

FILED

JUN 25 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 287289-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

In Re the Matter of

SHAWN BEACH

Appellant

v.

RACHELL JOHNSTON

Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT

Jacquelyn High-Edward

Counsel for Respondent/Cross-Appellant

WSBA #37065

Northwest Justice Project
1702 W. Broadway
Spokane, Washington 99201
(509) 324-9128

FILED

JUN 25 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 287289-III

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

In Re the Matter of

SHAWN BEACH

Appellant

v.

RACHELL JOHNSTON

Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT

Jacquelyn High-Edward

Counsel for Respondent/Cross-Appellant

WSBA #37065

Northwest Justice Project
1702 W. Broadway
Spokane, Washington 99201
(509) 324-9128

TABLE OF CONTENTS

	Pages Cited
I. INTRODUCTION -----	1
II. ASSIGNMENTS OF ERROR-----	2
III. STATEMENT OF THE CASE -----	3
IV. ARGUMENT -----	7
A. THE COURT SHOULD NOT CONSIDER LOGAN J. IN THIS APPEAL BECAUSE MR. BEACH FAILED TO APPEAL THE ORDER RELATED TO LOGAN J.-----	7
B. THE TRIAL COURT ERRED IN FINDING THAT MR. BEACH WAS ANGEL J.'S DE FACTO PARENT BECAUSE MR. BEACH, AS A THIRD PARTY, DOES NOT HAVE STANDING TO CLAIM DE FACTO PARENTAGE WHERE OTHER STATUTORY REMEDIES EXIST. -----	8
C. THE TRIAL COURT DID NOT ERR IN APPLYING THE ICWA BECAUSE THE ICWA CAN BE HARMONIZED WITH THE DE FACTO PARENT DOCTRINE, MR. BEACH'S STATUS AS A DE FACTO PARENT DOES NOT MAKE THIS A CASE "BETWEEN PARENTS", AND THE EXISTING INDIAN FAMILY EXCEPTION HAS BEEN SUPERSEDED BY STATUTE. -----	14
1. The Trial Court Properly Applied the ICWA Because the ICWA and the De Facto Parent Doctrine Can Be Harmonized with Each Other.-----	16

2.	The Trial Court Did Not Err in Finding that the ICWA Applied Because Mr. Beach's Status as a De Facto Parent Does Not Make the Action "Between Parents" as Defined Under the ICWA.-----	20
3.	The Trial Court Properly Rejected the Application of the Existing Indian Family Exception Because it Has Been Superseded by Statue and is in Direct Conflict with the Language and Intent of the ICWA. -----	22
	<i>a. The trial court did not err rejecting the application of the existing Indian family exception because it was superseded by statute.-----</i>	<i>23</i>
	<i>b. The trial court did not err in rejecting the application of the existing Indian family exception because it is in direct conflict with the express language and intent of the ICWA. -----</i>	<i>25</i>
D.	THE ICWA IS NOT UNCONSTITUTIONAL AS APPLIED TO ANGEL J. BECAUSE CONGRESS HAS EXPRESSED AUTHORITY TO REGULATE INDIAN AFFAIRS, THE ICWA DOES NOT CREATE AN IMPROPER RACIAL CLASSIFICATION AND THE ICWA DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS BECAUSE IT DOES NOT INFRINGE ON ANGEL J.'S RIGHTS. -----	29
1.	The ICWA Does Not Violate the Tenth Amendment Because the United States Constitution Gives Congress Explicit and Implicit Authority to regulate Commerce with Indian Tribes. -----	33

2.	The ICWA Does Not Violate the Equal Protection Clause Because the ICWA Does Not Create an Impermissible Race Classification but Rather is Based on the Indian Child's Political Affiliation with Her Tribe.-----	34
3.	The ICWA Does Not Violate Substantive Due Process Because it Does Not Infringe on Angel J.'s Rights. -----	37
V.	CONCLUSION -----	39

TABLE OF AUTHORITIES

Pages
Cited

U.S. SUPREME COURT CASES

<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U. S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)-----	15, 20, 21, 27, 28
<i>Morton v. Mancari et al</i> , 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)-----	33, 35, 36
<i>Troxel v. Granville</i> , 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)-----	37
<i>United States v. Antelope</i> , 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed2d 701 (1977)-----	35
<i>Worcester v. Georgia</i> , U.S. 515, 6 Pet. 515, 9 L.Ed. 483 (1832)-----	35

WASHINGTON CASES

<i>Bank of Am. NA v. Prestance Corp.</i> , 160 Wn.2d 560, 564, 160 P.3d 17 (2007)-----	8, 16, 20, 23 26, 33, 35, 37
<i>City of Seattle v. Burlington N. R.R. Co.</i> , 145 Wn.2d 661, 667, 41 P.3d 1169 (2002)-----	17
<i>In re the Custody of Anderson</i> , 77 Wn. App. 261, 890 P.2d 525 (1995)-----	38
<i>In re the Adoption of Crews</i> , 118 Wn.2d 561, 825 P.2d 305 (1992)-----	39

<i>In re Parentage of L.B.,</i> 155 Wn.2d 679, 122 P.3d 161 (2005)-----	8, 9, 10, 11 12, 13, 37
<i>In re the Parentage of M.F.,</i> 168 Wn.2d 528, 228 P.3d 1270 (2010) -----	1, 10, 11 12, 13, 14
<i>Satomi Owners Ass'n v. Satomi, LLC,</i> 167 Wn.2d 781, 225 P.3d 213 (2009)-----	16

OTHER STATE CASES

<i>In re A.J.S.,</i> 288 Kan. 429, 437, 204 P.3d 543 (2009)-----	23, 28
<i>In re Baby Boy C.,</i> 27 A.D.3d 34, 805 N.Y.S.2d 313, 550 N.E. 2d 1060 (2005)-----	31
<i>In re Baby Boy L.,</i> 231 Kan. 199, 643 P.2d 168 (1982)-----	22, 23
<i>In re Baby Boy L.,</i> 103 P.3d 1099 (2004)-----	31
<i>In re Brandon M.,</i> 54 Cal. App. 4th 1387, 63 Cal. Rptr. 2d 671 (1997)-----	18
<i>In re Bridget R.,</i> 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (1996)-----	29, 30, 31, 33
<i>In re Santos Y.,</i> 90 Cal. App. 4th 1026, 110 Cal. Rptr. 2d 1 (2001)-----	30
<i>In re Santos Y.,</i> 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001)-----	30
<i>In re the Adoption of Hannah S.,</i> 142 Cal. App. 4th, 988, 995, 48 Cal. Rptr. 3d 605 (2006)-----	30, 31

