Supreme Court No. (to be set)
Court of Appeals No. 39591-0-III (Consolidated)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Dependency of:
X.M.J.,
A minor child

Yakima County Superior Court

PETITION FOR REVIEW

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Table of Contents

Table of Authorities

Federal Cases

Washington State Cases

Constitutional Provisions

Washington State Statutes

Other Authorities

Introduction and Summary of Argument

This case provides the Supreme Court another opportunity to address the mistreatment inflicted on Native families[1] by Washington's Department of Children, Youth, and Families (DCYF). The Department's multiple violations of the Indian Child Welfare Act[2] deprived this Native family of precious time with three-year-old X.T.J. during the weeks leading up to his death from a heart attack.

Instead of recognizing the violations, the trial court contributed to the problem by blaming the mother for the Department's failures. The court further traumatized the family by separating the grieving mother from her surviving daughter just days after

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[1] When this brief uses the terms "Indian family" and "Indian children", the purpose is to mirror the language of statutes and cases. No disrespect is intended.

[2] ICWA and WICWA.

X.T.J.'s death. The court also unlawfully ordered the mother to submit to home intrusions by Department social workers.

Although dependency proceedings have been dismissed, the Supreme Court should grant review to address issues of continuing and substantial public interest.

Decision Below and Issues Presented

Petitioner D.B.-K., the mother, asks the Supreme Court to review the Court of Appeals' Ruling Denying Review (entered 10/31/23), Order Granting Motion to Modify (in part) (entered 2/7/24), and Unpublished Opinion (entered 1/30/25).[3] This case presents two issues:

1. Did the Department and the trial court violate multiple provisions of ICWA and WICWA?

[3] Decisions attached.

2. Did the trial court err by unlawfully requiring this Native family to submit to government intrusions into their home?

Statement of the Case

A. The court signed a pickup order without considering standards applicable to Native children.

D.B.-K. and her daughter X.M.J. are members of the Cowlitz Indian Tribe. CP 14; RP (2/7/23) 14. D.B.-K.'s son, X.T.J., was a member as well.[4] CP 14; RP (2/7/23) 14. In January of 2023, the mother left her children in the care of relatives while she went to run errands.[5] CP 2-4, 14-15; RP (2/9/23) 84-86. While out of the house, she received a call from the children's

[4] X.T.J. passed away while this case was pending. CP 122.

[5] The Court of Appeals erroneously conflated the children's maternal and paternal grandmothers and incorrectly suggested that the family lived in the home where the exposure occurred. Opinion, p. 2.

grandmother, who told her that her son, X.T.J., "was acting abnormal." CP 3.

The mother returned and rushed her son to the hospital. CP 2-4; RP (2/9/23) 84-86, 157. There, she learned that the child had ingested drugs while in the grandmother's care. CP 2-4; RP (2/9/23) 84-86, 157. Hospital staff described the mother as appropriate and loving. CP 2-4; RP (2/9/23) 154, 165-166, 214. She was cooperative, and explained what she knew. RP (2/9/23) 165-166. Despite this, both children were placed into protective custody. CP 2-4, 15; RP (2/9/23) 84-86; 146.

When the mother declined to sign a Voluntary Placement Agreement, DCYF filed a dependency petition and obtained a pickup order. CP 1, 11-12. The order did not mention that the mother and children were enrolled members of the Cowlitz Tribe, and the

court did not apply the standards for removal of Indian children. CP 11-12.

The Tribe intervened and appeared at the shelter care hearing, which commenced on February 7th, more than two weeks after removal. RP (2/7/23) 5; RP (2/9/23) 48. The court did not take any testimony on the first day of the hearing. RP (2/7/23) 1-45.

Instead, Juvenile Court Commissioner Robert Porter began the hearing by discussing the pickup order he had signed the week before. RP (2/7/23) 5-10. He said that he had no "duty to make specific findings on the order," but that he was "making them on the record right now." RP (2/7/23) 10.

He told the parties that there was "reasonable cause to believe… that active efforts had been made." RP (2/7/23) 9. He summarized these efforts as follows:

> [T]here were two levels of services offered. The voluntary placement agreement and the safety

> plan... [T]he Department made contact with mother, with mother's family, with father's family. And made several collateral contacts with police, hospital... and extended family... [A]t the end of the petition that there were some services that were requested for mom, but it did not tell me when those services were requested.
> RP (2/7/23) 8-9.

Commissioner Porter also noted that he "believed these children were in imminent harm if they were not retrieved." RP (2/7/23) 5. He repeated the phrase "imminent harm" several times. RP (2/7/23) 6, 7, 9. When prompted by the Tribe's attorney, the commissioner said he had "made a finding, although it's not in the order that the removal was necessary to prevent imminent physical damage to the child." RP (2/7/23) 10-11.

The hearing concluded without any testimony, and another hearing was scheduled for two days later. RP (2/7/23) 44. The court did not enter an interim order maintaining the children in care.

B. The court returned the children after hearing testimony at shelter care.

When testimony commenced on February 9th, the social worker told the court that the mother had asked for help with (1) housing, (2) childcare, and (3) transportation. RP (2/9/23) 87, 107-108.

The social worker admitted that she did not ever help the mother find housing. RP (2/9/23) 117-118. Instead, the Department gave the mother's sister (who was taking care of the children) a one-night hotel voucher on the day the children were removed from the mother's care. RP (2/9/23) 120.

The social worker texted the mother screenshots of information regarding childcare providers. RP (2/9/23) 108-109. She "did not have the opportunity to" meet with the mother to help her call the providers. RP (2/9/23) 108-109. The social worker later learned (through the mother's attorney) that the screenshots

were not accessible and not helpful to the mother. RP (2/9/23) 109-110.

The mother's counsel asked the social worker multiple times to send the daycare information via email. RP (2/9/23) 110. The social worker later claimed she'd provided information "through the AAG." RP (2/9/23) 111. On the day before requesting a pickup order, she emailed the information to the mother's attorney. RP (2/9/23) 111-112.

The social worker did not offer assistance when the mother asked for help repairing her car. RP (2/9/23) 115. Instead, the social worker "sent a referral for a bus pass." RP (2/9/23) 90.

Although the mother responded when the social worker tried to reach her, the Department painted her as resistant. RP (2/9/23) 102. The social worker took the refusal to sign a safety plan as "overtly rejecting or

refusing… intervention."[6] RP (2/9/23) 102. The social worker also suggested the mother was hiding the children after other caseworkers were unable to conduct an after-hours weekend welfare check while the children were in relative care. RP (2/9/23) 102. This was shortly after the mother's attorney had made clear that contact with the mother should occur through counsel.[7] RP (2/9/23) 102, 124-125.

After the social worker testified, Commissioner Porter concluded that there was no "imminent risk," and so "out of home placement is no longer justified… I can no longer authorize the removal of the children."

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[6] The mother had declined to sign on the advice of counsel, because the Department had failed to provide discovery about the case. RP (2/7/23) 21-22, 122.

[7] Even though the mother was represented by counsel, the social worker asked the mother to sign a safety plan without consulting her attorney. CP 39; RP (2/9/23) 111, 122, 126.

RP (2/9/23) 231, 240-241. The court returned the children to their mother.[8] RP (2/9/23) 231-241.

C. Over objection, the court found that the Department had made active efforts.

More than a month after the initial removal, the court entered an order placing the children with their mother. Over objection, Commissioner Porter found that the Department had made active efforts to prevent the breakup of this Native family. CP 90; RP (2/10/23) 265-266, 273; RP (2/24/23) 290, 298-299. This finding did not mention any specific actions taken. CP 90-91. The commissioner blamed a lack of evidence on the mother for "choosing to truncate the shelter care trial." CP 91.

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[8] Apart from the pickup order, no orders on placement were entered until February 24— more than a month after the initial removal. CP 88.

The court concluded its active efforts finding by saying "the mother thwarted much of the efforts of the social worker to prevent the child's removal by refusing to engage with the social worker." CP 91. The result, according to the commissioner, "was a lack of services accepted, but it was not due to a lack of effort by the Department." CP 91.

The mother and the Tribe sought discretionary review. CP 101, 103. The case was later consolidated with review of a later decision.

D. The court *sua sponte* removed X.M.J. without notice while the family was grieving X.T.J.'s death from a heart attack.

Tragedy struck on March 23, while the case was still in pretrial status. The family was living with the mother's sister in a hotel.[9] CP 122; RP (3/30/23) 53.

[9] A fire had destroyed the family home months earlier. RP (2/9/23) 55; RP (2/10/23) 265.

