COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAISY DANFORTH and JAKE DANFORTH, v. GILA RIVER INDIAN COMMUNITY and A.K.	No. 1 CA-CV 23-0485 Maricopa County Superior Court No. JG512607

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS

The Goldwater Institute (GI) is well known as the nation's foremost organization defending the rights of Indian children against the unconstitutional and unjust burdens imposed on them by the Indian Child Welfare Act (ICWA). GI has appeared frequently in this Court and other courts in ICWA cases. *See, e.g.,* *GRIC v. DCS*, 242 Ariz. 277 (2017); *J.P. v. State*, 506 P.3d 3 (Alaska 2022); *In re C.J., Jr.*, 108 N.E.3d 677 (Ohio App. 2018); *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016).

INTRODUCTION

The answers to this Court's questions overlap somewhat. To summarize: **ICWA doesn't apply here** because this is not one of the four types of cases referenced in 25 U.S.C. § 1903. The reason relates to the Court's second question: the adoption by the non-Indian parent means **this case is not a removal of custody from the biological parent of an Indian child**. The adoption, in turn, also means that GRIC's interest in the child is insufficient to warrant *its* court exercising personal jurisdiction. **The Tribal Court's lack of personal jurisdiction renders its purported wardship order invalid and not entitled to full faith and credit,** which means the Superior Court erred *even if* ICWA were applicable. And that, in turn, answers the Court's third question: Section 1911(a) contemplates wardship

orders entered by a tribal court that has personal jurisdiction—as opposed to the type of jurisdictional gamesmanship at play here.

I. Does ICWA apply to this proceeding? Answer: No.

This case is not governed by ICWA. ICWA only applies to: (a) foster care placements, (b) termination of parental rights (TPR) proceedings, (c) preadoptive placements, and (d) adoptive placements. 25 U.S.C. § 1903(1). This is none of those.

First, it's not a foster care placement, because it's not an action for "remov[al]" of a child from a "parent or Indian custodian." *Id.* Rather, the parent died, and death of a parent is not "removal" of custody. Even if that did constitute "removal," ICWA would still not apply, because ICWA only applies to the removal of custody "from a parent or Indian custodian," and it defines these terms as follows: "parent" means the "*biological* parent[] … of an Indian child" (inapplicable here) or "any *Indian person* who has lawfully adopted an Indian child" (also not the case here) and "Indian custodian" means "any *Indian person* who has legal custody," etc. 25 U.S.C. § 1903 (6), (9) (emphases added). Since the deceased mother was not Indian, she cannot qualify as either a "parent" or "Indian custodian," and consequently this case is not an "action removing an Indian child from its parent or Indian custodian" under 25 U.S.C. § 1903(1)(i).

This is not a TPR proceeding because no party seeks termination of rights of the deceased parent. Nor is this a preadoptive placement, because this is not a proceeding "after" a TPR order. *See id.* §1903(1)(iii). Finally, it's not an adoptive placement, because Appellants only seek guardianship, and guardianship is not adoption. *Compare* A.R.S. § 8-871 *with id.* § 8-101–173.

A Title 14 guardianship proceeding would be governed by ICWA only if it qualified as a "child welfare proceeding" under Section 1903 of ICWA. That is not the case here. Because this proceeding is not one of the four kinds of cases subject to ICWA, that Act does not apply. That alone is sufficient for reversal.

II. How does the child's adoption by a non-Indian parent affect GRIC's interest in the child? Answer: GRIC has insufficient interest to entitle its court to exercise jurisdiction.

The adoption by the (deceased) non-Indian parent means this guardianship proceeding does not qualify as one of the cases ICWA applies to. But there's another reason why the adoption affected GRIC's interest, and that goes to another reversible error in the decision below.

The error is this: **the Tribe's purported wardship order was invalid for lack of *personal* jurisdiction**—so it was not entitled to full faith and credit. *See C.J., Jr.*, 108 N.E.3d at 695–97 ¶¶ 89–104 (wardship order lacking personal jurisdiction not entitled to full faith and credit).

The same rules that govern personal jurisdiction in state courts also apply to tribal courts. *Id.* at 696 ¶ 95. Tribal courts must have personal jurisdiction in order to issue valid orders. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 819–20 (9th Cir. 2011); *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993). An order from a court that lacks personal jurisdiction is not entitled to full faith and credit. *Schilz v. Superior Ct.*, 144 Ariz. 65, 68 (1985).

The Tribal Court had no personal jurisdiction to enter the purported wardship order. Personal jurisdiction is a function of due process. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 213 ¶ 19 (App. 2007). For it to exist, there must be "minimum contacts" between the court and the individuals over whom that court purports to exercise authority, *Martinez v. Zuniga*, No. 2 CA-CV 2023-0214-FC, 2024 WL 1202876, at *1 ¶¶ 5–6 (Ariz. App. Mar. 21, 2024). This "minimum contacts" requirement can be satisfied by *specific* jurisdiction—meaning that the dispute involves the specific act by the individual that was directed to the forum exercising jurisdiction, *id.* ¶ 6 n.1—or *general* jurisdiction, which applies when the individual's "contacts with the forum … are substantial or continuous and systematic enough that the defendant may be haled into court in the forum, even for claims unrelated to the defendant's contacts with the forum.'" *Id.* ¶ 6 (citation omitted). But "[t]he level of contact required to show general jurisdiction is 'quite high.'" *Id.* (citation omitted).