<i>In re the Adoption of Riffle,</i> 227 Mont. 388, 922 P.2d 510 (1996) -----	31
<i>In re the Guardianship of D.L.L. and C.L.L.,</i> 291 N.W.2d 278 (1980)-----	31
<i>In re the Interest of A.B.,</i> 663 N.W.2d 625 (2003)-----	31, 36
<i>In re the Interest of Eleanor Armell,</i> 194 Ill. App. 3d 31 (1990) -----	31
<i>In re the Petition of N.B.,</i> 199 P.3d 16 (2007) -----	31
<i>In re Vincent M.,</i> 150 Cal. App. 4th 1247, 1267, 59 Cal. Rptr. 3d 321 (2007) -----	36

STATUTES AND REGULATIONS

25 U.S.C. § 1901 -----	34
25 U.S.C. § 1901(5)-----	27
25 U.S.C. § 1902 -----	15, 26, 27
25 U.S.C. § 1903 -----	24
25 U.S.C. § 1903(1)-----	15, 26
25 U.S.C. § 1903(1)(iv) -----	20, 26
25 U.S.C. § 1903(4)-----	36
25 U.S.C. § 1903(9)-----	20, 21
25 U.S.C. § 1912 -----	15, 17, 28, 38, 39
25 U.S.C. § 1912(d)-----	15
25 U.S.C. § 1912(d)(e)-----	16

25 U.S.C. § 1921 -----	15, 26
RCW 13.34-----	24, 38
RCW 13.34.020-----	37, 38
RCW 13.34.040-----	24
RCW 13.34.040(3)-----	24, 25
RCW 26.10-----	24, 37, 38
RCW 26.10.034(1)-----	24
RCW 26.10.034(1)(a)-----	24
RCW 26.26.101(2)(e)-----	12
RCW 26.26.703-----	12
RCW 26.33-----	24
RCW 26.33.040(1)-----	24
RCW 26.33.040(1)(a)-----	24, 25

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8-----	33
U.S. CONST. amend. X-----	33

COURT RULES

RAP 5.2(a)-----	7
-----------------	---

OTHER AUTHORITIES

Sen. Rules Com., Off Sen. Floor Analysis, 3d reading
analysis of Assem. Bill No. 65 (1999-2000 Reg. Sess.)-----31

H.R. 95-1386, U.S. Code Cong. & Admin.
News 1978 at 7534-41 -----32, 33

H.R. 95-1386 at 23-24
Reprinted in 1978 U.S.C.C.A.N. at 7546-----28

I. INTRODUCTION

This case involves the application of the Indian Child Welfare Act (hereafter the ICWA) to a claim of de facto parentage involving an Indian child. It also questions whether a boyfriend can be a de facto parent after the Washington State Supreme Court's decision in *In re the Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010).

Appellant/Cross Respondent, Shawn Beach, appeals the trial court's decision to apply the ICWA arguing that the ICWA does not apply because (1) it does not preempt the de facto parent doctrine; (2) his status as a de facto parent makes the proceeding "between parents;" (3) the existing Indian family exception applied because Respondent/Cross Appellant, Rachell Johnston, and the child, Angel J., have no significant social, cultural, or political ties to their tribe; and (4) the ICWA is unconstitutional as applied to Angel J. because it violates the Fifth, Tenth, and Fourteenth Amendments. Ms. Johnston addresses each of these contentions in this response brief.

In addition, in his opening brief, Mr. Beach asks this Court to apply the appeal equally to Logan J.'s case. Ms. Johnston asks this court to reject Mr. Beach's contention that this appeal should

also apply to Logan J. because Mr. Beach failed to appeal the final order in Logan J.'s case.

Ms. Johnston, in her appeal for cross review, asks this court to find that the trial court erred in finding that Mr. Beach was Angel J.'s de facto parent because a statutory remedy existed for him.

II. ASSIGNMENTS OF ERROR

A. The Court of Appeals should not consider Logan J. in this appeal because Mr. Beach failed to appeal the order relating to Logan J.

B. The trial court erred in finding that Mr. Beach is Angel J.'s de facto parent because as a third party, Mr. Beach had a statutory remedy available to him. As such, the common law de facto parent doctrine is not an available remedy for him.

C. The trial court did not err in applying the ICWA because the ICWA can be harmonized with the de facto parent doctrine, Mr. Beach's status as Angel J.'s de facto parent does not make the proceeding "between parent" as defined by the ICWA, and the existing Indian family exception has been superseded by statute and is in direct conflict with the express language and intent of the ICWA.

D. The ICWA is not unconstitutional because Congress has expressed authority to regulate Indian affairs, the ICWA does not create an impermissible racial classification, and it does not violate substantive due process because it does not infringe on Angel J.'s rights.

III. STATEMENT OF CASE

Rachell Johnston is the biological parent of Angel J. and is also an enrolled member of the Northern Cheyenne Tribe. RP 4, 218. Angel J. is eligible to be enrolled in the Northern Cheyenne Tribe. CP 38. Shawn Beach is not the biological parent of Angel J. RP 36.

Ms. Johnston and Mr. Beach began dating when Ms. Johnston was pregnant with Angel J. RP 36. Angel J. was born on April 24, 2003, and her biological father, David Davis, has not been legally declared her father. RP 37, 54.

Shortly thereafter, Ms. Johnston became pregnant with Mr. Beach's biological daughter, Samantha B. RP 37. While pregnant with Samantha B., Ms. Johnston's oldest child, Aspen, was involved in a catastrophic accident that left him permanently disabled. CP 8. It was also during this time that Ms. Johnston suffered emotional and physical abuse by Mr. Beach. RP 28.

After Samantha B.'s birth, Ms. Johnston became pregnant again. RP 37. A short time later, but prior to the child's birth, Ms. Johnston and Mr. Beach separated. RP 37. It was during this time that Ms. Johnston began using drugs. RP 17-18.

On May 15, 2007, Mr. Beach filed a petition to establish a residential schedule for Angel J. and Samantha B. CP 3-6. In the petition, he asked the court to find that he was Angel J.'s de facto parent. CP 3-6. The same day the court entered an ex parte order that placed Angel J. and Samantha B. with Mr. Beach. CP 16-18.

In October 2007, the State of Washington initiated a dependency action against Ms. Johnston and removed two older children in her care. RP 33-34.

During the dependency, Ms. Johnston engaged in all offered services including a drug and alcohol evaluation, drug and alcohol treatment, counseling, and family preservation services. RP 35, 117. As a result of her compliance with these services and remedying her parental deficiencies, the dependency was dismissed and Ms. Johnston's two older children were returned to her care on January 4, 2008. RP 33-34.