Other family members were also present in the hotel room. CP 122; RP (4/4/23) 78-79. Shortly after laying her son down for a nap, the mother noticed that X.T.J. had turned blue. CP 122; RP (3/30/23) 9; RP (4/4/23) 67, 68-69. She called 911, and her son was rushed to the local hospital, where it was determined he'd suffered a heart attack. CP 121-122, 124-126; RP (3/30/23) 9, 43-50; RP (4/4/23) 68-71, 77-79, 82. He died at Children's Hospital on March 27th, 2023. CP 122.

On March 30th, the parties appeared in court to address DCYF's request for an order directing the mother to allow government social workers into her home. CP 121-122; RP (3/30/23) 3. At the hearing, the social worker asked the court either to "order DCYF the ability [sic] to complete an assessment of safety [or] place the children [sic] in out-of-home care." RP (3/30/23) 12.

The mother (and the Tribe) asked the court to reset the hearing. RP (3/30/23) 5, 13, 18-19. The child's guardian *ad litem* agreed with the request: "I don't know that there is anything urgent at this point that we couldn't set it over." RP (3/30/23) 16. She thought it would be in the mother's best interest to "reset this so she can get through the funeral and take care of herself and [her daughter]." RP (3/30/23) 17.

However, upon learning of X.T.J.'s death, the court *sua sponte* ordered X.M.J. removed from her mother's care.[10] CP 124-126.; RP (3/30/23) 23-24. The order was based on a misleading declaration authored by the social worker, in which she gave the impression that X.T.J. had died from choking while unsupervised

[10] The mother, who was grieving her son, was not present. RP (3/30/23) 9, 14.

rather than from a heart attack. CP 121-122, 124-126; RP (3/30/23) 43-50; RP (4/4/23) 69-71, 77-79, 82.

The commissioner refused to hear argument prior to removal. RP (3/30/23) 27. He did not return X.M.J. until April 4th. RP (4/4/23) 80. At that point, the Department admitted that X.T.J. had died of a heart attack, and that the mother had done nothing wrong. RP (4/4/23) 66-70, 80.

E. After returning X.M.J. to her family, the court ordered the mother to submit to health and safety checks.

Although the case remained in pretrial status, the court directed the mother to submit to a "health & safety check" every 30 days. CP 129. Under the Court's April 10th order, these were to be done "in the home or at day care." CP 129. The Department was required to pre-arrange the presence of either the Tribe's social

worker or the mother's social worker (contracted through the Office of Public Defense). CP 129.

F. Appellate proceedings were dismissed as moot after the trial court dismissed the dependency.

The mother and the Tribe sought discretionary review; the case was consolidated with the earlier matter. CP 133. While review was pending, the trial court dismissed dependency proceedings. CP 130-131. Court of Appeals Commissioner Hailey Landrus subsequently denied review of the consolidated cases on mootness grounds. Ruling entered 10/31/23.

The mother filed a Motion to Modify, arguing that the case presented issues of continuing and substantial public interest. The Court of Appeals granted the motion "only as to the April 10, 2023 order." Order entered 2/7/24. Nearly a year later, the court issued an unpublished opinion, dismissing the case as moot.

Opinion, pp. 1, 6. The mother seeks review of the Court of Appeals' decisions.

Argument Why Review Should Be Accepted

I. The court's removal orders violated ICWA and WICWA.

An order "[s]eparating a child from their family, even for an hour, can cause great trauma." *In re J.M.W.*, 199 Wn.2d 837, 840, 514 P.3d 186 (2022). Here, the Department and the court traumatized this Native family on multiple occasions, in violation of ICWA and WICWA.

A. ICWA and WICWA protect against unlawful foster care placements of Native children.

This court has discussed at length the "widespread abusive practice of removing Native children from their families and destroying Native communities." *Id.* This abusive practice is the primary reason that ICWA and WICWA were enacted. *Id.*

The protections against improper removal apply to "child custody proceedings," which include "foster care placements." RCW 13.38.040(3). A foster care placement is "any action removing an Indian child from [a parent]... for temporary placement in a foster home...where the parent or Indian custodian cannot have the child returned upon demand." RCW 13.38.040(3).

The federal Act exempts "emergency proceedings" from this definition; however, WICWA includes no such exemption. S*ee* 25 C.F.R. §23.2; RCW 13.38.040(3); *see also* WAC 110-110-0010 *et seq.* Under the state statute's plain language, an order directing removal of an Indian child for placement in shelter care is a "foster care placement." RCW 13.38.040(3). Because Washington "provides a higher standard of protection

to the rights of the parent," WICWA's definition of "foster care placement" applies. 25 U.S.C. §1921.

When the Department seeks to effect a foster care placement, it must "satisfy the court that active efforts have been made… to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." RCW 13.38.130(1); 25 U.S.C. §1912(d).

The court must document the Department's active efforts "in detail in the record." 25 C.F.R. §23.120. Citing federal guidelines, the Supreme Court has outlined the minimum information that should be included in the record. *Matter of Dependency of G.J.A.*, 197 Wn.2d 868, 893, 489 P.3d 631 (2021) (citing BUREAU OF INDIAN AFFAIRS, U.S. Dep't Of

Interior, *Guidelines for Implementing the Indian Child Welfare Act*, p. 44 (2016)).[11]

Removal is not permitted absent a determination by the court "that the continued custody of the child by the parent… is likely to result in serious emotional or physical damage to the child." RCW 13.38.130(2). The determination must be made by clear and convincing evidence, supported by the testimony of a Qualified Expert Witness. RCW 13.38.130(2).

These protections reduce the risk that Native children will suffer the "great trauma" of separation from their families, "even for an hour." *J.M.W.*, 199 Wn.2d at 840. Here, neither the Department nor the

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[11] Available at https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf (accessed 2/26/25).

court followed the obligations imposed by ICWA and WICWA.

B. The court's pickup order violated WICWA.

In most cases, the order producing the "great trauma"[12] of family separation will be an *ex parte* order to take the child into custody (a "pickup order.") Because pickup orders are "foster care placements" under WICWA, Native children can't be taken from their families unless the Act's strict standards for removal are met.[13]

Here, the court's pickup order violated WICWA. It did not include a finding that the Department had made active efforts to prevent removal, and the court did not document the Department's active efforts in

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[12] *Id.*

[13] If a pickup order involves an emergency proceeding, it is not a foster care placement under the federal Act. *See* 25 C.F.R. §23.2.

detail in the record.[14] CP 11-12. Furthermore, the record shows that DCYF did little or nothing when the mother requested help with housing, childcare, and transportation. RP (2/9/23) 86-87, 107-110.

The court did not find, by clear and convincing evidence, that the children were at risk of serious emotional or physical damage. CP 11-12. Nor did the court did hear from a Qualified Expert Witness.[15] CP 11-12. The pickup order was unlawful.

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[14] The court's February 24th findings do not include facts showing active efforts. CP 90-91.

[15] Commissioner Porter later claimed that he had no "duty to make specific findings on the order," but that he was "making them on the record right now." RP (2/7/23) 10. Even assuming this is permissible, neither the court's written findings nor its supplemental oral findings satisfy the requirements of WICWA. CP 11-12, 90-91; RP (2/7/23) 10-43.

C. The March 30th removal order violated ICWA and WICWA.

DCYF did not make active efforts. At no point did DCYF make active efforts to help this Native family. As the social worker's own declaration shows, the Department's primary "effort" involved complaining about the lack of "access" to the children.[16] CP 121-122. The only assistance mentioned in the social worker's declaration is "a referral… [for] Childcare." CP 122.

But active efforts require far more than "simply providing referrals." RCW 13.38.040(1)(a)(ii). Furthermore, when the social worker learned that "the mother ha[d] not activated this referral," she did not follow up to understand why. CP 122.

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[16] The record shows that government social workers "accessed" the child and other family members multiple times. CP 122; RP (3/30/23) 9-10, 17-18.

The social worker insisted that the mother should have done more to engage. CP 121-122. But ICWA requires the *Department* to "actively engage the parent." *G.J.A.*, 197 Wn.2d at 888. A parent "ha[s] no burden to engage the Department." *Id.,* at 899. The caseworker "must try to engage the parent" even if the parent "fails to engage satisfactorily." *Matter of D.J.S.*, 12 Wn.App.2d 1, 33, 456 P.3d 820 (2020), *overruled in part on other grounds by G.J.A.*

Furthermore, social workers must be "cognizant of Indian families' mistrust of government actors due to centuries of abuse." *G.J.A.*, 197 Wn.2d at 905. Because "Native communities have endured a legacy of trauma at the hands of State actors… Native families are much more likely to harbor a unique distrust of government workers." *Id.* It is wholly understandable that "Native

families often do not trust child welfare workers." *Id.*, at 905-906.

