 Wash.App. at 550-51.* There is a strong presumption against preemption, and state laws are not preempted in the absence of a clear and manifest congressional purpose. *Id.* A person challenging a statute must demonstrate its unconstitutionality beyond a reasonable doubt. *Id; City of Seattle v. Montana, 129 Wash.2d 583, 589, 919 P.2d 1218 (1996).*

Federal preemption under the Supremacy Clause applies to statutes, not court rulings. *See, e.g., State v. Labor Ready, Inc., 103 Wash.App. at 779.* A Supremacy Clause challenge questions the statute's constitutionality. *See, e.g., Id.* Matters historically within a state's police powers are not preempted by federal statute and are therefore constitutional absent the clear and manifest intent of Congress. *Id. (citing Hue v. Farmboy Spray Co., 127 Wash.2d 67, 78, 896 P.2d 682 (1995)).* State court judges must often make decisions mindful of federal implications. [2]

This court should therefore proceed on the conviction that the proper approach for Angel Beach is to reconcile the operation of Washington's de facto parent doctrine and the ICWA with one another rather than holding one completely ousted.

With this background, we come to Mr. Beach's claim that the ICWA does NOT preempt Washington's de facto parent doctrine and the accompanying statutory scheme as it applies to Indian children. It is clear

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2 In *State v. Quintero Morelos, 133 Wn.App. 591, 600, 137 P.3d 114 (2006)*, the court refused to hold that a state sentencing judge exercising traditional sentencing discretionary authority ran afoul of the Supremacy Clause by imposing a sentence of one day less than a year so as to avoid the defendant's deportation by federal authorities. The sentencing judge was not circumventing federal law, but was acknowledging the obvious federal implications. *See, e.g., In Re Marriage of Glass, 67 Wash.App. 378, 391-392, 835 P.2d 1054 (1992)* (considering adverse tax consequences when adjusting maintenance award).

that the express preemption and field preemption do not apply here—the ICWA does not contain an express preemption provision, and it simply cannot be maintained that the ICWA "occupies the field" of matters related to child custody or adoption, even as to Indian children. The ICWA is devoid of any provisions dealing with substantive matters related to child custody, including but not limited to the bases on which a child may be removed from a parent's custody; the criteria upon which a custody decision shall be based; when and how often hearings must be held to review a child's status; who is entitled to what reunification services and for how long; and so on and on.

Preemption must then logically and exclusively depend upon a showing that there is a "conflict" between the Washington de facto parent doctrine and one or more provisions of the ICWA. The United States Supreme Court's basic approach to preemption in alleged conflicts between Indian rights and status and state law was set forth in *New Mexico v. Mescalero Apache Tribe (1983) 462 U.S. 324, 103 S.Ct. 2378.* There the court held that the application of New Mexico's hunting and fishing laws to even nonmembers of a tribe present on an Indian reservation was preempted by federal law and by the tribe's own regulatory scheme. The court stated the general rule to be: "State jurisdiction is pre-empted by the

operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id. at 334.* The court went on to recognize, however, that a state's interests "will be particularly substantial if the State can point to off-reservation effects . . ." *Id. at 336.*

A California court discussed this very issue as it is applied to the ICWA in the case of *In Re Bridget R. (1996) 41 Cal.App.4th 1483, 1510, 49 Cal.Rptr.2d 507.* The *Bridget R.* court noted:

> "The principles of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seek an accommodation between the interests of the tribes and the federal government on the one hand, and those of the states, on the other. [Citation.] Thus, the United States Supreme Court has held nonreservation Indians are generally subject to nondiscriminatory and generally applicable state laws '[a]bsent express federal law to the contrary.' [Citation.] Even on Indian reservations, state laws generally may be applied insofar as they do not interfere with reservation self-government or essential internal tribal affairs, or impair a right reserved by federal law. [Citation.] Jurisdiction over matters of family relations is traditionally reserved to the states. [Citations.] *Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do ' "major damage" to "clear and substantial federal interests.* [Citations].' [Citation.]" (emphasis added).

