

1 **ARIZONA COURT OF APPEALS**
2 **DIVISION ONE**

3 **In the Matter of the Guardianship of:**

Court of Appeals Division One
No. 1 CA-CV 23-0485

4 **A.K.**

5 **A Minor/Real Party in Interest.**

Maricopa County Superior Court
No. JG512607

6
7 **BRIEF OF AMICUS CURIAE NATIVE AMERICAN BAR**
8 **ASSOCIATION OF ARIZONA IN SUPPORT OF APPELLEES**

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INTERESTS OF AMICUS CURIAE

The Native American Bar Association (NABA-AZ) is a non-profit organization created to advance and improve the practice of Indian law and promote the professional development of its members. NABA-AZ members include Native American and non-Native American attorneys, law students, advocates and other legal professionals. NABA-AZ includes members who teach, publish scholarship, and practice in the areas of Indian law and Tribal law, including members of the Arizona Bar who represent Tribes in Indian Child Welfare Act (ICWA) proceedings. NABA-AZ has provided educational programs on ICWA and has commented on rules surrounding ICWA.

INTRODUCTION

Congress enacted the Indian Child Welfare Act of 1978 (ICWA) to preserve Tribes' independent sovereign interests in their children. 25 U.S.C. § 1901 *et seq.* Lawmakers understood, “[i]f tribal sovereignty [was] to have any meaning at all at this juncture of history, it must necessarily include the right ... to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity.” S.REP. NO. 95-597, at 50 (quoting *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973)). Congress confirmed

1 what Tribal leaders have long recognized: “our children are our greatest resource,
2 and without them we have no future.” *Indian Child Welfare Act of 1978: Hearing*
3 *Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on*
4 *Interior and Insular Affairs*, 95th Cong. 78 (1978) (statement of Faye La Pointe,
5 Coordinator of Social Services for Child Welfare, Puyallup Tribe of Washington).
6 Finding “there can be no greater threat to ‘essential tribal relations’ and no greater
7 infringement on the right of the ... tribe to govern [itself] than to interfere with tribal
8 control over the custody of [its] children,” Congress recognized that “a tribe’s
9 children are vital to its integrity and future.” H.R. REP. NO. 95-1386, at 15 (1978)
10 (quoting *Wakefield v. Little Light*, 347 A.2d 228, 237-38 (Md. 1975)). Congress has
11 repeatedly recognized ICWA’s purpose of protecting Tribal interests in state custody
12 proceedings. 149 CONG. REC. E2282-02 (Nov. 7, 2003) (statement of Hon. Don
13 Young); S.REP. NO. 105-156, at 26 (1997); S. Res. 707, 115th Cong. (2018).

14 ICWA protects “the rights of the Indian community and Tribe in retaining its
15 children in its society” with minimum federal standards before removing Indian
16 children from their families. *Mississippi Band of Choctaw Indians v. Holyfield*, 490
17 U.S. 30, 37 (1989) (citing H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978
18 U.S.C.C.A.N. 7530, 7546); 25 U.S.C. § 1902. ICWA recognizes the special
19 relationship between the U.S. and Indian Tribes and assumes a federal responsibility

1 “for the protection and preservation of Indian tribes and their resources” including
2 the “continued existence and integrity of Indian tribes and their children.” 25 U.S.C.
3 § 1901. ICWA’s legislative history and the U.S. Supreme Court’s interpretation of
4 ICWA in *Holyfield* affirms its purpose to protect Tribes’ interests in maintaining
5 political relationships with their children. 490 U.S. at 34. Further, ICWA recognizes
6 Tribes’ inherent and sovereign authority “to be involved in important child welfare
7 decisions.” S. RES. 707, 115th Cong. (2018). These interests are not limited to
8 children raised on or near the Tribe’s reservation. To create such a limitation would
9 render ICWA meaningless.