Here, the social worker did nothing to address this legacy. Instead, her actions exacerbated the problem. Rather than trying to help this Native family, she demanded additional "access." CP 121-122. This is not an active effort.

The court's "active efforts" finding. The court's March 30th "active efforts" finding consisted primarily of boilerplate language from the statute. CP 125. Such "boilerplate language… cannot meet the standard of a finding of active efforts." *Id.,* at 909.

In addition, the court blamed the mother for the Department's lack of active efforts: "the mother thwarted much of the efforts… by refusing to engage with the social worker." CP 91. This conflicts with the

Supreme Court's admonition that a parent "ha[s] no burden to engage the Department." *Id.,* at 899.

Improper standard for removal. The March 30th removal order was a "foster care placement," subject to the strict standard outlined in RCW 13.38.130(2). The court did not apply this standard.

Instead, the court claimed a risk of "imminent physical damage or harm." CP 125. This language stems from RCW 13.38.140, which does not apply (as outlined below).

The court also quoted from the improper removal statute, claiming that the child was at risk of "substantial and immediate danger or threat of such danger, under RCW 13.38.160." CP 125. Having found no improper removal,[17] the court should not have used

[17] In fact, the Native child remained in her mother's care up until the hearing; she had not been removed at all.

the improper removal statute. Furthermore, the improper removal statute does not provide a basis to circumvent the more rigorous standard applicable to all foster care placements. RCW 13.38.130(2).

In her Ruling Denying Review, Commissioner Landrus suggested that QEW testimony was unnecessary prior to the March 30th removal because the hearing was not an evidentiary hearing. Ruling, p. 16. But neither ICWA nor WICWA provide an exception allowing courts to dispense with QEW testimony when removing an Indian child from her family. RCW 13.38.130(2); 25 U.S.C. §1912(e).

D. The "emergency removal" statute does not apply to either removal order.

The juvenile court commissioner suggested that each removal order was necessary to prevent "imminent physical harm or damage to the child." RP

(2/7/23) 10; CP 125. This language stems from the emergency removal statute, which does not apply here. *See* RCW 13.38.140 (1).

The statute provides for the emergency removal of an Indian child "who is a resident of or is domiciled on an Indian reservation, but is temporarily located off the reservation." RCW 13.38.140 (1). The emergency removal statute recognizes the need to protect children who would ordinarily be under exclusive tribal jurisdiction. *See* RCW 13.38.060(1). It provides an exception to the ordinary apportionment of jurisdiction. It does not create a way to avoid the standards for a foster care placement of a Native child.

The emergency removal statute and the "imminent physical harm" standard do not apply to this case. Commissioner Porter's reliance on that standard violated ICWA and WICWA.

II. The Supreme Court should grant review and confirm that the trial court was required to decline jurisdiction.

The improper removal statute applies when the Department "has improperly removed the child from the custody of the parent." RCW 13.38.160. The statute provides two remedies. RCW 13.38.160; *see also* 25 U.S.C. §1920.

The statute's first remedy requires the court to decline jurisdiction. RCW 13.38.160; *see also* 25 U.S.C. §1920. There are no exceptions to this remedy. RCW 13.38.160; 25 U.S.C. §1920. By contrast, the statute's secondary remedy—return home—is conditional. These two remedies are separate directives.

The legislature did not place conditions on the directive to decline jurisdiction. Had it intended to do so, the statute might read "[T]he court shall decline jurisdiction [and] immediately return the child…

unless [declining jurisdiction and] returning the child" would be unsafe. RCW 13.38.160 (modified).

The legislature did not take this approach. It described two separate mandates, using the word "shall" twice instead of once ("shall decline" and "shall immediately return.") RCW 13.38.160. It also made clear that the safety of the child relates only to the question of "returning the child to the parent." RCW 13.38.160.

When a child is improperly removed, the court must decline jurisdiction. RCW 13.38.160; 25 U.S.C. §1920. Here, the Department failed to (a) make active efforts, (b) provide clear and convincing evidence of a risk of serious emotional or physical damage, and (c) produce the testimony of a Qualified Expert Witness supporting removal.

The children were improperly removed. The trial court was obligated to decline jurisdiction. RCW 13.38.160; 25 U.S.C. §1920.

III. Department investigators may not intrude into a family's home absent a court order supported by probable cause or an exception to the warrant requirement.

After twice concluding that D.B.-K. posed no risk of abuse or neglect, the juvenile court ordered her to allow government investigators into her home every 30 days. These investigators were the same people whose actions had wrongfully kept the mother from spending time with her son shortly before his fatal heart attack.

The court's order did not stem from a dependency finding. It was not supported by probable cause to believe that acts of abuse or neglect had occurred or that evidence relating to such abuse or neglect would be found in the home. The order amounted to pre-

authorization for an unreasonable search, an unconstitutional disturbance of the family's private affairs, and an illegal invasion of the family home without the authority of law.

A. The state and federal constitutions prohibit courts from authorizing government investigators to enter a family's home without probable cause.

Under the Fourth Amendment and Wash. Const. art. I, §7, "the home receives heightened constitutional protection." *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994); *Lange v. California*, 594 U.S. 295, 303, 141 S. Ct. 2011, 210 L. Ed. 2d 486 (2021); *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495 (2013). Except in limited circumstances, the government may not intrude into a person's home without a search warrant. *Lange,* 594 U.S. at 303-304. A warrant must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012).

There is no "social worker exception" to the warrant requirement. *Interest of Y.W.-B.*, 265 A.3d 602, 627 (Pa. 2021); *see also Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989). Instead, protections against home searches "appl[y] equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation." *Y.W.-B.*, 265 A.3d at 627.

In *Y.W.-B.*, the Pennsylvania Supreme Court addressed an order compelling the mother "to allow two DHS social workers in the home to assess the home to verify if mother's home is safe and appropriate." *Y.W.-B.*, 265 A.3d at 612. The court concluded that the order violated the mother's constitutional rights. *Id.*, at 635.

In reaching its decision, the *Y.W.-B.* court "join[ed] the vast majority of other federal and state courts in explicitly recognizing that the Fourth Amendment… applies to searches conducted in civil child neglect proceedings."[18] *Id.* at 628 (citing cases). Such searches "have the same potential for unreasonable government intrusion into the sanctity of the home" as law enforcement searches. *Id.; see also People v. Dyer*, 457 P.3d 783, 789 (Colo. App. 2019).

To obtain a court order allowing them to intrude, child welfare investigators must establish "probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home." *In re Petition to Compel Cooperation with Child Abuse Investigation*, 875 A.2d

[18] Curiously, Washington courts have not had the opportunity to address the issue until now.

365, 377 (Pa. Super. Ct. 2005). The standards used to assess probable cause in criminal cases apply equally in the child welfare context. *Y.W.-B.*, 265 A.3d at 617, 627; *see also Andrews v. Hickman Cnty., Tenn.*, 700 F.3d 845, 863 (6th Cir. 2012) ("Fourth Amendment standards are the same, whether the state actor is a law enforcement officer or a social worker.")

Thus, to authorize entry by government investigators, the court must find "the existence of a nexus between the areas to be searched and the suspected wrongdoing at issue, an assessment of the veracity and reliability of anonymous sources of evidence, and consideration of the age of the facts in relation to the facts presented to establish probable cause."[19] *Y.W.-B.*, 265 A.3d at 627.

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[19] Among other things, the Pennsylvania court concluded that the information in the case before it (a)

(*Continued*)

As the Pennsylvania Supreme Court observed, "[t]hese fundamental principles are critical to ensure that a court's finding of probable cause is firmly rooted in facts that support a constitutional intrusion into a private home." *Id.*

B. The court's April 10th order was not supported by probable cause.

In this case, as in *Y.W.-B.,* "[t]he order compelling [the mother's] cooperation with a governmental intrusion into her home was deficient for want of probable cause." *Id.,* at 635. The Department did not present evidence showing that D.B.-K. had engaged in an act of child abuse or neglect. Nor did it show that any evidence of abuse or neglect would be found in the family home.

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did not establish probable cause, (b) was unreliable and stale, and (c) failed to show a nexus between any alleged wrongdoing and the home. *Y.W.-B.*, 265 A.3d at 628-635.