Here, there was no *specific* jurisdiction, because the purported wardship did not involve any act by the child or adults directed toward the tribal forum. The tribal forum also lacked *general* personal jurisdiction. Although the child is a tribal member, **mere citizenship does not establish minimum contacts**. *See, e.g.,* *Cas. Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596, 600 (9th Cir. 1992) ("the fact that CARIB is a Guam corporation is not enough to satisfy the minimum contacts analysis"); *Lalonde v. Delta Field Erection, Inc.*, No. Civ.A.96-3244, 2000 WL 34440782, at *2 (E.D. La. May 4, 2000) ("citizenship is different from personal jurisdiction"); *Munsell v. La Brasserie Molson Du Quebec Limitee*, 618 F. Supp. 1383, 1385 (E.D.N.Y. 1985) ("citizenship alone does not suffice to establish *in personam* jurisdiction."). Rather, the person's contacts must be such that she is "at home" in the forum, *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014), and that's plainly not true here.

The child is not domiciled on reservation. She had no interactions with GRIC: no cultural, social, religious, or linguistic affiliation with it. She doesn't attend cultural ceremonies, speak a tribal language, practice a Native religion, etc. **There were simply *no* contacts**—let alone the "quite high" degree of contact necessary for the Tribal Court to exercise personal jurisdiction. *Martinez*, 2024 WL 1202876, at *1 ¶ 6 (citation omitted).

The Tribal Court recited no facts in its purported wardship order to substantiate jurisdiction, and the sole basis for tribal court jurisdiction that the Superior Court cited is the fact that the child is an enrolled member. But not only is citizenship alone insufficient to establish personal jurisdiction,[1] but the fact that GRIC citizenship is determined solely by biological ancestry means that asserting jurisdiction on that basis would violate due process. *See* Sandefur, *Escaping the ICWA Penalty Box*, 37 Child. Legal Rts. J. 1, 25 (2017) (discussing tribal court efforts to establish personal jurisdiction based on ancestry alone). Personal jurisdiction is a due process principle; it requires "fundamental fairness." *Hoskinson ex rel. Fleming v. State of Cal.*, 168 Ariz. 177, 177 (1991) (citation omitted). There's nothing fair about a biology-based or race-based jurisdiction.

C.J., Jr., is particularly instructive, because it involved not only similar facts, but the same tribe. There, the child was born, raised, and domiciled in Ohio, but GRIC claimed he was an enrolled member. 108 N.E.3d at 681–83 ¶¶ 2-9. After state court proceedings began, GRIC's tribal court issued an *ex parte* order purporting to make him a ward and commanding that the state court relinquish jurisdiction and send him to live on GRIC's reservation. *Id.* at 685 ¶ 26.

[1] Courts do recognize an exception to personal jurisdiction, called the "status" exception, in certain cases involving child welfare. It entitles courts to exercise jurisdiction over parties who lack minimum contacts, if that's necessary for protecting the child. But that exception only applies where *the child is present in the forum*, which was not true here. *In re C.J., Jr.*, 108 N.E.3d at 696 ¶¶ 96–97.

The Ohio court refused, because the purported wardship order was issued without personal jurisdiction. *Id.* at 695–97 ¶¶ 90–104. "GRIC tries to bootstrap exclusive jurisdiction over C.J., Jr. by virtue of the fact that they made him a ward of their court by means of the *ex parte* order," it observed. *Id.* at 696 ¶ 101. But such bootstrapping was invalid because ICWA's wardship provision only means that "[i]f a child is *already* a ward of a tribe," *before* state proceedings begin, "then exclusive tribal jurisdiction is retained even if the child is domiciled elsewhere later." *Id.* at 697 ¶ 101. ICWA's wardship provision does *not* permit tribal courts to create jurisdiction by *ipse dixit* "[w]ithout the requisite minimum contacts," *id.* at 696 ¶ 96, by the convenient and self-serving device of simply signing a piece of paper.

As in *C.J., Jr.,* the GRIC court's lack of personal jurisdiction here means the wardship order cannot be accorded full faith and credit. *Id.* at 695 ¶ 91; *see also* *Stephens v. Thomasson*, 63 Ariz. 187, 194 (1945); *cf.* *Starr v. George*, 175 P.3d 50, 57–58 (Alaska 2008) (tribal proceedings could not be granted full faith and credit due to lack of notice required for tribal court jurisdiction). That means the Superior Court committed reversible error.