Ms. Johnston responded to Mr. Beach's petition stating that the ICWA applied to Angel J. CP 37-39. Mr. Beach objected and

in a pre-trial decision, Superior Court Judge Harold Clark found that “[i]rrespective of the de facto parent claim and the court’s ultimate decision on that claim, the Indian Child Welfare Act applies to the child custody proceedings involving Angel.” CP 38.

At trial, the Guardian ad Litem (“GAL”) testified that Ms. Johnston was a fit parent and that Angel J. had a strong relationship with Ms. Johnston. RP 48, 119. When pressed by Mr. Beach’s counsel on whom Angel J. had a stronger bond with, the GAL stated, “I can’t say whether or not she’s primarily bonded to Mr. Beach or the mother.” RP 48. The GAL further stated that it was very likely that Ms. Johnston was Angel J.’s primary care provider until 2007 when she was placed with Mr. Beach. RP 48.

Ms. Johnston testified that she is an enrolled member with the Northern Cheyenne Tribe. RP 218. She also testified that she had only been to the reservation one time and had little knowledge of its social or political structure. RP 224-226. Ms. Johnston did state, however, that she is currently trying to learn about her culture and has taken the children to participate in some cultural events. RP 229-232.

The trial court ruled that Mr. Beach was Angel J.’s de facto parent. CP 90. However, the trial court found that a de facto

parent did not meet the definition of a parent under the ICWA and, therefore, did not stand in parity with Ms. Johnston. CP 91. Therefore, the proceeding was not between parents and the trial court ruled that the ICWA applied to Angel J.'s case. CP 91.

In making this finding, the trial court rejected Mr. Beach's argument that the existing Indian family exception prevented the application of the ICWA to Angel J.'s case because Ms. Johnston and Angel J. had little connection to their tribe. RP 474. In rejecting the application of the existing Indian family exception trial court stated, ". . . her lack of knowledge [about the tribe] is quite evident. That doesn't matter in terms of the Indian Child Welfare Act." RP 474.

The court further found that Mr. Beach had not met his burden under the ICWA to remove Angel J. from Ms. Johnston's care. CP 91, RP 485. The court ordered that Angel J. should be immediately returned to Ms. Johnston's care. CP 91.

Final orders in the cases were entered on December 4, 2009. CP 88-92. On December 31, 2009, Mr. Beach filed a notice of appeal challenging the "Findings of Fact and Conclusions of Law and Order Denying Petition for Parenting Plan Relating to Angel."

On May 10, 2010, Ms. Johnston filed a Notice of Appeal – Cross Review challenging the finding that Mr. Beach was Angel J.’s de facto parent. Ms. Johnston’s notice of appeal was set for dismissal and was to be heard by the commissioner on June 9, 2010. As of the writing of this brief, the decision on Ms. Johnston’s Notice of Appeal – Cross Review has not been issued.

IV. ARGUMENT

A. THE COURT SHOULD NOT CONSIDER LOGAN J. IN THIS APPEAL BECAUSE MR. BEACH FAILED TO APPEAL THE ORDER RELATED TO LOGAN J.

Superior court orders must be appealed within 30 days after the entry of the decision. RAP 5.2(a). To date, Mr. Beach has not filed a notice of appeal of the trial court’s decision in the non-parental custody action involving Logan J., Spokane County cause number 08-3-00345-9. Therefore, this court is without authority to consider any element of the trial court’s decision in that matter.¹

¹ It should be noted that at trial, counsel for Mr. Beach conceded that the ICWA applied to Logan J. Specifically, counsel stated, “[t]he Indian Child Welfare Act clearly applies. I’m not here to dispute that for Logan [J.]” RP 426.

B. THE TRIAL COURT ERRED IN FINDING THAT MR. BEACH WAS ANGEL J.'S DE FACTO PARENT BECAUSE MR. BEACH, AS A THIRD PARTY, DOES NOT HAVE STANDING TO CLAIM DE FACTO PARENTAGE WHERE OTHER STATUTORY REMEDIES EXIST.

The trial court erred in finding that Mr. Beach is Angel J.'s de facto parent because the common law de facto parent doctrine is only available to individuals who lack a statutory remedy. Because Mr. Beach, as a third party, could file a petition for non-parental custody, he does not lack a statutory remedy and, therefore, is prohibited from claiming de facto parent status of Angel J.

Questions of law are reviewed de novo. *Bank of Am. NA v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

In 2005, the Washington State Supreme Court created a common law remedy called the de facto parent doctrine. *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). This doctrine allowed non-related adults to claim parentage over a child under special and limited circumstances. *Id.*

L.B. involved a same sex couple in a committed relationship who decided to conceive and raise a child together. *L.B.* 155 Wn.2d at 683. Given the biological impossibility of conceiving a child alone, the couple elected to have one partner artificially

inseminated. *Id.* at 683-684. The couple shared in the birthing and raising of the child and held themselves out as a family. *Id.*

The relationship dissolved when the child was six years old. *L.B.*, 155 Wn.2d at 684-685. After initially sharing custody and parenting responsibilities, the biological parent moved to limit the non-biological parent's access to the child, ultimately terminated all contact between the child and the non-biological parent. *Id.* at 685.

The non-biological parent moved for an establishment of parentage of L.B. *L.B.*, 155 Wn.2d at 685. As part of her petition, she asked the court to find that she was L.B.'s de facto parent. *Id.*

The Washington State Supreme Court agreed that the non-biological partner was L.B.'s de facto parent and with this decision formulated the common law doctrine of de facto parentage. *L.B.*, 155 Wn.2d at 707. In doing so, the court found that there was a statutory gap that prevented the non-biological parent from establishing her parentage over L.B. *Id.* It was this statutory gap that allowed the court to adopt the common law doctrine of de facto parentage. *Id.*

In *L.B.*, the court established a five-prong test to establish standing as a de facto parent: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the

petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature; and (5) the petitioner has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. *L.B.*, 155 Wn.2d at 708.

The Washington State Supreme Court did not consider another de facto parent case until 2010. *In re the Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010). *M.F.*, decided in April 2010, clarified the limited scope of the common law action for de facto parentage. *Id.*

M.F. involved a stepfather's petition to be determined M.F.'s de facto parent. *M.F.*, 168 Wn.2d at 530. M.F.'s mother and stepfather began dating when M.F. was fourteen months old. *Id.* They married a few years later and had two children together. *Id.* The marriage ended when M.F. was about nine years old. *Id.* For approximately three years, M.F. usually accompanied her brothers when they visited with their father. *Id.* However, at some point,

M.F.'s mother moved to limit M.F.'s contact with her stepfather and eventually terminated all contact between the two. *Id.*

The stepfather initiated an action to be declared M.F.'s de facto parent claiming that he could meet all five factors outlined in *L.B. M.F.*, 168 Wn.2d at 530. The Supreme Court disagreed and found that the de facto parent doctrine did not apply to stepparents because, unlike *L.B.*, a statutory remedy existed. *Id.* at 531-532.