First, X.T.J.'s accidental exposure to drugs while he was cared for by relatives did not stem from neglect. CP 2-4, 14-15; RP (2/9/23) 84-86. The mother believed the child's grandmother was sober, and that the other responsible adults in the home would help ensure that her child remained safe. CP 3, 6; RP (2/9/23) 56. Furthermore, any problem was remedied before the court entered the challenged order: the mother had taken a firm stance (echoed by court order) that the child would have no more contact with the grandmother or her residence. CP 80-81, 90; RP (2/9/23) 57-58.

Second, the mother cannot be blamed for her son's heart attack. Although the Department initially misled the court into thinking the child choked while unsupervised, the social worker knew this was false. CP 121-122, 124-126; RP (3/30/23) 43-50; RP (4/4/23)

69-71, 77-79, 82. The child was napping in a room full of family members when he showed signs of distress. CP 122; RP (3/30/23) 9; RP (4/4/23) 78-79. The mother immediately called 911, and the child was rushed to the hospital. CP 122; RP (3/30/23) 9.

At the time of the April 10th order, the commissioner knew that X.T.J. had died of natural causes. RP (4/4/23) 66-70, 78-80. The commissioner also knew that the mother was blameless. RP (4/4/23) 63-70, 78-80. Despite this, he ordered the mother to open the family home to government investigators. CP 129.

In the absence of probable cause, the order was unconstitutional. It violated the Fourth Amendment and Wash. Const. art. I, §7; *see Y.W.-B.*, 265 A.3d at 635.

C. Unlawful orders such as the one entered here further the discriminatory treatment of Native families and other families of color.

For families, enduring a DCYF investigation is not a benign event, but a source of fear and stress. Investigations are experienced as "deeply intrusive state action that touches upon aspects of privacy that the culture and law typically have considered fundamental." Doriane Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 415 (2005). Furthermore, "the majority of intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm." Coleman, at 441.

The "trauma of family regulation investigations is not evenly distributed." Anna Arons, *The Empty*

Promise of the Fourth Amendment in the Family Regulation System, 100 Wash. U.L. Rev. 1057, 1074 (2023). Families of color are disproportionately represented at every level of child welfare intervention. *See* Alan Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do they Exist, and What Can be Done to Address Them?* 692(1) Annals Am. Acad. Pol. & Soc. Sci. 253 (2020);[20] Richard Wexler, Nat'l Coal. for Child Prot. Reform, *Child Welfare and Race* (2018);[21] U.S. Dep't. of Health and Human Svcs, Children's Bureau:

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[20] Available at https://journals.sagepub.com/doi/abs/10.1177/0002716220980329 (accessed 2/26/25)

[21] Available at https://nccpr.org/nccpr-issue-paper-7-family-policing-and-race/ (accessed 2/26/25).

Racial Disproportionality and Disparity in Child Welfare (2016).[22]

Native families are disproportionately targeted. Arons, p. 1074. Government officials investigate Native families at twice the rate of their representation in the population. Robert Hill, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels,* p. 11 (2007).[23] The result is disproportionate removal rates. Hill, p. 11; National

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[22] Previously available at https://www.childwelfare.gov/all-information-gateway-publications-and-resources (accessed 6/6/24). This resource has apparently been removed from the Children's Bureau website at the direction of Donald Trump.

[23] Available at https://www.aecf.org/resources/an-analysis-of-racial-ethnic-disproportionality-and-disparity-at-the-nation (accessed 2/26/25).

Indian Child Welfare Association, *Disproportionality in Child Welfare* (2021) (NICWA Fact Sheet).[24]

This is as true in Washington as it is elsewhere. *See* Department of Children, Youth, and Families, *Statewide ICW Case Review Report* (2019) ("*Statewide Review*");[25] Department of Children, Youth, and Families, *Child Welfare Racial Disparity Indices Report* (2019) ("*Disparity Report*.")[26] In fact, a 2019 study showed that Washington is among the worst states, with Native children being removed at three

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[24] Available at https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf (accessed 2/26/25).

[25] Available at https://www.dcyf.wa.gov/sites/default/files/pdf/reports/state-ICWCaseReviewReport2019.pdf (accessed 2/26/25).

[26] Available at https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf (accessed 2/26/25).

times their rate of representation in the population. NICWA Fact Sheet, p. 2.

State social workers "have often misunderstood the ways of Indian family life, the dynamics of Indian extended families, and Indian child-rearing practices." *G.J.A.*, 197 Wn.2d at 892 (internal quotation marks and citation omitted). Because they are "ignorant of Indian cultural values and social norms, they have broken up Indian families without justification." *Id.* (internal quotation marks and citation omitted).

Here, the trial court's order exposed this already-traumatized Native family to the risk of further harmful intervention. This case demonstrates why Washington courts must follow "the vast majority of other federal and state courts" in protecting families from intrusive government investigation in the absence of probable cause. *Y.W.-B.*, 265 A.3d at 628.

V. The Supreme Court should review this case even though it is moot.

An appellate court will review a moot case "if the contested issue is a matter of continuing and substantial public interest." *Matter of Dependency of L.C.S.*, 200 Wn.2d 91, 99, 514 P.3d 644 (2022). Courts consider "whether the issue is of public or private nature, whether an authoritative determination is desirable to provide future guidance, and whether the issue is likely to reoccur." *Id.* The court may also consider, *inter alia*, "the likelihood that the issue will escape review." *Id.*

A. The Supreme Court can ameliorate the dependency system's abysmal treatment of Native families.

The correct application of ICWA and WICWA are issues of a public nature. *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 161 n. 7, 471 P.3d 853 (2020).

Clarification of ICWA standards "provide[s] guidance to trial courts on how to proceed with ICWA cases." *Id.*

Despite recent opinions addressing those standards, more guidance is necessary. As this case shows, trial courts and DCYF continue to violate ICWA and WICWA.

Furthermore, there are no cases addressing the proper standards for pickup orders in Indian child welfare cases. Because such orders create "great trauma," it is essential that trial courts apply the correct standard. *J.M.W.*, 199 Wn.2d at 840.

Nor are there cases addressing the improper removal statute's first remedy—declining jurisdiction. RCW 13.34.160. Although there are cases discussing the statute's second remedy (immediate return home), none have involved an appellant's request to decline jurisdiction. *See, e.g., G.J.A.*, 197 Wn.2d at 911.

Guidance is critical, considering the child welfare system's ongoing mistreatment of Native children. Washington is in the bottom eight states for disproportionate foster placement of Native children. *See* NICWA Fact Sheet. Native children are nearly seven times more likely to be placed outside the home compared to the group with the lowest placement rate (Asian and Pacific Islander). *Disparity Report,* p. 4.

The issues in this case are likely to recur. The Supreme Court has noted that "[c]hild custody proceedings take place each day in our state courts." *Z.J.G.*, 196 Wn.2d at 161 n. 7. The "correct application of ICWA and WICWA is essential to the proper function of these proceedings." *Id.*

Because of "the short-lived, but critical, nature of shelter care hearings," issues arising at shelter care "often escape review." *Id.; see also L.C.S.*, 200 Wn.2d at

99; *J.M.W.*, 199 Wn.2d at 844. The problem is even more acute when it comes to pickup orders. Such orders ordinarily become moot within 72 hours, when the court must hold a shelter care hearing. RCW 13.34.065(1)(a).

The Indian Child Welfare issues meet all the criteria for review, even though the case is moot. Review is appropriate under *L.C.S.*

B. The Supreme Court can reduce the over-policing of families in the dependency system.

The order authorizing intrusion into the family's private affairs should also be reviewed under the public interest exception to the mootness doctrine. *L.C.S.*, 200 Wn.2d at 99. The issues are likely to recur, and may evade review, given the short-lived nature of shelter care proceedings.

After granting review of this moot issue, the Court of Appeals declined to reach the issue. It pointed the adoption of the Keeping Families Together Act, and reasoned that "an opinion on the merits would necessarily address laws or regulations that are no longer in effect." Opinion, p. 5.

This is puzzling. The challenged order and the constitutional arguments presented here are unrelated to any statute or regulation.

Equally puzzling is the court's criticism of the adequacy of the record. Opinion, pp. 5-6. The issue involves a pure question of law regarding the standards governing State intrusion into the family home when dependency has not been established. This question can be resolved on the record presented here.

The Supreme Court should grant review of the April 10th order, even though the case is moot. *Id.* The

case involves issues of continuing and substantial public interest.

VI. The Supreme Court should grant review under RAP 13.4(b).

The legality of the court's April 10th order involves a significant question of law under the state and federal constitutions. The Supreme Court should grant review under RAP 13.4(b)(3).

In addition, this case involves multiple issues of substantial public interest, as outlined in the preceding section. These issues should be decided by the Supreme Court under RAP 13.4(b)(4).

