NO. 92127-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 47364-0-II

In re Welfare of: T.A.W.,

and

R.B. and C.B., Respondents/Petitioners,

and

C.W., Appellant/Respondent.

AMICUS BRIEF IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

U.S. Statutes

State Statutes

Local Rules

Other Authorities

I. Introduction

This case, more than any other, highlights the race-based separate and substandard treatment given to Indian children under the federal Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq.*, and its counterpart in Washington state law ("WICWA"), Chapter 13.38 RCW. TAW's existing relationship of about seven years with his stepfather will not be given legal recognition or effect solely because TAW is an Indian child.[1] The decision of the Court of Appeals goes against fundamental principles of equal treatment under law and respect for individual rights embedded in the United States and Washington Constitutions. U.S. Const. amend. XIV, § 1; WA Const. art. I, §§ 3, 12.

Indian Birth Mother, CB, divorced non-Indian Birth Father, CW. *In re Adoption of TAW*, 354 P.3d 46, 48 ¶ 6 (Wash. App. 2015). And not without good reason. Birth Father became addicted to methamphetamines beginning in 2008 (Mtn. Rev. 2). Shortly thereafter, he was sentenced to 36 months in prison for "theft of a motor vehicle, possession of a stolen vehicle, residential burglary, and second degree burglary." *Id.* at 48 ¶ 7. After Birth Father was released from prison, he was charged and convicted of second degree robbery and sentenced to 43 months in prison. *Id.* at 49 ¶ 9. Birth

[1] TAW and his Birth Mother, CB, are members of the Shoalwater Bay Indian Tribe. *In re Adoption of TAW*, 345 P.3d 46, 48 ¶ 4 (Wash. App. 2015). Pursuant to the Shoalwater Bay Indian Tribe Code of Laws, all children born to a tribal member must have more than one-quarter Indian blood in order to qualify for membership in the Tribe. SHOALWATER BAY INDIAN TRIBE CONST. art. II, § 1, *available at* http://www.shoalwaterbay-nsn.gov/assets/PDFs/Law--Order-Codes/00-CONSTITUTIONAmended-11-16-05.doc. Consequently, TAW, who is a member of the Tribe, has at least one-quarter Indian blood, and therefore is an "Indian child" as defined in ICWA and WICWA. 25 U.S.C. § 1903(4); RCW 13.38.040(7).

Father was twice the subject of protective orders for violence against Birth Mother; Birth Father has not exercised his right to visit TAW in over six years (Mtn. Rev. 2–3). The trial court, in its Findings of Fact of August 21, 2014 ("FOF"), ¶ 2.12, found, "The father has not had face-to-face contact with the child since August 2009, and this failure is the sole responsibility of the father."[2] While Birth Father was serving his second prison sentence, Birth Mother, CB, married RB, a member of another Indian tribe (Mtn. Rev. 2).[3] *Id.* at 49 ¶ 10.

CB and RB petitioned to terminate Birth Father's parental rights and allow RB to adopt TAW. *Id.* On the recommendation of a court-ordered home study, and with complete support of the Shoalwater Bay Tribe (Mtn. Rev. 4), the trial court terminated Birth Father's parental rights and granted RB's petition to adopt TAW. *Id.* at 49 ¶ 11. Division 2 of the Court of Appeals reversed. *Id.* at 54 ¶ 41. CB and RB filed a timely Motion for Discretionary Review in this Court. This timely memorandum of the Goldwater Institute, amicus curiae, in support of the Motion for Discretionary Review, follows. RAP 13.3(d), 13.4(h).

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[2] The trial court also found, "[Birth Father] made little or no effort to contact his child while he was incarcerated, and made no effort to contact the child between June 4, 2010, and March 8, 2013, when he was not incarcerated." FOF ¶ 2.16. The trial court also found "beyond a reasonable doubt that [Birth Father] is currently unfit to parent [TAW]. … It is in [TAW's] best interest that the parental rights between he and [Birth Father] be terminated." FOF ¶¶ 2.19, 2.21. These findings of fact, the trial court concluded, "have been proven by clear, cogent and convincing evidence." FOF ¶ 3.2.