Another California case, involving an Indian child and his non-Indian stepfather, *In Re Brandon M., 63 Cal.Rptr.2d 671, 54 Cal.App.4th*

1387 (1997), applied this same logic:

> We do not believe that any "major damage" can or will be done to either federal law or Indian tribal law, custom, status or rights, as the same are posited in the ICWA, from the application of California's de facto parent doctrine in this case. Congress clearly intended that its 1978 statute exist side-by-side with the child custody laws of the 50 states and necessarily understood that the courts of those states would and should attempt to harmonize, not presume conflicts between, the two." *Id at 1397.*

It is clear that the de facto parent doctrine is substantially consistent with the spirit of these provisions of the ICWA, and not at all in conflict with their letter. Indeed, the marriage of the de facto parent doctrine and the pertinent ICWA sections means that the scope of the persons to whom preference should be given for custody (or, for that matter, for adoption—see *25 U.S.C. § 1915(a)*) is expanded from the already broad definition of "extended family" to include those persons embraced by the de facto parent doctrine. This expansion creates no conflict with, nor does any violence to, any mandate of the ICWA.[3] *In Re*

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3 At least two other California courts rejected arguments that the ICWA preempts procedural and jurisdictional precepts applicable to juvenile court proceedings. (*See In Re Pedro N. (1995) 35 Cal.App.4th 183, 190 [41 Cal.Rptr.2d 819]; Slone v. Inyo County Juvenile Court (1991) 230 Cal.App.3d 263, 266-268 [282 Cal.Rptr. 126].*

Brandon M., 54 Cal.App.4th at 1398-1399.

There is no conflict here. The ICWA provides that "in the absence of good cause to the contrary" preference in actions not between parents be given to "(i) a member of the Indian child's extended family . . ." *25 U.S.C. § 1915(b).* Section *1903(2)* says the child's extended family "shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." *25 U.S.C. § 1903(2).*

There are several things that are, for present purposes, noteworthy about the combination of these statutes. First, with regard to the definition of "extended family," this court cannot ignore the fact that Shawn Beach is the de facto father of Angel Beach. Indeed, without Shawn Beach, this young child is left with no known father. This de facto characterization arguably carries far more weight than any of the relationships itemized in the ICWA and makes him far more than mere "extended family." It makes him a parent. Thus, while not specifically itemized in the ICWA's

definition of "extended family," a de facto father should clearly satisfy the intent of the ICWA.[4]

Second, nothing in these sections, or any other provision of the ICWA, says that any of the people to whom preference should be given as custodians of an Indian child must themselves be of Indian heritage.

Third, and perhaps most importantly, the language and tenor of *25 U.S.C. § 1915(b)* manifestly bespeaks flexibility—it provides only for a "preference." It notes that even the preference gives way when there is "good cause to the contrary." And, it is preceded by an opening sentence, which provides that a child "shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met." *Id.* This language hardly suggests a congressional intention to mandate a connection with the child's Indian tribe when all other factors point in the opposite direction.

c. **The fact that Shawn Beach was found to be Angel Beach's de facto father makes this a custody proceeding between two parents, and as such, the ICWA does not apply.**

The court found that Shawn Beach is the de facto father of Angel Beach. *In Re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005)*, the

4 In *In Re Brandon M., 54 Cal.App.4th 1387*, the court found that the child's step father, also the father of the child's two siblings, qualified as his de facto parent per the ICWA despite some time lapse in their relationship.

court held that:

> . . . henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise . . . As such, recognition of a person as a child's de facto parent necessarily "authorizes [a] court to consider an award of parental rights and responsibilities ... based on its determination of the best interest of the child." Id. at 1152; see RCW 26.09.002. A de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child at the center of any such dispute. *Id. at 708.*