In making the distinction between *L.B.* and *M.F.*, the court focused on the original intent of the parties. *M.F.*, 168 Wn.2d at 531-532. In *L.B.*, the parties' original intent was to conceive and establish a family. *Id.* at 532. In *M.F.*, the parties' original intent was to have the stepparent enter the child's life as a third party. *Id.* at 532. At the time the stepfather entered her life, M.F. already had two parents whose legal status existed prior to the stepfather's involvement. *Id.* The court noted that here, unlike *L.B.*, the court was ". . . faced with the competing interests of parents - with established parental rights and duties - and a stepparent, a third party who has no parental rights." *Id.* The court noted the distinction between *L.B.* and *M.F.* by stating:

. . . we adopted the de facto parentage doctrine to correct a specific statutory shortcoming: the lack of remedy available to the respondent in *L.B.* who was a "parent" in every way but legally. To fill this statutory

gap, we created a common law method to establish parentage where, had the respondent been able to participate in traditional family *formation*, parentage would have or could have been established by statutory means. But here, the petitioner is a third-party to the two already existing parents, which places him in a very different position than the respondent in *L.B.* These differences as well as the presence of a statutory remedy available to [the stepfather], support our conclusion that the de facto parentage doctrine should not extend to the circumstances in this case.

M.F., 168 Wn.2d at 534 (emphasis added).

The statutory remedy for stepparents to obtain custody of stepchildren is through the non-parental custody statute. *Id.* at 532-533. The court noted that the fact that the statutory remedy does not allow a stepparent to obtain parental status it “does not equate to a lack of remedy.” *Id.* at 533.

Perhaps the most salient distinction between *L.B.* and *M.F.*, is that in *L.B.* the parties lacked the legal and biological means to form a family. *M.F.*, 168 Wn.2d at 534. In *L.B.*, the statutory law specifically denied a paternal interest to the sperm donor, and the non-biological parent could not marry the biological parent to take advantage of statutory parentage. See RCW 26.26.703; RCW 26.26.101(2)(e). This is the statutory gap the *L.B.* court sought to fill and which the *M.F.* court sought to clarify. *M.F.*, 168 Wn.2d at 534. This was not the case with Mr. Beach and Ms. Johnston who

had both the biological and legal means to form a family, and did so in regard to Samantha B.

The court also noted that the five statutory factors outlined in *L.B.* to establish a de facto parent claim were ill-suited to be applied to stepparents because the factors would be easily met. *M.F.*, 168 Wn.2d at 534. The court reasoned that biological parents would encourage a relationship between a stepparent and the child making establishment of the de facto parent factors easy. *Id.*

This case was decided before *M.F.* was announced. The facts of this case and *M.F.* are similar. Although Mr. Beach was not Angel J.'s stepparent, he claimed de facto parent status due to his parent-like relationship with Angel J. However, after *M.F.*, Mr. Beach's petition to be declared Angel J.'s de facto parent must be denied because the de facto parent doctrine does not apply where the statutory gap present in *L.B.* does not exist and where the petitioner has another statutory remedy available.

Ms. Johnston was pregnant with Angel J. when she met Mr. Beach. RP 36. Mr. Beach had no role in Angel J.'s conception. Instead, Mr. Beach's relationship to Angel J. was coincidental to his relationship with Ms. Johnston. Unlike the parties in *L.B.*, there was never intent between Mr. Beach and Ms. Johnston to conceive and

raise Angel J. together. Instead he understood when he began his relationship with Ms. Johnston that his role in Angel J.'s life was as a third party.

Further, Angel J. has two parents. The fact that her father's paternity has not been established does not diminish the fact that she has two parents with existing parental rights.

Mr. Beach's remedy was to file a non-parental custody action for Angel J. This remedy was available to him at the time he filed for de facto parentage. As made clear by *M.F.*, the fact that the non-parental custody statute does not provide him with parental status does not negate the fact that it is and was a remedy available to him.

Mr. Beach cannot be found to be Angel J.'s de facto parent under *M.F.* The trial court erred when it decided so.

C. THE TRIAL COURT DID NOT ERR IN APPLYING THE ICWA BECAUSE THE ICWA CAN BE HARMONIZED WITH THE DE FACTO PARENT DOCTRINE, MR. BEACH'S STATUS AS A DE FACTO PARENT DOES NOT MAKE THIS A CASE "BETWEEN PARENTS" AND THE EXISTING INDIAN FAMILY EXCEPTION HAS BEEN SUPERSEDED BY STATUTE.

The ICWA was enacted in 1978 out of Congress's growing concern about the abusive child welfare practices employed by the states to separate large numbers of Indian children from their

families and tribes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). This concern is reflected in the ICWA's purpose to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by establishment of minimum federal standards for the removal of Indian children from their family. . . ." 25 U.S.C. § 1902.

The ICWA applies to all child custody proceedings that seek to involuntarily move an Indian child away from her parent. 25 U.S.C. § 1903(1). It does not apply to proceedings between parents or "placement based upon an act which, if committed by an adult, would be a crime." 25 U.S.C. § (1)(iv). It also does not apply where state or federal law provides more protection to Indian parents, children, and tribes than the ICWA. 25 U.S.C. § 1921.

The ICWA imposes substantive and procedural standards in "child custody proceedings" in state court involving an Indian child. 25 U.S.C. § 1912. Substantively, the ICWA requires a petitioner to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). The petitioner must also

show, “by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(d)(e).

Mr. Beach argues that the trial court improperly applied the ICWA because application of the ICWA invalidly preempts the de facto parent doctrine. Mr. Beach further argues that the ICWA does not apply because his status as Angel J.’s de facto parent makes the proceeding “between parents.” Finally, Mr. Beach argues that the ICWA does not apply under the existing Indian family exception. Ms. Johnston disagrees with all of Mr. Beach’s arguments.

1. The Trial Court Properly Applied the ICWA Because the ICWA and the De Facto Parent Doctrine Can Be Harmonized With Each Other.

The ICWA does not preempt the de facto parent doctrine because ICWA and the de facto parent doctrine can be harmonized with each other. Issues of federal preemption and questions of law are reviewed de novo. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009); *Bank of Am.*, 160 Wn.2d at 564.