If the court concludes that this case involves a mix of interlocutory decisions and decisions terminating review, it should waive the requirements of RAP 13.5(b). *See* RAP 1.2(c); RAP 18.8(a). The court

should grant review of all issues under the standards outlined in RAP 13.4(b).

In the alternative, the court should grant review of any interlocutory decisions under RAP 13.5(b)(1) and (2). The trial court committed obvious or probable errors by violating multiple provisions of ICWA and WICWA. The Court of Appeals committed obvious or probable errors by allowing the violations to stand.

The errors rendered further proceedings useless.[27] The errors also had immediate effects outside the courtroom. *See In re Dependency of N.G.*, 199 Wn.2d 588, 595, 510 P.3d 335 (2022).

The Supreme Court should grant review.

[27] This court should analyze the effects prong of RAP 13.5(b)(1) separately from the issue of mootness.

Conclusion

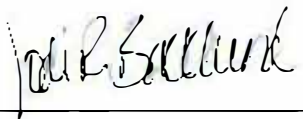
The trial court and the Department repeatedly violated the family's rights under the state and federal Indian Child Welfare Acts. The court also allowed the Department to unlawfully intrude on the family's private affairs. The Supreme Court should grant review.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 6358 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted March 3, 2025.

BACKLUND AND MISTRY



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Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

D.B.-K. (address confidential)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on March 3, 2025.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

APPENDIX

The Court of Appeals
of the
State of Washington
Division III

In re Dependency of: X.T.J.	No. 39591-0-III (Consol. w/Nos. 39592-8-III, 39635-5-III, 39729-7-III, and 39730-1-III) COMMISSIONER'S RULING

Mother D.K.-B. (hereafter "Mother") seeks discretionary review of five interlocutory decisions entered in her children's dependency cases, which have been dismissed. The Cowlitz Indian Tribe (hereafter "the Tribe") also seeks review of three of those decisions. The Department of Children, Youth, and Families (hereafter "DCYF") opposes review, primarily on the ground that the issues are moot.

FACTS

Mother seeks discretionary review of the following decisions entered in either one or two dependency cases, both of which have since been dismissed:

(1) February 3, 2023, Order to Take Child into Custody;

(2) February 24, 2023, Shelter Care Order;

(3) February 24, 2023, Order and Authorization re Health and Education;

(4) March 30, 2023, Order to Take Child into Custody and Place in Shelter Care; and

(5) April 10, 2023, Order After Hearing.

Intervenor Cowlitz Indian Tribe also seeks discretionary review; however, it designated only the second, third, and fourth orders listed above for review.

After a hearing on February 3, 2023, the trial court ordered that X.T.J. and X.M.J. be removed from Mother's custody after it found an imminent risk of physical damage or harm to the children based on DCYF's dependency petition. The petition alleged, according to a January 23, 2023, report by Mother and a coinciding emergency room visit, that two-year-old X.T.J. had ingested methamphetamine and cocaine at the home where his paternal grandmother was living. The petition further alleged that one-year-old X.M.J. was currently at the home where these drugs were admittedly present and where Mother intended to return upon X.T.J.'s release from the hospital. Law enforcement took X.T.J. and X.M.J. into protective custody on January 23. By January 25, X.T.J., who had been released from the hospital, and X.M.J. had been placed in protective custody with their maternal aunt, C.B.

At a family team decision-making meeting on January 25, DCYF proposed that Mother agree to a voluntary placement agreement (VPA) or DCYF would pursue dependency. DCYF's petition says it "offered parenting services, childcare assistance, assistance accessing resources, and ongoing support as needed." Appendix ("App.") at 5 (May 26, 2023). Mother agreed she needed support and debated over whether to sign a VPA. Once represented by counsel, she declined the VPA.

On January 26, DCYF drafted a safety plan and sent an image of it via a text message to Mother for review. Mother did not respond to the text message or answer DCYF's phone calls. With no agreed safety plan in place, DCYF attempted to conduct a welfare check on January 28 but could not locate Mother or the children. However, DCYF apparently contacted C.B., and Mother called the social workers on January 28 and reported that she was staying with her sister but had been advised to not speak with DCYF without her attorney present.

On January 30, Mother's attorney notified DCYF's counsel that Mother had declined the VPA, that any safety plan would be negotiated through counsel, and that Mother declined all services except for daycare, clothing vouchers, and a bus pass.

On February 2, Mother's urinalysis results were positive for cocaine.

Based on its investigation, DCYF identified two safety threats. First, "Caregiver lacks the parenting knowledge, skills, or motivation necessary to assure child's safety." App. at 7. This safety threat was based on Mother knowingly leaving her children under the care of an active user of illegal substances. Second, "Caregiver(s) overtly rejects CA intervention, refuses access to a child," because DCYF "has been unable to obtain cooperation to create a safety plan," and Mother "is overtly rejecting" DCYF intervention, has declined to speak with social workers, and has declined to allow DCYF to see the children to assess for safety. App. at 7.

DCYF filed petitions for dependency on February 3. Those petitions recommended either out-of-home placement or in-home placement with a safety plan. DCYF further recommended Family Preservation Services; licensed childcare for the children; individual counseling, a

chemical dependency assessment, and adequate and safe housing for Mother; and authority to walk through the home where Mother chooses to reside. DCYF also moved the court for an order to take X.T.J. and X.M.J. into custody. It asserted that its petitions demonstrated "a risk of imminent harm" and presented reasonable grounds to believe that the children's "health, safety, and welfare will be seriously endangered" if the children are not taken into custody. App. at 9.

On February 3, the court entered an ex parte *Order to Take Child into Custody*, which directed that X.T.J. and X.M.J. be taken into custody and placed in a licensed facility or a home not required to be licensed under DCYF's supervision. It authorized DCYF to evaluate the children's physical or emotional condition and seek routine medical and dental examination and care. To support its decision to remove the children from their Mother's custody, the court found it "contrary to the child's welfare . . . to remain at home." App. at 11. It also found that DCYF's petition and supporting declarations "establish reasonable grounds to believe . . . that, if the child is not taken into custody, the child's health, safety, and welfare will be seriously endangered." *Id.* Finally, it found that DCYF had demonstrated "a risk of imminent harm to the child in the child's home" and that DCYF's risk assessment constituted "reasonable efforts to prevent or eliminate the need for removal . . . and . . . services previously offered or provided to the parent(s) have not remedied the unsafe conditions in the home." *Id.*

On February 9, the court held what was expected to be the first day of a multi-day shelter care hearing. But, after hearing testimony from only the assigned social worker, who testified that

Mother was not residing at the home where X.T.J. ingested controlled substances, the court found that no imminent risk justified continuing to separate Mother from her children:

> THE COURT: Okay, very good. So first thing that's become obvious to me at this point is if mom is not residing at the Union Gap residence . . . , an imminent risk does not occur at this moment. And I think I would be remiss under the heightened standards of the Indian Child Welfare Act to continue the removal of the children.
>
> So I apologize if that thwarts anybody's case, but I think that's the legal bounds that I have to abide by. So what that does is that puts us in a position where we talk about how mom is reunited with her children, and what the ruling of the court would be until the shelter care hearing is completed? Does that make sense?

App. at 353. Based on the parties' agreement, the court stopped the hearing and directed that the children be returned to Mother with certain jointly-developed conditions pending resolution of DCYF's dependency petitions. The court's conditions prohibited the children from having contact with their grandmother and from returning to the home she occupied.

Having ended the shelter care hearing before taking all of the evidence, the parties requested an "active efforts" finding based on only DCYF's petition and its social worker's testimony. The court found active efforts; it further found, "[T]he mother thwarted much of the efforts of the social worker to prevent the child's removal by refusing to engage with the social worker. The result was a lack of services accepted, but it was not due to a lack of effort by the Department." App. at 91.

The following two orders were entered to memorialize February 9's initial shelter care hearing:

February 24, 2023, Shelter Care Hearing Order: The court's initial shelter care hearing order found that X.T.J. and X.M.J were enrolled members of the Cowlitz Indian Tribe and, therefore, Indian children. It further found no reasonable cause for shelter care because the children were not at current risk of imminent physical damage or harm at the time of the hearing. The order directs that the children be returned to their mother. The order further requires DCYF to offer or provide "Medical/therapy follow up" for X.T.J. and X.M.J. and authorizes DCYF to "access, inspect, and copy all records pertaining to [the children], including but not limited to health, medical, mental health and education records only as necessary to assist the Department in providing services to the family." App. at 96, 97. Mother and Cowlitz Indian Tribe objected to these medical-based provisions on the ground that the court lacked authority to order them. Finally, the order provides for DCYF health and safety checks and housing assistance:

> Other: The Department agrees to conduct no more than one health & safety check on the children at the mother's residence and no more than one health & safety check on the children at daycare between today and the 30-day status hearing. Routine health & safety checks may only take place with the Cowlitz Indian Tribe's social worker or the OPD social worker present. The Department will assist the mother with housing. If the Department is assisting the mother with making phone calls, it may do so with the OPD social worker or the Cowlitz Indian Tribe's social worker participating in those calls.