A petitioner who meets this rigorous test set forth in L.B to become a de facto parent may proceed, as any other legal parent, to establish a parenting plan and residential schedule under chapter 26.09 RCW, while a petitioner who cannot make the required showing must proceed instead under the nonparent custody statute, chapter 26.10 RCW. *In Re Parentage of J.A.B., 146 Wn.App. 417, 423, 191 P.3d 71 (2008).*[5]

RCW 26.09.002 sets forth the policy underlying custody matters between parents, noting in relevant part that the "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best

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5 This case is distinguished from the recent *In Re Parentage of M.F., 81043-5 (WASC)(April 1, 2010).* Here, Mr. Beach is NOT a third-party to the two already existing parents. Angel has no other father, and this fact puts him in the exact same position as L.B. found herself in.

interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." *Id.* With the cited policy consideration in mind, the court must, in a custody matter between parents, apply the criteria set forth in RCW 26.09.187.

A reading of 26.09 shows that the ICWA does not apply to actions brought under this authority. Moreover, by its own terms the ICWA does not apply to interparental custody disputes. *25 U.S.C. § 1903(1)* defines a "child custody proceeding" to means and include "foster care placement" or "termination of parental rights." This case is neither of those. It is also crucial to note that an extensive law review article suggests that the ICWA does not apply to "interfamilial child custody disputes" at all. *See Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity (1989) 36 UCLA L.Rev. 1051, 1093, 1106, and cases cited therein.*

This was exactly the reasoning of a 1993 case decided by a Minnesota appellate court, *Matter of Custody of K.K.S. (Minn.Ct.App. 1993) 508 N.W.2d 813.* In that case, the court stated that *25 U.S.C. § 1903(1)*, the provision which defines "child custody proceeding,"

effectively means that "[n]o federal law or policy preempts state power over interparental child custody disputes where the Indian child and at least one parent reside off the reservation." *Id. at 816.* Here, neither the parents nor the child resided on the reservation.

The trial court's finding that Shawn Beach is Angel Beach's de facto father is well supported by the record. This man has been a father to this child since her birth and for her entire life he has raised Angel as his daughter. After her parents separated, Angel, had substantial visitation with Mr. Beach, and on May 15, 2007, Angel commenced living full-time with he father. She remained there, with her extended family, in her familiar and former home conclusion of the trial in this matter.

While the actions and choices of the adults in this case are important, the impact that these actions and choices had on Angel is far more important, far more compelling. Shawn Beach is the only father Angel has ever known, and following the trial court's de facto parent determination, is the only legally recognized father that she has. If Angel considers Shawn Beach as her father, the Tribe should as well.

Logic dictates that improper application of the ICWA to this interparental custody dispute—to this child's life—has a devastating impact on near everyone closely involved to this matter. With this

application, Angel was robbed of her father because the trial court did not believe it had the authority to order visitation. With this application, Angel was separated from Samantha because the trial court placed Samantha with her father. With this application, Angel was robbed of the consistency of the existing pattern of interaction between her, her parents and significant other relationships, and her daily routine. With this application, Angel was placed with a mother who has a long-term impairment resulting from drug abuse that interferes with her performance of parenting functions. With this application, Angel was essentially bastardized because she has no acknowledged or legally recognized biological father. The application of ICWA here flies in the face of its mandate and it flies in the face of state law designed to serve and protect our children.

3. **BECAUSE NEITHER ANGEL BEACH NOR RACHELL JOHNSTON HAD ANY SIGNIFICANT SOCIAL, CULTURAL, OR POLITICAL RELATIONSHIP WITH INDIAN LIFE THERE IS NO EXISTING INDIAN FAMILY TO PRESERVE AND THE ICWA THEREFORE DOES NOT APPLY.**

The presence of an "existing Indian family" is a factual predicate to the application of ICWA and in this case, there was no existing Indian family. The stated purpose of the ICW is to serve the best interests of the

Native American children, families, and tribes. However, these interests are often in tension. To address such tension, including situations where application of the ICWA is unwarranted or unconstitutional, courts have applied an analysis known as the "existing Indian family doctrine" to decline the application of ICWA to situations where a child is not being removed from an existing Indian family.