10 ICWA specifically protects Indian children in child welfare proceedings and
11 safeguards Indian children’s relationships with their families, communities, and
12 identities. ICWA “require[s] states to send notice to tribes so...tribes may exercise
13 their independent rights and interests to protect their children and, in turn, the
14 continuing existence of tribes as thriving communities for generations to come.” *In*
15 *the Matter of Dependency of Z.J.G.*, 471 P.3d 853, 856, ¶ 2 (Wash. 2020) (en banc).
16 Thus, to protect sovereignty, Tribes have a “right to exercise tribal court jurisdiction”
17 or “intervene as a party” in these proceedings involving Indian children under
18 ICWA. *Id.* at 861, ¶ 2 (citing 25 U.S.C. § 1911 (a-c)).
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I. ICWA Applies to Title 14 Guardianship Proceedings.

To protect the rights of Indian families, Indian children, and Tribes, ICWA applies to foster-care, preadoptive and adoptive placements. 25 U.S.C. § 1915 (a-b); Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96476 (Dec. 30, 2016). ICWA includes guardianship under its definition of foster care placements (FCP).

[A]ny action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

25 U.S.C. § 1903(1)(i); *see also* Indian Child Welfare Act, 25 C.F.R. § 23.2(11)(i) (2016).

Courts have found that where parents cannot demand a child's return, such guardianships meet the FCP definition. *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 649 (S.D. 2004); *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. App. 1993); *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799 (Mich. App., 2008) (finding that ICWA applies to both voluntary and nonvoluntary proceedings); *In the Matter of C.G.*, 317 P.3d 936, 946-947 (Or. App. 2014) (finding that the exclusion of durable guardianships would undermine the purpose of ICWA); *Dep't of Hum.*

1 *Servs. v. J.G.*, 317 P.3d 936 (2014). Similarly, courts have found guardianships meet
2 FCP’s definition where custodial parents die. *In the Matter of the Guardianship of*
3 *Ashley Elizabeth R. and Amity Danielle G.*, 863 P.2d 451, 453 (NM App. 1993); *see*
4 *Matter of Guardianship I.L.J.E.*, 921 N.W.2d 463 (S.D. 2018).

5 FCPs are not limited to actions filed by state child welfare agencies. Jill E.
6 Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places:*
7 *Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119,
8 1149 (2010). ICWA applies to any attempts to place an Indian child with someone
9 other than the parent or Indian custodian “whether on a permanent or temporary
10 basis.” *See* BIA Guidelines for State Courts, Indian Child Proceedings, 44 Fed. Reg.
11 67,584, 67,587 (Nov. 26, 1979). Non-governmental parties can “initiate” FCP
12 proceedings, including guardianships. *In re Guardianship of Eliza W.*, 938 N.W.2d
13 307, 313 (Neb. 2020). Courts have found placing Indian children with relatives
14 constitutes placements in guardians’ or conservators’ homes under the FCP
15 definition. *Id.*; *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. App. 1993);
16 *see Jude M. v. State*, 394 P.3d 543, 554 (Alaska 2017). State initiated proceedings
17 of Indian children is not required to satisfy the FCP definition.

18 While this Court has found that ICWA applies to permanent guardianships
19 under Title 8 of Arizona law, ICWA also applies to Title 14 guardianship
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1 proceedings. *Navajo Nation v. Dep't of Child Safety*, 246 Ariz. 463, 467 ¶13 (App.
2 2019). Title 14 guardianships include both temporary and permanent guardianships.
3 A.R.S. §§ 14-5104, 14-5207. When a parent or Indian custodian cannot demand the
4 immediate return of the child, ICWA applies. When state courts authorize a
5 nonparent to “exercise the full range of parental rights and responsibilities,” ICWA
6 applies. *See* Tompkins, 81 U. COLO. L. REV. at 1122. Private parties may seek to
7 circumvent the protections triggered by ICWA when filing non-parent custody cases
8 under Title 14, or as NABA-AZ members have seen through in loco parentis actions
9 under Title 25. *See* A.R.S. § 25-409. Such actions result in Tribal children being
10 separated from their parents, Indian families and Tribes and is “[t]he very problem
11 that ICWA was enacted to address.” Tompkins, 81 U. COLO. L. REV. at 1122.