Federal preemption can occur in three ways: (1) express preemption, (2) field preemption, or (3) conflict preemption.

City of Seattle v. Burlington N. R.R. Co., 145 Wn.2d 661, 667, 41 P.3d 1169 (2002). Express preemption occurs where Congress expressly states how and where the federal statute preempts state law. *Id.* Field preemption occurs where states are “regulating an area that the federal government intended to exclusively occupy.” *Id.* Conflict preemption occurs “where it is impossible to comply with both local and federal law.” *Id.*

Mr. Beach argues that the ICWA does not preempt the de facto parent doctrine. Ms. Johnston agrees with this assertion. The ICWA does not preempt the de facto parent doctrine. Rather, it works in conjunction with the de facto parent doctrine by providing a set of substantive and procedural standards in state child custody proceedings involving Indian children. 25 U.S.C. § 1912.

However, Mr. Beach’s preemption argument also seems to imply that the de facto parent doctrine and the ICWA are mutually exclusive and the application of the de facto parent doctrine precludes the application of the ICWA. Ms. Johnston disagrees with this assertion because the de facto parent doctrine and the ICWA can be, and should be, harmonized.

In making his preemption argument, Mr. Beach relies extensively on the analysis provided in a 1997 California case

involving a dependency proceeding and the application of the de facto parent doctrine to the ICWA. *In re Brandon M.*, 54 Cal. App. 4th 1387, 63 Cal. Rptr.2d 671 (1997). However, contrary to Mr. Beach's argument, the *Brandon* decision did not stand for the proposition that because the ICWA did not preempt the de facto parent doctrine that it was inapplicable to the case. *Id.* at 1398. Rather, the *Brandon* court found that, "[c]ongress clearly intended that its 1978 statute [the ICWA] 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 to presume conflicts between, the two." *Id.* at 1397-1398. In making this finding, the *Brandon* court applied both the de facto parent doctrine and the ICWA to the case. *Id.* at 1398-1399.

The ICWA can be harmonized with Washington's de facto parent doctrine. Similar to *Brandon*, this case involved a finding of de facto parent status² and the application of the de facto parent doctrine to the ICWA protections. The two legal principals are not mutually exclusive to each other and were not treated as such by the trial court.

² Ms. Johnston has appealed the trial court's determination that Mr. Beach is Angel J.'s de facto parent. However, for the purposes of the remaining issues and argument only, Ms. Johnston will assume Mr. Beach is Angel J.'s de facto parent.

The trial court correctly understood Mr. Beach's action to establish a parenting plan based on de facto parent status to be a "child custody action" as that term is defined by the ICWA. CP 38; RP 91. On May 16, 2008, Judge Harold Clark entered an Order on Motions to Revise that stated, "[i]rrespective of the de facto parent claim and the court's ultimate decision on that claim, the Indian Child Welfare Act applies to the child custody proceedings involving Angel" CP 38. Similarly, the court's final order found that the ICWA applied despite a finding that Mr. Beach was Angel J.'s de facto parent because a de facto parent does not meet the ICWA's definition of "parent." CP 91. As such, the proceeding was not "between parents" and the ICWA applied. CP 91.

This is a perfect example of how the two legal principles work in harmony. The ICWA did not preclude a finding that Mr. Beach was Angel J.'s de facto parent. Similarly, the finding that Mr. Beach was a de facto parent did not preclude the application of the ICWA. Instead, once the de facto parent finding was made, the ICWA was appropriately applied in this case.

The trial court's appropriate application of the ICWA should be affirmed.

2. The Trial Court Did Not Err in Finding That the ICWA Applied Because Mr. Beach's Status as a De Facto Parent Does Not Make the Action "Between Parents" as Defined Under the ICWA.

Contrary to Mr. Beach's argument, the trial court properly applied the ICWA to this case because Mr. Beach's status as a de facto parent did not make this case "between parents" as defined by the ICWA. Questions of statutory construction are questions of law and are reviewed de novo. *Bank of Am.*, 160 Wn.2d at 564.

The ICWA does not apply to custody proceedings between parents. 25 U.S.C. § 1903(1)(iv). The ICWA defines a parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9).

The United States Supreme Court has ruled that critical terms under the ICWA are not to be left to state law or definition. *Holyfield*, 490 U.S. at 30. The Supreme Court found that unless specifically stated to the contrary, federal statutes and their critical terms are not dependent on state law. *Id.* at 43. The court reasoned that federal statutes are intended to apply universally and allowing critical terms in federal statutes to be defined by individual state law or definition would inevitably lead to inconsistent application. *Id.* The court also reasoned that the federal statutory

purpose would be impaired by allowing individual state law and definitions to dictate the application of the statute. *Id.* at 44.

As related to the ICWA, the Supreme Court specifically found that “the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term.” *Holyfield*, 490 U.S. at 44. The court noted, “[i]ndeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the states and their courts as partly responsible for the problem it intended to correct.” *Id.* As such, the court found that it was highly unlikely that Congress would leave the definition of a critical term to state law or interpretation. *Id.*

The term “parent” is specifically defined under the ICWA. 25 U.S.C. § 1903(9). It only includes biological parents and “any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.” 25 USC § 1903(9). Mr. Beach does not meet either definition of parent. Therefore, while the Washington Supreme Court has the authority to create the common law de facto parentage doctrine and the trial court has the authority to find that Mr. Beach is Angel J.’s de facto parent, the court does not have the authority redefine the critical term of “parent” in the ICWA to include a de facto parent.

Because Mr. Beach is neither Angel J.'s biological or adoptive parent, this is not a proceeding "between parents" and the trial court did not err in applying the ICWA.

3. The Trial Court Properly Rejected the Application of the Existing Indian Family Exception Because it Has Been Superseded by Statute and is in Direct Conflict with the Language and Intent of the ICWA.

In 1982, four years after the enactment of the ICWA, the Kansas Supreme Court announced a judicially created exception to application of the ICWA called the "existing Indian family exception." *In re Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982). The existing Indian family exception allowed a court to find that the ICWA was inapplicable where the Indian child never had been and possibly would never be a part of an Indian family. *Id.* The court reasoned that in such situations there was not the threat of breaking up an existing Indian family. *Id.* at 209. Therefore, application of the ICWA to those cases would not further Congress's intent of preserve existing Indian families. *Id.*

Since *Baby Boy L.* was decided, state courts have been split on the application of the existing Indian family exception. Twelve states, including Washington's western neighbors of Alaska, Arizona, Colorado, Idaho, Montana, Utah, and Oregon, have

rejected the exception. *In re A.J.S.*, 288 Kan. 429, 437, 204 P.3d 543 (2009). Two states, including Washington, adopted the exception and then abandoned it either by statute or judicial decision. *Id.* at 437-438. Most importantly, in 2009, the Kansas State Supreme Court overturned *Baby Boy L.* and ruled the existing Indian family exception was in direct violation with the expressed language and intent of the ICWA. *Id.* at 439.