[3] The Tribe of which RB is a member is not known to amicus curiae.

II. Argument

At every step in the termination and adoption proceedings, state and federal law requires that TAW be discriminated against because he has at least one-quarter Indian blood. This is in obvious violation of his constitutional rights and in complete disregard of his best interest. This discriminatory statutory scheme, as applied to TAW by the Court of Appeals, is therefore unconstitutional.

The legislature's intent in enacting Chapter 26.33 RCW could not be clearer: "the purpose of adoption is to provide stable homes for children. … The guiding principle must be determining what is in the best interest of the child." RCW 26.33.010. Particularly, stepparent adoptions are utterly routine in Washington. *Matter of H.J.P.*, 789 P.2d 96 (Wash. 1990). After all, one of the parents is the child's birth parent and the birth parent's current spouse seeks to adopt the child. The best interest of the child is the primary concern, and the rights of the parent whose rights are being terminated are adequately protected by requiring an intermediate level of proof and by not allowing termination to occur on a no-fault basis. RCW 26.33.120(1); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Matter of H.J.P.*, 789 P.2d 96 (Wash. 1990). If the birth parent whose rights are sought to be terminated in a stepparent adoption scenario withholds consent to the stepparent adoption, state law provides that such a withholding of consent be balanced against the best interest of the child. RCW 26.33.120(1). The withheld consent termination-of-parental-rights requirements in

dependency cases[4] are the same as in stepparent adoption cases. *Matter of H.J.P.*, 789 P.2d at 101.

If nothing else, this standard protects "the rights of all parties," RCW 26.33.010: the substantive rights of parents, *Troxel v. Granville*, 530 U.S. 57 (2000), as well as "a child's liberty interests in preserving established familial or family-like bonds." *Id.* at 88 (Stevens, J., dissenting).

But if a child is deemed Indian by blood quantum, the child and the petitioning birth parent's rights are given no consideration in a stepparent adoption scenario. The very same statute that purports to protect the rights of all parties begins with the phrase: "Except in the case of an Indian child." RCW 26.33.120(1). State law requires that Indian children be carved out from the protection of uniform and race-neutral state law applied to all other children. With regards to termination of parental rights, the ICWA carve-out states:

> No [involuntary] termination of parental rights may be ordered … in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f); RCW 13.38.130(3).

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[4] Termination in dependency is similar to termination in stepparent adoption scenarios, but they differ in that to terminate a parent-child relationship of non-Indian children adjudicated dependent, Washington courts first focus on the "adequacy of the parent[]," proven by "clear, cogent, and convincing evidence" involving the six factors outlined in RCW 13.34.180. *In re Welfare of A.B.*, 232 P.3d 1104, 1106 (Wash. 2010). The second step focuses on the "child's best interests" proven by "only a preponderance of the evidence." *Id.*

The standard of proof used in terminating a parent-child relationship "reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Santosky v. Kramer*, 455 U.S. at 756. ICWA, by requiring proof beyond a reasonable doubt, places a low value indeed on the individual liberty of Indian children like TAW *because* they are Indian, and on the individual liberty of petitioning parties like Birth Mother who is divorced from Birth Father, and Stepfather who has been the *de facto* parent to TAW for more than a majority of TAW's life. The individual liberties of TAW, Birth Mother, and Stepfather purportedly do not count because of TAW's ancestry. Put differently, even if a parent is proven to be unfit—a showing sufficient to terminate parental rights with regards to non-Indian children, *In re Welfare of K.M.M.*, 349 P.3d 929 (Wash. App. 2015)—such a showing is not sufficient to provide Indian children like TAW the sanctuary of legal protection; there needs to be an obvious proof of "serious emotional or physical damage" 25 U.S.C. § 1912(f), to an Indian child in order for that child's individual liberty to be sufficiently valued by society, and courts, so that the child may be given a reprieve by terminating the parental rights of an unfit parent.