App. at 98.

February 24, 2023, Order and Authorization re health Care and Education: Like the February 24 shelter care hearing order, the *Order and Authorization re Health Care and Education*

granted DCYF "the right to inspect and copy all health, medical, and mental health records of [the children] for the purpose of providing services to the family only" without Mother's consent. App. at 99. This order was entered over Mother's and Cowlitz Indian Tribe's objection that the court lacked authority under RCW 13.34.069 to enter it.

On March 29, 2023, DCYF filed an affidavit in X.M.J.'s case. The affidavit, which was read in open court at a regularly scheduled hearing on March 30, 2023, reported to the court that X.T.J. had passed away and asked the court to order either (1) emergency removal of X.M.J. or (2) a safety plan, in-home health and safety visits with X.M.J., and monthly face-to-face contacts with Mother. At the March 30 hearing, the court signed an order to take X.M.J. into custody. Within that order, the court found (1) a petition had been filed alleging that X.M.J. is dependent; (2) DCYF's affidavit established reasonable grounds to believe X.M.J. is dependent and that her health, safety, and welfare would be "seriously endangered" if she was not taken into custody; (3) DCYF demonstrated a "risk of imminent harm to the child in the child's home"; (4) DCYF's risk assessment was a reasonable effort to prevent removal; (5) "because of the risk of imminent harm to the child, there are not reasonably available services that can be provided . . . to maintain the child in the child's home"; (6) previously offered services had not remedied the unsafe conditions in the home; and (7) "due to the death of the child's sibling while in the home of the mother as outlined in the affidavit incorporated by [DCYF], the safety of this child cannot be ensured in the mother's home at this time." App. at 461. The court also found DCYF made active efforts because it had "attempted to assist the family [but] has been not allowed to access the family directly[.]"

App. 462. Finally, the court found, by clear, cogent, and convincing evidence, that Mother's continued custody of X.M.J. "would subject the child to substantial and immediate danger or threat of such danger." *Id.*

At a shelter care hearing on April 4, 2023, DCYF notified the court of X.T.J.'s autopsy report, which revealed that X.T.J. died of natural causes and that Mother did nothing to cause his death. Based on the autopsy report, DCYF asked the court to return X.M.J. to Mother on the conditions that Mother reside with C.B. and that the Department be allowed to perform health and safety visits. The court found no risk of imminent physical harm to X.M.J. and concluded that shelter care was not needed. X.M.J. was returned to Mother again subject to the same conditions that accompanied the court's February 24 shelter care hearing order, except that the court permitted only one monthly health and safety check.

Finally, on April 14, DCYF moved to withdraw its dependency petition as to X.M.J. on the ground that "there are no longer any safety threats." Supp. App. at 468. The motion was granted.

ANALYSIS

Mother and the Cowlitz Indian Tribe seek review under RAP 2.3(b)(2), which requires them to demonstrate that the trial court committed a probable error and that its decision substantially altered the status quo or substantially limited a party's freedom to act.

1. **Whether the trial court probably erred by: (1) ordering the removal of X.T.J. and X.M.J. from Mother's care on February 3, 2023, without receiving testimony from a qualified expert witness and without making ICWA-/WICWA-required findings under RCW 13.38.130, and (2) misapplying WICWA's emergency removal statute when it orally found removal was necessary to prevent imminent physical harm?**

Mother first contends the trial court's February 3, 2023, *Order to Take Child into Custody* ("February 3 pickup order") was probably erroneous because it applied and made findings pursuant to former RCW 13.34.050(1) (2005) – the juvenile court act's emergency removal statute – instead of RCW 13.38.130 – WICWA's involuntary foster care placement statute. She argues that the trial court should have but did not find (1) active efforts in accordance with RCW 13.38.130(1); or that (2) Mother's continued custody was "likely to result in serious emotional or physical damage to the child" under RCW 13.38.130(2). Further, the court did not hear from a qualified expert witness (QEW) consistent with RCW 13.38.130(2). DCYF concedes that the trial court's lack of findings under RCW 13.38.130 in its February 3 pickup order was probably erroneous but argues that compliance with the statute's QEW requirement was not required because it was impossible under the circumstances. DCYF notes that *In re J.M.W.*, 199 Wn.2d 837, 847-48, 514 P.3d 186 (2022), shows QEW testimony would not have been required in these cases.

Mother also contends the trial court, in its oral statements preceding the first shelter care hearing, erroneously applied WICWA's emergency removal statute, which applies to only "an Indian child who is a resident of or is domiciled on an Indian reservation, but is temporarily located off the reservation." RCW 13.38.140(1). DCYF disagrees, arguing that the *J.M.W.*, 199 Wn.2d 847-48, and Division I's *A.W.*, 199 Wn.2d 848, n.4, 519 P.3d 262 (2022), demonstrate that RCW

13.38.140's "imminent physical harm" standard does apply to the emergency removal of Indian children.

Regardless of DCYF's concession, these issues concerning RCW 13.38.130 and .140 were not raised in the trial court and, therefore, have not been preserved for review. *See* RAP 2.5(a)(3). For example, trial counsel for Mother and the Tribe did not challenge the trial court's statement, in reliance upon *In re J.M.W.*, 199 Wn.2d 837, 848, 514 P.3d 186 (2022), that prior active efforts are not required when a court orders the department to take a child into custody in an emergency. Further, trial counsel merely asked the court to clarify the basis for its imminent harm finding; they did not object to the court making an imminent harm finding on the ground that RCW 13.38.140 did not apply. Finally, with respect to the court's allegedly erroneous oral application of WICWA's emergency removal statute, a trial court's written decision controls over an inconsistent oral ruling. *Pham v. Corbett*, 187 Wn. App. 816, 830-31, 351 P.3d 214 (2015).

Even if Mother could satisfy RAP 2.3(b)(2), this court declines to exercise its discretion to accept review of these moot issues. To determine whether to review a moot issue, the court considers: (1) whether the issue's nature is public or private, (2) whether an authoritative determination is desirable to provide future guidance, and (3) whether the issue is likely to recur but evade review due to the short-lived nature of the facts in controversy. *Id.* "The court may also consider the adverseness of the parties, the quality of the advocacy, and the likelihood that the issue will escape review." *Matter of Dependency of L.C.S.*, 200 Wn.2d 91, 99, 514 P.3d 644 (2022). DCYF's concession of error indicates the parties are not genuinely adverse with respect

to the lack of an "active efforts" finding in the February 3 pickup order. Further, the undeveloped trial court record impairs the quality of advocacy of the issues. Had the issues been raised and fully addressed in the trial court, the parties might have discovered that *J.M.W.* and *A.W.* provide sufficient guidance or at least could have clarified why further guidance is necessary.

2. Whether the trial court probably erred because its "active efforts finding in its February 24, 2023, *Shelter Care Order* is not supported by substantial evidence?

Mother and the Tribe next challenge the trial court's "active efforts" finding in its February 24 shelter care order. They argue that the court's finding lacks the minimum level of detail required by *Matter of Dependency of G.J.A.*, 197 Wn.2d 868, 489 P.3d 631 (2021). They also assert that the finding is not supported by substantial evidence. DCYF insists no "active efforts" finding was required because the children had been returned to Mother after the February 9 initial shelter care hearing and because RCW 13.38.130(1) requires an "active efforts" finding only when "active efforts" are unsuccessful.

The February 24 *Shelter Care Order* found DCYF made active efforts to prevent or eliminate the need for removal based on the following:

> Child was originally removed from the home after a judicial finding of imminent risk of physical damage or harm to the child when the petition was filed. At trial, the social worker testified the conditions that created a risk of physical damage or harm to the child had been resolved between the filing of the petition and the testimony at trial. The court, sua sponte, made a finding regarding the lack of a current risk of imminent physical damage or harm and returned the child to the maternal parent as a result of that finding on February 9, 2023. Conditions were imposed including that the

> child could not have contact with L[.]Z[.] nor return to the residence at 3202 Tacoma Street, trailer 4, Union Gap, WA 98903.
>
> The shelter care trial was truncated after the court ruled the risk of imminent physical damage or harm was no longer present. Only the social worker testimony had been presented to that point. Parties requested the court make a determination of active efforts based only on the social worker's testimony and the petition. The court found active efforts had been employed by the Department in its efforts to help maintain the family and prevent the child's removal. Counsel objected to a finding of active efforts regarding housing, but by choosing to truncate the shelter care trial, the result was to limit the evidence before the court to the petition and the social worker's testimony. Based on that evidence and the petition, the court found active efforts were employed by the Department. In addition, the court acknowledged the efforts to coordinate services provided by both the tribal social worker and the Department's social worker.
>
> Further, the mother thwarted much of the efforts of the social worker to prevent the child's removal by refusing to engage with the social worker. The result was a lack of services accepted, but it was not due to a lack of effort by the Department.