Ms. Johnston urges this court to find that the existing Indian family exception, as applied in Washington, has been expressly superseded by statute. She further urges this court to find that the existing Indian family exception is not viable in Washington because it is in direct conflict with the ICWA's expressed language and intent.

- a. The trial court did not err rejecting the application of the existing Indian family exception because it was superseded by statute.

Contrary to Mr. Beach's argument, the existing Indian family exception is not viable in the state of Washington because the doctrine was superseded by statute. Questions of statutory construction are issues of law that are reviewed de novo. *Bank of Am.*, 160 Wn.2d at 564.

In 1992, the Washington State Supreme Court adopted the existing Indian family exception. *In re the Adoption of Crews*, 118 Wn.2d 561, 825 P.2d 305 (1992). However, in 2004, in direct response to the existing Indian family exception, the Washington State Legislature amended all statutory causes of action where a third party petitioned to obtain custody of an Indian child. RCW 26.33.040(1) (2004); RCW 26.10.034(1) (2004); RCW 13.34.040 (2004). These amendments mandated the application of the ICWA in all child custody proceedings involving a third party and an Indian child. RCW 26.33.040(1) (2004); RCW 26.10.034(1) (2004); RCW 13.34.040 (2004). Specifically, the statutes were amended to read:

Every petition filed in proceedings under this chapter [RCW 26.33, RCW 26.10, and RCW 13.34] shall contain a statement alleging whether the child is or may be an Indian child as defined in 25 U.S.C. § 1903. If the child is an Indian child as defined under the Indian Child Welfare Act, the provisions of the act *shall* apply. RCW 26.33.040(1)(a); RCW 26.10.034(1)(a); RCW 13.34.040(3) (emphasis added.)

The amendments effectively ended the application of the existing Indian family exception in Washington by mandating the application of the ICWA to all custody proceedings involving a third party and Indian child as defined by the ICWA. RCW 26.33.040(1)(a); RCW 26.10.034 (1)(a); RCW 13.34.040(3). In

other words, the statutes specifically prohibit the court from determining whether there is an existing Indian family before applying the ICWA. RCW 26.33.040(1)(a); RCW 26.10.034 (1)(a); RCW 13.34.040(3).

Here, the trial court appropriately rejected Mr. Beach's assertion that the existing Indian family exception applied. RP 474. The trial court acknowledged Ms. Johnston's lack of knowledge about her tribe, but stated, "[t]hat doesn't matter in terms of the Indian Child Welfare Act." RP 474.

Ms. Johnston recognizes that Mr. Beach's petition to establish his de facto parentage of Angel J. is not brought under a statutory cause of action. However, Ms. Johnston asserts that the legislature's mandatory application of the ICWA all statutory causes of action where a third party moves for custody of an Indian child specifically rejected the existing Indian family exception in all cases, statutory or common law, including de facto parent cases. She urges this court to find the same.

- b. The trial court did not err in rejecting the application of the existing Indian family exception because it is in direct conflict with the express language and intent of the ICWA.

Contrary to Mr. Beach's argument, the trial court did not err in rejected the existing Indian family exception because the existing

Indian family exception is not an expressed exception to the ICWA, and it is in direct conflict with the expressed intent of the ICWA.

Issues of statutory construction are issues of law that are reviewed de novo. *Bank of Am.*, 160 Wn.2d 564.

The ICWA is applicable to all child custody proceedings that involve the involuntary removal of an Indian child from her parent. 25 U.S.C. § 1903(1). There are only three exceptions to its application: (1) custody proceedings between parents; (2) “placement based upon an act which, if committed by an adult, would be deemed a crime;” or (3) where state or federal law provides a higher standard of protection than the ICWA. 25 U.S.C. § 1903(1)(iv); 25 U.S.C. § 1921.

This expressed language of the ICWA does not provide room for the state to determine whether it will be applied to child custody proceedings involving an Indian child. 25 U.S.C. § 1903(1)(iv); 25 U.S.C. § 1921. It also certainly does not give states the authority to make subjective determinations of whether the ICWA will apply based on the parent’s and child’s connection their tribe. 25 U.S.C. § 1902. Instead, the express language of the ICWA states that absent the limited exceptions, if the child custody

proceeding involves an Indian child being involuntarily removed from her parent, the ICWA applies. 25 U.S.C. § 1902.

Further, the concept of the existing Indian family exception is in direct conflict with the expressed Congressional intent of the ICWA. *Holyfield*, 490 U.S. at 32. The ICWA was enacted out of growing concern of the abusive child welfare practices employed by the states to separate large numbers of Indian children from their families and tribes. *Id.* In passing the ICWA, Congress found “that the states, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901(5). The United States Supreme Court specifically found that 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.’ It does so by establishing ‘a Federal policy that, where possible, an Indian child should remain in the Indian community,’ 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.’”

Holyfield, 490 U.S. at 37, citing H.R. No. 95-1386 pp. 23-24 (1978); 1978 U.S.C.C.A.N. p. 7546.

As a result, the ICWA requires states to meet additional substantive and procedural standards before an Indian child can be involuntarily removed from her parent. 25 U.S.C. § 1912. These additional safeguards were in direct response to Congress's concern "with the rights of Indian families and Indian communities vis-à-vis state authorities," including courts. *Holyfield*, 490 U.S. at 45.

More recently, the Kansas State Supreme Court, in overturning its judicially created exception of the existing Indian family exception, noted that the ICWA was passed for the express purpose of preventing state courts from making misinformed, subjective determinations as to the "Indianness" of a child or their parent. *A.J.S.*, 288 Kan. at 441. The Kansas court found that state courts are and have always been ill equipped to make such determinations, and to adhere to an exception that allows such subjective misinformed determinations is in direct violation of the word and spirit of the ICWA. *Id*

Here, the trial court properly rejected Mr. Beach's assertion that the existing Indian family exception precludes the application of the ICWA to Angel J. RP 474. The trial court refused to determine, based on Ms. Johnston's and Angel J.'s connection to the tribe,

whether they were “Indian enough” to have the ICWA applied. RP 474. Specifically, the trial court stated, “. . . her [Ms. Johnston’s] lack of knowledge is quiet evident. That doesn’t matter in terms of the Indian Child Welfare Act.” RP 474.