As if this almost insurmountable burden of proof were not enough, the Court of Appeals required proof of an additional requirement: that of active efforts. 25 U.S.C. § 1912(d); RCW 13.38.130(1); RCW 13.38.040(1)(a)–(b).

The Court of Appeals, in utter disregard of the individual liberties of Birth Mother, Stepfather, and TAW, concluded that a finding beyond a

reasonable doubt of Birth Father's unfitness, FOF ¶ 2.19, and a finding of abandonment based on clear, cogent and convincing evidence, 354 P.3d at 49 ¶ 11, is not sufficient to comply with ICWA. *TAW*, 354 P.3d at 49-50 ¶ 16; *but see In re Dependency of MSR*, 271 P.3d 234, 243 (Wash. 2012) ("the child's liberty interest in a [termination-of-parental-rights] proceeding is very different from, but at least as great as, the parent's.").

Similarly, evidence of Birth Father's addiction, incarceration, and questionable prospects of providing financial and emotional support in the future is sufficient to terminate parental rights on grounds of abandonment for all children; efforts to provide remedial services and rehabilitative programs in situations where children are not removed from their parents is not needed. *Matter of Adoption of Gargan*, 587 P.2d 545 (Wash. App. 1978); *Matter of Interest of Pawling*, 679 P.2d 916 (Wash. 1984); RCW 13.34.180(1)(d); RCW 13.34.136(1); RCW 26.33.120. Except now for children, like TAW, with the requisite amount of Indian blood, proof is needed that active efforts to provide remedial or reunification services were made but were unsuccessful before parental rights of the noncustodial parent can be terminated. *Compare TAW*, 354 P.3d at 49 ¶ 15, *with In re Infant Child Skinner*, 982 P.2d 670, 675 (Wash. App. 1999) (holding that when a non-Indian child's mother petitions for termination of father's parental rights prior to adoption, the state statutes or the constitution does not require that the noncustodial parent who withholds consent to child's adoption be offered remedial or reunification services prior to termination

of parental rights) ("rights of the parent must yield, when necessary, to the best interests of the child").

What would the active efforts requirement as applied in the stepparent adoption scenario look like? How are Birth Mother and Stepfather going to make a "documented, concerted, and good faith effort to facilitate the [Birth Father's] receipt of and engagement in" RCW 13.38.040(1)(b) "reasonably available and culturally appropriate preventive, remedial, or rehabilitative services … includ[ing] … services offered by tribes and Indian organizations" RCW 13.38.040(1)(a)? The Shoalwater Bay Indian Tribe, in supporting TAW's adoption by Stepfather, implicitly determined that active efforts were made and that they were unsuccessful. The trial court found: "Between April 2008 and May 2009, [Birth Father] had extremely limited contact with [TAW]. Any contact between [Birth Father] and [TAW] was initiated solely by [Birth Mother] or [Birth Father's] mother, not by any effort of [Birth Father]." FOF ¶ 2.8. Contrary to the Court of Appeals' instructions on remand, to the extent active efforts were required by law, such efforts were already made and adequately documented by the trial court. The Court of Appeals' "interpretation" and application of the active efforts requirement in the stepparent adoption context, thus, "raise[s] equal protection concerns." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