The only Washington case to address the existing Indian family doctrine is *In Matter of Adoption of Crews, 118 Wn.2d 561, 825 P.2d 305 (Wash. 1992)*. The issue in this case was whether the ICWA applied to invalidate a final decree terminating parental rights properly entered under state law. After careful consideration of ICWA and its legislative history[6], the court was "convinced that ICWA was not intended to apply in the situation presented by the specific facts of this case." *Id. at 567.*

The facts in *Crews* are as follows. The mother, Crews, and the Choctaw Nation asked the court to apply the ICWA to a child who had never been a part of an existing Indian family unit or any other Indian community. Neither Crews nor her family ever lived on the Choctaw

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6 The *Crews* court said it has been stated, and "we agree, that the underlying thread that runs throughout the entire Act [is] to the effect that the Act is concerned with the removal of Indian children from an *existing* Indian family unit and the resultant breakup of the Indian family." *In Matter of Adoption of Crews, 118 Wn.2d at 569, citing In Re Adoption of Baby Boy L., 231 Kan. 199, 206, 643 P.2d 168 (1982)* (emphasis added.)

reservation in Oklahoma and she had no plans to relocate her family to the reservation. *Id. at 569.* Moreover, neither Crews nor the Choctaw Nation committed to raising the child in an Indian environment. *Id.* To the contrary, Crews demonstrated no substantive interest in her Indian heritage and gave no indication this lack of interest change in the future. *Id.* Finally, the child's father had no ties to any Indian tribe or community, and he supported the child's adoption by a non-Indian family. *Id.*

Based on these facts, while the child at issue may have been an "Indian child" based on the Choctaw Constitution, the court did not find "an existing Indian family unit or environment from which [the child] was removed or to which he would be returned. *Id.* To apply ICWA in this specific situation would not further the policies and purposes of ICWA. *Id.* Consequently, we hold ICWA does not apply to invalidate Crews' voluntary termination of her parental rights and consent to adoption." *Id.*

Washington is not alone is the application of the existing Indian family doctrine. At present, 10 states, including Washington and California, have adopted the doctrine[7], six have rejected it, and the

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7 Alabama (S.A. v. E.J.P. (Ala.Civ.App. 1990) 571 So.2d 1187); Indiana (Matter of Adoption of T.R.M. (Ind. 1988) 525 N.E.2d 298); Kansas (Matter of Adoption of Baby Boy L. (Kan. 1982) 643 P.2d 168); Kentucky (Rye v. Weasel (Ky. 1996)

position of the remaining states is unclear.

In the case at hand, Rachell Johnston did not provide Angel with an Indian family unit. Indeed, Ms. Johnston has never shown any demonstrable interest in her Indian heritage. She was only on "her" reservation once in her lifetime, and that was during her childhood. She has no relationship with her father, who is the family member through which her Indian blood originated. She did not participate in any cultural events and never attempted to educate herself. Angel was never exposed to or educated about her Indian heritage—or any Indian heritage for that matter. These facts lead to a stark reality: Angel Beach is an Indian by blood only, and yet her best interest and her well-being been sacrificed to preserve an Indian family that simply does not exist beyond the formality of blood. Surely that cannot be what our Federal and State legislatures—and what Indian tribes—want for their children.