It is an undisputed fact that Angel J. is an Indian child and that this is a child custody proceeding. CP 91. As such, this is a proceeding to involuntarily remove an Indian child from her parent, and the ICWA must be applied.

Ms. Johnston urges this court to determine that the existing Indian family exception does not apply because it is in direct conflict with the ICWA’s expressed language and intent.

D. THE ICWA IS NOT UNCONSTITUTIONAL AS APPLIED TO ANGEL J. BECAUSE CONGRESS HAS EXPRESSED AUTHORITY TO REGULATE INDIAN AFFAIRS, THE ICWA DOES NOT CREATE AN IMPROPER RACIAL CLASSIFICATION AND THE ICWA DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS BECAUSE IT DOES NOT INFRINGE ON ANGEL J.’S RIGHTS.

In 1996, the California Court of Appeals from the Second District found that the ICWA, in its application to an Indian child with no significant social, cultural, or political ties to her tribe, was unconstitutional under the Fifth, Tenth, and Fourteenth amendments of the United States Constitution. *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (1996), *superseded by*

statute as recognized in In re Santos Y., 90 Cal. App.4th 1026, 110 Cal. Rptr. 2d 1 (2001) *overruled on other grounds by In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001). Specifically, the *Bridget R.* court ruled that unless the ICWA was limited by the existing Indian family exception that it was unconstitutional because it exceed Congressional authority under the Tenth Amendment, created an impermissible racial classification in violation of the Fourteenth Amendment, and infringed on a child's fundamental right to a permanent and stable placement in violation of the Fifth Amendment. *Id.* at 1483.

Since its announcement, the *Bridgett R.* decision has been a point of controversy within California and amongst the states. *In re the Adoption of Hannah S.*, 142 Cal. App. 4th 988, 995, 48 Cal. Rptr. 3d 605 (2006). The California State Legislature specifically amended its statutes to supersede the *Bridgett R.* decision. *Santos Y.*, 90 Cal. App. 4th at 1026. In passing the legislation, the California State Legislature noted the statute specifically overturns judicial holdings that employ the existing Indian family exception and bars "the use of the existing Indian family doctrine in California." *Santos Y.*, 90 Cal. App. 4th 1026 *citing*, Sen. Rules

Com., Off Sen. Floor Analysis, 3d reading analysis of Assem. Bill No. 65 (1999-2000 Reg. Sess.).

California appellate courts have split evenly on the constitutionality of applying the ICWA to children with little or no social, cultural, or political ties to their tribe. *In re Hannah S.*, 142 Cal. App. 4th at 995. The First, Third, and Fifth appellate divisions of California soundly rejected the rationale of *Bridget R.* *Id.* Similarly, many states, including Colorado, New York, Illinois, North Dakota, South Dakota, Montana, and Oklahoma, have specifically rejected the holding in *Bridget R.* *In re the Petition of N.B.*, 199 P.3d 16 (2007); *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313, 550 N.E.2d 1060 (2005); *In re the Interest of Eleanor Armell*, 194 Ill. App.3d 31 (1990); *In re the Interest of A.B.*, 663 N.W.2d 625 (2003); *In re the Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278 (1980); *In re the Adoption of Riffle*, 227 Mont. 388, 922 P.2d 510 (1996); *In re Baby Boy L.*, 103 P.3d 1099 (2004).

The legislative history of the ICWA also shows that Congress went to great lengths to address its constitutionality in the construction and passage of the statute. See H.R. 95-1386, 95th Cong., 2nd Sess. 12-19 (1978), *reprinted in* 1975 U.S.C.C.A. 7534-41. The legislative history shows that Congress recognized that

children are subject to their parents' decisions, including decisions about tribal membership. *Id.* Because of this, Congress felt it vitally important to protect the rights of those children, who by virtue of their age, could not independently exercise the rights and benefits that accompanied their political relationships to their tribes. *Id.*

The legislative history cites several court decisions dealing with the breadth of Congress's authority to regulate the relationship between the Indian tribes, individual Indians, and the states. See H.R. 95-1386, 95th Cong., 2nd Sess. 12-19 (1978), *reprinted in* 1975 U.S.C.C.A.N. 7534-41. These cases make it clear that the self-imposed limitation on the application of the ICWA to cases involving children who are members or eligible for membership in a tribe removes any suggestions that the intent of Congress's application of the ICWA to "Indian children" is based on an impermissible racial classification. *Id.* Rather, the legislative history proves that the application of the ICWA is premised solely on the political relationship each "Indian child" has to his or her federally recognized Indian tribe. *Id.*

There is no Washington case addressing the constitutionality of the ICWA when applied to children with no social, political, or

cultural ties to the tribe. Ms. Johnston asks this court to reject *Bridget R.* and find that ICWA is constitutional as applied to Indian children as defined by the ICWA.

1. The ICWA Does Not Violate the Tenth Amendment Because the United States Constitution Gives Congress Explicit and Implicit Authority to Regulate Commerce With Indian Tribes.

Contrary to Mr. Beach's argument, the ICWA does not violate the Tenth Amendment because the United States Constitution gives Congress expressed authority to regulate Indian affairs. Questions of whether the ICWA violates the Tenth Amendment are issues of law that are reviewed de novo. *Bank of Am.*, 160 Wn.2d 564.

Article I, § 8, of the United States Constitution provides Congress with the power to regulate commerce with Indian tribes. U.S. CONST., art. I, §8. In contrast, the Tenth Amendment states that "powers *not* delegated to the United States by the Constitution" are reserved to the states. U.S. CONST. amend. X (emphasis added).

The United State Supreme Court has long recognized Congress's power to legislate Indian affairs. *Morton v. Mancari et al*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). As noted in *Morton*, this power is "based on a history of treaties and the

assumption of a 'guardian-ward' status as well as explicit and implicit constitutional powers delegated under Article I, Section 8, of the United States Constitution." *Id.* at 551-552.

It is under its expressed Constitutional authority that Congress enacted the ICWA. 25 U.S.C. § 1901. This expressed delegation of authority precludes the states, under the Tenth Amendment, from claiming sole ownership over family relations involving Indian children covered by the ICWA. It is important to remember that the Tenth Amendment, and therefore the states' power, is limited by the Constitution's expressed delegation of powers to the United States government. Because the Constitution expressly delegates the power to regulate Indian affairs to Congress, it is not reserved for the states and therefore does not violate the Tenth Amendment.

2. The ICWA Does Not Violate the Equal Protection Clause Because the ICWA Does Not Create an Impermissible Race Classification but Rather is Based on the Indian Child's Political Affiliation with Her Tribe.