Far from protecting the fundamental liberty interests of TAW, his Birth Mother, and his Stepfather, federal and state law requires from them proof beyond a reasonable doubt that termination of the unfit Birth Father's

rights will be appropriate. Not only that, state law now requires them to take "active efforts" to help Birth Father undermine their case against him. State law, federal law, and the Court of Appeals' decision eviscerate all meaningful difference between adequately protecting the rights of all parties and protecting the rights of some parties by sacrificing the rights of others. This imbalance in the law not only flies in the face of substantive due process rights of children deemed Indian, their remarrying Indian birth parents, and the stepparent, but it also utterly fails to provide them the equal protection of the laws. If stepparent adoptions are going to be prevented or discouraged by law based solely on the fact that the child has some quantum of Indian blood, then the Equal Protection Clause demands that such racial classifications "be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967). If stepparents and remarrying Indian birth parents of Indian children are forced to bear procedural and evidentiary burdens substantially higher than those borne by similarly-situated parents of non-Indian children based solely on the quantum of Indian blood of the child, then such a racial classification must be "narrowly tailored" to "further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

But what exactly is the government's interest in this racial classification and resulting discriminatory treatment? The interest, we are told, is "that an alarmingly high percentage of Indian families are broken up by *removal*, often unwarranted, or their children from them *by nontribal public and private agencies*." 25 U.S.C. § 1901(4) (emphasis added); *TAW*,

354 P.3d at 49 ¶ 13 (quoting same). If anything, this interest implies limits on state power in dependency proceedings, Chapter 13.34 RCW; it is neither compelling nor tailored to stepparent adoptions, where, by definition, there is no removal of a child by nontribal public and private agencies. There can be no conceivable governmental interest in actively seeking to prevent or discourage stepparent adoptions.

By predicating the entire body of Washington stepparent adoption law on the point of the racial composition of a child's blood, what message does it send to remarrying birth parents and stepparents who wish to adopt Indian children? The family bonds between a stepparent and an Indian child are not to be given legal recognition because of the child's race while the non-existent bonds between a child and an unfit parent who abandons the child are to be perpetuated because of the child's race. If the child needs to be hospitalized, the Stepfather who has been the child's *de facto* parent, is to be disarmed by law from taking necessary steps to authorize medical procedures to save the child's life or to be involved in educational decisions. Why are remarrying Indian birth parents disadvantaged? Why are Indian children disfavored by law in such a manner? Indeed, there is no fabric of governmental interest that can ever be tailored to justify such unequal treatment and utter disregard of the individual rights and liberties of some parties for the benefit of an unfit Birth Father.

Washington courts have unequivocally held that "ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests.… Rather, '[w]ell-established principles for deciding

custody matters should further [ICWA's] goals.'" *In re Welfare of L.N.B.-L.*, 237 P.3d 944, 965 (Wash. App. 2010) (quoting *In re Mahaney*, 51 P.3d 776, 784 (Wash. 2002)). That holding should be applied here.

III. Conclusion

The rule we urge the Court to adopt is straightforward: apply the same standards to all children and all adults, regardless of their race. The reason we urge this rule is also straightforward: the state and federal Equal Protection Clauses require that individuals not be subject to race-based discrimination. U.S. Const. amend. XIV, § 1; WA Const. art. I, §§ 3, 12. The state and federal Due Process Clauses, *id.*, require that the fundamental rights and liberties of all parties—children, birth parents, stepparents—be protected by not sacrificing or disregarding the rights of some in order to protect those of others. The balance the Supreme Court struck in *Santosky v. Kramer*, we submit, is the better rule of law that, if uniformly applied in a race-neutral manner strikes the proper balance between the rights and liberties of all parties. Consequently, we urge this Court to grant CB and RB's Motion for Discretionary Review and allow full briefing on the question of whether ICWA and WICWA as applied to stepparent adoptions is unconstitutional under the state and federal Due Process and Equal Protection Clauses. This "significant question of law" which is of "continuing and substantial public interest," should be adequately briefed by the parties and amicus curiae and properly addressed for the first time on appeal. *In re Dependency of MSR*, 271 P.3d 234, 240 (Wash. 2012); RAP 2.5(a), 13.4(b)(3)–(4).

Respectfully submitted this 25th day of September, 2015.

Respectfully submitted,

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I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

Dated September 25, 2015, Phoenix, Arizona.

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