12 Fulfilling ICWA’s purpose, Tribes must always receive proper notice—
13 including in guardianship proceedings. *Guardianship of D.W.*, 164 Cal. Rptr. 3d
14 414 (2013). Limiting ICWA’s triggering mechanism to parental engagement
15 endangers Tribes’ notice necessary to defend their independent interests. *See*
16 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“This
17 right to be heard has little reality or worth unless one is informed that the matter is
18 pending and can choose for himself whether to appear or default, acquiesce or
19 contest.”). Failure to provide statutory notice effectively nullifies Tribes’ sovereign
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1 interests in their citizens, thereby denying Tribes' ICWA-guaranteed protections and
2 potentially circumventing the law.

3 4 **II. Tribes Have a Sovereign Interest in their Children that is Not Diminished after Adoption.**

5 ICWA is the gold standard of child welfare laws, recognizing tribal
6 sovereignty and protecting the best interests of Indian children. “[F]ew matters are
7 of more central interest to a tribe seeking to preserve its identity and traditions than
8 the determination of who will have the care and custody of its children.” *Matter of*
9 *Adoption of Halloway*, 732 P.2d 962, 966 (Utah 1986) (citing H.R. REP. NO. 95-
10 1386, 95th Cong., 2d Sess. 19). “The importance of tribal primacy in matters of
11 child custody and adoption . . . is grounded on the premise [of] tribal self-
12 government.” *Id.* In establishing ICWA, Congress sought to reverse past state
13 welfare practices and found that Indian children are the most vital resource to the
14 “continued existence and integrity of Indian tribes.” 25 U.S.C. § 1901. This Court
15 has recognized that ICWA was enacted to “protect the best interests of Indian
16 children and to promote the stability and security of Indian tribes and families.” *In*
17 *re Coconino County Juvenile Action No. J-10175*, 153 Ariz. 346, 348–349 (App.
18 1987) (quoting *In re Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528,
19 531 (App. 1983) (quoting 25 U.S.C. § 1902)).

1 Tribes’ sovereign interest in their children is unaffected by the racial or
2 political status of a child’s adopted parents. A Tribe’s interest in its children exists,
3 whether a child lives on or off the reservation or whether the child has already been
4 subject to foster care, preadoptive, or adoptive care placements. Subsequent
5 placements of an Indian child must also comply with ICWA. *In the Matter of C.G.*,
6 317 P.3d 936, 947 (Or. App. 2014). ICWA applies if (1) the child custody
7 proceeding is subject to ICWA and (2) the child is an Indian child defined by ICWA.
8 25 U.S.C. § 1903(4). “The fact that a child may have been living in a non-Indian
9 home is no reason, standing alone, to dispense with the provisions of [ICWA]”). *In*
10 *re Coconino Cnty. Juv. Action No. J-10175*, 153 Ariz. at 349 (citing *In re Adoption*
11 *of Halloway*, 732 P.2d 962, 963–64 (Utah 1986)).

12 Adoption by a nonIndian family does not affect a child’s Tribal membership.
13 Tribal membership is an internal matter within Tribes’ exclusive authority. *Santa*
14 *Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In this case, the child is a member
15 of the Gila River Indian Community (GRIC). According to GRIC law, legal
16 adoption “shall not extinguish any status, rights or privileges due to the child’s
17 Indian ancestry, heritage or [GRIC] membership.” GRIC Code, §7.610(K)(2).

18
19 **III. ICWA Recognizes that Tribal Courts Have Presumptive Jurisdiction**
20 **over Indian Children.**

1 “Congress recognized, rather than granted or created, tribal jurisdiction over
2 child custody proceedings involving Indian children.” *Gila River Indian Cmty. v.*
3 *Dep’t of Child Safety*, 242 Ariz. 277, 282, ¶ 20 (2017) (citing *Holyfield*, 490 U.S. at
4 42). ICWA recognizes presumptive Tribal court jurisdiction, as a matter of Tribal
5 self-governance, because Congress found, “the States, exercising their recognized
6 jurisdiction over Indian child custody proceedings through administrative and
7 judicial bodies, have often failed to recognize the essential tribal relations of Indian
8 people and the cultural and social standards prevailing in Indian communities and
9 families.” 25 U.S.C. § 1901; *see also*, *Holyfield*, 490 U.S. at 36.