It is painfully clear that the unique values and traditions of the Indian culture were not advanced, or even mentioned, in Ms. Johnston's

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934 S.W.2d 257); Missouri (In Interest of S.A.M. (Mo.App. 1986) 703 S.W.2d 603); New York (In Re Adoption of Baby Girl S. (Sur. 1999) 690 N.Y.S.2d 907); Oklahoma (Matter of Adoption of Baby Boy D. (Ok. 1985) 742 P.2d 1059); Tennessee (In Re Morgan (Tenn.Ct.App. 1997) WL 716880); Washington (Matter of Adoption of Crews (Wash. 1992) 825 P.2d 305).

home. Primary residential placement with her father did not result in Angel's removal from an existing Indian family. The existing Indian family doctrine thus works to bar application of the ICWA to this matter. Angel should be returned to her father's primary residential care and should have visitation with her mother consistent with the visitation afforded her sister, Samantha. If she so chooses, Ms. Johnston can use her residential time with Angel begin the process of educating Angel about their rich Indian culture.

4. APPLICATION OF THE ICWA TO ANGEL BEACH AND LOGAN JOHNSTON IS A CLEAR VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Application of the ICWA to Angel Beach, and Logan Johnston, both of whom are in all respects, except in genetic heritage, indistinguishable from any other children in this state violates the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution.

a. Substantive Due Process:

Family rights are afforded substantive protection under the due process clause of the Fifth and Fourteenth Amendments. *Santosky v. Kramer (1982) 455 U.S. 745, 753.* The United States Supreme Court '"has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause

of the Fourteenth Amendment.' [Citation.]" *Moore v. East Cleveland (1977) 431 U.S. 494, 499.* As the court in *L.B.* noted, parenthood comprises much more than mere custody—a parent has a fundamental liberty interest in the care, custody, and control of his or her child. *L.B., 155 Wash.2d at 710.*[8] Because one who meets the rigorous test to qualify as a de facto parent stands in legal parity to an otherwise legal parent, he is therefore vested with the same parental rights and responsibilities, limited only by the best interests of the child. *Id. at 708.*

The United States Supreme Court has also issued several opinions establishing that children are constitutionally protected. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In Re Gault (1967) 387 U.S. 1, 13.* "'Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' [Citation.]" *Troxel v. Granville (2000) 530 U.S. 57, 89, fn. 8 (dis. opn. of Stevens, J.).* The California Supreme Court

8 The California Supreme Court agrees and has recognized that an individual's rights respecting family relationships do not necessarily depend upon the existence of a biological connection, and that interests in familial ties which grow between members of a de facto family may outweigh biological relationships in some circumstances. (In Re Bridget R., 41 Cal.App.4th at 1505.)

has declared that "[c]hildren . . . have fundamental rights—including the fundamental right . . . to 'have a placement that is stable, [and] permanent.'" *In Re Jasmon O., (1994) 33 Cal.Rptr.2d 85, 8 Cal.4th 398, 419-420.* Washington should follow the California's lead and recognize that "children are not simply chattels belonging to their parent, but have fundamental interests of their own . . ." which are constitutional in dimension. *Id.*; *In Re Bridget R., 41 Cal.App.4th at 1490.* The court in Bridget R. probably said it best in terms of the right of a child to her familial relationships:

> It is, "[i]f anything, . . . more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring." *Id. at 1504.*

Legislation that substantially interferes with the enjoyment of a fundamental right is subject to strict scrutiny *Sherbert v. Verner (1963) 374 U.S. 398.* The legislation must be set aside or limited unless it serves a compelling purpose and is necessary to the accomplishment of that purpose. Thus, application of the ICWA that fundamentally interferes with a child's right to retain her existing stable familial relationships requires

that the statute be subjected to strict scrutiny to determine whether, as applied, it serves a compelling government purpose and, if so, whether its application is actually necessary and effective to the accomplishment of that purpose. *In Re Bridget R., 41 Cal.App.4th at 1507.*

Following the lead of Bridget R., this court should apply the following test: (1) are the tribal interests that are protected by ICWA sufficiently compelling under substantive due process standards to justify the impact that ICWA's implementation would have on the constitutionally protected familial rights that Angel Beach and Logan Johnston have in their de facto family; and, if so (2) whether the application of ICWA, under the facts of the case, is necessary to further those tribal interests.