Contrary to Mr. Beach's argument, the ICWA does not violate the Equal Protection Clause because the application of the ICWA is not based on an impermissible racial classification but instead on the child's political affiliation with her tribe.

The question of whether the ICWA violates the Equal Protection Clause is an issue of law that is reviewed de novo. *Bank of Am.*, 160 Wn.2d at 564.

Federal legislation regulating Indian affairs “is not based on impermissible racial classifications.” *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed2d 701 (1977). Rather, legislation “expressly singling out Indian tribes” is based on Constitutional authority, the federal government’s unique history with the tribes, and on tribes’ status as “unique aggregations possessing attributes of sovereignty over both their members and their territory.” *Id.*, citing *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 9 L.Ed. 483 (1832). As such, any preference provided to Indians through legislation “is granted . . . not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.” *Morton*, 417 U.S. at 554.

The United States Supreme Court has repeatedly rejected claims that legislation giving preference to Indians is based on impermissible racial classification. *Antelope*, 430 U.S. at 645. The court has stated that, “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the

Indians, such legislative judgments will not be disturbed.” *Morton*, 417 U.S. at 555.

The ICWA does not classify Indian children based on race. 25 U.S.C. § 1903(4). Rather, for the ICWA to apply, the child must be a member or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). Such membership or eligibility of membership ensures that the children who are subject to the protections of the ICWA have a political affiliation with the tribe. In re *Vincent M.*, 150 Cal. App. 4th 1247, 1267, 59 Cal. Rptr. 3d 321 (2007). This is not an impermissible racial classification because the ICWA protections are not afforded to all children of Indian ancestry. *A.B.*, 663 N.W.2d at 636. Instead, application of the ICWA requires a political affiliation between the child, parent, and quasi-sovereign tribe. *Id.*

Similarly, the application of the ICWA to Angel J. is not based on her genetic heritage, but is based on her political affiliation with the tribe. Angel J. is just not a child of Indian descent; she is an eligible member of her tribe. CP 38. This designation does not constitute a racial classification, but rather it is a political affiliation that is not afforded to all children of Indian ancestry.

Ms. Johnston urges this court to find that the ICWA does not create an impermissible racial classification.

3. The ICWA Does Not Violate Substantive Due Process Because it Does Not Infringe on Angel J.'S Rights.

Contrary to Mr. Beach's argument otherwise, the application of the ICWA does not violate substantive due process because it does not infringe on Angel J.'s rights to basic nurture, safety, and health.

The issue of whether the ICWA violates substantive due process is an issue of law that is reviewed de novo. *Bank of Am.*, 160 Wn.2d at 564.

While the federal government and the state of Washington has not proclaimed that a child has constitutional right to a safe and stable home, the state of Washington's child custody statutes dealing with placing children with non-parents do recognize the rights of children to a nurture, safety, and health. RCW 13.34.020; RCW 26.10. Balanced with the child's rights are parents' recognized fundamental constitutional right to the care, custody, and control of their children. *In re L.B.*, 155 Wn.2d at 709, *citing Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In Washington, it is only when the rights of the child

conflict with the rights of the parent that the rights of the child prevail. RCW 13.34; RCW 26.10.

For instance, in the dependency statute, a child's rights are paramount, and parental rights are terminated when there is a conflict between the two. RCW 13.34.020. Similarly, in the non-parental custody statute, a child's rights prevail where a parent is found to be unfit or where placement with a fit parent is a detriment to the child's growth and development. RCW 26.10; *In re the Custody of Anderson* 77 Wn. App. 261, 264, 890 P.2d 525 (1995). These statutes guarantee that a child's right is never overshadowed by a parent's constitutional right.

Contrary to Mr. Beach's argument otherwise, the ICWA provides similar protections to children's rights. 25 U.S.C. § 1912. In no manner does the application of the ICWA prohibit the involuntary placement of an Indian child with a non-parent. 25 U.S.C. § 1912. Instead, involuntary placement with a non-parent occurs where there is evidence that continued placement of the child with the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912.

The ICWA, like the Washington State termination statute and non-parental custody statute, ensures that the child's right to

nurture, health, and safety are protected, and when in conflict with a parent's rights, are paramount. 25 U.S.C. § 1912. The ICWA is consistent with, not contrary to, the state of Washington's protections of Angel J.'s rights.

It is vitally important to remember that Ms. Johnston is a fit parent and Angel J.'s bond to her is significant. RP 48, 199. Ms. Johnston has not voluntarily relinquished her parental rights, and there is no conflict between Ms. Johnston's recognized, fundamental constitutional right and Angel J.'s right to nurture, health, and safety. If there was a conflict, the ICWA would have removed Angel J. from Ms. Johnston's care.

The ICWA does not violate substantive due process because Ms. Johnston is a fit parent, and the ICWA protects rather than infringes on Angel J.'s right to nurture, safety, and health.

V. CONCLUSION

Ms. Johnston respectfully asks this court to find that the trial court erred in determining that Mr. Beach is Angel J.'s de facto parent. She further asks this court to reject the existing Indian family exception pronounced in *Crews* because it has been superseded by statute and is in direct conflict with the express language and intent of the ICWA. Finally, Ms. Johnston asks this

court to uphold the constitutionality and application of ICWA to
Angel J.'s case.

Respectfully submitted this 25th day of June, 2010.

NORTHWEST JUSTICE PROJECT


JACQUELYN M. HIGH-EDWARD
WSBA #37065
Attorney for Rachell Johnston

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

In re the Marriage of:

SHAWN BEACH,

Appellant,

and

RACHELL JOHNSTON,

Respondent.

NO. 287289-III

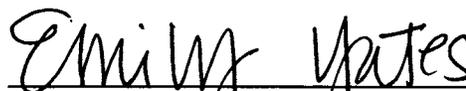
**DECLARATION
OF SERVICE**

I declare under penalty of perjury under the laws of the state of Washington that on the 25th day of June, 2010, I served the Appellant, Shawn Beach, with a full, true and correct copy of the Brief of Respondent/Cross Appellant by personally delivering said document to the offices of his attorneys, at the following addresses:

Matthew Dudley
Attorney for Appellant
2824 E. 29th, #1B
Spokane, WA 99223

Robin D. Andrews
Attorney for Appellant
900 N. Maple #200
Spokane, WA 99201

Signed this 25th day of June, 2010, within the county of
Spokane, state of Washington.



EMILY YATES, Legal Intern

DECLARATION OF SERVICE

Northwest Justice Project
1702 W. Broadway
Spokane, Washington 99201
Phone: (509) 324-9128
Fax: (509) 324-0065