10 ICWA establishes that Tribes have exclusive jurisdiction over children who
11 live on an Indian reservation, and concurrent “but presumptive tribal jurisdiction”
12 with the state when the Indian child lives off the reservation. 25 U.S.C. § 1911(a).
13 Moreover, ICWA’s wardship provision vests exclusive Tribal jurisdiction over
14 wards “notwithstanding the residence or domicile of the child.” *Id.*; *see Gila River*
15 *Indian Cmty. v. Dep’t of Child Safety*, 242 Ariz. 277, 280, ¶ 13 (2017).

16 The Tribal wardship provision recognizes the sovereign importance of
17 protecting Indian children’s welfare, transcending Tribal authority beyond
18 reservation boundaries. *See* Patrice H. Kunesh, *Borders Beyond Borders—*
19 *Protecting Essential Tribal Relations Off Reservation Under the Indian Child*

1 *Welfare Act*, 42 NEW ENG. L. REV. 15 (2007). Tribes establish wardship status by
2 exercising authority over Indian children through Tribal court orders in child custody
3 or guardianship proceedings. *See Matter of M.R.D.B.*, 787 P.2d 1219, 1223 (Mont.
4 1990); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 282 (S.D. 1980).

5 ICWA does not define “ward;” however, courts have determined wardship
6 exists from Tribal orders’ intent and nature, especially orders retaining jurisdiction
7 until future dates/events. *Matter of M.R.D.B.*, 787 P.2d at 1222; *Powell v. Crisp*,
8 E19902539C0AR3CV, 2000 WL 1545064, at *2 (Tenn. App. Oct. 18, 2000).

9 Wardship can apply to any Indian child, including a nonmember. CONFERENCE OF
10 WESTERN ATTORNEY GENERALS, AMERICAN INDIAN LAW DESKBOOK § 13:12 (2024).

11 If a child is a ward of a Tribal Court, the Tribal Court will generally have exclusive
12 authority regardless of the child’s residence/domicile. 25 U.S.C. § 1911(a); *Matter*
13 *of M.R.D.B.*, 787 P.2d at 1222; *Matter of D.L.L.*, 291 N.W.2d at 282. However,
14 temporary state authority exists to “prevent imminent physical damage or harm to
15 the child.” 25 U.S.C. § 1922.

16 If a Tribe lacks exclusive jurisdiction over an Indian child, the Indian child
17 can become a ward of the state court. For example, if an Indian child is living or
18 domiciled off the reservation and a Tribal court has not exercised authority over the
19 child in child welfare matters, the state has authority to initiate proceedings
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1 involving the Indian child. However, even if a Tribe lacks exclusive jurisdiction, a
2 Tribe can request that the case be transferred to Tribal court because “tribes have
3 inherent authority to hear child custody proceedings involving their own children.”
4 *Gila River Indian Cmty v. Dep’t of Child Safety*, 242 Ariz. at 281–82, ¶ 21. While
5 ICWA clarifies the mandatory requirements for the transfer of cases to Tribal courts
6 in FCP or termination of parental rights cases, a state court may also transfer cases
7 involving pre-adoptive and adoptive placements. *Id.* at 281–82, ¶ 19.

9 CONCLUSION

10 ICWA provides a roadmap to support Tribal self-determination. While Title 8
11 guardianships resulting from dependencies clearly fall within ICWA’s scope, private
12 actions that have the same effects that ICWA sought to remedy can also occur under
13 Title 14 guardianships as well as Title 25. These legal tools should not be used to
14 circumvent the purposes of ICWA. Even if an Indian child has been previously
15 adopted by a nonIndian, the child is still an Indian child, and any subsequent custody
16 proceedings subject to ICWA must be followed. A Tribe has exclusive jurisdiction
17 over child welfare matters involving Indian children who reside on the reservation
18 or children who have been made wards of the Tribal court according to Tribal law.
19 If a Tribal court has exclusive jurisdiction, the state court should decline to entertain
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any child welfare cases involving the child unless it is an emergency. To do so,
would frustrate the basic principles set forth in ICWA.

RESPECTFULLY SUBMITTED this 17th day of June, 2024.

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