Certainly preserving Native-American culture is a significant, if not compelling, governmental interest. This interest of preservation, however, is not served by applying the ICWA to Angel Beach or Logan Johnston. This is particularly true when the tribal interests "can serve no purpose which is sufficiently compelling to overcome the child's right to remain in the home where [she] . . . is loved and well cared for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow." *Id. at*

1508.

There is no Indian family here to preserve. Ms. Johnston's connection with the Tribe is predicated on her childhood enrollment. She lives a state away from the reservation and the record does not indicate that she had any real connection with the Northern Cheyenne Tribe or any other Indian affiliation. To the contrary, the record illustrates Ms. Johnston's complete indifference to her Indian heritage. The sole connection that Angel and Logan have to the Northern Cheyenne the Tribe is a genetic contribution from an enrolled bloodline.

Placing Angel and Logan with Ms. Johnston will do absolutely nothing to promote the stability, security, and future of the Northern Cheyenne Tribe. Because such placement is contrary to their obvious best interests and a violation of their Constitutional rights, the trial court's application of ICWA is constitutionally impermissible. The constitutionally protected interests that Angel and Logan have in a loving, secure, and familiar home and family necessarily outweigh the statutorily created interest of the tribe.

b. **Equal Protection:**

RCW 26.09.002 outlines the policy considerations that a court must apply when determining custody of a child between her parents.

First, the state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and further, that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Second, the best interests of a child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Finally, the legislature recognizes that said best interests of a child are ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

When the ICWA is applied to Angel Beach, she is deprived of equal protection of this statute. The trial court took it one step further though--beyond the obvious change in residential placement and loss of her sister's companionship[9], when the court deemed that ICWA applied to Angel, it failed to order any contact between her and her de facto father. That lifelong relationship was simply severed, leaving this little girl fatherless.

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9 Absent ICWA application, it is probable that Angel's final parenting plan would have mirrored that of her little sister, Samantha, who continues to reside primarily with Mr. Beach and have visitation with Ms. Johnston.

When disparate treatment, like that of Samantha and Angel, is based upon social, cultural, or political relationships between an Indian child and its tribe, it is consistent with the equal protection requirements of the Fifth and Fourteenth Amendments. *In Re Bridget R., 41 Cal.App4th at 1508.* Absent social, cultural, and political relationships, or where the relationships are very attenuated, the only basis for applying ICWA rather than state law *in dependency proceedings* is the child's genetic heritage. *Id.* (emphasis added.) This case isn't even a dependency proceeding—it is a custody case between two parents. ICWA has no place in such a case.

The United States Supreme Court has enunciated three standards of review for analyzing constitutional equal protection challenges, two of which are relevant to this analysis. For legislation concerning a "suspect" classification involving an immutable characteristic, such as race, ethnicity, or ancestry, courts have been directed to apply strict scrutiny and to uphold the legislation only if its classification is precisely tailored to further a compelling governmental interest. *Adarand Constructors, Inc. v. Pena (1995) 515 U.S. 200, 227.* Over the years, the United States Supreme Court "has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v.*

Virginia (1967) 388 U.S. 1, 11, citing Hirabayashi v. United States (1943) 320 U.S. 81, 100. The *Bridget R.* court followed suit, noting that "[a]ny application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause." *Bridget R., 41 Cal.App.4th at 1509.* The test that must be applied is whether the classification serves a "compelling governmental interest" and is "narrowly tailored" to achieve its goal. *Adarand Constructors, Inc. v. Pena, 515 U.S. at 226.*

The record reflects that Angel Beach has no association with the Tribe beyond genetics. Regardless of whether this genetic association is characterized as racial, ethnic, or ancestry, it is still a classification based on "blood." This on its face invokes strict scrutiny to determine whether the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest. The facts of this case force the conclusion that application of the ICWA to Angel Beach is a violation of substantive due process, and consequently, a violation of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution.