App. at 90-91 (alterations added).

G.J.A. does not support the conclusion that *the trial court's finding* on "active efforts" was probably erroneous for lack of detail. In *G.J.A.*, the Supreme Court held that "the Department", not the trial court's finding, "must document its provision of active efforts in the record" and listed the type of information that must be documented. 197 Wn.2d at 893. The Court further explained, "It is the Department's responsibility to clearly document its actions in the record to enable the court to reach an informed conclusion about the Department's provision of active efforts." *Id.* Mother and the Tribe do not establish probable error on this point.

Mother also fails to satisfy the probable error standard with her lack-of-substantial-evidence contention, because it lacks argument. The Tribe argues the trial court's "active efforts" finding probably lacks substantial evidentiary support because (1) DCYF failed to communicate its proposed safety plan to Mother and her family and then abandoned it; and (2) DCYF did nothing to address Mother's alleged substance use, which the Tribe says was identified in DCYF's dependency petition as a factor supporting removal.

The Tribe's argument fails to satisfy RAP 2.3(b)(2)'s probable error standard on this point, too. First, DCYF's petition does not identify Mother's alleged substance use as a factor for removal. Her substance use is not listed under any of the safety threat categories set forth in the petition. Second, the applicable legal standard is the substantial evidence standard, which requires the court to review the record for evidence that supports the finding, not evidence that contradicts it. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). The evidence the Tribe highlights with respect to a safety plan – that DCYF fumbled in its attempt to send its proposed safety plan to Mother for review and that DCYF abandoned its safety plan efforts –conflicts with evidence in the record that DCYF and Mother worked at negotiating a safety plan. E.g., App. at 207, 208, 215-16, 241, 244-45, 248. Conflicting evidence does not satisfy the substantial evidence standard. *Merriam*, 168 Wn.2d at 631.

Mother also argues that the trial court probably erred by finding that "the mother thwarted much of the efforts . . . by refusing to engage with the social worker" because "[a] parent 'ha[s] no burden to engage the Department." Mot. for Discretionary Review at 34 (quoting *G.J.A.*, 197

Wn.2d at 899). Even if the finding was probably erroneous under *G.J.A.*, Mother does not demonstrate how that particular finding in the February 24 shelter care order substantially altered the status quo or limited her freedom to act. While she argues that the February 24 shelter care order altered the status quo by imposing conditions upon her, she does not show that vacating the finding would have changed those conditions or argue that the conditions themselves were probably erroneous. Mother fails to satisfy RAP 2.3(b)(2)'s criteria. And the court would deny review even if the criteria were satisfied, because the moot substantial evidence issues raised by petitioners are not matters of public importance but turn on the specific facts of this case.

3. **Whether the March 30, 2023, *Order to Take Child into Custody and Place in Shelter Care* violated due process and exceeded the court's authority by *sua sponte* removing X.M.J. from Mother?**

Mother and the Tribe next contend the court's March 30 order, which *sua sponte* removed X.M.J. from Mother based on the court's concern that X.T.J.'s death may have been caused in part by Mother's lack of supervision, exceeded the court's authority and violated separation of powers and due process because (1) neither Mother nor the Tribe received notice that removal was sought as required by ICWA, WICWA, and JuCR 3.10; (2) the petition was not amended to allege that the standards of removal were met; (3) no law allows the trial court to *sua sponte* remove a child; (4) the trial court did not hear testimony from a QEW; (5) the court made no oral record that his findings were by clear and convincing evidence; (6) the court erroneously applied a "substantial and immediate danger" standard to support removing X.M.J., an Indian child; and (7) DCYF's Affidavit of Circumstances did not support the court's "active efforts" finding. DCYF argues that

the trial court did not erroneously apply ICWA and WICWA's notice requirements and that its March 30 order did not violate the dependency statute in effect at the time or Petitioners' due process rights. DCYF insists the issue is moot in any event.

The court finds that none of the seven arguments listed above satisfy RAP 2.3(b)(2) criteria. First, as to lack of notice, DCYF's affidavit, which was read into the record at the March 30 hearing where counsel for Mother and the Tribe were present, put Mother and the Tribe on notice of its request for emergency removal. Mother and the Tribe also had an opportunity to be heard on the issue of emergency removal at the March 30 hearing. Further, existing Supreme Court case law indicates that notice is not required under circumstances like those presented to the court on March 30. While JuCR 3.10 requires notice and while WICWA requires notice"[w]hen the nature of the emergency allows", RCW 13.38.140(3), and 10-days' notice by certified mail in the event of an involuntary foster care placement, RCW 13.38.070(1), the Supreme Court has concluded that notice is not required when it could not be accomplished to prevent imminent physical damage to an Indian child. *J.M.W.*, 199 Wn.2d at 848, n.4 ("Such a requirement would be inconsistent with RCW 13.38.140(1). Read as a whole, WICWA does not require that notice when it could not be accomplished"). Even if the Tribe could establish probable error here, the court declines to review the moot issue because *J.M.W.* appears to provide sufficient guidance.

Second, while it is true that DCYF did not amend its petition for dependency of X.M.J. to reflect X.T.J.'s death, neither Mother nor the Tribe demonstrate how this probable error had an immediate effect outside the courtroom. *See In re Dep. of N.G.*, 199 Wn.2d 588, 596, 510 P.3d

335 (2022) (requiring immediate effect outside courtroom to substantially alter status quo). Even if RAP 2.3(b)(2) could be satisfied on this narrow, moot issue, the court declines to accept review of it because X.M.J. has been returned to Mother, the dependency has been dismissed, the parties do not appear to seriously dispute the proper interpretation and application of RCW 13.34.050's standards for removal, and further guidance is not needed.

The third argument, claiming lack of authority for *sua sponte* removal, overlooks DCYF's affidavit, which specifically requested emergency removal of X.M.J. and, when read into the record at the March 30 hearing where counsel for Mother and the Tribe were present, put Mother and the Tribe on notice of it request for emergency removal. The arguments also overlook that Mother and the Tribe had an opportunity to be heard on the issue of emergency removal at the March 30 hearing. The record does not support finding a probable error.

Fourth, Mother's and the Tribe's argument that the court probably erred by ordering X.M.J.'s second removal without QEW testimony. *J.M.W.* suggests that, under the circumstances of this case and the March 30 hearing, which was not an evidentiary hearing, the absence of a QEW was not probable error. 199 Wn.2d at 847-48, n.4.

Fifth, the trial court's failure to orally find that the clear, cogent, and convincing burden of proof had been satisfied is not subject to review and does not establish probable error. This court reviews only written decisions. *See* RAP 5.2(g). And, again, a trial court's written decision controls over an inconsistent oral ruling. *Pham*, 187 Wn. App. at 830-31.

Sixth, even if the court probably erred by applying the "substantial and immediate danger" standard to support removing X.M.J. from Mother, petitioners fail to demonstrate that this particular finding had an immediate effect outside the courtroom. It appears that the trial court's March 30 pickup order was based on its finding of imminent risk of harm to X.M.J., which petitioners do not contend is probably erroneous. Thus, RAP 2.3(b)(2) is not satisfied. And, even if it is, the court will not exercise its discretion to review the moot issue.

And, seventh, while the court agrees that DCYF's Affidavit of Circumstances probably did not support the court's "active efforts" finding, the remedy for this probable error has been realized. The court declines to accept discretionary review of the moot issue.

4. Whether the trial court was obligated to decline jurisdiction after the child was improperly removed?

Without addressing RAP 2.3(b)(2) criteria, Mother argues that the trial court was obligated to decline jurisdiction in X.T.J.'s and X.M.J.'s cases under RCW 13.38.160 (WICWA's improper removal statute) based on her arguments that the Department failed to satisfy the requirements of RCW 13.38.130 (WICWA's involuntary foster care placement statute) and placed the children into protective custody without a court order. Because Mother fails to satisfy RAP 2.3(b)(2) and because the quality of advocacy is compromised by a record that shows Mother did not ask the trial court to decline jurisdiction, discretionary review of this moot issue is not warranted.