III. What qualifies a child as a "ward" under Section 1911(a) of ICWA? Answer: ICWA contemplates wardship orders issued by tribal courts already having jurisdiction over children domiciled on reservation.

The Indiana and South Dakota Supreme Courts have addressed situations like this, in which tribal courts have tried to use post-hoc wardship orders to take over jurisdiction of state cases—and they've said it's improper.

In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), involved a voluntary adoption initiated by a tribal member mother of a child not domiciled on reservation. *Id.* at 301–02. A day before the would-be adoptive parents filed their adoption petition, the tribal court issued a wardship order, *id.* at 302, and sought to transfer the case to tribal court. The Indiana Supreme Court held this was invalid. ICWA's wardship provision applies "only to such wardship orders of the tribal court which are entered while the child is residing or domiciled on the reservation," it said. *Id.* at 306. The purpose of the wardship provision is to prevent children over whom a tribal court properly has exclusive jurisdiction—i.e., cases involving domiciliaries—from being spirited out of that jurisdiction. The wardship provision was *not* designed to enable tribes "to effectuate the status of a child as a 'ward of the court' … where the child was never domiciled on the reservation, and was not residing on the reservation at the time the tribal court exercised jurisdiction and entered the wardship order." *Id.*

To hold otherwise would create a loophole in ICWA's carefully designed jurisdiction provisions. Section 1911 divides ICWA cases into two kinds: those involving children domiciled on reservation (subsection (a)), and those involving non-domiciliary children (subsection (b)). If a tribe could use a wardship declaration to seize exclusive jurisdiction over cases involving *non*-domiciliary children, then subsection (b) would be pointless; a tribe could effectively confiscate exclusive jurisdiction over *any* Indian child's case by mere assertion.

In *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007), South Dakota's Supreme Court agreed with *T.R.M.*, and held that a tribe cannot create its own exclusive jurisdiction by the simple expedient of a wardship order. *J.D.M.C.* involved the child of a tribal-member mother who brought a neglect petition against the non-Indian father. *Id.* at 799 ¶ 3. The tribal court declared the child—who was not domiciled on reservation—a ward, and ordered custody taken from the father. *Id.*

The state court said this was improper. *Id.* at 804–5 ¶ 23. ICWA's wardship provision, it noted, uses the word "retain"—that is, to keep jurisdiction it already has. Since a tribe has no exclusive jurisdiction over non-domiciliary children (that's why Section 1911(b) exists), a tribe cannot "retain" such jurisdiction through a wardship order. "[T]he only effective way a wardship order can be used to obtain exclusive jurisdiction is to enter the order *while the Indian child is*

domiciled or residing on the reservation," said the court, "and *before the proceeding commenced [in state court]*." Id. at 805 ¶ 25 (emphasis added).

Rather than applying these on-point cases, the Superior Court here relied on *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990), which involved crucially different—and complicated—facts. There, a voluntary adoption was initiated in state court, involving a child born to a tribal-member mother. Two months later, she withdrew her consent in state court, and a few days after that, appeared in tribal court as a petitioner, seeking to have the tribal court take jurisdiction. Id. at 1220. It did so, issuing a wardship order to which the state court accorded full faith and credit. Id. Then, a year later, the tribal court removed the child from the birth mother's custody, due to neglect, *see* id. at 1222–23, and then a year after that, returned custody to her on the condition that she raise the child in her home. Id. at 1220. Three years later, however, she again placed the child with the couple who had originally hoped to adopt. Id. The dispute before the Montana Supreme Court concerned whether *that* proceeding could go on in state court. Id. at 1221.

What's crucial is that *no party contested the validity of the original wardship order.* Rather, the case concerned whether that order had been *terminated* by subsequent developments. *See* id. at 1223 ("The Collins' [*sic*] contend that Michelle ceased to be a ward … when the [tribal] court granted physical custody to the mother."). *No* party raised—and the court never addressed—whether a tribal

court can (as GRIC is attempting here) bootstrap its own jurisdiction over a case already pending in state court merely by asserting wardship *ipse dixit*. Obviously, a precedent is "is authority only for the points actually involved and actually decided," *People v. Lopez*, 222 Cal. Rptr. 101, 104 (App. 1986), so *M.R.D.B.* is actually irrelevant.

CONCLUSION

The wardship order lacked personal jurisdiction and was therefore not entitled to full faith and credit, so the decision below should be *reversed*.

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The undersigned certifies that on May 17, 2024, she caused the attached Brief Amicus Curiae of Goldwater Institute in Support of Petitioners and Reversal to be filed via the Court's Electronic Filing System and electronically served a copy to:

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Pursuant to Ariz. R. Civ. App. P. 16 and this court's April 17, 2024 Order, I certify that the body of the attached Brief Amicus Curiae of Goldwater Institute in Support of Plaintiffs and Reversal appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and 2,491 words in length, excluding table of contents and table of authorities.

Respectfully submitted this 17th day of May 2024 by:

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