c. **The Tenth Amendment:**

The final constitutional argument involves the Indian and interstate commerce clause and the Tenth Amendment. The Indian and interstate commerce clause provides that the ". . . Congress shall have the power to regulate Commerce . . . among the several States, and with the Indian Tribes[.]" *U.S. Const., art. I, § 8, cl. 3.* Tenth Amendment of the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *United States v. Lopez (1995) 415. U.S. 549*, the court found that Congress exceeded its enactment powers per the interstate commerce clause with enactment of the Gun Free School Zone Act (18 U.S.C. § 922(q)(1)(A)) because this statute did not regulate activity that substantially affected interstate commerce. Since jurisdiction over family relations is traditionally a power reserved to the states, and since *Lopez* instructed that Congress exceeds its authority when, acting under an enumerated power, it legislates in matters generally reserved to the states in the absence of a substantial nexus between the enumerated power and the matter regulated[10], it follows that in order for a federal law to override

10 The Supreme Court has reinforced the requirement that a substantial nexus

state law on a matter of family relations, it must be shown that application of the state law would do "major damage" to "clear and substantial" federal interests. *Bridget R., supra, 41 Cal.App.4th at 1510, citing Rose v. Rose (1987) 481 U.S. 619, 625.* Applying this logic, the *Bridget R.* court concluded that since no substantial nexus exists between the Indian commerce clause and child custody proceedings involving children whose families who failed to maintain significant relationships with an Indian tribe, community, or culture, application of the ICWA to such children would impermissibly intrude upon a power reserved to the states. *Bridget R., supra, 41 Cal.App.4th at p. 1511.*

In this case, no substantial nexus exists between the Indian commerce clause and the ICWA. Application of the ICWA to a child whose only connection with an Indian tribe is a genetic contribution—a child with literally no connection to the Tribe or any other Indian cultural teachings or heritage—does not serve the purpose for which the ICWA was enacted, which was "to protect the best interests of Indian children

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exist between Congress's exercise of an enumerated power and the activity regulated by that exercise. See *United States v. Morrison (2000) 529 U.S. 598* (holding that interstate commerce clause did not authorize Congress to enact the civil remedy provisions of the Violence Against Women Act, inasmuch as the provision did not regulate activity which substantially affected interstate commerce); *Solid Waste Agency of Northern Cook City. v. Army Corps of Engineers (2001) 531 U.S. 159* (holding that enactment of the Migratory Bird Act exceeded Congress's powers under the Commerce Clause).

and to promote the stability and security of Indian tribes and families." *25 U.S.C. § 1902.* As applied to Angel Beach and Logan Johnston, the ICWA impermissibly intrudes on a power reserved to the states—the care of its of dependent children.

III. CONCLUSION

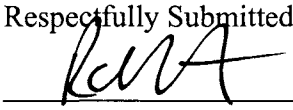
Improper application of the Indian Child Welfare Act to Angel Beach served to excise her father from her life, isolate her from her sister and "de facto" family unit, place her in the care of a woman who would have in all likelihood lost her bid for primary residential placement but for the ICWA. Angel's best interests and constitutional rights were trampled for no good cause.

Logan Johnston's rights and best interests were equally ignored in the interest of preserving a nonexistent Indian family.

This matter should therefore be reversed and/or remanded for a ruling consistent with RCW 26.09 and in furtherance of the best interests of the children involved.

DATED this 26 day of May, 2010.

Respectfully Submitted,



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CERTIFICATE OF DELIVERY

I declare under penalty of perjury that on May 26, 2010, I served a copy of this Brief of Appellant on Co-Counsel, Matthew Dudley by personal service to his office located at 2824 E. 29th Avenue, Suite 1B Spokane, WA 99223; and Respondent 's counsel, Thomas N. Tremaine, Northwest Justice Project, by personal service to his office located at 1702 W. Broadway Avenue, Spokane, WA 99201.

Date: May 26, 2010

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