5. **Whether the trial court probably erred when it granted the Department access to the children's healthcare and education records after returning the children to Mother at the initial shelter care hearing?**

The Mother and Tribe contend that the trial court probably erred by granting DCYF unlimited access to her children's health care and education records. DCYF is authorized to access a child's records only when the child "is placed in the custody of the department." RCW 13.34.069(1). It is undisputed that X.T.J. and X.M.J. were never placed in DCYF custody.

DCYF concedes the trial court erroneously authorized DCYF to access the children's medical records but argues that review should be denied because the issue is moot. The court concludes that this issue satisfies RAP 2.3(b)(2). However, in light of DCYF's concession, and the lack of any apparent dispute over the correct interpretation and application of RCW 13.34.069(I)'s plain language, no authoritative determination is necessary for future guidance, the issue is unlikely to recur, and the parties are not truly adverse, which limits the quality of advocacy. The court declines to exercise its discretion to grant review of this moot issue.

Accordingly, IT IS ORDERED, Mother's and the Tribe's motions for discretionary review are denied.

Hailey L. Landrus
COMMISSIONER

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE THE DEPENDENCY OF	)	
	)	No. 39591-0-III
	)	(Consol. with 39592-8-III,
X.T.J.,	)	39635-5-III, 39729-7-III, and
	)	39730-1-III)
	)	
	)	ORDER GRANTING
	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
	)	(April 10, 2023 ORDER)

Having considered petitioner's motion to modify the commissioner's ruling of October 31, 2023, respondent's answer to the motion, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is GRANTED only as to the April 10, 2023 order.

PANEL: Judges Staab, Fearing, Cooney

FOR A MAJORITY:

George Fearing

GEORGE FEARING
Chief Judge

FILED
JANUARY 30, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Dependency of:	)	No. 39591-0-III
	)	(consolidated with
X.T.J. and X.M.J.	)	No. 39592-8-III,
	)	No. 39634-7-III,
	)	No. 39635-5-III,
	)	No. 39729-7-III,
	)	No. 39730-1-III)
	)	
	)	UNPUBLISHED OPINION
	)	

KORSMO, J.P.T.[1] — This court initially granted discretionary review of this admittedly moot action in order to consider the question of a trial court's authority to authorize entry into a family home for child welfare purposes. A more thorough review of the record has convinced us that the atypical fact pattern of this case and changes in controlling law mean it is not the appropriate vehicle for resolving the issue. Accordingly, we dismiss this moot appeal.

BACKGROUND

The case has its genesis in a series of child welfare complaints in early 2023 concerning two children, XTJ and XMJ, who were members of the Cowlitz Indian Tribe. The Department of Children, Youth, and Families (DCYF) became involved when the two infants, then aged 2 and 1, were taken to the hospital on January 23, 2023, by their

[1] Kevin M. Korsmo, a retired judge of the Washington State Court of Appeals, is serving as a judge pro tempore of this court pursuant to RCW 2.06.150(1).

mother and grandmother after the older child, XTJ, ingested illegal drugs at the grandmother's home where the family was living. The child tested positive for cocaine and methamphetamine.

A Yakima County Superior Court commissioner granted an ex parte order to take the two children into protective custody. DCYF filed a dependency petition. A shelter care hearing was held and the commissioner ordered a return of the children to their mother in accordance with the standards of the federal Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963. The return order also prohibited the children from having contact with the grandmother or visiting her residence. The mother and children moved in with the mother's sister. The dependency petition was set for fact-finding. The order also authorized DCYF to make one child welfare visit at the mother's home prior to the case status conference.

On March 23, 2023, XTJ was put to bed after eating lunch because he was tired. His mother soon thereafter noted that his lips were blue and sought medical assistance. Emergency medical technicians placed XTJ on a ventilator and ultimately transported him to Seattle Children's Hospital. XTJ was not expected to survive, so the mother authorized the removal of life support. The child died on March 27, 2023.

In light of XTJ's death, DCYF obtained an order on March 30, 2023, placing XMJ

in the custody of the mother's sister and allowing visitation by the mother. By the time of a hearing on April 4, 2023, an autopsy had determined that XTJ had died from a heart attack due to the same inherited health condition that had also killed his father. The juvenile court commissioner returned XMJ to the custody of the mother. In anticipation of the dependency trial occurring in June, the court's written order filed April 10, 2023, continued the restriction against living at the grandmother's address and included the following provision at issue in this case:

> 3.2 Safety Visits. [DCYF] may not conduct more than one health & safety check on the child every 30 days. [DCYF] may only talk to and interact with the child during the health and safety check. Health and safety checks may be done in the home or at day care. Health & safety checks in the home may only take place with the Cowlitz Indian Tribe's social worker or OPD [Office of Public Defense] social worker present. [DCYF] must pre-arrange the physical presence of either social worker.

Clerk's Papers at 129 (boldface omitted).[2]

Four days after the entry of the order, the juvenile court granted a motion by DCYF to dismiss the dependency action concerning XTJ.[3] The mother then sought discretionary review of five orders entered by the juvenile court, and the Tribe sought

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[2] This order referenced "day care" because the mother had expressed the desire to enroll the child in day care, but had not yet done so.

[3] The dependency action involving XMJ was also dismissed due to the child's death and is not at issue in this action.

review of three of those orders. Our commissioner denied discretionary review because the case was moot. A panel of this court granted a motion to modify the commissioner's ruling solely as to the home visitation provision of the April 10 order.

ANALYSIS

An appeal is moot if an appellate court cannot provide effective relief. *In re Det. of LaBelle,* 107 Wn.2d 196, 200, 728 P.2d 138 (1986). Nonetheless, an appellate court will consider a moot case when it is in the public interest to do so. *Id.* Factors to be considered include whether or not the matter is of a private or public nature, the need for guidance to public officials, and whether the problem is likely to recur. *In re Det. of Cross,* 99 Wn.2d 373, 377, 662 P.2d 828 (1983).

DCYF has competing obligations both to protect an at-risk child and to keep families together. ICWA adds the additional obligation to act in the best interests of an Indian child, 25 U.S.C. § 1902. In addition, the Washington State Indian Child Welfare Act (WICWA), chapter 13.38 RCW, requires placement decisions to consider both the best interests of the child and their tribe. RCW 13.38.030. ICWA and WICWA, as recognized by the juvenile court, therefore militate against removal of an Indian child from the home.

The adoption by the Washington Legislature of the Keeping Families Together Act

revised the obligations concerning the initial decision to remove children from their families. LAWS OF 2021, ch. 211. The act took effect July 1, 2023, ten weeks after the order at issue in this case and four months after the initial order to take the children into protective custody. LAWS OF 2021, ch. 211, § 12. Thus, to the extent that the question presented on review involves statutory obligations of DCYF, an opinion on the merits would necessarily address laws or regulations that are no longer in effect. The Tribe advised us that a similar factual pattern arose under current law in two cases pending in Division Two of this court. Reply to State's Br. at 3 (citing to *In re Welfare of P.R.L.M.*, No. 59673-3-II, linked with *In re Welfare of B.G.J.M.*, No. 56983-1-II).[4] Thus, to the extent that this issue may arise in the future, we are confident that resolution of the argument under the new statute is a far better solution than offering an advisory opinion about the former law.

While we dismiss this review for that reason, we do want to encourage the petitioners to better frame their trial court arguments should this problem arise again. The unstated premise of the petitioners' arguments is that a parent's privacy right in their

[4] On September 20, 2024, a commissioner of Division Two of this court determined that the cases were moot and denied discretionary review. A panel of the court later declined to modify the commissioner's ruling and certificates of finality were issued on January 17, 2025.

home trumps the ability of the court and DCYF to ensure an endangered child is safe by visiting the home. Argument and evidence for and against such a proposition would go a long way toward developing a proper record to allow courts to determine the correct resolution to the issue.[5] Although constitutional issues may be raised for the first time on appeal, having an adequate record to properly address the issue is critical for appellate review. *E.g., State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (without adequate record, alleged constitutional error is not "manifest" within the meaning of RAP 2.5(a)).

The appeal is dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.P.T.

WE CONCUR:

Lawrence-Berrey, C.J.

Cooney, J.

[5] These concerns may also inform a juvenile court's decision on placement. Return of a child to a dangerous environment without oversight could be a significant factor in the placement decision.

BACKLUND & MISTRY

March 03, 2025 - 11:44 AM

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Appellate Court Case Title:	In re the Dependency of: X.T.J.
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